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

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Abstract

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Introduction/Abstract

With cross-border trade and the free movement of people inevitably legal disputes follow. Businesses and individuals need the assurance that a venue for the resolution of legal disputes is available. Not only must there be a reliable judicial system for the resolution of those disputes, but also a means of enforcing judgments. Enforcement of civil judgments within one country can present challenges, enforcement of civil judgments cross-border can present even bigger challenges. With this in mind the European Union has addressed the issue to allow for greater free movement of civil judgments across the Union. This is an important legal step that will enhance and promote cross-border trade and the free movement of people within the Union. This paper will examine a brief history of civil and commercial judgment enforcement in the Union, significant case law and the deficiencies in the law within the Union. Lastly, the newest proposals from European Commission under consideration in 2011 will be examined to address those deficiencies.

I. History of Cross-Border Civil Judgment Enforcement:

The first attempted at enforcing judgments from one member state in another member state's judicial system was in 1968 with the conclusion of the Brussels Convention.[2] The Brussels Convention had the goals of promoting economic growth within the Union and harmonizing the rules for cross-border enforcement of civil judgments. Connected with the Brussels Convention was the Lugano Convention.[3] This

[2] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[3] Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

was entered into by the six members of the European Free Trade Association. There are few differences between the Brussels Convention and the Lugano Convention.

The Brussels Convention begins in its preamble by articulating the goals of the Convention. It states:

> Desiring to implement the provisions of Article 220 of that Treaty[4] 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.[5]

In that small preamble the outline of the Convention is laid out; simply to allow for the reciprocal recognition and enforcement of judgments within the Union. The Convention applies to civil or commercial matters.[6] Article I immediately goes on to list the situation where the Convention does not apply. They include: family law, wills, bankruptcy, insolvency, social security or arbitration. A person whether they are a natural or legal person can only be sued in a member state if they are domiciled in that state. Final determination on domicile is determined by the national court applicable to

[4] Reference to the Treaty of Rome establishing the European Community.
[5] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Preamble.
[6] *Id.* Title I, Article 1.

nationals of that state.[7] Article 4 in Title II speaks to the situation where a defendant is not domiciled in the forum state. In such a case the Convention does not apply. The Convention leaves it up to the forum state to apply its own national rules for determining personal jurisdiction over the defendant. Article 4 also allows someone who is in fact domiciled in a member state to avail themselves to the same extra judicial reach as a national of that state.

The Convention speaks to specialized situations like insurance and consumer contracts.[8] It also clearly defines under what conditions a person domiciled in a member state may be sued in that state.[9] Article 5 & 6 are quite detailed with respect to various causes of action and the proper venue within a national court.[10]

II. Council Regulation (EC) No 44/2001:

It is not until December 22, 2000 that the European Council adopts Regulation No. 44/2001. It went into effect in March of 2002. It effectively replaced the Brussels Convention. It applies to all member states except Denmark[11], however Denmark has entered into a separate international agreement with the Union for judicial cooperation. The Regulation states an objective "of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is endured."[12] The Regulation states:

Certain 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

[7] *Id.* Title II, Section 1, Article 2
[8] *Id.* Title II, Section 3, Article 7 & 13
[9] *Id.* Title II, Section 2, Article 5 & 6
[10] See *infa* Council Regulation No 44/2001 for further detailed explanation of substantive portions of the Convention
[11] Council Regulation No 44/2001, Chapter I, Article I(3)
[12] *Id.* Preamble (1)

formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.[13]

It calls for measures on judicial cooperation in civil matters; concluding they are necessary for the sound operation of the internal market. The Regulation seeks the same goals as the Brussels Convention, however merits a closer look to fully understand the proposals for changes being made by the European Commission.

As with the Brussels Convention the Regulation applies to all civil and commercial matters with the same exceptions. The goal of the Regulation, as stated *supra*, is to enforce judicial decisions cross-border; however a closer look reveals detailed procedural law on related matters. (The Regulation does not address recognition issues until Chapter III.) One of those is the concept of legal jurisdiction. Courts generally must have both subject matter jurisdiction and personal jurisdiction before proceeding on a particular matter. Chapter II of the Regulation deals with personal jurisdiction. It clearly sets down the rule that if an individual is domiciled in a Member State regardless of that individual's nationality, then that person is subject to the personal jurisdiction of that Member State's courts.[14] The Regulation clearly states "[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."[15] In terms of cross-border trade and the free movement of people, this is an important fact that cannot be glossed over. Whether a legal or natural person is aware of this when they move from one Member State to another is important. By virtue of being domiciled in a Member State, there is submission to the personal jurisdiction of that state's courts. Nationality will not provide a basis to object to the personal jurisdiction of the court.

[13] *Id.* Preamble (2)
[14] *Id.* Chapter II, Article (2)(1)
[15] *Id.* Article (2)(2)

The real reach of the Regulation over personal jurisdiction can especially be appreciated in Section 2, Article 5 of the Regulation entitled "Special Jurisdiction". By virtue of being domiciled in a Member State, that will subject that person to the personal jurisdiction of the courts of some other Member State. The subject matters allowable are quite detailed. 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.[16] To further appreciate the reach of the Regulation one needs to examine Article 6. A person domiciled in a Member State may also be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Therefore establishing domicile in a Member State subjects a person to the personal jurisdiction of the courts of another Member State simply because there are co-defendants in that other Member State. This brings the reach of the courts within the Union even broader than jurisdiction based solely on domicile in one single state.

Chapter III deals with actual recognition and enforcement. Article 32 starts off by defining what a judgment is. "[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 states that "a judgment given in a Member State shall be recognized in the other Members States without any special procedure being required."

Following of course are exceptions to recognition. A judgment shall not be recognized: 1. If such recognition is manifestly contrary to public policy in the Member

[16] See *Id.* Section 2, Article 5 for detailed explanation.

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 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.[17]

There is nothing unusual about the exceptions. They are all very common to the domestic law of sovereigns with respect to enforcing judgments from other sovereigns' judicial systems. For instance The Regulation 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 Regulation defers all questions of fact to that original issuing court.[18] The respect afforded the original court on questions of fact is reinforced in Article 36; stating "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 my stay the proceedings pending the outcome of the appeal.[19]

Section 2 of Chapter III speaks to enforcement. Article 38 allows for the enforceability of judgments cross-border; it is however conditional. 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

[17] *Id.* Chapter III, Section 1, Article 34
[18] *Id.* Article 35 (2)
[19] *Id.* Article 37 (1)

Member State.[20] 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[21], 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 the Regulation 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.

III. 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.[22] 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.[23] *Enforcement*, on the other hand, as stated above, is

[20] *Id.* Article 38 (1)
[21] Annex V is a standard form to be completed by the issuing court attesting to the authenticity of the copy of the judgment.
[22] *Id.* Chapter III, Section 1, Article 32 – 34.

[23] According to the Heidelberg Report, "the concept of "judgment" in the sense of the Judgment Regulation 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

granted only upon the satisfaction of the relatively simple[24] *exequatur* proceedings described above.[25]

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.[26] 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).[27] 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.[28] In essence, no Article 34 and 35 defenses/grounds can be raised by a defendant or the

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the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03 also referred to as the Heidelberg Report), para. 1.

[24] 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 Regulation 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 (2–3weeks). B. Hess/T. Pfeiffer/P. Schlosser, Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03 also referred to as the Heidelberg Report), para. 1.

[25] Generally governed by Articles 38 – 52

[26] 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.

[27] *Id.* Chapter III, Section 1, Article 34

[28] *Id.* Article 43.

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).[29] 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.[30] 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.

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 defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."[31] In general, Article 34(2) is intended to guarantee that the judgments admitted to free

[29] *Id.* and Article 53.

[30] *Id.* Articles 34 & 35.

[31] *Id.* Article 34(2).

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.[32]

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. The Austrian *district* court granted the enforceability application based on the certification of the Dutch district court.[33] At such

[32] 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 Regulation 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 defence of a defendant that the document instituting the proceedings was not properly and timely served is not longer successful."

[33] 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:

time, a copy of the enforcement order was caused to served 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

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[…]Regulation 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 Convention , in Regulation 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 defence contained in Art.34(2) of that regulation, are considered by a court. According to Art.41 of Regulation 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 regulation.

According to Arts 53 to 55 of Regulation 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 regulation, 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.

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 Regulation 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 defence 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 most be properly served to the defendant so that he may become acquainted with its actual contents and remain in a position to defendant 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 the 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 Regulation 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 defence, where *he*

was able to commence proceedings to challenge that judgment before the courts of the Member State of origin."[34]

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 Regulation 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 defence."

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

[34] Emphasis added.

process rights, the Apostolides case shows that the CJ will not choose form over substance.

IV. Proposal Revisions to The European Parliament and to The Council:

A current proposal is existing from the Commission to the Parliament and Council to amend Council Regulation No. 44/2001 of December 22, 2001. The Commission has acknowledged that the Regulation has worked well, however after conducting empirical studies there are a number of deficiencies that need to be addressed.[35] 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".[36] The Commission has identified four major areas of concern. They are:

- "The procedure for recognition and enforcement of a judgment in another Member State ("exequatur") remains an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market.
- Access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU. With some exceptions, the current Regulation only applies where the defendant is domiciled inside the EU. Otherwise 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, other cannot, even in situation where no other court guaranteeing a fair trial is competent. In addition, where nation legislation does not grant access to court in

[35] Explanatory memorandum accompanying proposal from Commission to Parliament and Council dated December 2010.
[36] *Id.*

disputes with parties outside the EU, the enforcement of mandatory EU law protecting e.g. consumers, employees or commercial agents is not guaranteed.

- The efficiency of choice of court agreements needs to be improved. Currently, the Regulation 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

- The interface between arbitration and litigation needs to be improved. Arbitration is excluded from the scope of the Regulation. 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."[37]

The Commission has recognized that overall there are still problems associated with cross-border enforcement of judgments. In summary, litigants from outside of the EU still have problems accessing the courts to enforce judgments. As the Commission has noted, "with some exceptions, the current Regulation only applies where the defendant is domiciled inside the EU"[38]. The current Regulation also does not completely respect choice of court agreements and lastly arbitration is excluded from the Regulation.

[37] *Id.*
[38] *Id.*

Prior to making its recommendations for revisions, the Commission conducted several studies on the current regulation.[39] In addition, two further studies examining different options for reform were conducted by external groups.[40] "Two conferences on the revision were co-organized by the Commission in 2009[41] and 2010[42]. A meeting with national experts was held in July 2010. A separate expert group was constituted on the issue of arbitration and three meetings were held in July, September and October 2010".[43] The Commission encouraged and sought out the opinions of several outside groups before moving forward with their final recommendations for revisions.

There are seven (7) detailed recommendations for revisions; which require further analysis. First, is the abolition of *exequatur*. "*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."[44] Under the current Regulation, 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. "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

[39] 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

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

[41] Conference organized jointly with the University of Heidelberg and the Journal of Private International Law.

[42] Conference organized jointly with the Spanish Presidency.

[43] Explanatory memorandum accompanying proposal from Commission to Parliament and Council dated December 2010.

[44] http://ec.europa.eu/civiljustice/glossary/glossary_en.htm

judgments covered by the regulations's scope with the exception of judgments in defamation and compensatory collective redress[45] cases."[46] If the formalities are to be abolished, then there must be some safeguards to protect fundamental rights.

The abolition of *exequatur* will be accompanied by procedural safeguards which ensure that the defendant's right to a fair trial and his rights of defense as guaranteed in Article 47 of the EU Charter on Fundamental rights are adequately protected. The defendant would have three main remedies at this disposal by which he could prevent in exceptional circumstances that a judgment given in one Member State takes effect in another Member State: first, he would be able to contest the judgment in the Member State of origin if he was not properly informed about the proceedings, in that State. Second, the proposal would create an extraordinary remedy in the Member State of enforcement which would enable the defendant to contest any other procedural defects which might have arisen during the proceedings before the court of origin and which may have infringed his right to a fair trial. A third remedy would enable the defendant to stop the enforcement of the judgment in case it is irreconcilable with another judgment which has been issued in the Member State of enforcement or provided that certain conditions are fulfilled in another country.[47]

The goal is to simplify the current process of having a court recognize a foreign judgment and at the same time still allow for some basic protections of fundamental rights. In no way would the revisions make foreign judgments automatic without question. If that were the case, that would indeed be a complete abolition of *exequatur*.

Second, is the improving the functioning of the Regulation in the international legal order. Defendants outside of the EU can be sued in an EU country where for

[45] Compensation of harm caused by unlawful business practices to a multitude of claimants.
[46] *Id.* Note 29
[47] *Id.* at page 7

example the place of contract is within the EU. Probably a more realistic change would be the ability to sue a third country defendant where that defendant has assets within an EU member state. The only qualification would be that "the value of the assets is not disproportionate to the value of the claim and that the dispute has sufficient connection with the Members State of the court seized."[48] Lastly, the revisions would allow for an EU court to stay proceedings where a non-EU court has taken a matter "and is expected to render a decision within a reasonable period of time and the decision will be capable of recognition and enforcement in that Member State".[49]

Third, are revisions to improve choice of forum clauses. The proposal strengthens choice of forum clauses. If private parties choose a particular court to hear a dispute resulting from an agreement, the that court's jurisdiction must be respected. This is "regardless of whether it is first or second seised. Any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction".[50] The proposal puts forth the rational that by strengthening choice of forum clauses, they will become more effective and will also "eliminate the incentives for abusive litigation in non-competent courts".[51]

Fourth, is improvement of the interface between the Regulation and arbitration. This portion of the proposal would clearly recognize private parties' choice of arbitration. Where private parties have chosen to arbitration, under the new proposal a court would lose jurisdiction if one of those parties tried to avoid arbitration proceedings and sought relief directly from the courts. "It 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

[48] *Id.* at page 9
[49] *Id.* at page 9
[50] *Id.* at page 9
[51] *Id.* at page 10

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".[52]

Fifth, is the better coordination of legal proceedings before the courts of Member States. In order to accomplish this goal of the proposal, it sets forth the following goals: The proposal aims at improving the general *lis pendens* rule by prescribing a time limit for the court first seised to decide on its jurisdiction. In addition the amendment provides for an exchange of information between the courts seised of the same matter.

The proposal facilitates the consolidation of related actions by doing away with the 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.* By contrast, the proposal prevents the circulation of provisional measures ordered by a court other than the one having jurisdiction on the substance Given the wide divergence of national law on this issue, the effect of these measures should be limited to the territory of the Member State where they were granted, thereby preventing the risk of abusive forum shopping. Finally, if proceedings on the substance are pending in one court and another one is asked to issue a provisional measure, the proposal requires the two courts to cooperate in order to ensure

[52] *Id.* at page 11

that all circumstances of the case are taken into account when a provisional measure is granted.[53]

All of these are aimed at allowing commercial matters to move more freely through the courts of the Union and preventing litigants from hiding behind different jurisdictional boundaries.

The sixth and final set of proposals to the Regulation is aimed at improving access to justice. Contained within this last set of recommendations for amendments are the following:

The creation of a forum for claims of rights *in rem* at the place where moveable assets are located;

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 Convention. Its reinsertion in the regulation 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 reverse situation, i.e., where an employer would consolidate proceedings against several employees, does not seem to arise in practice in matters of individual contracts of employment;

The possibility to conclude a choice of court agreement for disputes concerning the tenancy of premises for professional use, and

The mandatory information of a defendant entering an appearance about the legal consequences of not contesting the court's jurisdiction.[54]

[53] *Id.*
[54] *Id.* at page 12

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.

V. Conclusion

Despite some deficiencies, Regulation 44/2001 has been acknowledged as a success. The regulation 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 Convention. A material aspect of this success has been the free movement of judgments. Regulation 44/2001 has achieved free movement of judgments by greatly facilitating judgment recognition and judgment enforceability.

Presently, under the Regulation, 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 Regulation'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 Regulation'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 Regulation. 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 Regulation. And consequently, lead to greater commercial interaction between the nationals of the Member States and the ensuing economic growth.