EFFECTS OF JUDGMENTS IN CROSS-BORDER PERSPECTIVE

ABSTRACT

This chapter is concerned with the enforceability effects of judgments within the scope of the Brussels I bis Regulation. It examines how far enforcement action is authorised, or may be delayed or stayed, following the issue of a judgment at first instance: a judgment that may later be revised or quashed. Although the starting point is that a judgment should be final before it can be enforced, in practice Member States provide for the provisional enforceability of judgments under certain circumstances even before they become final. This chapter first provides a comparative overview of the provisional enforceability of judgments under the national laws of selected Member States. In particular, it looks at the role of the certificate of enforceability required by national laws before enforcement can take place, and it explores how far the certificate is relevant to the material enforceability of the judgment. The paper then explores some of the problems that arise in cross-border cases with respect to the certificate of enforceability provided for by Art. 53 of Brussels I bis. There is a growing case law concerning the role and effects of the certificate. National expectations as to the enforceability effects of judgments and the functions of a certificate of enforceability may help to explain the interpretative difficulties that have arisen.

(I) INTRODUCTION

This chapter is concerned with the enforceability effects of judgments within the scope of EU Regulation 1215/2012 (henceforth: Brussels I bis). It first provides a comparative overview the national laws of selected Member States, and then explores the problems that may arise in cross-border cases. In practice, an important aspect of cross-border enforcement is the question whether the judgment in question is entitled to recognition, or whether one of the defences to recognition may be asserted. This question has been analysed in many publications. The focus of the present chapter is the extent to which enforcement action itself is authorised, or may be delayed or stayed, following the issue of a judgment at first instance. It requires consideration of a series of issues:

(i) Is a first instance judgment provisionally enforceable before it becomes final? And if so, are there ways of challenging a decision that the judgment is enforceable?

(ii) What procedures exist under Member State laws for verifying the enforceability of domestic judgments and dealing with changes in circumstances that affect whether and how a judgment can be enforced and the identity of the parties to the enforcement proceedings?

(iii) What are the implications of any differences in national laws for cross-border enforcement under Brussels I bis?

(II) PROVISIONAL ENFORCEABILITY

Legal systems differ in the way that they structure their approach to the effects of judgments[1] and the different effects that they recognise at different points in proceedings. As far as the 'enforceability effect' of judgments is concerned, an appropriate starting point is to say that a judgment is enforceable when it becomes final, and any period allowed for voluntary compliance (typically payment) has passed. Enforceability effects may then be brought forward, by allowing (provisional) enforcement immediately, before the judgment becomes final, or they may be deferred, by granting a further grace period for compliance. In some countries, first instance judgments are immediately enforceable as of right, leading to full satisfaction of the judgment creditor. It is assumed that appeals will not often be successful and that a first instance decision is reasonably secure.[2] In other countries, provisional enforcement is available, but the judgment creditor must make a separate application for it and may have to provide security. In both these cases the further question arises as to when enforcement may be suspended in the case of an appeal on the merits. In a third group of countries, enforcement – in the sense of full satisfaction of the creditor – is not available in most cases. Steps may nevertheless be taken to secure the assets of the judgment debtor pending full execution.

[1] Much of what is said in this article is also applicable to other enforcement titles, but reference is here restricted to judgments for ease of discussion. The commonest case is a money judgment, and so the parties are referred to as creditor and debtor.

[2] For this reason, it will not normally be necessary for the judgment creditor to provide security, although the court may order otherwise in appropriate cases.

Although these categories are distinct in principle, in practice there is a spectrum of approaches that blur the distinctions. Thus, jurisdictions that deny the immediate enforceability of judgments as a general principle have exceptions to that principle that may be more or less extensive. Moreover, the difference between judgments being immediately enforceable as of right and judgments being enforceable in appropriate cases on an individual application is also limited if provisional enforcement is permitted on a regular basis and is customarily sought by claimants during the proceedings on the merits. Distinctions may nevertheless exist in terms of cost, complexity of procedure and a possible requirement to provide security. The following paragraphs have categorised jurisdictions based on what appears to be the 'general' position in each jurisdiction, while recognising that these categorisations may deserve adjustment in the light of practice.

a) First instance judgment immediately enforceable as of right

France provides an example of the first approach to enforceability. According to Art 501 CPC, a judgment is enforceable once it becomes final ('*passe en force de chose jugée*') subject to two exceptions: on the one hand enforcement may be deferred if a '*délai de grâce*' has been granted; and on the other hand, enforcement may be brought forward if the judgment[3] is provisionally enforceable. But in fact, following recent reforms to the law, first instance decisions are immediately (provisionally) enforceable as of right, unless otherwise provided by law or in the decision itself (Art. 514 CPC).[4] Thus, in an individual case, a judge may conclude that provisional enforcement is 'incompatible with the nature of the case' (Art. 514-1 CPC). Under Art. 514 CPC is not necessary for the judgment creditor to provide any security to protect the position of the judgment debtor: a review of the desirability of provisional enforceability only arises if an appeal is lodged or an application is made to set aside the judgment ('*opposition*'). If an appeal is lodged, the first president of the appeal court can hear an application to stop provisional enforcement if there is a serious argument for annulling or revising the decision and enforcement risks causing 'manifestly excessive' consequences. (Art. 514-3 CPC). In this situation, rejection of the application to stop provisional enforcement may be made subject to the provision of security (Art. 414-5 CPC)

[3] *Décret n° 2019-1333 du 11 décembre 2019 réformant la procédure civile*, Art.3.

[4] Art. 514 CPC: 'Les décisions de première instance sont de droit exécutoires à titre provisoire à moins que la loi ou la décision rendue n'en dispose autrement'.

A similar approach, providing for the provisional enforceability of first instance judgments, can be found in Belgium. Art 1397 CJ states that (except where an exception is provided for by the law or a judicial decision) '*jugements définitifs*' are provisionally enforceable – irrespective of any appeal and without the need to provide security unless the court so orders.[5] Subject to any exceptions provided for by the law or a judicial decision, however, an appeal or application to set aside a judgment will suspend enforcement in the case of a default judgment.

In some jurisdictions where the general principle is that first instance judgments are not provisionally enforceable as of right, certain types of judgment are nevertheless identified as being provisionally enforceable – for example, awards of maintenance,[6] judgments in cases in which the defendant admits the claim,[7] default judgments,[8] decisions awarding payment to employees under labour law regulations.[9]

b) Decision on provisional enforceability in the individual case

As noted above, the second category of cases blends into the first, in so far as provisional enforcement is regularly ordered by courts. Differences will nevertheless exist as to the circumstances justifying provisional enforcement and any requirement of security. This can be illustrated by a few examples.

In the Netherlands, Art. 233 Rv provides that a first instance judgment may be declared provisionally enforceable (unless the law or the nature of the case dictates otherwise). A

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5 See Belgian National Report para.152 as to this policy decision to prevent the abusive use of appeals procedures.

5 E.g. Poland, Art 333(1) KPC (maintenance payments that became due prior to bringing the action and due for a period of no longer than three months); Czech Republic § 162(1) OSR; Lithuania, Art.282(2)(1) CPK.

7 E.g. Poland, Art.333(1) KPC.

8 E.g. Poland, Art.333(1) KPC; Sweden, Ch. 3, s.5(2) UB. In fact, Ch.3 ss.5–9 UB provide for a range of other situations in which provisional enforcement is possible, and in principle this extends to other money judgments with certain provisos.

9 E.g. Poland, Art.4772(1) KPC (cases concerning matters regulated by labour law when the judgment awards a sum of money to an employee which does not exceed a full one month's salary of that employee); Czech Republic, § 162(1) OSR (remuneration for the three months prior to the delivery of the judgment); Lithuania, Art.282(2)(2) CPK (award of work pay – the parts of judgements not exceeding an average monthly wage).

provisional declaration of enforceability may concern the entire judgment or part of it, and the court may make the declaration subject to the provision of security. In fact, although the court may order *ex officio* that the creditor must provide security, this only occurs if one of the parties requests it. Art 350 Rv then deals with the position in the case of an ordinary appeal. The default position is that if provisional enforcement has not been ordered, enforcement is suspended by the appeal. The judgment creditor may nevertheless seek provisional enforcement (Art 234 Rv), and where provisional enforcement has already been ordered, the judgment debtor may apply for enforcement to be suspended (Art 351 Rv). Moreover, Art. 235 Rv permits a cross-appeal for security in cases where provisional enforcement of a judgment has been permitted without security and then an appeal has been lodged against that judgment.

Provisional enforcement is also considered in the individual case in Germany. Arguments on provisional enforcement and provision of security should be made during the main proceedings and will then be addressed by the judge dealing with the merits. Provisional enforcement is typically ordered against provision of security. The decision on provisional enforcement may be the subject of an appeal: §§ 708 ff. ZPO.

Provisional enforcement is not the general rule in Poland, the Czech Republic or Lithuania but is granted *ex officio* by the court in some cases where it is authorized by statute[10] and may be ordered in individual cases where a delay would prevent or significantly hamper the enforcement of the judgment or put the claimant at the risk of incurring damage.[11] Swedish law provides more generally that provisional enforcement may be ordered 'if there is a reason for doing so'.[12]

Spain permits provisional enforcement after an appeal is lodged *except* in the case of judgments that are specifically excluded (notably judgments relating to family matters, those that declare the expiration or annulment of intellectual property rights, and those that require a declaration

[10] See above at n. 6–9.

[11] Poland, Art 333 § 3 KPC; Czech Republic § 162(2) OSR (the party would be in danger of suffering damage that is significant or difficult to compensate). A more extensive list of situations is provided for Lithuania, Art. 283(1) CPK.

[12] Chapter 17, s.14 RB, which also provides for the immediate enforceability of decisions made during the proceedings that cannot be appealed against separately, and lists other immediately enforceable decisions concerning procedural matters, detention of persons and protective measures.

of will).[13] The judgment debtor can challenge provisional enforcement, but in the case of monetary judgments they cannot lodge a general opposition to enforcement. They can only oppose specific methods of enforcement and offer alternatives.

In Portugal, a distinction is drawn in the Code of Civil Procedure between appeals that have a merely devolutive effect and those that have a suspensive effect. The default position is for appeals to have a devolutive effect, with the result that provisional enforcement is possible.[14] Appeals have suspensive effect where a legal provision so provides. This includes cases concerned with the status of persons, and those concerned with the ownership or possession of a dwelling house.[15] Moreover, in addition to the cases specifically provided for by law, an appellant may request that the appeal have a suspensive effect if enforcement will cause them considerable damage.[16]

In some jurisdictions, provisional enforcement may be conditional on the judgment creditor providing appropriate security,[17] but alternatively in the situations where provisional enforcement is permitted the judgment debtor who lodges an appeal may be required to provide security in order to obtain a stay of enforcement.[18] The judgment creditor who seeks enforcement takes the risk that the judgment may be overturned on appeal. In addition to the restitution of payment made, compensation may be payable to the judgment debtor if provisional enforcement causes them any additional loss or damage.[19]

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[13] Art. 524 ff LEC.

[14] Art. 647 CPC and see also Art.704 CPC.

[15] Art. 647(3) CPC.

[16] Art. 647(4) CPC.

[17] Sweden, Ch.17 s.14 RB. See also Poland, Art 334 § 1 KPC but note that Art. 335 § 1 KPC provides that a judgment may not be rendered provisionally enforceable, even where security is deposited, if the enforcement of the judgment could result in the defendant incurring irrecoverable damage.

[18] E.g. Spain, Arts 528–530 LEC (National Report, para.6.1.2.1.). In Portugal, the provision of security may be required from a judgment debtor under Art.647(4) CPC as a condition for suspending enforcement. However, in the case of provisional enforcement, seized property may be sold but without the resulting payment being transferred to the judgment creditor. If the creditor wants to receive it, they have to provide a guarantee: Art. 704(3) CPC.

[19] See National Reports at 6.1.2. and e.g. Belgium, Art. 1398 CJ; Poland, Art 338 KPC; Netherlands, Hoge Raad 19.5.2000, *Nederlandse Jurisprudentie* 2000, 603; Hoge Raad 1.4.2016, *Nederlandse Jurisprudentie* 2016, 189; Sweden, Ch. 3 s.22 UB. Portugal, Art. 858 CPC requires proof of intention and is not of great utility in practice.

c) Provisional enforcement limited to security measures

In other jurisdictions, provisional enforcement – in the sense of full satisfaction of the judgment creditor (*Exekution zur Befriedigung*) – is not ordinarily permitted. Nevertheless, certain decisions may be immediately enforceable, and it may be possible to apply for protective measures pending the time when the judgment becomes final.[20]

In Austria, the general position is that an appeal against a judgment on the merits (*Berufung*, *ordentliche Revision*) has suspensive effect, and so no *Exekution zur Befriedigung* is available.[21] Certain forms of appeal do not, however, have suspensive effects (*außerordentliche Revision*[22]). And protective seizure to secure a debt (*Exekution zur Sicherstellung*) is generally available.[23] As well as preventing a dissipation of assets, protective seizure preserves rank among creditors.

A similar approach has been adopted in Slovenia.[24] According to Art.19 ZIZ, a court decision is enforceable if it has become final and if the deadline for voluntary fulfilment of the debtor's obligation has expired.[25] Enforcement is also allowed by the court on the basis of a court decision that has not yet become final, if the law stipulates that the appeal does not suspend its enforcement. Otherwise, only protective seizure is possible pending the time when the decision becomes final.[26]

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[20] Cf the intermediate position in Portugal under Art.647(4) CPC as stated in text accompanying n 16.

[21] The National Report for Austria explains the formal and material requirements for enforceability at para.6.2. The formal requirements are checked by the court that gave judgment on the merits before it issues a confirmation of enforceability (*Vollstreckbarkeitsbestätigung*). The material requirements are checked by the enforcement court before it issues an enforcement order (*Exekutionsbewilligung*). See below at II (b).

[22] § 505(4) ZPO.

[23] §§ 370–377 EO.

[24] National Report at 6.1.1. For the historical close connections between Austrian and Slovenian civil enforcement law see W.Kennett, *Civil Enforcement in a Comparative Perspective: a Public Management Challenge* (Intersentia 2021), Ch. 14.

[25] Time starts to run on the day following the day on which the decision was served on the debtor.

[26] V. Rijavec, *Civilno izvršilno pravo* (GV založba 2003) 210 ff.

(III) OBTAINING FORMAL CERTIFICATION OF ENFORCEABILITY

Before a judgment can be enforced, even if it is immediately enforceable in principle, formal confirmation of enforceability must normally be obtained.[27] This typically take the form of a seal or endorsement on the face of the judgment itself, although it may be contained in a separate document.

The formal confirmation is provided by the court that issued the decision. It is regulated in national laws with varying degrees of formality and may involve administrative or judicial personnel. By way of example, a comparison may be drawn between the procedures in Germany, Austria and France.

(a) Germany

Germany adopts a particularly formal approach to the issue of a certificate of enforceability. Enforcement takes place on the basis of an enforceable execution copy of the judgment (*vollstreckbare Ausfertigung*).[28] Both the formal and substantive requirements for enforcement are checked in one distinct, formal civil procedure (*Klauselerteilungsverfahren*) with its own competent authority and specific remedies (§§ 724 ff ZPO). In the most straightforward cases the clerk of the court office for the court that issued the enforcement title (*Prozessgericht*) can issue the certificate if a judgment is immediately enforceable (*einfache Klausel*).[29] But in cases where there are further issues to be considered – as in cases of succession in title or assignment of rights, or where enforcement is subject to proof that a condition has been satisfied by the creditor (§§ 26–29 ZPO) – it is the *Rechtspfleger*[30] at the *Prozessgericht* who is competent to issue the *Vollstreckungsklausel* (*qualifizierte Klausel*) and the debtor is entitled to be heard.[31]

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[27] There are exceptions to this principle, notably in the case of protective measures.

[28] § 724 ZPO.

[29] § 724(2) ZPO.

[30] A senior judicial administrator. For further details see Kennett, W. (2021). *Civil Enforcement in a Comparative Perspective: a Public Management Challenge*. Intersentia. Ch.14, section

[31] §§ 26-30 ZPO. See also § 20 Nr. 12 RPflG. If enforcement is dependent on the provision of security by the creditor, this is not something that needs to be checked by the Rechtspfleger. Instead, the procedure in § 24 II ZPO applies. The provision of security will by checked by the enforcement agent later in accordance with § 751 II ZPO. There are other cases in which checking that a condition is satisfied are sufficiently

In more complex cases, where there is no official document to prove the creditor's right to bring enforcement proceedings and further proof-taking is necessary, § 731 ZPO provides for an action for the issue of a *Vollstrekungsklausel.*

The approach adopted by German law is the consequence of its bifurcated system of enforcement. Depending on the enforcement measure sought, application may be made to the competent enforcement court (*Vollstreckungsgericht*[32]) or to the *Gerichtsvollzieher* – a figure based historically on the French *huissier de justice* but whose regulation and functions have developed in ways that are quite distinct from those of their French counterpart.[33] The *Gerichtsvollzieher* has a lower level of education and more limited competences, but nevertheless plays an important role in procedures requiring personal contact with the debtor, such as service of enforcement documents, settlement negotiations and seizure of tangible movable property. To reflect expectations of the *Gerichstvollzieher*, the procedure for obtaining a *Vollstreckungsklausel* is intended to provide clarity on the parties to the enforcement procedure and the obligation owed by the debtor.

The fact that a formal procedure exists for the issue of a certificate of enforceability is reflected in the remedies available to both creditor and debtor.[34] Moreover, the importance of this procedure to ensure that the *Gerichtsvollzieher* is in no doubt about how to act also helps to explain why German law has further procedures in the first instance court (rather than in the course of enforcement proceedings) to deal with changes in circumstances that arise after a *Vollstreckungsklausel* has been obtained.[35]

straightforward that the procedure in § 26 I does not need to apply – such as where performance of an obligation becomes due on a particular date.

[32] A section of the lowest level first instance court (*Amtsgericht*).

[33] See further Kennett, W. (2021). *Civil Enforcement in a Comparative Perspective: a Public Management Challenge*. Intersentia. Ch. 15.

[34] *Klage auf Erteilung einer Vollstreckungsklausel* (§ 731 ZPO); *Erinnerung* (§ 573 ZPO); *sofortige Beschwerde* (§ 567 II ZPO; § 567 I Nr. 2 ZPO, § 11 I RPflG).

[35] §§ 323, 767 ZPO

The ZPO provides several different possibilities for challenging the issue of a *Vollstreckungsklausel*.[36] But it is significant that any issues as to the material enforceability of the judgment, and the impact of any new facts arising after the close of the hearing in the original proceedings that was the last opportunity for objections to be asserted, must be raised in the *Prozessgericht* by means of a *Vollstreckungsgegenklage* under § 767 ZPO. This is therefore the way to proceed if the debtor argues that the claim has been paid, set off or remitted, that some payment arrangement has been made or that the identity of creditor or debtor has changed – for example as a result of an assignment.[37] Third party claims with respect to seized assets – for example an assertion of ownership of the asset – are also brought by way of an action on the merits, rather than a dispute in enforcement proceedings (§ 771 ZPO)

(b) Austria

By contrast, in Austria, the requirements for enforceability are checked at two different procedural stages. Initial certification of enforceability (*Vollstreckbarkeitsbestätigung*) by the court that issued the judgment is confined to checking the formal requirements for enforceability under § 7 EO.[38] These are:

• The enforcement title must have been properly served on the debtor[39]
• Time limits for appeals with suspensive effect must have expired[40]
• The time allowed for performance (which is usually 14 days from the judgment) must have expired[41]

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[36] For further discussion of means of recourse see e.g. Brox, H., & Walker, W.-D. (2017). *Zwangsvollstreckungsrecht*. Vahlen. 81 ff See also C. Wolf, L. Volkshausen and N. Zeibig, *Cross border Enforcement of Monetary Claims - Interplay of Brussels IA Regulation and National Rules: National Report: Germany* (Maribor University Press 2018) 4, 18.

[37] § 767(2) limits the operation of this article to situations where the grounds of action arose after the close of the hearing in the original case. Note also that where the debtor has been ordered to make recurrent payments, § 323 permits them to make an application in the *Prozessgericht* for the order to be modified on the basis of a material change in factual or legal circumstances that has arisen after the hearing in the original proceedings.

[38] For discussion of these requirements, and in particular the requirement that performance must have become due (*Fälligkeit)*, see especially Angst, P., & Oberhammer, P. (2015). *Exekutionsordnung* (3 ed.). Manz. at § 7 EO III A.

[39] § 416 ZPO.

[40] §§ 464 (1), 466, 505 (2)-(4) ZPO.

[41] § 409(1) ZPO in conjunction with § 7(2) EO.

• Where performance is due at a point in time later than the issue of the judgment, the due date must have passed[42]
• The enforcement title must not have expired due to the passage of time.

According to § 16(1) no.2 RpflG, a *Rechtspfleger* is usually responsible for issuing the certificate of enforceability (*Vollstreckbarkeitsbestätigung*).[43] A *Vollstreckbarkeitsbestätigung* issued unlawfully or incorrectly shall, either ex officio or at the request of one of the parties, be revoked by decision (*Aufhebungsbeschluss*).[44] This decision must be served on all parties and, in contrast to the certificate of enforceability itself, is open to appeal.[45]

For enforcement to take place, an application must then be made to the competent enforcement court which likely to be the court for the domicile of the debtor.[46] That court, again acting through a *Rechtspfleger*, relies on the *Vollstreckbarkeitsbestätigung* as proof that the formal requirements for enforcement are satisfied. But in accordance with § 7(1) EO[47] it must check that the material requirements for enforcement are met before issuing an enforcement order (*Exekutionsbewilligung*) as the first stage in the enforcement process. In other words, the identity of the person entitled to enforcement, and the person against whom enforcement is to take place, must be certain as well as the object, nature, scope and time of the performance owed.

The procedure for checking that the material requirements for enforcement are satisfied is *ex parte* and based on the documents presented by the creditor. Austrian law allows only limited

[42] § 7(2) EO. The question whether performance is due (*Fälligkeit*) is sometimes a matter of material enforceability – for example when the performance of the debtor depends on the fulfilment of a condition by the creditor and the satisfaction of that condition must be verified before enforcement can take place. But when the date for performance is given in (or can be calculated from) the original judgment, modern jurisprudence considers the question of *Fälligkeit* to be evidenced by the *Vollstreckbarkeitsbestätigung*. Indeed, this approach is required by legislation in certain cases (§ 43 Abs 3 AußStrG). See further Angst, P., & Oberhammer, P. (2015). *Exekutionsordnung* (3 ed.). Manz. § 7 EO Rn 95 ff.; Burgstaller, & Deixler-Hübner. (2019). *Exekutionsordnung: Kommentar* (28 ed.). LexisNexis. § 7 EO Rn 151.

[43] See further Neumayr, M., & Nunner-Krautgasser, B. (2018). *Exekutionsrecht* (4 ed.). Manz'sche Verlags- und Universitätsbuchhandlung. 75.

[44] § 7(3) EO.

[45] § 517(1) Z 6 ZPO.

[46] See §§ 4–6 EO for alternatives.

[47] In conjunction with § 36 (1) Z 1 EO.

opportunities to dispute the issue of the *Exekutionsbewilligung*, but further procedures exist that enable the debtor or a third party to challenge enforcement. Objections to the *Exekutionsbewilligung* can be made via an *Impugnationsklage* (§ 36 EO), which enables the debtor to assert that enforcement should not have been authorized – for example, because performance has not yet become due, or because there is a legal objection to using the selected method of enforcement, or because the identity of the debtor or creditor has changed. Going beyond this, if new facts have arisen after the issue of the enforcement title[48] that impact the continued existence of the creditor's claim (*nova producta*), those facts may be raised in an *Oppositionsklage* (§ 35 EO) in the court where the *Exekutionsbewilligung* was issued.[49] Such new facts may include payment of the judgment debt, or an agreement between debtor and creditor on a payment arrangement.[50] If a third-party claims rights in a seized asset, the implications of this for enforcement may also be resolved in proceedings in the enforcement court (§ 37 EO).[51]

(c) France

The procedures in Austria and Germany for issuing a certificate of enforceability or order for enforcement may be compared with the French system, where similar concerns for about the immediate enforceability of the enforcement title, service on the judgment debtor, identification of the parties to the enforcement proceedings and the grant of time to pay also apply, but responsibility for undertaking or checking these factors is allocated differently. An enforcement title must be endorsed as immediately enforceable – through the application of the '*formule exécutoire'* – before enforcement can take place. A *greffier* (court registrar) is responsible for checking whether a judgment is enforceable. But service of the judgment is a

[48] Or in the case of a judgment, after the point in time at which those facts could be raised in the original proceedings.

[49] In the case of facts that arose before the issue of the enforcement title but were not discoverable or provable in time to be taken into account (nova reperta), a Wiederaufnahmsklage (§ 530 ZPO) exists as a remedy that permits the reopening of the original proceedings. See § 35(2) for the jurisdictional rules in the case of employment or maintenance cases.

[50] Angst, P., & Oberhammer, P. (2015). *Exekutionsordnung* (3 ed.). Manz. § 35 EO Rn 3, 12–14.

[51] Any assertion of rights going beyond the implications for enforcement requires a separate action on the merits. For the nature of the recourse provided by § 37 EO (*Exszindierungsklage*) see ibid.§ 37 EO Rn 51.

matter for the *huissier de justice* on the instructions of the creditor.[52] And once a creditor, in possession of an enforcement title endorsed with the *formule exécutoire*, employs a *huissier de justice* to enforce that title, the *huissier* must first give the debtor time to pay by issuing a *commandement de payer*. Issues arising in the process of enforcement will typically be referred the *juge d'exécution* (JEX).

> 'The JEX has sole competence to determine issues relating to enforcement titles and disputes that arise in the course of forced execution, even if they relate to substantive issues unless they fall outside the competence of courts of the 'ordre judiciaire' (Art. L213-6 *Code de l'organisation judiciaire*)

The competence of JEX extends to 'the reality of the executory character of the title, or its correct notification, the possibility that it no longer produces effects, or its nullity or to judge its regularity if the enforcement title is one other than a judgment'.[53] They can rule on disputes relating to the debt owed – including the amount and whether it is due as well as questions of the interest payable. They can also determine questions relating to the identity of the debtor or creditor.[54]

Nevertheless, a *huissier de justice* may also sometimes play a significant role in clarifying substantive issues. Thus, in the case of the death of a debtor, delay on the part of an heir in accepting the inheritance can be combatted through the employment of a *huissier* to serve on the heir a requirement to opt whether to accept the inheritance or not (with the presumption that no response indicates acceptance of the inheritance and therefore the debts of the deceased).

(IV) APPLICATION TO BRUSSELS I BIS

[52] Art. 675 of the *Code de procédure civile* states that judgments are notified by way of *signification* unless the law provides otherwise. *Signification* is formal service by a *huissier de justice* (from 1 July 2022, *Commissaire de justice*).

[53] N. Fricaro, *Procedures civiles d'exécution* (Gualino, Lextenso 2020) 68. The JEX cannot modify a judgment or stay its enforcement, but they can grant a '*delai de grâce*'.

[54] ibid.

It is apparent from the foregoing that challenges to the enforceability of an enforcement title may arise in various different ways and at different points in proceedings. It may be that service of the judgment in question has not taken place. It may be that a judgment is not enforceable because the time allowed for lodging an appeal has not yet expired. It may be that the competent authority has not made a payment request to the debtor prior to commencing enforcement proceedings; or it may be necessary to prove that a particular condition has been satisfied before the judgment is enforceable. It may be that a question arises as to right of the alleged creditor to act, or as to the person against whom enforcement should take place – and depending on the relevant national procedure and the time at which the issue arises, this may affect the enforcement title and the certificate of enforceability. The procedure for challenging enforceability will therefore vary depending on the ground of challenge and the legal system in question.

The certificate of enforceability issued for the purpose of enforcement under Brussels I bis (henceforth: Art. 53 certificate) is a relatively detailed document that provides information about the court in the state of origin, the identities of debtor and creditor, and details of the judgment including questions of service, enforceability, subject matter, principal amount payable and payment arrangements, currency, joint or several liability, costs and interest. Debates about the procedure for issue of the Art. 53 certificate and possible challenges have to be seen against the background of the varying national approaches to the enforceability of a judgment and the certification of enforceability.

(a) A tendency to assimilate the Art. 53 certificate to national certificates of enforceability

National courts have tended to see the certificate of enforceability issued under Regulation 44/2001 and the Art. 53 certificate through the lens of their own procedures for certification of enforceability. Thus, the Austrian OGH has stated that the certificate issued under Art. 54 of Regulation 44/2001 is 'nothing other than an extended form of the *Vollstreckbarkeitsbestätigung* that is already familiar under national law'.[55] It draws from that the conclusion that the national law provisions relevant to challenging a *Vollstreckbarkeitsbestätigung* are also applicable to a certificate of enforceability issued under Art. 54 of Regulation 44/2001. A similar parallelism between national law and EU law can be

[55] OGH 3Ob152/15x at 3.1 ff.

found in Germany. Wolf and Volkshausen describe the certificate as 'a functional equivalent' of a *vollstreckbare Ausfertigung* of a judgment.[56] § 1110 ZPO provides that the courts or notaries competent to issue an enforceable copy of an enforcement title are also competent to issue the certificate of enforceability under Arts 53 and 60 of Brussels I bis. § 1111(1) ZPO provides for the possibility of a hearing of the debtor in the situations identified in §§ 726–729 ZPO in the context of the issue of a *Vollstreckungsklausel*. And § 1111(2) ZPO states that the provisions concerning challenges to a decision to issue a *Vollstreckungsklausel* apply by analogy to the decision to issue an Art. 53 certificate.[57]

The issue of an Art. 53 certificate in Germany or Austria may thus be in the hands of the clerk of the court or the *Rechtspfleger*. In France, issue of the certificate is regulated by the French Code de Procedure Art. 509. According to Art. 509-1, applications for certification of French enforcement titles, for their recognition and enforcement abroad under Brussels I bis should be made to the *directeur de greffe* for the court that gave judgment or approved a settlement of the dispute. Under Art. 509-7 a refusal to issue the certificate may be referred to the President of the *tribunal judiciaire* who gives a final decision on the application.[58] [59]

(b) Preliminary references concerning the interpretation of Art. 53

i. Admissibility of the reference

[56] C. Wolf, L. Volkshausen and N. Zeibig, *Cross border Enforcement of Monetary Claims - Interplay of Brussels IA Regulation and National Rules: National Report: Germany* (Maribor University Press 2018) 14 ff.

[57] For further comment see Schlosser/Hess *EuZPR* Art. 53 EUGVVO and C. Wolf, L. Volkshausen and N. Zeibig, *Cross border Enforcement of Monetary Claims - Interplay of Brussels IA Regulation and National Rules: National Report: Germany* (Maribor University Press 2018) 16 ff.

[58] The applicant and the authority that has refused to issue the certificate are given a hearing.

[59] Vincent Richard, 'L'office du juge certifiant une décision rendue en droit de la consommation' (2020) Rev. Crit. 149 at 154 notes that the judgment of the CJEU in Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA* ECLI:EU:C:2015:825 led to the reform of French law on EEOs so that the certification was given by a judge, not a *greffier*. But Art. 509-1 still places the issue of an Art. 53 certificate in hands of the *greffier*. In fact, in several jurisdictions, senior administrators have taken on certain functions formerly performed by judges. This is also true of *greffiers*, although to a lesser extent than their counterparts in Germany and Austria (*Rechtspfleger*) and Spain (*Letrados de la Administración de Justicia*). See further Kennett, W. (2021). Civil Enforcement in a Comparative Perspective: a Public Management Challenge. Intersentia.

Several decisions of the CJEU have recently addressed the nature of the procedure for issuing the Art. 53 certificate. The nature of the procedure is significant because it determines whether an application for a preliminary ruling is admissible in the case. Under Art.267 TFEU a national court can only refer a question to the CJEU if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.[60] The characterisation of the procedure for issuing a certificate had previously arisen in the context of European Enforcement Orders (EEOs). According to Art. 5 of Regulation 805/2004:

> A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

To be certified as an EEO, a judgment must meet certain criteria that are set out in the Regulation. The CJEU therefore concluded, in Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*,[61] that certification 'requires a judicial examination of the conditions laid down by Regulation No 805/2004'. It observed that

> [t]he legal qualifications of a judge are essential to the correct assessment – in a context of uncertainty as to the observance of the minimum requirements intended to safeguard the debtor's rights of defence and the right to a fair trial – of the remedies under national law…. Moreover, only a court or tribunal within the meaning of Article 267 TFEU is capable of ensuring, by means of a reference for a preliminary ruling to the Court of Justice, that the minimum requirements laid down by Regulation No 805/2004 are interpreted and applied uniformly throughout the European Union.

On the other hand, it considered that the formal act of issuing a certificate after certification of a judgment as an EEO was a matter that could be left to a registrar.

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[60] See Case C-511/14, *Pebros Servizi* ECLI:EU:C:2016:448.

[61] ECLI:EU:C:2015:825.

It will be apparent from the discussion at (II) above that Member States vary significantly in the procedure they adopt for the issue of an Art. 53 certificate and the organ competent to issue the certificate. In straightforward cases, it may be that a registry official can issue the certificate. In more complex situations, decision-making competence may be required. The reasoning in the case law of the CJEU in cases concerned with certification of a judgment as an EEO can thus be extended – at least in some cases – to the Art. 53 certificate.

Although this issue first arose in Case C-579/17, *Gradbeništvo Korana*,[62] more recent clear expression of the approach adopted by the CJEU can be found in Case C-347/18, *Salvoni v Fiermonte*.[63] The CJEU stated that

> [T]he role of the certificate provided for in Art. 53 of Regulation No 1215/2012 in the system established by that regulation warrants, where some of the information which must be provided in the certificate is not in the judgment whose enforcement is sought, or requires an interpretation of that judgment or is of a contentious nature, the exercise of judicial functions by the court of origin. In such cases, that court forms part of the continuity of the previous judicial proceedings, ensuring the full effectiveness thereof, in so far as, in the absence of certification, a judgment may not freely be enforced within the European judicial area. Such a conclusion responds to the need to ensure rapid enforcement of court judgments while ensuring the legal certainty which is the basis of mutual trust in the administration of justice within the European Union.

But the court also stated that Art. 53

> does not provide, in any way, that it is for that court to examine the aspects of the dispute which fall outside the scope of that provision, such as questions of substance and jurisdiction which have already been dealt with in the judgment enforcement of which is sought. Moreover, it follows from the case-law of the Court that the delivery of that certificate is almost automatic …[64]

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62 ECLI:EU:C:2019:162.

63 ECLI:EU:C:2019:661. The question raised in this case was whether the court asked to issue a certificate of enforceability could consider of its own motion whether the judgment at issue had been given in compliance with the rules of Brussels I bis relating to jurisdiction in consumer disputes.

64 At para. 38, citing Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd*, ECLI:EU:C:2012:531.

The implication of this approach is that the procedure for the issue of a certificate of enforceability is judicial in character if involves a decision on an issue that was not decided in the original proceedings – but is not judicial if all relevant issues were decided in the original proceedings.

ii. The function of the Art. 53 certificate

The function identified for the Art. 53 certificate necessarily impacts on the interpretation of rules concerning its issue and effects. This function has, in fact, been addressed by the CJEU in Case C-579/17, *Gradbeništvo Korana*,[65] but only in an oblique way. At paragraph 37 of its judgment, the Court stated that the certificate 'forms the basis for implementation of the principle of direct enforcement of judgments delivered in the Member States'.[66] It refers in this context to para 44 of the Opinion of AG Bot in the case,[67] and the Advocate General elaborates on this idea in para. 45 by saying that the certificate 'was designed as a substitute for that judgment, without a translation of the certificate, or even of the judgment to be enforced, being required in all cases'. This confers a particularly important role on the certificate when combined with the fact that

> [t]he system established by Regulation No 1215/2012 is based on the abolition of exequatur, which implies that no control is exercised by the competent court of the requested Member State, since only the person against whom enforcement is brought can oppose the recognition or enforcement of the judgment affecting him.[68]

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65 ECLI:EU:C:2019:162.

66 Cf. for the function of the certificate of enforceability under Regulation 44/2001, *Trade Agency Ltd v Seramico Investments Ltd* at para. 41: 'the function ascribed to the certificate is specifically to facilitate, in the first stage of the procedure, the adoption of the declaration of enforceability of the judgment given in the Member State of origin, making its delivery almost automatic'.

67 ECLI:EU:C:2018:863.

68 CJEU, Case C-579/17, *Gradbeništvo Korana*, ECLI:EU:C:2019:162, para. 36. In fact, there are examples in several Member States of courts conducting a review of the application for enforcement to ensure, at least, that it falls within Brussels I bis. See Kennett, W. (2018). Brussels I Recast: General Context of Enforcement Systems. In V. Rijavec, W. Kennett, T. Keresteš, & T. Ivanc (Eds.), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (pp. 273-299). Kluwer Law International. In a recent case (Case C-568/20 *H v J* ECLI:EU:C:2022:264) the question was raised as to how far an Art. 53 certificate can determine

Several decisions of the CJEU have addressed questions as to what is meant by the enforceability of a judgment in the State of origin. These indicate that the Court interprets the requirement of enforceability as meaning formal enforceability. Thus, in Case C-267/97, *Coursier*,[69] a case decided under the 1968 Brussels Convention, the CJEU stated that the term 'enforceable' in Article 31 of the Convention 'refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin'.

Issues of material enforceability or alterations in factual circumstances affecting the creditor's claim are thus matters for the enforcement State. This is emphasised in Case C-139/10, *Prism Investments BV v Jaap Anne van der Meer*[70] in which the judgment debtor sought to resist cross border enforcement on the basis that it had already complied with the judgment at issue. According to the CJEU:

> [C]ompliance with a judicial decision does not in any way deprive that decision of its enforceable nature, or lead to its being given, at the time of its enforcement in another Member State, legal effects that it would not have in the Member State of origin. Recognition of the effects of such a judgment in the Member State in which enforcement is sought, which is precisely the subject of the enforcement procedure, concerns the specific characteristics of the judgment in question, without reference to the elements of fact and law in respect of compliance with the obligations arising from it. Such a ground may, by contrast, be brought before the court or tribunal responsible for enforcement in the Member State in which enforcement is sought. [71]

whether a judgment of a Member State falls within the scope of the Regulation. Although this is an interesting question (and one given a positive answer by AG Pikamäe but circumvented by the CJEU), it is not directly relevant to the topic of this chapter.

69 [1999] ECR I 2543.

70 ECLI:EU:C:2011:653.

71 At paras 39–40, and see also para.37 'no provision of Regulation No 44/2001 permits the refusal or revocation of a declaration of enforceability of a judgment that has already been complied with because such a situation does not deprive that judgment of its enforceable nature, which is a characteristic specific to that judicial act.'

In the light of the fact that Brussels I bis removes the *exequatur* procedure, it cannot be assumed that judgments concerning the certificate of enforceability issued under Regulation 44/2001 can automatically be transposed to this new regime. In particular, the distinctive approach of German law to the emergence of new facts and circumstances following the close of the hearing in the original proceedings that was the last opportunity for objections to be asserted (§ 767 ZPO), and the place of the German *Gerichtsvollzieher* within the enforcement system, do not provide a smooth fit with the vision of enforcement proceedings espoused by the CJEU. In Case 220/84, *AS-Autoteile Service GmbH v Pierre Malhé*,[72] the CJEU has already characterised §767 ZPO as a part of 'proceedings concerned with the enforcement of judgments' for the purposes of Art. 16(5) of the Brussels Regulation 1968 (now Art. 24(5) of Brussels I bis). But it is perhaps of interest that the Advocate General in that case, AG Lenz, was a German lawyer who did not think that the issue was sufficiently discussed in the proceedings to permit the Court to define exactly to what extent actions under §767 ZPO fell within the exclusive jurisdiction of the enforcement State.

Should any modification in the approach of the CJEU to the certificate of enforceability be thought desirable, it must nevertheless be borne in mind that the new procedure is intended to further facilitate the free movement of judgments and so any change in interpretation or practice needs to reflect that objective.

iii. Emerging questions: in the State of origin

In fact, a proposal for enhancing the information provided with the certificate has recently been made in a request for a preliminary ruling (C-135/18, *Logistik XXL GmbH v CMR Transport & Logistik*) – although the request was later withdrawn.[73] The case concerned an application for an Art. 53 certificate in respect of a judgment of the LG Berlin. The judgment had been declared provisionally enforceable, subject to the provision of security, but the judgment creditor had not provided the designated security. Under German law, this does not prevent the issue of a copy of the judgment with a *Vollstreckungsklausel*. It simply means that enforcement is restricted to protective measures securing the debtor's assets until the required

[72] ECLI:EU:C:1985:302. The case was concerned with enforcement under the Brussels Convention 1968 and involved the interpretation of Art.16(5) (current Art. 24(5)).

[73] The judgment debtor was successful in an appeal against the judgment sought to be enforced.

security is provided by the judgment creditor or the judgment becomes final.[74] §726 ZPO regulates the issue of a *vollstreckbare Ausfertigung* in cases where enforcement is conditional on the creditor proving certain facts.[75] But proof of provision of security is specifically excluded from the operation of this article. This not normally a matter for the court: compliance with a requirement of security is checked by the *Gerichtsvollzieher* during the enforcement process. This nuanced approach to the question whether enforceability is subject to a condition does not fit easily into the regime established by Brussels I bis.[76]

Point 4.4. of the Art. 53 certificate seeks confirmation that the judgment at issue is enforceable without any further conditions being met: it does not make any reference to the provision of security. There was therefore debate in Germany as to whether a judgment that had been declared provisionally enforceable subject to the provision of security could be issued with an Art. 53 certificate – even though enforcement measures could be taken in the State of origin. In its decision to request a preliminary ruling, the BGH observed that

> [t]he form in Annex I of the EuGVVO does not sufficiently take into account the differences between final and non-final judgments in terms of enforcement law. Therefore, there are doubts as to how, under national law, the special requirements provided for enforcement of judgments that have not yet become final are to be classified. This applies in particular if these regulations – as in German law – offer different enforcement options for judgments that are not yet final.[77]

The BGH then referred to the earlier CJEU decision in *Coursier*.[78] If the Art. 53 certificate was concerned with the question whether a judgment was enforceable 'in formal terms', the BGH considered that there were good arguments in favour of a conclusion that the judgment at issue

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[74] §§ 720a, 724–726 ZPO.

[75] Requiring such proof to take the form of 'public records or documents, or records or documents that have been publicly certified'

[76] Differences in national approaches to the provisional enforcement of judgments did not arise in quite the same way under Regulation 44/2001, since the court in the enforcement State could determine whether security should be provided (Art. 46). The Regulation also limited enforcement to protective measures until such time as any disputes about recognition had been decided. A somewhat different dynamic was therefore at work in enforcement proceedings under the earlier legislation.

[77] ECLI:DE:BGH:2018:250118BIXZB89.16.0 at para.15.

[78] [1999] ECR I 2543.

was not enforceable in the absence of the provision of security. If, on the other hand, the focus was on the actual effects that the judgment had in the State of origin, confirmation should be given in point 4.4. of the certificate that the judgment was enforceable.

This produced a policy dilemma. On the one hand, the freedom of movement of decisions would be jeopardized if a judgment creditor was prevented from implementing security measures in the enforcement State even though security enforcement was easily possible in the country of origin. But on the other hand, the Art. 53 certificate did not provide any opportunity to clarify the scope of enforceability and to explain that it was limited to protective measures. There was therefore a risk that the judgment might have greater effects in the State addressed than in the State of origin. The reference submitted by the BGH for a preliminary ruling suggested various possible ways of dealing with this problem, in particular suggesting that the way forward might be to include with the certificate information concerning the rules of the State of origin as the scope of enforceability of the judgment and the requirement of security.

iv. Emerging questions: in the enforcement State

A pending reference also picks up the question of the most appropriate forum for dealing with issues around provisional enforcement and the possible requirement of security. Case C-393/21, *Lufthansa Technik AERO Alzey GmbH c Arik Air Ltd (Lithuania)* concerns a European Enforcement Order (EEO) certificate under Regulation 805/2004, rather than an Art. 53 certificate under Brussels I bis but it raises questions that are also relevant to an Art. 53 certificate. A decision of the AG Hünfeld had been certified as an EEO, and enforcement was sought in Lithuania. The request for a preliminary ruling does not explain the enforcement steps taken in Lithuania, but the implication is that assets have been seized. The judgment debtor then applied to the LG Frankfurt am Main for withdrawal of the EEO certificate and termination of enforcement. It claimed that the certificate had been issued unlawfully because the relevant procedural documents had not been duly served on it, causing it to miss the time limit for lodging objections. It also requested a stay of enforcement pending a decision on its application. The response of the *Landgericht* was that enforcement would only be stayed pending its decision if the judgment debtor provided security of € 2 million. This scenario places the judgment debtor in a difficult situation: if assets have been seized in the State addressed, and security is also sought in the State of origin before the enforceability of the judgment is suspended, there is an excessive restriction of the debtor's assets.

The judgment debtor requested the bailiff in Lithuania to stay the enforcement proceedings. The bailiff refused, on the basis that the Lithuanian Code of Civil Procedure gave him a limited discretion to stay proceedings, and that discretion did not extent to the situation that had arisen (i.e. a claim for withdrawal of an EEO certificate before a court of the State of origin). The judgment debtor challenged this refusal in the Lithuanian courts, eventually leading to the request for a preliminary ruling by the Lithuanian Supreme Court.

The court posed several questions concerning the interpretation of Art. 23(c) of Regulation 805/2004[79] and, in addition, it asked about the effect that should be given to any judgment in the State of origin concerning the suspension or cancellation of enforceability. Should such a judgment be recognised without any special procedure being required (by analogy with Art. 36(1) Brussels I bis) or was a 'legal regime similar to that specified in Art. 44(2)' of Brussels I bis applicable.[80] This question highlights the fact that litigation around certificates of enforceability is taking on a life of its own, creating judgments which themselves may be entitled to recognition and enforcement under Brussels I bis, and, more generally, it draws attention to the need to ensure co-ordination between the security measures and further enforcement steps that can be taken in the State of origin and in the enforcement State, and to the implications of any order for the suspension or stay of proceedings.[81]

(V) CONCLUSIONS

With the passage of time since Brussels I bis came into force, questions concerning the enforceability effect of judgments and the way this is evidenced by the Art. 53 certificate have begun to emerge.

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[79] This provision allows a competent court or authority in the Member State of enforcement to stay the enforcement proceedings 'under exceptional circumstances' when the debtor has applied for the withdrawal of an EEO certificate (under Art.10 of Regulation 805/2004). Clarification was needed because the reference to 'exceptional circumstances' indicated that something more than merely an application for withdrawal of the certificate was required but gave no guidance as to what kinds of factors could be taken into consideration.

[80] Art. 44(2) states: 'The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin'. It is not obvious that the enforceability of the judgment is suspended in Germany in the absence of evidence that the required security has been provided.

[81] AG Pikamäe gave his opinion on 22 October 2022 and took the view that Art. 11 of Reg. 805/2004 did in fact supply the answer to the question posed. He concluded that the enforcement proceedings should be suspended if the enforceability of the judgment was suspended in the Member State of origin.

Member States take distinctively different approaches to the enforceability effect of judgments that remain subject to appeal. Such judgments may automatically be immediately enforceable – leading to full satisfaction of the judgment creditor – without the need for the provision of security. Alternatively, they may be declared enforceable in the individual case – with or without provision of security – or it may be that only protective measures to secure the judgment debtor's assets are available. These different approaches are not adequately considered in the design of the Art. 53 certificate. From a policy perspective, the free movement of judgments is best furthered by rules that ensure a judgment produces the same effects in the State addressed as in the State of origin. The Art. 53 certificate does not, however, provide any mechanism for clarifying the scope of the enforceability of a judgment if it is conditional on the provision of security.

As to the procedures for issuing the certificate and for dealing with disputes arising out of the issue of the certificate, these are also matters on which the laws of the Member States differ substantially. There is a natural tendency for national laws to treat the Art. 53 certificate as comparable to the domestic certification of enforceability of a judgment, and to regulate it in an analogous way. But, as observed at (II) above, domestic regulation is shaped by the relationship between courts and enforcement institutions. Thus, in Austria the enforcement institution is a court and can resolve issues concerning material enforceability that arise during enforcement. In Germany, the main enforcement institution is the *Gerichtsvollzieher*, a civil servant external to the courts with limited qualifications and competences. As a result, German law ensures that the trial court determines questions concerning the material enforceability of a judgment. And in France, the main enforcement institution is the *huissier de justice* who can seek guidance from the JEX in cases in which it becomes necessary to decide legal questions relevant to enforcement. Thus, although the onus may often be on the debtor to raise objections to enforcement, the *huissier de justice* also has obligations in this respect.

In Brussels I bis cases the allocation of decision-making responsibility to the trial court or the court with responsibility in enforcement matters plays out in a cross-border context, with plenty of scope for confusion as to respective competences of the courts in the State of origin and the enforcement State. This is likely to prove problematic for debtors with limited resources and litigation experience. The differences between Member State laws suggest that further research may need to be done to clarify how Member States handle questions of the formal and material

enforceability of judgments (and other enforcement titles) and the impact of changes in factual and legal circumstances – both to appreciate where confusion may arise and to consider whether modifications to the Art. 53 certificate may be advisable to address specific problems.

In *Lufthansa Technik AERO Alzey GmbH c Arik Air Ltd (Lithuania)* the Lithuanian Supreme Court observed that

> the need to analyse the legal rules of another Member State on appealing against judgments, taking into account differences between the legal systems and linguistic differences, may be very resource-consuming, and this may not always be compatible with the objective of prompt enforcement of a judgment of another Member State. Therefore, it is important to ascertain how these values should be reconciled and the extent of the assessment that the competent authorities of the Member State of enforcement should carry out.[82]

While this observation was made in the context of the application of Art. 23(c) of Regulation 805/2004, it seems to be of general relevance. As disputes concerning the issue of an Art. 53 certificate emerge, greater attention needs to be paid to the appropriate forum for resolving questions concerning the enforceability effect of a judgment to promote the equal treatment of creditors and debtors in different Member States with respect to their access to both enforcement measures and measures to protect against enforcement.

[82] Summary of the request for a preliminary ruling in Case C-393/21, at para. 16.