



Sacred Heart University
DigitalCommons@SHU

WCOB Working Papers

Jack Welch College of Business

2011

The Status Of Recognition And Enforcement Of Judgments In The European Union

Michael D. Larobina J.D., L.L.M.
Sacred Heart University, larobinam@sacredheart.edu

Richard L. Pate J.D.
Sacred Heart University, pater@sacredheart.edu

Follow this and additional works at: http://digitalcommons.sacredheart.edu/wcob_wp

 Part of the [International Business Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Larobina, Michael D. J.D., L.L.M. and Pate, Richard L. J.D., "The Status Of Recognition And Enforcement Of Judgments In The European Union" (2011). *WCOB Working Papers*. Paper 7.
http://digitalcommons.sacredheart.edu/wcob_wp/7

This Article is brought to you for free and open access by the Jack Welch College of Business at DigitalCommons@SHU. It has been accepted for inclusion in WCOB Working Papers by an authorized administrator of DigitalCommons@SHU. For more information, please contact ferribyp@sacredheart.edu.

THE STATUS OF RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION

MICHAEL D. LAROBINA

LarobinaM@sacredheart.edu
John F. Welch College of Business
Sacred Heart University

RICHARD L. PATE

pater@sacredheart.edu
John F. Welch College of Business
Sacred Heart University

ABSTRACT. International trade and the free movement of people are inevitably followed by legal disputes. Such litigants require an efficient and predictable dispute resolution mechanism capable of handling cases between diverse nationals. An essential part of such mechanism is a clearly defined process of judgment enforcement across national boundaries. In the past several decades, the European Union (“EU”) has necessarily addressed judgment enforcement across the boundaries of its member nations (“Member States”). Citizens of the EU need to prosecute and defend their legal rights in their home and in other EU member states. Presently, the EU is, again, considering such issues and is poised to make some changes in this area. As with past EU legislation regarding judgment recognition and enforcement, the proposed changes are intended to promote the growth of the European economy by encouraging and furthering cross-border trade and the free movement of people. This paper presents the following, (1) a brief introduction to civil and commercial judgment recognition and enforcement in the EU, (2) the current status of judgment enforcement as exemplified in significant case law, (3) the deficiencies of current EU judgment enforcement Brussels I, and finally, (3) the proposed changes to such Brussels I currently.

Keywords: European Community, Brussels I 44/2001, judgment, recognition, enforcement, exequatur proceedings

Introduction

International trade and the free movement of people are inevitably followed by legal disputes. Such litigants require an efficient and predictable dispute resolution mechanism capable of handling cases between diverse nationals. An essential part of such mechanism is a clearly defined process of

judgment enforcement across national boundaries. In the past several decades, the European Union (“EU”) has necessarily addressed judgment enforcement across the boundaries of member nations (“Member States”). Citizens of the EU need to prosecute and defend their legal rights in their home and in other EU member states. Presently, the EU is, again, considering such issues and is poised to make some changes in this area. As with past EU legislation regarding judgment recognition and enforcement, the proposed changes are intended to promote the growth of the European economy by encouraging and furthering cross-border trade and the free movement of people. This paper presents the following, (1) a brief introduction to civil and commercial judgment recognition and enforcement in the EU, (2) the current status of judgment enforcement as exemplified in significant case law, (3) the deficiencies of current EU judgment enforcement Brussels I, and finally, (3) the proposed changes to such Brussels I currently.

1. Cross-Border Civil Judgment Enforcement in the EU

The 1968 Brussels Convention (“Brussels”) was the first comprehensive legislation dealing with, among other things, the enforcement of judgments in the EU.¹ As articulated in its preamble, Brussels’ ultimate goal was to promote economic growth within the Union and harmonize the rules for cross-border enforcement of civil judgments:

Desiring to implement the provisions of Article 220 of that Treaty² by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals; Anxious to strengthen in the Community the legal protection of persons therein established; Considering that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements.³

Brussels applied to civil or commercial matters (excluding matters related to family law, wills, bankruptcy, insolvency, social security or arbitration).⁴ It addressed the mutual dependent subjects of jurisdictional and judgment enforcement. On December 22, 2000, the European Council adopted Regulation No. 44/2001 (“Brussels I”), which went into effect in March of 2002, effectively replacing Brussels and becoming the keystone of EU procedural law.⁵ Most of the concepts included in Brussels I merely reproduce the rules already in force its predecessor. As stated in its

preamble, the principal aims of Brussels I, which applies to all member states (except Denmark⁶), remain those of Brussels, “[c]ertain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Brussels I are essential.”⁷

Brussels I keeps the framework of the Brussels (but introduces a number of amendments, which are outside the scope of this article). As with Brussels, Brussels I applies to all civil and commercial matters only.⁸ The substantive areas of Brussels I benign with Chapter II, which addresses personal jurisdiction, and sets forth the basic rule, as found in Brussels) that an individual is subject to the jurisdiction of the courts of the state in which the individual is domiciled, regardless of that individual’s nationality.⁹ The real reach of the Brussels I over personal jurisdiction can especially be appreciated in Section 2, Article 5 of the Brussels I entitled “Special Jurisdiction.” Under this Article, the basic rule stays the same as Brussels, but for all obligations in the sale of movable goods and in the provision of services, the place of performance is the place where the goods have been delivered or the services have been provided.¹⁰ As for subject matter jurisdiction, Brussels I covers, generally, all contract matters, tort matters, claims for restitution under limited circumstances, disputes arising out of the operation of a branch, agency or other establishment, disputes in connection with a settler, trustee or beneficiary of a trust and for claims regarding payment of remuneration where cargo or freight has been secured for payment.¹¹

Recognition and enforcement of judgments are addressed in Chapter III of Brussels I. Under Article 32 “[j]udgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.” Article 33 plainly and clearly reiterates the underlying principle of Brussels, “a judgment given in a Member State shall be recognized in the other Members States without any special procedure being required.”

Article 34 creates exceptions to Article 33 and its automatic recognition, it states that judgments will not be recognized, “1. If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; 2. Where is was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to

enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; 3. If it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, providing that the earlier judgment fulfils the conditions necessary for its recognition in the Member States addressed.¹²

The Brussels I recognizes the importance of respecting the jurisdiction of the original court of judgment. With respect to any questions arising over jurisdiction in the original court, the Brussels I defers all questions of fact to that original issuing court.¹³ The respect afforded the original court on questions of fact is reinforced in Article 36, which states: “Under no circumstances may a foreign judgment be reviewed as to its substance.” If an appeal is pending, the court in which enforcement is sought may stay the proceedings pending the outcome of the appeal.¹⁴

Section 2 of Chapter III address judgment enforcement, the heart of the issue. Article 38 allows for the enforceability of judgments cross-border. The judgment is enforceable when an interested party makes application to the proper authority in the other Member State for a declaration that the judgment is enforceable in that other Member State.¹⁵ Although not automatic, Article 41 states a judgment shall be declared enforceable immediately on completion of the formalities in Article 53. Article 53 and 54 essentially states that if the party seeking enforcement produces with the judgment a certificate that conforms to Annex V,¹⁶ then in that case the judgment is presumed enforceable.

The judgment must be submitted to a specific court in the other Member State. Annex II to Brussels I list the appropriate courts for each Member State. Each Member State also retains the right to establish the procedure to be used when making an application for enforcement. The party against whom enforcement is sought is entitled to notice of the declaration of enforceability and there is a right of appeal on the enforceability decision.

2. Two Illustrative Cases Arguing Non-Enforceability under Article 34

As detailed above, in absence of the applicability of the aforementioned Article 34 defenses (and in some cases Article 35 defenses), pursuant to Articles 32 and 33, *recognition* is expected to be virtually automatic.¹⁷ That is, a judgment issued in a Member State is to be recognized in other Member State without the need for any proceeding in the courts of the

latter.¹⁸ *Enforcement*, on the other hand, as stated above, is granted only upon the satisfaction of the relatively simple¹⁹ *exequatur* proceedings described above.²⁰

The distinction between recognition and enforceability is, however, blurred when it comes to remedies available to a party against whom enforcement or recognition is sought.²¹ Firstly, both recognition and enforceability can be refused on the grounds listed in Articles 34 and 35 *only* (articles which on the surface seem to deal with recognition only).²² Secondly, the exclusive remedy for a violation of either Article 34 or 35 provisions is an *appeal* of the declaration of enforceability, pursuant to Article 43.²³ In essence, no Article 34 and 35 defenses/grounds can be raised by a defendant or the court, *sua sponte*, before (such as at recognition stage) or during the enforcement/ *exequatur* proceedings. Once the aforementioned Article 53 formalities are met, an enforcement declaration *must* be issued without review by any authority. Review may only be had subsequently, by appeal pursuant to Article 43(1).²⁴ The net effect of this is that the recognition and enforcement process becomes perfunctory; until a defendant appeals the declaration of enforceability, courts cannot scrutinize the judgment for which enforcement is sought to determine whether or not it ought to be recognized.

In the end, all roads lead to the same place; both recognition and enforcement are contestable only by the same exclusive means (an appeal under Article 43) and only on the same grounds/defenses (Articles 34 and 35). Accordingly, further scrutiny of the procedural and substantive aspects of Articles 34 and 35 is warranted.²⁵ However, given the broad coverage of these two Articles, this section of the article will limit its inquiry to two cases, both representative of the workings of the appeal remedy. Both cases deal exclusively with Article 34(2), that is, non-recognition in cases of a default judgment for failure to appear.

As stated above, Article 34(2) states that a judgment shall not be recognized “where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.”²⁶ In general, Article 34(2) is intended to guarantee that the judgments admitted to free movement in the Member States have been issued in observance of the rights of the defendant. Empirical evidence shows that, in practice, Article 34(2) is an often cited provision for objecting to the recognition / enforcement of a judgment.²⁷

The first of the two cases is *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)*, (C-283/05) [2006] E.C.R. I-12041. In *ASML*, the European Court of Justice handed down a ruling on the

interpretation of Article 34(2). The procedural context of *ASML* is as follows: *ASML Netherlands BV* ('*ASML*'), a company established in the Netherlands, obtained a default judgment (for failure to appear) in a Dutch district court, against *Semiconductor Industry Services GmbH* ('*SEMIS*'), a company established in Austria. The judgment ordered *SEMIS* to pay *ASML* the sum of 219,918.60 Euros. However, notice of the default *hearing* was served to *SEMIS* only several days after the hearing, and the eventual default judgment was not served to *SEMIS* at all.

ASML domesticated the judgment in Austria by applying for recognition and enforcement in an Austrian district court.²⁸ The Austrian *district* court granted the enforceability application based on the certification of the Dutch district court. At such time, a copy of the enforcement order was caused to serve on *SEMIS* (the original default judgment was, again, not included in such service). *SEMIS* appealed the enforceability order to the *regional* court in Austria. The court found that enforceability could not be allowed since the judgment should have been served on the defendant to be "possible" for it to commence proceedings to challenge the judgment, within the meaning of Article 34(2).

ASML appealed to the Austrian Supreme Court which referred the issue to the European Court of Justice (ECJ), based on the Article 34(2) exception. As previously set forth, the general rule under Article 34(2) disallows recognition of a judgment when given in default of appearance if the defendant was not served with the document which commenced the proceeding in sufficient time and manner to allow defendant to defend himself. Article 34(2), however, also creates an exception to this rule, which allows recognition of a judgment even in absence of service described above, if the *defendant failed* to commence proceedings defend himself by challenging the judgment when it was "possible" for him to do so. *ASML's* argument was based on this exception when it argued that although *SEMI* did not receive the notice of judgment, it had knowledge that the hearing occurred and that a judgment was issued, in part because, although untimely, *SEMI* had received notice of the hearing and proceeding. Consequently, according to *ASML*, it was "possible" for *SEMI* to challenge the judgment in the courts of the Member State where it was first issued.

The ECJ, however, decided "that Article 34(2) of Brussels I No 44/2001 is to be interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defense before the courts of the State in which the judgment was given." In other words, knowledge of judgment alone is not sufficient, a judgment default must be properly served to the defendant so that he may become acquainted with its actual contents and remain in a position to defend himself in a timely manner in the courts of

the Member State which issued judgment. In essence, service of the judgment order is a second bite of the apple should the first bite (the service of document which commences proceedings) fail. The *ASML* decision is illustrative of Article 34(2) emphasis on the protection of the rights of the defense, which derive from the right to a fair legal process, requiring to begin with proper notice/ service of a complaint or a judgment order.

The second illustrative case, *Apostolides v Orams* (C-420/07) [2009] E.C.R. I-3571 (ECJ (Grand Chamber)), is a landmark legal case for several reasons beyond the scope of this article. The matter concerned the right for Greek Cypriot refugees to reclaim land in northern Cyprus, displaced after the 1974 Turkish invasion. The case determined that although Cyprus does not exercise effective control in northern Cyprus, cases decided in its courts are applicable through European Union law. The case, however, is also significant to Article 34(2) interpretation. The Apostilides (Greek-Cyprus nationals) sued the Orams (British nationals) in a Cyprus court, essentially seeking a return of their land. The documents commencing such proceedings were arguably defectively served upon the defendants, and consequently, the Omars failed to appear in the case in a timely manner. Unsurprisingly, the Apostilides prevailed and obtained a judgment based on the Omars' lack of appearance. The Omars eventually learned of the judgment and applied to the *same* court to have the judgment set aside. At such proceedings, the Omars argued that they were not properly served the documents which commenced the case. The court was not convinced by their argument, accordingly, the Apostilides, again, prevailed and then sought and received a judgment enforcement order in the courts of England, pursuant to Article 43. The Orams appealed the enforcement order, pursuant to Article 44 to the English Court of Appeal which then referred the matter to the European Court of Justice.

The question posed to the CJ was as follows: “the referring court asks essentially whether the recognition or enforcement of a default judgment may be refused under Article 34(2) of Brussels I No 44/2001 by reason of the fact that the defendant was not served with the document instituting the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, where *he was able* to commence proceedings to challenge that judgment before the courts of the Member State of origin.”²⁹

In the light of the foregoing, the CJ stated, “the answer to the fourth question is that the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Brussels I No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the

equivalent document in sufficient time and in such a way as to enable him to arrange for his defense.”

In essence, in this case the CJ found that the defendants were adequately protected even though Article 34(2)’s general rule requiring proper service of initial documents was not satisfied. The CJ found that the defendants was sufficiently protected under the aforementioned Article 34(2) exception; despite the lack of service, the fact that the defendants, in fact, challenged the default judgment demonstrated that it was “possible” for them to commence proceedings to challenge the judgment, within the meaning of Article 34(2).

In the end, while the respective procedural histories of the *Apostolides* and *ASML* suggest a substantive inconsistency between the two cases, the suggestion is only superficial. In both matters the protection of the defendant is paramount to the CJ, and in both cases the CJ first and foremost ascertains whether the defendant is procedurally protected. It may additionally argued that despite its strive to protect a defendant’s due process rights, the *Apostolides* case shows that the CJ will not choose form over substance.

3. Brussels I and its Deficiencies

Presently, the Commission to the Parliament and Council of EU is considering amending Brussels I. The Commission has acknowledged that the Brussels I has worked well, however, after conducting empirical studies t a number of deficiencies arose.³⁰ The Commission has pointed out that the goal of the revisions is “facilitating cross-border litigation and the free circulation of judgments in the European Union. The revision should also contribute to create the necessary legal environment for the European economy to recover.”³¹ The Commission has identified four major areas of concern.

Firstly, the current procedure for the enforcement of judgments in another Member State (“*exequatur*”) remains an obstruction to the free circulation of judgments. The process needs to be further streamlined so to eliminate unnecessary costs and delays which currently deter companies and citizens from making full use of the internal market.³²

Secondly, access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU. With some exceptions, the current Brussels I applies only when the defendant is domiciled inside the EU, and as a result, jurisdiction is governed by national law. The diversity of national law leads to unequal access to justice for EU companies in transactions with partners from third countries; some can easily litigate in the EU, others cannot.³³

Thirdly, the efficiency of choice of forum agreements needs to be improved. Currently, the Brussels I obliges the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seized first. This rule enables litigants acting in bad faith to delay the resolution of the dispute in the agreed forum by first seizing a non-competent court. This possibility creates additional costs and delays and undermines the legal certainty and predictability of dispute resolution which choice of court agreements should bring about.³⁴

Fourthly, the interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Brussels I. However, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings which may lead to irreconcilable resolutions of the dispute. This leads to additional cost and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.³⁵

4. Brussels I and Current Proposals

Numerous studies of the current Brussels I paradigm have been conducted.³⁶ Two studies examining different options for reform were conducted by external groups,³⁷ and several conferences regarding such revision were co-organized by the Commission in 2009.³⁸ In the end, the Commission encouraged and sought out the opinions of several outside groups before moving forward with their final recommendations for revisions of Brussels I.

Several principal recommendations for revisions were put forth, the first of which is the proposed abolition of *exequatur*. As previously stated, “*exequatur* is a concept specific to the private international law and refers to the decision by a court authorizing the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad.”³⁹ Under the current Brussels I, there are formalities that must be met before a foreign court recognizes and enforces a judgment from another jurisdiction. The proposed revisions would eliminate these formalities. More specifically, the change would eliminate the need for a “declaration of enforceability,” the documents discussed in the two cases in section II of this article. “The Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States. The proposal therefore abolishes the *exequatur* procedure for all judgments covered by the scope of Brussels I with the exception of judgments in defamation and compensatory collective redress⁴⁰ cases.”⁴¹

The second proposal strengthens the validity of choice of forum clauses. If private parties choose a particular court to hear a dispute resulting from an agreement, the parties' choice must be recognized regardless of whether it is first or second seised.⁴² The proposal puts forth the rationale that the strengthening choice of forum clauses will "eliminate the incentives for abusive litigation in non-competent courts."⁴³

Thirdly, the proposals seek to clearly recognize private parties' choice of arbitration clauses. The proposed revision "...obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. This modification will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics".⁴⁴

Fourthly, the revision seeks to better coordinate the procedural rule of each Member States' judiciary system, more specifically, procedural rules in matters dealing with *lis pendens* rules b requirement that consolidation has to be possible under national law. Concerning provisional, including protective measures, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte*.⁴⁵

The revisions also seek to increase access to justice, by for example, the creation of a forum for claims of rights *in rem* at the place where moveable assets are located and the possibility for employees to bring actions against multiple defendants in the employment area under Article 6(1). This possibility existed under the 1968 Brussels Brussels. Its reinsertion in the Brussels I will benefit employees who wish to bring proceedings against joint employers established in different Member States. Restoring the possibility to consolidate proceedings against several defendants in this context will mainly benefit employees. The revisions also propose making mandatory information of a defendant entering an appearance about the legal consequences of not contesting the court's jurisdiction.⁴⁶ This last set of proposals appears to be technical in a sense and is aimed at the overall improvement of cross-border enforcement and jurisdictional issues.

5. Conclusion

Despite some deficiencies, Brussels I 44/2001 has been acknowledged as a success. The Brussels I has provided businesses and individuals with the predictability and reliability necessary for effective dispute resolution across Member States' borders. This clarity has, in turn, contributed to the promotion of the economic growth desired beginning with the 1968 Brussels Brussels. A material aspect of this success has been the free movement of judgments. Brussels I 44/2001 has achieved free movement of judgments by greatly facilitating judgment recognition and judgment enforceability.

Presently, under the Brussels I, recognition is obtained without the need for any proceeding in the courts of the recognizing State, and enforcement is granted upon the satisfaction of relatively simple *exequatur* proceedings. Contemporaneously, as demonstrated by the *ASML* and *Apostolides* cases, the intended ease is balanced by the CJ's strict scrutiny of any procedural defect which may undermine a defendant's rights to due process.

Notwithstanding the Brussels I's effectiveness, the EC is seeking to further improve the paradigm by considering the enactment of certain revisions. Several years since its enactment, empirical studies have suggested that some modifications would further improve the Brussels I's temporal, monetary and procedural efficiency and result in greater uniformity of these same factors among the several Member States.

The provisions' principal goal remains the same as that of back in 1968; the revisions are intended ameliorate the legal environment so to help improve the European economy. To help achieve this goal, among other things, the revisions would remove even the rudimentary *exequatur* proceedings presently required by the Brussels I. The revisions are also intended to create greater uniformity in access to justice by expanding the authority to resolve disputes involving parties from outside the EU. Lastly, the revisions would also help avoid evident, unnecessary costs and (at times intentionally created) delays, by strengthening / establishing recognition of choice of forum agreements and arbitration agreements.

In the end, as examined above, the proposed changes should add to the fluidity of the free movement of judgments achieved by the present Brussels I. And consequently, lead to greater commercial interaction between the nationals of the Member States and the ensuing economic growth.

NOTES AND REFERENCES

1. Brussels of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Subsequently, the Brussels Brussels was “supplemented” by the Lugano Brussels 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was entered into by the six members of the European Free Trade Association.

2. Reference to the Treaty of Rome establishing the European Community.

3. Brussels of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Preamble.

4. *Id.*, Title I, Article 1.

5. Council Brussels I No 44/2001.

6. Denmark, however, remains governed by Brussels.

7. *Id.* Preamble (2).

8. Matrimonial matters (divorce, legal separation, marriage annulment, parental responsibility and child abduction) were eventually covered under Council Brussels I (EC) No 2201/2003 (“Brussels II”).

9. The Brussels I clearly states that “[p]ersons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.” *Id.*, Chapter II, Article (2)(2).

10. *Id.*, Section 2, Article 5.

11. *Id.*

12. *Id.*, Chapter III, Section 1, Article 34.

13. *Id.*, Article 35 (2).

14. *Id.*, Article 37 (1).

15. *Id.*, Article 38 (1).

16. Annex V is a standard form to be completed by the issuing court attesting to the authenticity of the copy of the judgment.

17. *Id.*, Chapter III, Section 1, Article 32–34.

18. According to the Heidelberg Report, “the concept of “judgment” in the sense of the Judgment Brussels I must be interpreted broadly, including provisional and protective measures given after a hearing of the debtor. “However, in the practice of the national courts, uncertainties still exist... [However] despite the practical problems encountered with Article 32 JR in the Member States, the basic concept of the provision seems to be well balanced: It provides for an autonomous concept of “judgment” which must be applied to the heterogeneous decisions of the civil courts of (now) 27 Member States. There is no doubt that the application of the provision may entail uncertainties in the Member States. In the present state of affairs, however, the *ECJ* has elaborated the basic structures of the Community concept, while its application in relation to the different enforceable instruments of the Member States is a matter for the national courts.” B. Hess/T. Pfeiffer/P. Schlosser, Report on the Application of Brussels I Brussels I in the Member States (Study JLS/C4/2005/03 also referred to as the Heidelberg Report), para. 1.

19. As detailed above, under Article 53, in essence, an application for enforceability must be submitted and certain procedures must be satisfied in the Member State where enforcement is sought before declaration of enforcement (required by Article 41) is issued. Empirical evidence gathered from Member States, pursuant to the Heidelberg Report (B. Hess/T. Pfeiffer/P. Schlosser, Report on the Application of Brussels I Brussels I in the Member States (Study JLS/C4/2005/03

also referred to as the Heidelberg Report), para. 1) demonstrates that Member States generally agree that *exequatur* proceedings operate efficiently. Although the time for obtaining *exequatur* decisions varies greatly from State to State, the average time is relatively short. According to the same source information, the judgment creditor obtains a decision on enforceability within less than two weeks all necessary documents are presented. Id.

The relevant time periods are as follows: Austria (1 week), Belgium (n.a), Cyprus (1–3 months), England and Wales (1–3 weeks), Estonia (3–6 months), Finland (2–3 months), France (10–15 days), Germany (3 weeks), Greece (10 days–7 months), Hungary (1–2 hours), Ireland (1 week or more), Italy (Milan: 20–30 days; Bolzano: 7–20 days), Latvia (10 days), Lithuania (up to 5 months), Luxembourg (1–7 days), Poland (1–4 months), Portugal (n. a.), Slovakia (n. a.), Slovenia (2–6 weeks), Spain (1–2 months), Sweden (2–3 weeks). B. Hess/T. Pfeiffer/P. Schlosser, Report on the Application of Brussels I Brussels I in the Member States (Study JLS/C4/2005/03 also referred to as the Heidelberg Report), para. 1.

20. Generally governed by Articles 38–52.

21. The decision regarding the declaration of enforceability may be appealed by either party; Article 43 provides that “either party” may file an appeal, irrelevant of whether the decision grants or rejects the application. However, typically, only the party against whom enforcement is sought will have an interest in appealing a declaration of enforceability.

22. Id., Chapter III, Section 1, Article 34.

23. Id., Article 43.

24. Id., and Article 53.

25. Id., Articles 34 & 35.

26. Id., Article 34(2).

27. Heidelberg Report... “In practice, the most important provision for objecting to the recognition of a foreign judgment is still Article 34(2) JR. This provision mainly applies to default judgments which occur frequently in the European Judicial Area. Most of the problems relate to the service of the document instituting the proceedings. In this context, the application of Articles 14 and 19 of the Service Brussels I has proved to be difficult. 741 However, due to the amendment of Article 34(2) JR in 2001, its practical impact has been reduced considerably. Case law shows that the former defense of a defendant that the document instituting the proceedings was not properly and timely served is not longer successful.”

28. With regard to the aforementioned issue of remedies (available to a party against whom enforcement or recognition is sought), it is worth noting that in ASML the Advocate General (in points 26–28 of his ASML Opinion), observes as follows:

[...] Brussels I 44/2001 provides that consideration of that application will not give rise to a judgment by a court, but simply to a declaration of enforceability, made either by a court or by a competent authority following purely formal checks. Contrary to what is provided in the Brussels Brussels, in Brussels I 44/2001 it is only where an appeal is lodged against that declaration that the grounds for refusal, such as the ground

of infringement of the rights of the defense contained in Art. 34(2) of that Brussels I, are considered by a court. According to Art. 41 of Brussels I 44/2001, the judgment is to be declared enforceable immediately on completion of the formalities in Art. 53 without any review of the grounds for refusal contained in Art. 34, in particular, of that Brussels I.

According to Arts 53 to 55 of Brussels I 44/2001, those formalities comprise production of a copy of the judgment making it possible to establish its authenticity, and of a certificate issued by the court which delivered the judgment or the competent authority of the state of origin, or, where appropriate, an equivalent document. The certificate, which must be drawn up using the standard form attached in Annex V to that Brussels I, must mention in particular the date of service of document instituting proceedings where the judgment was delivered in default of appearance, and the fact that the judgment is enforceable in the state of origin.

ASML (C-283/05) Opinion of Advocate General at 26–28.

29. Emphasis added.

30. Explanatory memorandum accompanying proposal from Commission to Parliament and Council dated December 2010.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Conducted by Prof. Burkhard Hess of the University of Heidelberg and available at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm and Conducted by Prof. Arnaud Nuyts of the University of Brussels and available at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

Study on Data Collection and Impact Analysis Certain Aspects of a Possible Revision of Council Brussels I No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters, conducted by the Centre for Strategy & Evaluation Services, 2010.

37. Study on Data Collection and Impact Analysis Certain Aspects of a Possible Revision of Council Brussels I No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters, conducted by the Centre for Strategy & Evaluation Services, 2010.

38. Conference organized jointly with the University of Heidelberg and the Journal of Private International Law. Explanatory memorandum accompanying proposal from Commission to Parliament and Council dated December 2010.

39. http://ec.europa.eu/civiljustice/glossary/glossary_en.htm

40. Compensation of harm caused by unlawful business practices to a multitude of claimants.

41. *Id.*, Note 29.

42. *Id.* at p. 9.

43. Id. at p. 10.

44. Id. at p. 11.

45. Id.

46. Id. at p. 12.

© Michael D. Larobina, Richard L. Pate