CROSS BORDER ENFORCEMENT OF MONETARY CLAIMS - INTERPLAY OF BRUSSELS I A REGULATION AND NATIONAL RULES

NATIONAL REPORT: GERMANY

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University of Maribor Press

University of Maribor

Faculty of Law

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August 2018

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Subtitle National report: Germany

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Cover designer Jan Perša, M.D. (University of Maribor Press)

Cover graphics German flag (CC0 pixabay)

Co-published by / Izdajateljica:
University of Maribor, Faculty of Law
Mladinska ulica 9, 2000 Maribor, Slovenia
http://pf.um.si, pf@um.si

Published by / Založnik:
University of Maribor Press
Slomškov trg 15, 2000 Maribor, Slovenia
http://press.um.si, zalozba@um.si

Edition 1st

Publication type e-publication

Available at http://press.um.si/index.php/ump/catalog/book/350

Published Maribor, August 2018

This publication has been produced with the financial support of the **Justice Programme of the European Union**. The contents of this publication are the sole responsibility of authors and can in no way be taken to reflect the views of the European Commission.

With the support of
the Civil Justice Programme
of the European Union

CIP - Kataložni zapis o publikaciji
Univerzitetna knjižnica Maribor

341.9:347.73/.76(430)(0.034.2)

WOLF, Christian, 1958-
Cross border enforcement of monetary claims - interplay of Brussels I A regulation and national rules [Elektronski vir] : national report. Germany / authors Christian Wolf, Luisa Volkhausen, Nicola Zeibig. - 1st ed. - El. knjiga. - Maribor : University of Maribor Press, 2018

Način dostopa (URL): http://press.um.si/index.php/ump/catalog/book/350

ISBN 978-961-286-187-2 (pdf)

doi: 10.18690/978-961-286-187-2
1. Volkhausen, Luisa 2. Zeibig, Nicola
COBISS.SI-ID 95112961

ISBN 978-961-286-187-2 (PDF)

DOI https://doi.org/10.18690/978-961-286-187-2

Price Free copy

For publisher full prof. Zdravko Kačič, Ph.D., Rector (University of Maribor)

Cross border Enforcement of Monetary Claims - Interplay of Brussels I A Regulation and National Rules

National report: Germany

CHRISTIAN WOLF, LUISA VOLKHAUSEN & NICOLA ZEIBIG

Abstract The "National Report: Germany" systematically and comprehensively addresses the main features of the enforcement of monetary claims in the German legal system, focusing in particular on the analysis of legal remedies in the enforcement procedure. Said issues are approached from both national and cross-border perspectives. The issues discussed are profoundlytopical in light of the recent coming into effect of the Brussels IA Regulation (Recast) and its more or less successful implementation in the national systems of the Member States, which has raised a number of issues. The report critically reflects some of the controversial solutions covered by the Recast Regulation regarding the effectiveness and appropriateness of the Regulation's application in the legal system in question and related problems. It also deals with national specificities in the enforcement procedure, which still constitute an obstacle to cross-border procedures. The report was created as part of a study conducted under the auspices of the EU project BIARE ("Remedies on the Enforcement of Foreign Judgments according to Brussels I Recast") under the coordination of the Faculty of Law University of Maribor.

Keywords: • Brussels IA Regulation • cross-border enforcement procedure • enforcement of monetary receivables • legal remedies • Germany •

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DOI https://doi.org/10.18690/978-961-286-187-2 ISBN 978-961-286-187-2

Available at: http://press.um.si.

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1 Main features of the national enforcement procedures for recovery of monetary claims

In the German legal system the enforcement procedure is mainly regulated in the Eighth Book of the German Code of Civil Procedure, §§ 704-945. In addition, the European regulations have to be considered.[1] As the enforcement procedure is only conducted by state-owned bodies, the enforcement organs ("Vollstreckungsorgane"), it is part of the public law.[2] The owner of a court's title ("Titelinhaber") does have a claim against the German state to conduct the enforcement in his favor ("Vollstreckungsanspruch"). Thus, although the enforcement procedure is seen as a trial between the parties ("Parteiverfahren"), the general principle of the parties ruling the trial is not applicable in an enforcement procedure. The organs ruling the enforcement procedure for recovery of monetary claims are in general the bailiff or the enforcement court.

According to § 753 of the German Code of Civil Procedure, the bailiff is responsible for the enforcement procedure, if the enforcement is not assigned to the courts.[3] He is mainly entitled to the enforcement of monetary claims into movable items.

[1] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 1.
[2] Lackmann, Zwangsvollstreckungsrecht, 10. Ed. 2013, para. 3.
[3] Lackmann, Zwangsvollstreckungsrecht, 10. Ed. 2013, para. 11.

The local court, in whose district the enforcement is taking place, is the responsible enforcement court.[4] It is mainly responsible for enforcement of monetary claims into immovable property, §§ 828 ZVG.

The underlying philosophical and dogmatic framework of the German enforcement procedures

In a civil law country like Germany, it is characteristic for the jurisprudent to structure a legal subsystem like enforcement law by means of certain principles.[5] For the basic understanding of the German enforcement system, five principles are predominant: The principle of decentralization, the principle of priority, the principle of strict enumeration of enforcement actions, the principle of clarity and definiteness and principle of formalization.[6]

The first principle, that already explains the structure of the German enforcement system and the correlative structure of legal remedies, is the **principle of decentralization**.

The principle of decentralization means that the enforcement process is not a single proceeding like the trial proceeding. Firstly, we have several competent units for different enforcement actions. Under the umbrella of the local courts ("Amtsgerichte"), the court-appointed enforcement officer is responsible for the attachment of movables; the officer of justice ("Rechtspfleger") is responsible for the attachment of a monetary claim[7] and the enforcement court is in charge of the enforcement in land.[8] Last but not least, the trial court is responsible for the enforcement of actions that may not be taken by others and omissions, section 888 German Code of Civil Procedure. The underlining principle constitutes that the court-appointed enforcement officer is responsible for all enforcement acts in regard to physical power; the enforcement court, especially the officer of justice, is in charge of all enforcement measures in the legal field like the attachment of a claim, and the

[4] Lackmann, Zwangsvollstreckungsrecht, 10. Ed. 2013, para. 13.
[5] In general: Röhl/Röhl, Allgemeine Rechtslehre, 3. Ed. 2008, p. 283 et seqq.
[6] Baur/Stürner/Bruns, Zwangsvollstreckungsrecht, 13. Ed. 2006, § 6.
[7] § 20 Abs. 1 Nr. 16 RechtspflG.
[8] § 1 Compulsory Auction of Immovable Property Act.

trial court for all enforcement acts which need a deep understanding and judgment of the case.[9]

In comparative legal analysis, there are approximately as many countries that do know the principle of gradus executionis in their national legal system as there are, not having it established in their legal system.[10] Due to the principle of decentralization, the German enforcement law is one of those legal systems that does not know gradus executionis.[11]

Since the Roman period until the occurrence of the German Civil Procedure (ZPO/ CPO) in 1879 the creditor was obliged to enforce only movable objects first. Subsequent to those objects he was allowed to access the immovable property, and at least the creditor was allowed to access the creditor's rights.[12]

By the implementation of the Civil Procedure the German legislation purposely decided to not keep this principle but to grant the creditor the ease of choice (an exception are section 777 and section 850b German Code of Civil Procedure).[13]

Thus, in principle, it is upon the creditor to choose among several enforcement instruments. It is also possible to use some of the instruments simultaneously.[14] Furthermore, it is possible to receive an additional, enforceable execution copy of the judgment, section 733 German Code of Civil Procedure. Before the court executes this additional enforceable execution copy of the judgment, the creditor must be heard. In addition, it is necessary that the debtor has a legitimate interest. This is the case if the creditor wishes to enforce the judgment in different assets of the debtor which are located in different enforcement districts or functionally different enforcement bodies are responsible for the enforcement.[15]

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[9] Baur/Stürner/Bruns, § 6 par 6.50; Gaul, Zur Struktur der Zwangsvollstreckung, Rpfleger 1971, p. 86.
[10] F. Baur/ R. Stürner/ A. Bruns, *Zwangsvollstreckungsrecht* (Heidelberg: C.F. Müller, 2006), sec. 6.18.
[11] Baur/Stürner/Bruns, § 22 par 22.7.
[12] C.Paulus, *Zivilprozessrecht* (Berlin: Springer, 2016), para 777 et seqq.
[13] C.Paulus, *Zivilprozessrecht* (Berlin: Springer, 2016), para 777 et seqq.
[14] Gaul in Gaul/Schilken/Becker-Eberhard, § 5 par 27 et seqq.
[15] Wolfsteiner in MüKO/ZPO, 4 Ed. 2012, § 733 par 13.

It is obvious that this system may jeopardize the legitimate interests of the debtor. Thus, criticism of the creditor's ease of choice arose: The creditor's ease of choice would not be in accordance with the constitutional principle of proportionality.[16]

Thus, the German enforcement system provides several tools to protect the interests of debtor. Firstly, each enforceable execution copy must be noted on the original judgment, section 734 German Code of Civil Procedure. This record enables the court, the creditor and the debtor to be informed about the number of the enforceable execution copies. All partial payments must be noted on the enforceable execution copy. In case of a final payment, the enforceable execution copy must be surrendered to the debtor, section 757 German Code of Civil Procedure. Finally, the enforcement has to be terminated if a public record or document is produced, or a private record or document created by the creditor shows that the creditor - after the delivery of the enforceable judgment - is satisfied, section 775 No 4 German Code of Civil Procedure. If the debtor does not possess such a document, he has to start a legal action to oppose enforcement, section 767 German Code of Civil Procedure.[17]

Furthermore, the enforcement procedure contains sections 74a and 85a Compulsory Auction of Immovable Property Act. Section 74 a Compulsory Auction of Immovable Property Act provides the "rule of 7/10 of the property value", aiming to protect the creditor's interests.[18] In relation, section 85a Compulsory Auction of Immovable Property Act is a protective rule for the creditor.

Summing up, the German enforcement system does not know the obligation of the creditor to enforce in a certain order, but grants the creditor's ease of choice[19] and the principle of decentralization.

Furthermore, the German enforcement law follows the **principle of priority,** section 804 para. 3, section 930 para. 1 German Code of Civil Procedure, section 11 para. 2 Compulsory Auction of Immovable Property Act. This means that the

[16] C.Paulus, *Zivilprozessrecht* (Berlin: Springer, 2016), para 777 et seqq.
[17] Gaul in Gaul/Schilken/Becker-Eberhard, § 5 par 30.
[18] J. Kindl/C. Meller-Hannich/H. Wolf, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos, 2015), § 74a, para. 1.
[19] Cp. C.Paulus, *Zivilprozessrecht* (Berlin: Springer, 2016), para 777 et seqq.

creditor who is the first to attach an asset of the debtor will be satisfied before the creditor who was next in attaching the same asset.[20] Strictly speaking, the principle of priority is not a proceeding principle, but of the material issue of a fair distribution that ranges into the field of enforcement procedure.[21]

In contrast, the insolvency law in Germany follows the equal treatment principle, sections 1 s.2, 38 seqq., 226 para. 1, 294 Insolvency Statute ("Ausgleichsprinzip").

If a dispute arises between two creditors (who have attached the same asset) over the question who must – following the principle of priority - be satisfied first, both creditors can raise a legal action for preferential satisfaction (section 805 German Code of Civil Procedure, "Klage auf vorzugsweise Befriedigung").

The principle of strict enumeration of enforcement actions says that, like the law of property, the enforcement law only allows an enumerative numbers of enforcement species.[22] For example, the German law requires the attachment of individual movables. It is impossible to attach a warehouse as a whole. Outside the scope of enforcement as described by the law, enforcement is not possible.[23]

The **principle of clarity and definiteness** ("Bestimmtheitsgrundsatz") has a close connection to the principle of formalization and has a common ground with the principle of strict enumerations of enforcement actions. The principle of clarity and definiteness means that the title which has to be enforced must be unequivocally and clear. It is the task of the trial to verify what the debtor owes the creditor and what the enforcement agent has to enforce. This is the consequence of the separation of the trial process and the enforcement process.[24]

One of the most important principles of the German enforcement law is the **principle of formalization**.[25] Generally speaking, the principle of formalization

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[20] Baur/Stürner/Bruns, § 6 par 6.37 et seqq.
[21] H. Gaul/ E. Schilken/ E. Becker-Eberhard, *Zwangsvollstreckungsrecht* (München: C.H. Beck, 2010), § 5 par 84; H. Gaul, ‚Rechtsverwirklichung durch Zwangsvollstreckung aus rechtsgrundsätzlicher und rechtsdogmatischer Sicht', *Zeitschrift für Zivilprozess* 112 (199): 151.
[22] Baur/Stürner/Bruns, § 6 par 6.63 et seqq.
[23] Baur/Stürner/Bruns, § 2 par 2.9 et seqq.
[24] Gaul in Gaul/Schilken/Becker-Eberhard, Zwangsvollstreckungsrecht, 12. Ed. 2010, § 10 par 21
[25] Gaul in Gaul/Schilken/Becker-Eberhard, Zwangsvollstreckungsrecht, 12. Ed. 2010, § 5 par 9 et seqq.

immunizes the enforcement proceeding as far as possible against all questions related to substantive law. The principle of formalization can be subclassified into two parts. The first part deals with the enforcement conditions and the second part relates to the enforcement actions. More precisely: In the enforcement proceedings the enforcement authorities do not have to control or correct the judgement.[26] They have to enforce the judgment on the basis of very formal conditions. The main conditions are the title (section 704 German Code of Civil Procedure: "Compulsory enforcement may be pursued based on final judgments that have become final and binding, or that have been declared provisionally enforceable") and the court certificate of enforceability ("Vollstreckungsklausel", section 724 German Code of Civil Procedure: "Compulsory enforcement will be pursued based on an execution copy of the judgment furnished with the court certificate of enforceability (enforceable execution copy)".

The reason for both conditions lies within the separation between the trial proceeding and the enforcement proceeding.[27] The court of the trial proceeding is in general not responsible for the enforcement of the judgment.[28] The competence for enforcement lies with the courts responsible for execution ("Vollstreckungsgerichte", section 764 German Code of Civil Procedure). These are the local courts ("Amtsgerichte"). This separation between trial and enforcement proceeding requires an efficient communication between the trial court and especially the court-appointed enforcement agent ("Gerichtsvollzieher").

Permitting the enforcement: the German court certificate of enforceability ("Vollstreckungsklausel")

The hinge between the trial proceeding and the enforcement proceeding is the court certificate of enforceability ("Vollstreckungsklausel"), § 725 German Code of Civil Procedure:[29]

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[26] Gaul, Zur Struktur der Zwangsvollstreckung, Rpfleger 1971, p. 90.
[27] Gaul in Gaul/Schilken/Becker-Eberhard, Zwangsvollstreckungsrecht, 12. Ed. 2010, § 5 par 2 et seqq.
[28] Compare to the historic development Baur/Stürner/Bruns, Zwangsvollstreckungsrecht, 13. Ed. 2006, § 3.
[29] Becker-Eberhard in Gaul/Schilken/Becker-Eberhard, Zwangsvollstreckungsrecht, 12. Ed. 2010, § 16 par 4 et seqq.

> The court certificate of enforceability:
> 'The above execution copy is issued to (designation of the party) for the purposes of compulsory enforcement' is to be added to the execution copy of the judgment at its end, it is to be signed by the records clerk of the court registry, and is to be furnished with the court seal.

In general, the execution of every court decision needs a previous court certificate of enforceability; it is a necessary part of the enforcement procedure (§ 724 German Code of Civil Procedure) as it officially certificates the enforceability of the enforcement instrument ("Vollstreckungstitel")[30]. Such a certificate of enforcement contains a note according to the certified description of judgment, that says that the enforcement of the judgment against the debtor is permitted. This note is signed by the responsible officer.[31] However, the wording does not have to meet the exact wording § 725 German Code of Civil Procedure, but rather reflect the original meaning.

On the one hand, a certificate of enforceability aims to help the execution organs ("Vollstreckungsorgan"), as they do not have to examine the legality and the enforceability of the original judgment.[32] However, such an examination by the enforcement officers would exceed their competence, as they do not know all necessary records of the case.[33] Thus, the legality and the enforceability of the judgment are verified within a special proceeding ("Klauselverfahren"). In the following, the execution organ is bound to the content of court certificate of enforceability, it is not allowed to restudy the decisive factors itself once again.[34]
On the other hand, a certificate of enforceability aims to protect the debtor, as the requirement of an enforcement are only verified by a special organ.[35]

[30] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 102.
[31] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 102.
[32] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 103.
[33] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 103.
[34] Lackmann, Zwangsvollstreckungsreckt, 10. Ed. 2013, par 67.
[35] Brox/ Walker, Zwangsvollstreckungsrecht, 10. Ed. 2014, para. 104.

2 National procedure for recognition and enforcement of foreign judge-ments

The recognition of foreign judgements is regulated in § 328 of the German Code of Civil Procedure. The enforcement of foreign judgements, on the other hand, is regulated in §§ 722, 723 of the German Code of Civil Procedure. Thus, when considering a claim for enforcement according to §§ 722, 723 of the German Code of Civil Procedure, the recognition has to be considered implicitly.[36] However, § 328 of the German Code of Civil Procedure is only applicable for foreign judgements beyond the scope of the Brussel I a Regulation (chapter 3).[37]

Regarding the wording of § 328 of the German Code of Civil Procedure, it does not set up requirements that need to be fulfilled by a foreign judgement to be recognised, but lists up grounds for refusal.[38] This means that foreign judgements are equated to national judgements.[39]

According to § 328 para. 1, No. 1 of the German Code of Civil Procedure the recognition of a judgment handed down by a foreign court shall be ruled out if the courts of the state to which the foreign court belongs do not have international

[36] *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 1.
[37] *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 1.
[38] *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 1.
[39] *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 1.

jurisdiction according to German law. The jurisdiction is evaluated on the basis of the German rules on jurisdiction.[40] Thus, it has to be asked, if the foreign court would have had jurisdiction in accordance to the applicable German rules. This leads to a mirror-inverted application of the German rules on the applicable jurisdiction ("Spiegelbildprinzip").[41]

According to § 328 para. 1, No. 2 of the German Code of Civil Procedure, the recognition of a foreign judgment shall furthermore be ruled out "if the defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself'. This ground for refusal in special applies to default judgements ("Versäumnisurteile"). The right to a fair hearing is impaired, if the respondent is not informed in time about the commencement of the proceedings.[42]

Another bar to recognition under § 328 para. 1, No. 3 of the German Code of Civil Procedure is a foreign judgment that is incompatible with a judgment delivered in Germany or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have become pending earlier in Germany.. This means that national judgements always have priority.[43] To affirm incompatibility, the conflicting judgements first have to relate to the same matter. Second, the legal force of the first judgement has to inhibit the delivery of a second judgement in this matter.[44]

According to § 328 para. 1, No. 4 of the German Code of Civil Procedure, the Recognition of a judgment handed down by a foreign court shall be ruled out if the recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights.

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[40] *Dörner* in: Saenger ZPO, 7. Ed. 2017, § 328 para. 21.
[41] *Dörner* in: Saenger ZPO, 7. Ed. 2017, § 328 para. 22.
[42] *Dörner* in: Saenger ZPO, 7. Ed. 2017, § 328 para. 28.
[43] *Dörner* in: Saenger ZPO, 7. Ed. 2017, § 328 para. 41; *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 20.
[44] *Stadler* in: Musielak/ Voit, ZPO 14. Ed. 2017, § 328 para. 20.

The recognition of a foreign judgement has the effect that all procedural effects, the judgement causes in its state of origin, extend to the German national territory – assumed that the caused effects are applicable to the German law.[45]

[45] *Dörner* in: Saenger ZPO, 7. Ed. 2017, § 328 para. 5.

3 Recognition and Enforcement in B IA

The execution of Regulation (EU) No 1215/2012 in Germany was accompanied by the implementation of provisions in the German Code of Civil Procedure. Its sections 1110 and 1111 further specify the competence and procedure for the issuance of the certificate of enforceability in the sense of Art. 53 B IA RE.

Art. 53 B IA RE itself provides that, upon the application of one of the entitled persons, the court of origin will issue the certification of enforceability using the form set out in the Annex.[46] Section 1110 German Code of Civil Procedure additionally stipulates that the notary and the judicial officer of the court ("Rechtspfleger"), who are functionally competent to issue an enforceable execution copy ("vollstreckbare Ausfertigung"), also have the authority to draw up the certificate of enforceability. The rationale behind this regulation is rooted in the fact that the certificate is a functional equivalent of an enforceable execution copy ("vollstreckbare Ausfertigung"). Contrary to the obligatory procedure in national enforcement proceedings in Germany, the certificate in the sense of Art. 53 B IA RE does not require an enforcement clause ("Vollstreckungsklausel").

[46] Heinrich Dörner in Ingo Saenger, ZPO, EuGVVO, Baden-Baden, Nomos, 7 ed., 2017, Art. 53 para. 1.

Several certificates may be issued if the creditor aims to pursue enforcement in more than one Member State.[47]

There is a debate in German legal literature who can apply for a declaration in the sense of Art. 53 B IA RE. Some take a rather narrow approach and believe that only the creditor, who benefits from the title, is entitled to such request.[48]

With regard to the wording of the English text of the Regulation, other scholars take the view that any *interested* party may request the aforementioned declaration. Such interest in the issuance of the declaration is generally accepted for a party who intends to invoke a judgment given in another member state and, thus, relies on the incidental recognition of the judgment (Art. 37 para. 1 B IA RE), for a party who applies for a declaratory decision that there are no grounds for refusal of recognition (Art. 36 para. 2 B IA RE) or for a party who applies for the decision that the recognition shall be refused (Art. 45 para. 4, 46 B IA RE). Regularly, the parties of the original dispute will take such actions. However, if the judgement's legal effect affect third parties who were not involved in the proceeding itself, e.g. in case of a reversionary succession or a will being executed (Sections 325 to 327 German Code of Civil Procedure), this third party may have an interest in a declaration in the sense of Art. 53 B IA RE to initiate proceedings according to Art. 37 para. 1 B IA RE.[49]

Art. 57 B IA RE specifies in which language decisions under the Regulation or the certificate in the sense of Art. 53 B IA RE need to be translated. The German legislator did not make use of the option provided in Art. 57 para. 2 B IA RE to accept such translations or transliterations in other languages than German, section 1113 German Code of Civil Procedure.

As mentioned before section 1111 German Code of Civil Procedure concerns the procedure for the issuance of the certificate of enforceability in the sense of Art. 53 B IA RE. In this provision, the law distinguishes between a simple and a qualified

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[47] Caroline Meller-Hannich in Johann Kindl/Caroline Meller-Hannich/Hans-Joachim Wolf, Gesamtes Recht der Zwangsvollstreckung, Baden-Baden, Nomos, 3 ed., 2015, § 1110 para. 1.
[48] Rainer Hüßtege in Heinz Thomas/ Hans Putzo, Zivilprozessordnung, Munich, C.H. Beck, 38. ed., 2017, Art. 53 para. 1.
[49] Geradl Mäsch in Johann Kindl/Caroline Meller-Hannich/Hans-Joachim Wolf, Gesamtes Recht der Zwangsvollstreckung, Baden-Baden, Nomos, 3 ed., 2015, Art. 53 para. 2.

certificate. Generally, the certificate is issued in a rather simple procedure without a hearing, section 1111 para. 1 s. 1. This approach mirrors the procedure for the issuance of an enforceable execution copy ("vollstreckbare Ausfertigung") in domestic enforcement proceedings according to section 724 German Code of Civil Procedure. A qualified certificate in the sense of section 1111 para. 1 s. 2 German Code of Civil Procedure is required in cases in which the title needs to be supplemented or assigned in the sense of sections 726 para. 1, 727 to 729 German Code of Civil Procedure. These provisions deal with the issuance of an enforceable execution copy ("vollstreckbare Ausfertigung") for the enforcement of a payment or another action that is subject to conditions in the title (section 726 para. 1 German Code of Civil Procedure), for enforcement by or against the successor in the title (section 727 German Code of Civil Procedure) or the reversionary heirs or executors (section 728 German Code of Civil Procedure) and for enforcement against a party taking over the property of another person and against parties acquiring firms (section 729 German Code of Civil Procedure). In the aforementioned cases, where a qualified certificate is necessary, the court may conduct a hearing of the debtor at its own discretion, section 730 German Code of Civil Procedure.[50]

The certificate in the sense of Art. 53 B IA RE shall be served to the person against whom the enforcement is sought prior to the first enforcement measure, Art. 43 para. 1 B IA RE. The service of the certificate is conducted ex officio, section 1111 para. 1 s. 3 German Code of Civil Procedure. Contrary to the situation in domestic proceedings, the certificate needs to be served prior to the first enforcement measure. In domestic enforcement proceedings the title may be served simultaneously with the first enforcement measure, section 750 German Code of Civil Procedure, thus, essentially generating a surprise effect for the creditor. This effect is not foreseen for proceedings under the Regulation.[51]

Annex I provides the mandatory form for the certificate. Modification in content or structure are not permissible as it is otherwise not possible to ensure that the content can be derived from the certificate without a translation.[52]

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[50] Evgenia Pfeiffer/ Max Pfeiffer in Reinhold Geimer/ Rolf A. Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, Munich, C.H. Beck, 52. ed., 2016, vol. I, Art. 53, para. 5.
[51] Evgenia Pfeiffer/ Max Pfeiffer in Reinhold Geimer/ Rolf A. Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, Munich, C.H. Beck, 52. ed., 2016, vol. I, Art. 43, para. 2
[52] Astrid Stadler in Hans-Joachim Musielak/ Wolfgang Voit, Kommentar ZPO, Munich, Vahlen, 14. ed., 2017, Art. 53 para. 1; Evgenia Pfeiffer/ Max Pfeiffer in Reinhold Geimer/ Rolf A. Schütze,

In section 1111 para. 2 German Code of Civil Procedure, the law refers for legal remedies against the decision about the issuance of the certificate of enforceability to the remedies that are applicable in domestic enforcement proceedings concerning the issuance or refusal of an enforcement clause ("Vollstreckungsklausel"). The situation for remedies against the declaration in the sense of Art. 53 B IA RE must – at this point – remain rather theoretical since there seems to be no published judicial precedent on the matter.

Due to the synchronization of the enforcement clause ("Vollstreckungsklausel") and the declaration in the sense of Art. 53 B IA RE, the following part will describe the system of remedies regarding the enforcement clause ("Vollstreckungsklausel") and the issues that are discussed in connection with these remedies.

Accordingly, the debtor can pursue a reminder serving as a legal remedy against the issuance of the certificate due to formal errors, section 732 German Code of Civil Procedure ("Klauselerinnerung"). The court whose judicial officer issued the contentious enforcement clause ("Vollstreckungsklausel") has the exclusive jurisdiction to decide the issue, section 802 German Code of Civil Procedure. The court will decide on the application in the form of an order ("Beschluss"), section 732 para. 1 s. 2 German Code of Civil Procedure.

Such order can either reject the reminder should the judge decide that there were no formal errors concerning the issuance of the enforcement clause ("Vollstreckungsklausel") or it can hold that "the enforceable execution copy ("vollstreckbare Ausfertigung") and the enforcement based on it are inadmissible".[53] In the latter case, the order will have the effect described in sections 775 no. 1, 776 German Code of Civil Procedure. This provision stipulates that enforcement shall be terminated where a decision is produced which shows that the judgment to be enforced has been repealed or declared inadmissible. It is directed towards the enforcement authorities who are forbidden to execute enforcement in the abovementioned case.

Internationaler Rechtsverkehr in Zivil- und Handelssachen, Munich, C.H. Beck, 52. ed., 2016, vol. I, Art. 53, para. 8.

[53] Christian Seiler in Heinz Thomas/ Hans Putzo, Zivilprozessordnung, Munich, C.H. Beck, 38. ed., 2017, § 732 para. 2.

While there is dispute neither about the fact that formal errors can be remedied by a reminder in the sense of section 732 German Code of Civil Procedure nor about the form of its decision, the jurisdiction to render the respective order is debated. More specifically, in case of a decision in favor of the creditor holding that the issuance of enforcement clause lacked for formal reasons and, thus, rendering the reminder justified it is unclear which body within the competent court will react. This issue is a subject of controversial discussion in doctrine and jurisprudence.

Some scholars and court decisions assume that the judicial officer of the court may remedy his own initial decision regarding the issuance of the enforcement clause. The aforementioned opinion leaders reach this result by an analogous application of sections 573 and 572 para. 1 German Code of Civil Procedure, which stipulate such approach for the reminder serving as a legal remedy against decisions during the evidentiary process by the delegated or requested judge or judicial official. In such proceeding, the adjudicating body, whose decision is being contested, is to grant redress should it hold that the complaint is justified. Following said approach for the enforcement clause ("Vollstreckungsklausel") would ultimately lead to the legal assumption that the initial enforcement clause was never issued. The opposing party would be left with the legal remedies applicable in that situation (see para. #).[54]

Other scholar take a rather different view. In their opinion, irrespective of the outcome of the case only a judge within the competent court has the jurisdiction to render the decision regarding the reminder.[55]

Even authors, who claim that the judicial officer may grant redress if the issuance of enforcement clause ("Vollstreckungsklausel") was erroneous (see para. #), agree that

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[54] Michael Giers in Johann Kindl/Caroline Meller-Hannich/Hans-Joachim Wolf, Gesamtes Recht der Zwangsvollstreckung, Baden-Baden, Nomos, 3 ed., 2015, § 732 para. 7; Rolf Lackmann in Hans-Joachim Musielak/ Wolfgang Voit, Kommentar ZPO, Munich, Vahlen, 14. ed., 2017, § 732 para. 9; Johann Kindl in Ingo Saenger, ZPO, EuGVVO, Baden-Baden, Nomos, 7 ed., 2017, § 732 para. 5; Kurt Stöber in Richard Zöller, Cologne, Otto Schmidt, 31. ed., 2016, § 732 para. 14; OLG Stuttgart, Rpfleger 1997, p. 521; OLG Naumburg, NJOZ 2003, p. 343; OLG Coblenz, FamRZ 2003, p. 108.

[55] Bernhard Ulrici in Volkert Vorwerk/ Christian Wolf, Beck'scher Online Kommentar ZPO, Munich, C.H. Beck, 24 ed., 2017, § 732 para. 15; Hans Wolfsteiner in Thomas Rauscher/ Wolfgang Krüger, Münchner Kommentar zur ZPO, Munich, C.H. Beck, 5. ed., 2016, vol. II, § 732 para. 12; David-Christoph Bittmann in Bernhard Wieczorek/ Rolf A. Schütze, Zivilprozessordnung und Nebengesetze, Berlin, Walter de Gryter, 4. ed., 2016, vol. IX, § 732 para. 5.

the law does not contain a legal basis for the court to reclaim the enforceable execution copy ("vollstreckbare Ausfertigung").[56]

An oral hearing is possible, but not mandatory, cf. section 128 para. 4 German Code of Civil Procedure. The court must grant the creditor the right to be heard in case of an adverse decision. Furthermore, he must be notified of the order by service of the document. The losing party may lodge an immediate complaint in the sense of section 567 para. 1 German Code of Civil Procedure ("Sofortige Beschwerde"). Against this decision, a complaint on points of law in the sense of section 574 para. 1 no. 2 German Code of Civil Procedure ("Rechtsbeschwerde") is possible if the court hearing the immediate complaint has granted leave to do so in its order.[57]

In cases, in which a qualified certificate is needed according to section 1111 para. 1 s. 2 German Code of Civil Procedure, the debtor may bring an action against the certificate in the sense of section 768 German Code of Civil Procedure ("Klauselgegenklage"). In this type of proceeding, the debtor is allowed to raise substantial objections against the issuance of the certificate. The court of the first instance has the exclusive jurisdiction to decide on such claim, sections 768 para. 1, 767 para. 1, 802 German Code of Civil Procedure.

The action in the sense of section 768 German Code of Civil Procedure ("Klauselgegenklage") is modelled after the action raising an objection to the claim being enforced in section 767 German Code of Civil Procedure ("Vollstreckungsabwehrklage") and equally is a claim resulting in an action for the modification of rights ("prozessuale Gestaltungsklage"). This action is aimed against the inadmissibility of the enforcement based on the contentious certificate. Its procedural counterpart is the action brought for issuance of the certificate in the sense of section 731 German Code of Civil Procedure ("Klage auf Erteilung der Vollstreckungsklausel"). The decision of the court takes the form of a judgment. With regard to the issuance of of an enforcement clause ("Vollstreckungsklausel")

[56] Johann Kindl in Ingo Saenger, ZPO, EuGVVO, Baden-Baden, Nomos, 7 ed., 2017, § 732 para. 6; Rolf Lackmann in Hans-Joachim Musielak/ Wolfgang Voit, Kommentar ZPO, Munich, Vahlen, 14. ed., 2017, § 732 para. 9; Kurt Stöber in Richard Zöller, Cologne, Otto Schmidt, 31. ed., 2016, § 732 para. 15.

[57] Rolf Lackmann in Hans-Joachim Musielak/ Wolfgang Voit, Kommentar ZPO, Munich, Vahlen, 14. ed., 2017, § 732 para. 9.

such judgment must be provisionally enforceable to trigger the effect of section 775 no. 1 German Code of Civil Procedure.[58] The judgment can be challenged by means of an appeal ("Berufung") in the sense of section 511 German Code of Procedure, an appeal on points of law ("Revision") in the sense of section 542 German Code of Civil Procedure or – in case of a default judgment – by a protest ("Einspruch") in the sense of section 338 German Code of Civil Procedure.[59]

The creditor can pursue legal remedies if the certificate in the sense of Art. 53 B IA RE was denied. These remedies are equally based on the legal remedies available under the German Code of Civil Procedure against the refusal of an enforcement clause ("Vollstreckungsklausel"). Accordingly, the creditor can file a complaint against a decision by the judicial officer of the court refusing to issue the certificate pursuant to sections 567 German Code of Civil Procedure and 11 para. 1 Act on Senior Judicial Officers ("Sofortige Beschwerde"). Equally, the same decision by a notary is refutable according to sections 54 Notarization Act and 58 ff. Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction ("Beschwerde"). The judicial officer of the court and the notary may rectify their respective decision. If the decision is not rectified, the competent court will decide on the matter, section 574 German Code of Civil Procedure. If the judicial officer of a Higher Regional Court ("Oberlandesgericht") or of the ("Bundesgerichtshof") denies the issuance of the certificate this decision, the creditor may file the legal remedy of the reminder, section 11 para. 2 Act on Senior Judicial Officers ("Erinnerung"). Again, should the judicial officer upon such reminder not rectify his decision, the court will decide the issue. Against the decision of the Higher Regional Court, a legal complaint on a point of law ("Rechtsbeschwerde") is applicable, section 574 German Code of Civil Procedure. Additionally, an action brought for issuance of the certificate in the sense of section 731 German Code of Civil Procedure ("Klage auf Erteilung der Vollstreckungsklausel") is admissible by analogy.[60]

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[58] Christian Seiler in Heinz Thomas/ Hans Putzo, Zivilprozessordnung, Munich, C.H. Beck, 38. ed., 2017, § 768 para. 1.

[59] Christian Seiler in Heinz Thomas/ Hans Putzo, Zivilprozessordnung, Munich, C.H. Beck, 38. ed., 2017, § 768 para. 11 referring to § 767 para. 31 and § 731 para. 8; Karsten Schmidt/Moritz Brinkmann in Thomas Rauscher/ Wolfgang Krüger, Münchner Kommentar zur ZPO, Munich, C.H. Beck, 5. ed., 2016, vol. II, § 768 para. 14 referring to § 767 para. 9.

[60] Bernhard Ulrici in Volkert Vorwerk/ Christian Wolf, Beck'scher Online Kommentar ZPO, Munich, C.H. Beck, 24 ed., 2017, § 1111 para. 35.

4 Remedies

The first part of this section gives a general overview of the remedies of the German Civil Code of Procedure. The second tries to explain the German enforcement system by taking its basic principles and their meaning for the remedy system into account.

Overview of the remedies of the German Civil Code of Procedure:

The German code of civil procedure provides for three instances and thus for a multi-stage procedure system:

- the local courts and the regional courts provide the first instance (sections 23, 71 of the Courts Constitution Act, "Gerichtsverfassungsgesetz"), wherefore local courts have jurisdiction for disputes up to a value of € 5,000, and regional courts for disputes over € 5,000 (section 23 no. 1 of the Courts Constitution Act),
- the regional courts and the higher regional courts provide the second instance (court of appeal), sections 72, 119 para. 1, No. 2 of the Courts Constitution Act,
- the federal court of justice as the court of revision.

If the local court is the court of first instance, it is possible to lodge an appeal against the judgement at a regional court and then to lodge a revision against the judgement at the Federal Court of Justice. If the regional court is the court of first instance, it is possible to lodge an appeal against the judgement at a higher regional court and

then to lodge a revision at the Federal Court of Justice. Beside of that it is possible to make a so called "Sprungrevision" from the first instance directly to the Federal Court of Justice under the certain requirements of section 566 para. 4 of the German Code of Civil Procedure.

In conclusion, there are two successive forms of appellate remedy against the ruling of the court of first instance: appeal (sections 511 para. 1, et seq. of the German Code of Civil Procedure) and revision (sections 542 et seq. of the German Code of Civil Procedure). The appeal opens the way for a judgement rendered by the court of first instance to undergo a factual and legal review (section 513 of the German Code of Civil Procedure). The court of appeal decides on the matter itself. Nevertheless, an appeal is only permissible if either the amount in dispute exceeds € 600 or if the court of first instance allows for an appeal in its ruling (section 511 para. 2 of the German Code of Civil Procedure). The court of revision on the other hand, is bound to the established facts as recorded by the court of first instance and the court of appeal (sections 545 – 547 of the German Code of Civil Procedure). However, if the court of revision believes that more facts must be established, it will revoke the ruling and refer the matter back to the court of appeal for a new hearing at which a new judgment will be rendered (section 563 of the German Code of Civil Procedure).

Beside these legal remedies, the German Civil Procedure Law provides for several other legal remedies to guarantee a legal protection, fair trial and the access to justice to anybody whose civil rights and obligations are affected by a court decision or any other court acts.

In civil law proceedings there are three more different types of legal actions/remedies that are available at the full trial stage:

Action for performance ("Leistungsklage"), which is a specific performance, payment or damages (this remedy is not explicitly regulated in the German Code of Civil Procedure, however, it doesn't matter since the action for performance is the regular remedy under the German Code of Civil Procedure),

Action for declaratory judgement ("Feststellungsklage"), which is seeking a declaration of the existence or non-existence of a legal relationship between a person and an object or between the parties (section 256 of the German Code of Civil Procedure),

Action for alteration of a legal relationship ("Gestaltungsklage"), which can change an existing legal relationship by way of judgement (e.g. sections 323, 722, 728 of the German Code of Civil Procedure).

With these in mind, there are certain main stages of typical court proceedings under the German Code of Civil Procedure. The statement of claim must specify the competent court, the parties to the dispute, and the relief sought (section 253 of the German Code of Civil Procedure).

Under section 253 of the German Code of Civil Procedure the statement of claim must as a minimum specify the grounds for the claim raised and the subject matter. Also a value of the matter in dispute should be included in a statement of claim. If these requirements are fulfilled the competent court will serve the statement of claim on the Respondent. By doing this, the court will generally set a time limit of normally two weeks for the Respondent to decide whether it will defend itself, and normally another additional time limit of at least another two weeks for the Respondent to file a statement of defense (sections 271 et seq. of the German Code of Civil Procedure). The following stages of a claim are then as follows:

If the Respondent does not reply to the statement of claim within the given time limit, the court has the power to give a default judgement (sections 331 et seq. of the German Code of Civil Procedure), if the Claimant applied on it. Subsequently, the judgement becomes legally binding, if the Respondent does not object to the default judgement within a specific time period (section 345 of the German Code of Civil Procedure).

The German Code of Civil Procedure provides for one oral hearing in which witnesses can be heard and different evidence can be taken (sections 279, 284 et seq. of the German Code of Civil Procedure). However, the court and the parties may meet several times for a hearing or to produce evidence, in particular in large and complex cases.
Usually the proceedings end with a binding judgement (section 300 of the German Code of Civil Procedure). However, often the proceedings end by a settlement between the parties (section 278 para. 1 of the German Code of Civil Procedure). In this case the court is only assisting, wherefore even during the beginning of the oral hearing a settlement can be reached on the settlement terms suggested by the court.

If a judgement is reached, the successful party can enforce a local judgement in the local court against the unsuccessful party (sections 704 et seq. of the German Code of Civil Procedure).

Concerning the enforcement of judgements on monetary claims, it is possible to submit an application for garnishment measures with the local court that has jurisdiction over enforcing the judgement (section 803 et seq. of the German Code of Civil Procedure).[61] The application must identify the claims or rights of the debtor

[61] Stefan Tützel, Andrea Leufgen and, Eric Wagner, *Litigation and Enforcement in Germany: overview* (Thomson Reuters Practical Law).

to be garnished, such as deposits in bank accounts, or claims against third parties.[62] An alternative is to submit an application with the bailiff (section 802a et seq. of the German Code of Civil Procedure), in order to enforce a judgement against the debtor's tangible assets. In addition, by submitting an application for a compulsory mortgage or for the compulsory sale of the real property, it is also possible to enforce a judgement against the debtor's intangible assets[63].

The enforcement of judgments other than monetary judgments follows different rules. Judgments for delivery or recovery of goods, as well as for surrendering possession of property are enforced by the bailiff of the German Code of Civil Procedure (section 883 et seq. of the German Code of Civil Procedure).[64] Judgments for the performance of, refraining from or acquiescence to, an act are enforced by the court by ordering coercive penalty payments or detention of the judgment debtor.[65]

According to the German principle of formalization, the German remedy system is a bipartite system; It separates the enforcement proceedings as far as possible from questions related to substantive law. Thus, also the German remedy system branches into *remedies against the violation of formal requirements* and *remedies against the violation of material requirements*.

Remedies against the violation of formal requirements apply, if the formal requirements of the enforcement proceeding are not met. For example, the officer of justice attached an object which is exempted from attachment (section 811 German Code of Civil Procedure).

A remedy against such a violation of formal requirements is **the reminder serving as a legal remedy against the nature and manner of compulsory, section 766 German Code of Civil Procedure** (in the following "reminder", "Erinnerung gegen Art und Weise der Zwangsvollstreckung"). section 766 German Code of Civil Procedure allows the participants of the enforcement procedure to allege the violation of any provision on formal requirements and on accomplishment the enforcement procedure itself.[66]

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[62] Stefan Tützel, Andrea Leufgen and, Eric Wagner, *Litigation and Enforcement in Germany: overview* (Thomson Reuters Practical Law).
[63] Stefan Tützel, Andrea Leufgen and, Eric Wagner, *Litigation and Enforcement in Germany: overview* (Thomson Reuters Practical Law).
[64] Stefan Tützel, Andrea Leufgen and, Eric Wagner, *Litigation and Enforcement in Germany: overview* (Thomson Reuters Practical Law).
[65] Stefan Tützel, Andrea Leufgen and, Eric Wagner, *Litigation and Enforcement in Germany: overview* (Thomson Reuters Practical Law).
[66] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1160.

Regarding the jurisdiction, that local court is responsible in which district the enforcement procedure takes place (sections 766 para. 1, 764 para. 2 German Code of Civil Procedure).

To be admitted for a judicial admission the reminder needs to meet the admissibility requirements:

Beside the general procedural requirements (section 50 para. 1 German Code of Civil Procedure, sections 55 seqq German Code of Civil Procedure, section 569 paras. 2, 3 German Code of Civil Procedure), the reminder, first of all, has to be the right remedy for the applicant's request.[67] section 766 para. 1 German Code of Civil Procedure is admissible, if the applicant aims to proceed against the procedure of the enforcement. Furthermore, it allows to assault rulings of the enforcement court, as long as they relate to the proceeding of the enforcement. section 766 para. 2 German Code of Civil Procedure is relevant, if the bailiff regrets to take the application of enforcement or if the applicant resists the estimated costs.

Although it is not explicitly paraphrased in the legal text, section 766 German Code of Civil Procedure requires a legitimate authority of the appellant. This is granted, if the appellant's rights are potentially interfered.[68] In regard to the debtor, this is generally the case, if he is addressed by an enforcement procedure, as the enforcement might access his property. In return, the creditor can be interfered in his rights, if the bailiff rejects his enforcement application.

The relief is furthermore substantiated, if the questioned measure must not have been conducted at all or at least not in that way. In regard to a creditor's complaint about a possible refusal of the enforcement, the reminder is substantiated, if the enforcement had to be conducted. Hence, the court has to survey whether the substantive requirements of the questioned enforcement procedure are met.[69]

The reminder within the meaning of section 766 German Code of Civil Procedure is a legal remedy, which leads to a review within the same court (cp. 4.1., the general system of the German procedure law). Thus, it does not lead to a judgement by a higher court ("Devolutiveffekt"), but initiates legal proceedings.[70]

The right remedy against the reminder section 766 German Code of Civil Procedure is the complaint subject to a time limit, section 793 German Code of Civil Procedure

[67] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1172.
[68] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1195.
[69] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1211 seqq.
[70] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1161.

(see below). By the end of the deadline of section 569 para. 1 German Code of Civil Procedure the remedy becomes legally binding and cannot be assaulted any longer.[71]

The **complaint subject to a time limit, section 793 German Code of Civil Procedure** ("Sofortige Beschwerde"), aims to revise or even to set the first instance's decision aside. The appeal of section 793 German Code of Civil Procedure puts the legal force of the original decision off ("Suspensiveffekt") and leads to a decision of a higher court ("Devolutiveffekt").

Beside the general requirements (see before), section 793 German Code of Civil Procedure at first has to be admissible. The complaint subject to a time limit allows a revision of decisions that did not need an oral hearing within the enforcement procedure. Thus, it only applies to legal proclamations, such as the reminder of section 766 German Code of Civil Procedure or those enforcement court's decisions under sections 887 seqq. German Code of Civil Procedure, but not to legal judgements.

Due to the devolutive effect of section 793 German Code of Civil Procedure, the court of the next higher instance has jurisdiction (section 72 of the German court's enforcement law – GerVollzG).

Entitled persons are the creditor, the debtor and third persons that have a legitimate interest. The complaint subject to a time limit is substantiated and finally granted, if the questioned decision is based on a procedural irregularity or is substantially incorrect. Against the ruling in regard to the complaint subject to a time limit, the complaint on points of law section 574 German Code of Civil Procedure ("Rechtsbeschwerde") is applicable.

Another remedy is the **appeal according to section 11 para. 2 Act on Senior Judicial Officers** ("Rechtspflegeerinnerung"). If the judge, however, passes a judgement that is not contestable, section 11 para. 2 Act on Senior Judicial Officers comes to nothing. Hence, in a case the court officer makes a decision that would not be contestable, if it has been made by a judge, the appeal according to section 11 para. 2 Act on Senior Judicial Officers on is applicable its own.

Against decisions of the land registry, the **appeal of section 71 Land Register Act** ("Grundbuchbeschwerde") is applicable. The competent authority in regard to section 71 Land Register Act is the judge or the court officer, who decided in the first place. If the judge or the court officer is not willing to decide again, the regional court of the district the land office is located is competent, section 72 Land Register Act.

[71] H. Brox/ W. Walker, *Zwangsvollstreckungsrecht*, (Köln: Carl Heymanns Verlag, 2014), para. 1247.

Beside these remedies against the of formal requirements, the German principle of formalization, and the resulting German bipartite remedy system, needs remedies against the violation of material requirements. These remedies provide for a correction, if the requirements in accordance with the principle of formalization do not match the requirements of substantive law. The competence to prove this does not lie with the enforcement court but with the trial court.

The German remedy system offers different legal actions to achieve that the substantive law overrules the requirements of the principle of formalization:

The first legal action is the **action to oppose enforcement, section 767 German Code of Civil Procedure** ("Vollstreckungsgegenklage"). The action to oppose enforcement enables the judgment debtor to raise questions of substantive law against the title of the judgment.[72] The basis for the enforcement proceeding is not the original claim but the title as ruled in the judgment. Therefore, it does not matter in terms of the enforcement proceeding if the claim of the judgment creditor is paid or dissolved. The judgment debtor has to address this question in a special trial proceeding - the action to oppose enforcement.[73]

The second legal action is **a third-party proceeding instituted to prevent the execution of a judgment, section 771 German Code of Civil Procedure** ("Drittwiderspruchsklage"). During the enforcement proceeding we do not prove the ownership of the debtor concerning the attached object of enforcement. In regard to movables, it is sufficient that the debtor has the custody of and the control over the object of enforcement. The substantive law is based on the assumption that the person who possesses an object is also the owner of the object, section 1006 BGB.[74] Since this assumption is disprovable, the same applies for the enforcement proceeding. The custody of and the control over the object of enforcement establishes only a disprovable assumption that the owner of the attached movable is simultaneously the debtor. But a third-party can contest this in a trial proceeding.
The last legal action is the action for preferential satisfaction, section 805 German Code of Civil Procedure ("Klage auf vorzugsweise Befriedigung").

Regarding and describing the German procedure to recognize a foreign judgement, it basically has to be noted that a court ruling represents an act of public authority. Hence, only German judgements automatically gains recognition.[75] Foreign judgements, in return, need a legal recognition to become effective in the territory

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[72] Herget in Zöller, Zivilprozessordnung, 31. Ed. 2016, § 767 par 5; Lackmann in Musielak/Voit, Zivilprozessordnung, 13. Ed. 2016, § 767 par 1.
[73] Schneiders in Kindl/Meller-Hannich/Wolf, Gesamtes Recht der Zwangsvollstreckung, 3.Ed. 2015, § 767 par 1 et seqq.
[74] Berger in Jauernig, Bürgerliches Gesetzbuch, 16. Ed. 2015, § 1006 par 1.
[75] H. Dörner, *Zivilprozssordnung Prof. Dr. Ingo Saenger* (Baden-Baden: Nomos Verlag, 2017), § 328, para. 5.

of German law. Such recognition, however, does not require any special procedure: As far as the requirements of section 328 German Code of Civil Procedure are met, a foreign judgement autonomously takes effect.[76]

Section 328 German Code of Civil Procedure namely states several reasons of exclusion:

(1) Recognition of a judgment handed down by a foreign court shall be ruled out if:

> 1. The courts of the state to which the foreign court belongs do not have jurisdiction according to German law;
> 2. The defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself;
> 3. The judgment is incompatible with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have become pending earlier in Germany;
> 4. The recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights;
> 5. Reciprocity has not been granted.

(2) The rule set out in number 5 does not contravene the judgment's being recognised if the judgment concerns a non-pecuniary claim and if, according to the laws of Germany, no place of jurisdiction was established in Germany.

If none of these reasons of section 328 German Code of Civil Procedure applies to the questioned foreign judgement, it autonomously gains recognition within the territory of German law. To gain recognition again means that all procedural impacts, the foreign judgement has under the law of the origin state, from now on also extend to the territory of German law, as long as the German law knows those legal impacts.[77]

To furthermore regard the enforcement of judgements, the basic structure of the German enforcement process calls for an enforcement clause. Nearly each[78]

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[76] H. Dörner, *Zivilprozssordnung Prof. Dr. Ingo Saenger* (Baden-Baden: Nomos Verlag, 2017), § 328, para. 5.

[77] H. Dörner, *Zivilprozssordnung Prof. Dr. Ingo Saenger* (Baden-Baden: Nomos Verlag, 2017), § 328, para. 6.

[78] No court certificated enforcement clause is necessary for writs of execution (Vollstreckungsbescheid), § 796 ZPO; writs of seizure (Arrestbefehlt), § 929 ZPO and Injunction

domestic judgment and each title needs a court certificated enforcement clause for the German enforcement process, sections 724, 795 German Code of Civil Procedure. This court certificate clause of enforcement is based on the principle of formalization.

In regard to foreign judgments, however, the B IA forces Germany to accept an exemption from this basic structure of the enforcement law. For the enforcement of a judgment within the scope of the B IA the German law expressively states that a court certificate of enforceability is not required.

Therefore section 1112 German Code of Civil Procedure reads: Dispensability of court certificate of enforceability

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

This is obviously an exception from the normal requirements of enforcement. It becomes even more significant if one takes into account that section 794 para. 1 no 9 German Code of Civil Procedure equates a European judgment with a domestic judgement.[79] In accordance with Art 42 para. 1 B IA it is sufficient that the creditor provides the enforcement authority with a copy of the judgment and a certificate issued pursuant to Art 53 B IA.

To now finally regard a party's remedies according to the recognition and enforcement of a foreign judgement, the German law offers an incidental revision of the foreign judgements legality: Thus, the parties can bring an **action for acknowledgement, section 256 German Code of Civil Procedure** to revise whether the foreign judgement has to be recognized or not.[80] This again depends on whether the foreign judgement meets the requirements of section 328 German Code of Civil Procedure. Thus, grounds for challenging a foreign judgement are stated in section 328 German Code of Civil Procedure.

Art. 45-47 B IA determine an application procedure in the Member State of enforcement to remedy the general recognition or rather to subsequently refuse the enforcement of a foreign judgement.[81] As an enforcement clause is no longer required, these provisions take account of the debtor's interests.

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regarding the subject matter of the litigation (einstweilige Verfügung), § 936 ZPO. Detailed commentary on the exemptions Wolfsteiner in MüKo/ZPO, 4. Ed. 2012, § 724 par 9.

[79] To this function of § 794 para. 1 no. 9 Hess in Schlosser/Hess, 4. Ed. 2015, Art 39 par 1.

[80] H. Dörner, *Zivilprozssordnung Prof. Dr. Ingo Saenger* (Baden-Baden: Nomos Verlag, 2017), § 328, para. 5.

[81] I. Saenger, *Zivilprozessordnung* (Baden-Baden: Nomos Verlag, 2017), § 1115, seq. 1.

Thereby, Art. 47 B IA defines the central procedural principles for such a refusal of enforcement. Section two, however, requests the national legislators to specify the details in their national law autonomously.[82] Thus, the German Code of Civil Procedure provides section 1115 German Code of Civil Procedure that specifies the proceeding of a refusal of enforcement:

Firstly, Art. 1115 paras. 1, 2 German Code of Civil Procedure assign the jurisdiction. According to Art. 1115 para. 1 German Code of Civil Procedure, and in contrast to the ruling of the Recognition and Enforcement Implementation Law (AVAG), the regional court has jurisdiction.[83] The local jurisdiction conforms to the district of the debtor's domicile.[84] Secondly, paragraph three to six specify the proceedings. To initiate a refusal of enforcement the applicant has to hand in a written or recorded request.[85] A representation by a lawyer (section 78 para. 2 German Code of Civil Procedure) is not obligated. Although an oral hearing is not required, the respondent has to be given the opportunity to be heart.[86]

In return, the right remedy against the refusal of enforcement is the complaint subject to a time limit, sections 567 para. 1, 793 German Code of Civil Procedure (requirements and proceedings see above).

Art. 40 B IA emphasizes that the enforcement of a judgement of the member state of origin does not only allow the execution of the enforcement in the member state addressed, but further more allows protective measures according to the law of the member state addressed. The German law in this regard differentiates between protective measures in regard to the enforcement of monetary claims and the enforcement of other claims and offers the following protective measures:

Protective measures in regard to the enforcement of monetary claims:

A first protective measure of the German Civil Procedure Code is the **precautionary attachment, section 720 a German Code of Civil Procedure** ("Sicherungsvollstreckung"). The precautionary attachment requires a preliminary enforceable court ruling that forces the debtor to settle payments and a relating determination of costs ("Kostenfestsetzungsbeschluss").[87]

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[82] G. Mäsch, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), Art. 47, seq. 1.
[83] C. Meller-Hannich, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), § 1115, seq. 2.
[84] C. Meller-Hannich, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), § 1115, seq. 2.
[85] I. Saenger, *Zivilprozessordnung* (Baden-Baden: Nomos Verlag, 2017), § 1115, seq. 3.
[86] I. Saenger, *Zivilprozessordnung* (Baden-Baden: Nomos Verlag, 2017), § 1115, seq. 3.
[87] J. Kindl/C. Meller-Hannich/H. Wolf, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), § 720 a, para. 3.

Section 720 a German Code of Civil Procedure, however, only replaces the requirement of the security deposit; apart from that the general requirements of an enforcement have to be fulfilled.[88]

Secondly, the **notice of imminent attachment of a debt, section 845 German Code of Civil Procedure** ("Vorpfändung") is a private enforcement of the creditor to protect himself against a delay of the attachment.[89] section 845 German Code of Civil Procedure causes the pretense of a right of having a request ("Rechtsschein für die Forderungsinhaberschaft"). Therefore, the notice of imminent attachment of a debt requires the existence of an enforceable title due to a monetary claim.[90]

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[89] J. Kindl/C. Meller-Hannich/H. Wolf, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), § 845, para. 1.

[90] J. Kindl/C. Meller-Hannich/H. Wolf, *Gesamtes Recht der Zwangsvollstreckung* (Baden-Baden: Nomos Verlag, 2015), § 845, para. 3.

5 Final critical evaluation of B IA – what necessary adaptations to national legislations need to be done?

The European system of recognition and enforcement law is in a process of transformation. On the one side, the European commission and its allies have been tirelessly advocating the principle of mutual trust between the member states and the free movement of court decisions among the European Union. On the other side, it is questionable if the factual requirements for a common room of mutual trust exist among all member states. Thus, it still has to be considered in how far there is a gap between European wishes and the European reality.

The abolishing of exequatur according to Brussel Ia as an alien element in the German enforcement system

Nearly each[91] domestic judgment and each title needs a court certificated enforcement clause in Germany for the enforcement process, §§ 724, 795 ZPO. Before the recast of Brussels Ia a foreign judgement within the scope of Brussel I needed the court certificate of enforceability in regard to § 9 AVAG. However, Brussel Ia forced Germany to accept an exemption from the basic structure of the

[91] No court certificated enforcement clause is necessary for writs of execution (Vollstreckungsbescheid), § 796 ZPO; writs of seizure (Arrestbefehlt), § 929 ZPO and Injunction regarding the subject matter of the litigation (einstweilige Verfügung), § 936 ZPO. Detailed commentary on the exemptions Wolfsteiner in MüKo/ZPO, 4. Ed. 2012, § 724 par 9.

enforcement law. For the enforcement of a judgment within the scope of the Brussel Ia, § 1112 of the German Code of Civil Procedure expressively states that a court certificate of enforceability is not required. This is an exception from the normal requirements of enforcement. It becomes even more significant if one takes into account that § 794 sec 1 no 9 ZPO equates a European judgment with a domestic judgement.[92] In accordance with Art 42 sec 1 Brussel Ia it is sufficient that the creditor provides the enforcement authority with a copy of the judgment and a certificate issued pursuant to Art 53 Brussel Ia.

Functions of the exequatur

The exequatur had several functions,[93] that now may be endangered:

The **implementation function** is endangered because the recognition and enforcement law was harmonized but not the enforcement law as such.[94] Generally speaking, the German enforcement law requires a title which fulfills the principle of clarity and definiteness. It must be easy and simple to take from the judgment and its title what the debtor has to do.[95] Especially with regard to interest rates one can find different national styles[96] that could lead to problems in regard to the clarity and definiteness of the judgement. Therefore, the foreign title must be adapted to the national law of the state of enforcement. Until the recast of Brussel Ia this was one of the functions of the exequatur decision in accordance with Art 38 Brussel I.[97]

Furthermore, the exequatur has a **perpetuate function.** This function deals with the question of the basis of enforcement. Is this the foreign title or the court certificated enforcement clause?

The control function in a narrower sense means to bind the use of state power to certain standards of human rights.[98] To enforce a judgment is the use of state power. The usage of state power must be justified in line with human rights. The state which

[92] To this function of § 794 sec 1 no. 9 Hess in Schlosser/Hess, 4. Ed. 2015, Art 39 par 1.
[93] Thöne, Die Abschaffung des Exequaturverfahrens und die EuGVVO, 2016, p. 50 et seqq.
[94] Thöne, Die Abschaffung des Exequaturverfahrens und die EuGVVO, p. 50 et seq.
[95] Gaul in Gaul/Schilken/Becker-Eberhard, § 10 par 21.
[96] Seidl, Ausländische Vollstreckungstitel und inländischer Bestimmtheitsgrundsatz, 2010, p. 54 et seqq.
[97] BGH, NJW 1993, 1801; Baur/Stürner/Bruns, § 55.26.
[98] Very clear Schack, FS for Erecinskiego, 2011, 1345, 1354.

enforces a judgment cannot delegate the responsibility to the Member State of origin.[99] Of course, it is mutually recognized that the Member State addressed do not have the right of the revision au fond.[100] But mutual trust cannot substitute the responsibility of the Member State addressed for its own exercise of state power in the enforcement process.[101] Mutual trust takes place on the collective level, the violation of the creditor's fundamental and human rights by enforcing a foreign judgment, which for example violates the right to be heard, takes place on the individual level. Abolishing the control function of the exequatur means to sacrifice the individual rights for the aim of the European integration.[102]

At least the **control function also works as tool to develop and strengths a common standard of the rule of law**. It may encourage the Member State of origin to improve its legal standards, if the Member State addressed refuses to enforce the judgment of state of origin.[103] This function cannot be substituted by the state of origin. But this is the concept of the European Regulations of the second generation, like European Small Claims Regulation or the European Enforcement Order. For example, in Chapter III of the European Enforcement Order a minimum standard which must be fulfilled is defined and the state of origin has to certify that its own proceeding has met this minimum standard as laid out in chapter III of the regulation.[104] With other words the state of origin itself certifies that it has met all requirements. An encouragement to meet all minimum standards and not to be blamed by the courts of the Member State addressed is not connected with this concept.[105]

Abolishing the exequatur but maintaining the function of the exequatur?

Brussel Ia has abolished the exequatur, but this does not mean that the four functions of the exequatur also have vanished. Even though we do not have any court experience about that yet, we can assume that most of the functions maintained. Nevertheless, the new regulation needs some new adjustments.

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[99] Schack, FS for Erecinskiego, 2011, 1345, 1354.
[100] Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3. Ed. 2010, Art 37 par 1.
[101] Compare Recitals 18 of the regulation (EC) No 805/2004 (European Enforcement Order for uncontested claims), which abolished the exequatur.
[102] Wolf, ZZP, 125 (2012), p. 250, 254.
[103] Thöne, Die Abschaffung des Exequaturverfahrens und die EuGVVO, 2016, 74.
[104] Art 6 sec 1 lit c REGULATION (EC) No 805/2004.
[105] Rechberger, in FS for Erecinskiego, 2011, 1277, 1301.

The **implementation function** of the exequatur can be found in Art 54 Brussels Ia now. The implementation problems arise for example if a foreign judgement states just the legal interest must be paid without telling how to calculate the interest rate.[106] Recital 28 sentence 2 states that the Member States should determine who is in charge for the adaption. Contrary to recommendations in the legal literature[107] the law makers in Germany did not create a special jurisdiction at the courts responsible for execution or at the locally competent higher regional court, comparable to the jurisdiction under § 765 ZPO. Rather the law makers leave it to the competent enforcement officers to adapt the foreign title to the national system.[108] This decision may cause problems in the future.[109] In order to adapt a foreign title to the domestic enforcement system it is necessary to functionally evaluate the foreign measure on a comparative law basis and to judge which domestic measure is equivalent.[110] This task does not fit into the enforcement proceeding and will mostly need a much higher qualification than the one which the court appointed enforcement officer has received.

Originally, a title must have been **inspected before the title could be enforced.** The enforcement could have only taken place after the title of a European judgement had been declared enforceable, Art 38 Brussels I. Now, we have inversed the process. In every member state, except Denmark, a European judgement can be enforced only on the basis of the certificate in accordance with Art 53 Brussels Ia.

Art 42 sec lit b explicitly only asks for such a certificate from the court of origin and § 1112 ZPO mirrors this. Nevertheless, there are several possibilities to inspect the judgement in the member state addressed. The yardstick for these inspections is in any case Art 45 Brussel Ia. There is no right to review the substance of the Judgement, Art 52 Brussels Ia. In general, with regard to this there are no changes to Brussel I. Solely Art 45 sec 2 lit e i Brussel Ia now additionally allows a refusal of the enforcement if the court of Member State of origin has violated the jurisdiction privilege of the employees.[111]

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106 Seidl, Ausländische Vollstreckungstitel und inländischer Bestimmtheitsgrundsatz p. 57 et seqq.
107 Hess, IPRax, 2011, 125, 129; Roth, IPRax 1994, 350.
108 Bt-Drs. 18/823, p. 22.
109 Gössl, NJW 2014, 3479.
110 Dörner in Saenger, ZPO, 6. Ed. 2015, Art 54 EuGVVO par 1.
111 Dörner in Saenger, ZPO, 6 Ed. 2015, Art 45 par 30.

For the administration of the **inspection function**, we have four different procedural tools which are all highly regulated through Brussel Ia itself. Three of these tools deal with the question whether the judgment can be recognized in the Member State addressed. The last tool affects the enforcement itself.[112]

The judgment of the Member State of origin is automatically recognized in the Member State addressed as Art 36 sec 1 Brussel states. Nevertheless, it may be disputable whether the conditions for the recognition are fulfilled. This question can be raised by the debtor as well as by the creditor. Both sides have a specific application process, which is governed by Art 46 to 51 Brussel Ia. Only as far as the application process is not governed by the regulation, the national law has to fill the gap, Art 47 sec 2 Brussel Ia. In German law § 1115 ZPO serves as fill-in.[113]

The right to a positive declaratory action in accordance with the conditions of sec 3 subsection 2 Brussel Ia is regulated in Art 36 sec 2 Brussel Ia for the creditor. The opposite right to a negative declaratory action for the debtor is stated in Art 45 sec 4.

Beside these proceedings under the conditions of sec 2 subsection 2 Brussel I a there is no room for an additional declaratory proceeding, exclusively regulated by national law (In Germany the "positive or negative Feststellungsklage", § 253 ZPO). The relationship between the application processes in accordance with Art 36 sec 2 and Art 45 sec 4 is not self-explanatory.

The third inspection function is laid out in Art 46 Brussel Ia. The debtor and only the debtor can initiate the application process in accordance with Art 46 Brussel Ia. Because of the abolishing of the enforcement declaration, the creditor has no need for a legal remedy in the enforcement phase. The relationship between the application process in accordance with Art 46 Brussel Ia and the declaratory

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112 As far as Mäsch in Kindl/Meller-Hannich/Wolf, Gesamtes Recht der Zwangsvollstreckung, 3. Ed. 2015, Art 45 EUGVVO par 1 speaks about five remedies, he still basis his argumentation on Brussel I. Brussel I only knew the positive declaratory action in Art 33 sec 2 but not the negative declaratory action. Therefore, there had been a discussion whether the debtor must have the possibility to raise a negative declaratory action.
Compare for the discussion also Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3. Ed. 2010, Art 33 par 85 et seqq. Meanwhile Brussel Ia has expressly regulated this question in Art 45 sec 4. Therefore, there is no room for an analogous application of Art 36 sec 2 Brussel Ia.

113 Stadler in Musielak/Voit, ZPO Art 36, 3 f.

proceeding in regard to Art 36 sec 2 and Art 45 sec 4 Brussel Ia is not expressively regulated.[114] However, on a closer reflection, the same what had been said about the relationship between the positive and the negative declaratory judgment must in principle apply here. In contrast to that, Art 29 et seqq. Brussel Ia cannot be applicable in this regard. The logic of the enforcement process requires that in an ongoing enforcement proceeding, the application process in accordance with Art 46 Brussel Ia has to prevail.

The decision in accordance with Art 46 Brussel Ia can only be based on the reasons given in Art 45 and not on any additional reason, especially none in the sense of Art 41 sec 2 Brussel Ia.[115] The common ground between all three application processes is that the effect is limited to the Member State addressed.[116]

At least, Art 36 sec 3 Brussel Ia allows an incidental review of the judgment of origin if the judgment has an impact on a German trial proceeding.

The perpetuated function has not been maintained under Brussel Ia. Because the debtor has the possibility to start the inspection process in the case of enforcement, one can still argue that the requirement of the democratic legitimacy of exercising state power is fulfilled. The consequences for the **action to oppose enforcement (“**Vollstreckungsgegenklage”**)** are more critical**.** Regarding Brussel I we have discussed three different questions. The first question has been, whether the action to oppose enforcement could be integrated in the exequatur process with regard to Art 43 Brussel I.[117] The European court of justice decided that the action to oppose enforcement (“Vollstreckungsgegenklage”) cannot be combined with the exequatur process.[118] In the meantime, also Art 41 sec 2 Brussel Ia states this very clearly. The second question had been, whether the court of the Member State of origin or the court of the Member State addressed should have jurisdiction over the action to oppose enforcement.[119] The last question has been, whether the action to oppose

[114] Hau, MDR 1417, 1419.
[115] Zöller/Geimer, Art 46 par 2.
[116] Zöller/Geimer Art 36 par 40; Franzina in Dickinson /Lein, the brussel I regulation recast, 2015, par 1374.
[117] See Oberhammer in Stein/Jonas, ZPO, 22. Ed. 2011, Vol. 10, Art 43 par 15 et seqq.
[118] ECJ, Judgment from 13.10.2011 case 139/10
[119] Oberhammer, in König/Mayr (Ed.) Europäisches Zivilverfahrensrecht in Österreich III, 2012, 83 et seqq.

enforcement only deals with the enforceability of the judgment in the Member State addressed or in all member states.[120]

The consequence of abolishing the perpetuate function is that now, the Member State addressed has the competence to decide the action to oppose enforcement (for example § 1117 ZPO). Furthermore, in accordance with Art 24 sec 5 the Member State addressed has the exclusive jurisdiction and the decision must be recognized in all member states.[121] In opposition to this, it cannot be disputed that the action to oppose enforcement has a very close connection to the original trial process and its decision.[122] The impact of abolishing the perpetuating function on the action oppose enforcement may not be intended; to find a balanced solution between the interest of the debtor and the creditor is still a pending issue.[123]

[120] Thöne, Die Abschaffung des Eyequaturverfahrens und die EuGVVO, 2016, 55.
[121] Thöne, Die Abschaffung des Eyequaturverfahrens und die EuGVVO, 2016, 89 et seqq.
[122] Halfmeier, IPRax 2007, 381, 385 et seq.
[123] Compare Oberhammer, in König/Mayr (Ed.) Europäisches Zivilverfahrensrecht in Österreich III, 2012, p. 83, 99 et seqq.

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MARIBOR, AUGUST 2018