

Abolition of Exequatur in Brussels Ia Regulation – New Challenges for the National Judge (Croatia)

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Abstract This article will analyse and evaluate if and to what extent enforcement of judgments according to the Brussels Ia Regulation may be challenging for Croatian judges. It seeks to answer the questions a) which novelties in terms of recognition and enforcement of foreign judgments are introduced through the system of cross-border enforcement of judgments under Brussels Ia and b) with regard to the lack of implementation provisions in Croatian legal system, how will a new “adaptation device” according to Art. 54 of the Brussels operate. In particular, how and by whom will the adaptation of measure or order be carried out and how will it be challenged pursuant to Art. 54 (2) of the Brussels Ia Regulation. In a search for possible answers, approaches as well as solutions adopted in the legal systems of some Member States will also be taken into account. Considerations which can be attributed to the lack of provisions regarding implementation of the Brussels Ia Regulation in Croatian legal system will be highlighted.

KEYWORDS: • exequatur • abolition • Brussels Ia Regulation • adaptation • measure • order • recognition • enforcement • execution • judgment

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1 Introduction

Although at the EU level ever since the European Council in Tampere in 1999¹ and especially in the course of the consultation process which led to the adoption of Regulation No 1215/2012 (hereinafter Brussels Ia Regulation)² there were many political discussions as well as theoretical debates on the idea of abolition of *exequatur*, which featured as the most prominent amendment in the Brussels Ia Regulation. In the paper it will be examined how the pursuit of this goal will influence developments at the national level, in particular, which challenges it will impose on Croatian judges in cross-border proceedings under the Brussels Ia Regulation. It should be kept in mind that the recent developments in the regime of free cross-border movement of judgments are inspired primarily by economic considerations, but also, by the objective of creating an area of freedom, security and justice. As such, they also influence national rules which have until now, together with the rules of international treaties served to assimilate and transpose foreign judgments in the national legal systems. Hence, along with the adjustment to the new cross-border enforcement regime under Brussels Ia Regulation, national judges have to amend and mitigate application of national rules in order to abolish previously required formalities and at the same time secure protection of fundamental (procedural) rights under Art.6 (1) ECHR.

Undoubtedly, abolition of *exequatur* in Brussels Ia Regulation should be observed as a final result of a development which has been initiated already with the establishment of European Community. The *exequatur* procedure is found in the Brussels Convention 1968³, the Regulation No 1346/2000 (hereinafter Insolvency Regulation)⁴, the Regulation 44/2001 (hereinafter Brussels I Regulation)⁵, the Regulation No 2201/2003 (hereinafter Brussels II bis Regulation)⁶, the Mediation Directive⁷, the Regulation No 4/2009 (hereinafter Maintenance Regulation)⁸ and the Regulation No 650/2012 (hereinafter Succession Regulation)⁹. However, steps in the direction of abolition of *exequatur* can be traced in a number of EU instruments preceding Brussels Ia Regulation, including the Brussels II bis Regulation, the Regulation No 805/2004 (hereinafter European Enforcement Order (EEO) Regulation)¹⁰, the Regulation No 1896/2006 (hereinafter European Order for Payment (EOP) Regulation)¹¹, the Regulation No 861/2007 (hereinafter European Small Claims (ESCP) Regulation)¹², the Mediation Directive and the Maintenance Regulation. It is obvious that some of the same instruments have been included in both categories. This is due to the fact that they contain a two-track system for enforcement: one with *exequatur* and one without for specific matters or in relation to specific proceedings (Linton, 2016: 257–259).

Although the fact that the development towards abolition of *exequatur* in Brussels Ia Regulation was gradual would seem to imply that Member States have reached the same level of standards in the new cross-border enforcement regime,

diversities still exist. There are several possible contributing factors which need to be taken into account.

The Brussels Ia Regulation was adopted on 6 December 2012 and applies from 10 January 2015 in Member States. Prior to its adoption, Brussels I Regulation (whose application is maintained for proceedings instituted before 10 January 2015) as the successor to the 1968 (Brussels) Convention has already proven to be the most important piece of legislation on judicial cooperation in civil matters in the Member States and in the literature it is even referred to as European Conflicts of Law (ECL) (Dickinson, 2011: 3; Meškić & Radončić, 2013: 52). However, not all of the Member States have equal experience in the application of the Brussels regime. In regard to Croatia for example, temporal application of the Brussels regime is different, due to the fact that it has become a Member State on 1 July 2013. So, regardless of the fact that even in the pre-accession stage efforts have been made to harmonize Croatian law with the *acquis* and prepare for the application of regulations as the most important sources of the private international law (PIL) of the EU still, the fact remains that Croatian judges have been applying the Brussels regime for (only) three years (Meškić & Radončić, 2013: 56). Overall, the same level of competence for the application of the Brussels Ia Regulation in Member States should not be expected. Namely, there are different starting points in terms of tradition and manner of approach towards recognition and enforcement of foreign judgments in Member States. In comparison to Germany, whose model of *ex lege* recognition of foreign judgements has served for the amendment of Brussels I Regulation and abolition of *exequatur*, under the new cross-border enforcement system, other Member States will have to adjust their national systems even more than it was required under Brussels I Regulation. For Croatian judges who under the Conflicts of Law Act Concerning the Resolution of Conflicts of Laws with the Provisions of other Countries in Certain Matters (hereinafter Croatian PIL Act)¹³ relied on deliberation procedure, recognition and enforcement of foreign judgements according to Brussels Ia Regulation will certainly pose a challenge (Adolphsen, 2014: 179, 187). One should also keep in mind that the number and range of cross-border cases in Member States also varies and with it also the level of experience as well as specialization of judicial and non-judicial authorities involved in recognition and enforcement of foreign judgements. Finally, regardless of the necessary adjustment of the national legal systems to regulation abolishing *exequatur*, the impact of divergences among national rules on enforcement which govern execution of judgments in Member States should not be disregarded.

In this sense adaptation of a measure or order contained in a foreign judgment, which is not known in the law of the Member State addressed under Art.54 of the Brussels Ia Regulation presents an important element in ensuring that a full effect is given to a foreign judgement in a Member State addressed as well as a significant mechanism for ensuring that a new cross-border enforcement regime

functions properly. Since it is left to the Member States to determine how and by whom the adaptation is to be carried out (Recital 28) unique solutions from different Member States may be expected. In the central part of the paper, detailed analysis of how the adaptation of a measure or order under Art 54 of the Brussels Ia Regulation will be carried out in Croatia as the newest and the least experienced Member State in the application of Brussels regime, only a year upon the Brussels Ia Regulation entry into force. Among SEE Member States pertaining to the same Romano-Germanic (civil) law tradition (Slovenia, Austria, Germany) only Germany has provided implementation provisions on Art. 54 in German Civil Procedure Act (hereinafter ZPO)¹⁴, so there is little possibility for comparison of how that adaptation is going to be carried out in Member States with similar legal systems. Legal literature only scarcely refers to this issue and none relates to Croatia. Due to the recent recast and entry into force of Brussels Ia Regulation no relevant case law from the Member States can be found. Finally, there has been no guidance from the CJEU, since so far no reference has been made concerning the Member State's implementing procedures under Art. 54 of Brussels Ia Regulation. Though all of the mentioned factors may be identified as aggravating factors in the analysis, they can also be seen as valuable arguments in favour of a closer discussion of the topic presented in this contribution.

2 Abolition of *exequatur* in the Brussels Ia Regulation

It is obvious that the new system of cross-border enforcement introduced by the Brussels Ia Regulation in comparison to enforcement schemes present in other European instruments, presents an entirely new and the most straightforward system which fully reduces the formal function of *exequatur* and retains the possibility of invoking the grounds for refusal in the Member State of enforcement. It could be argued that the main reason why elimination of *exequatur* was introduced in the Brussels Ia Regulation and not (at least not to the same extent) in other European instruments is the fact that the scope of Brussels Ia Regulation covers all the main civil and commercial matters. In comparison, other EU instruments cover a variety of proceedings such as family proceedings or commercial proceedings and the nature of the judgments delivered in these proceedings require enforcement schemes which ensure that specific interests are protected. Although the idea of abolition of *exequatur* was aimed at enhancing free circulation of judgments in the EU, it is evident that a diversity of enforcement schemes is still present at EU level. It should not be disregarded that this adds to complexity of European legislation and can be an impediment to predictability for judiciaries and as such disrupts the mutual trust which is a prerequisite for enabling free circulation of judgments. Nevertheless, it is left to be seen if the step taken with the recast of Brussels I Regulation will be a step in the direction of reconciling these differences to a larger extent or to their further deepening.

Namely, along with the rules on abolition of *exequatur*, the Brussels Ia Regulation also requires certain constraints of the operation of national enforcement rules in order to ensure that goals of the Regulation will be fulfilled. If this rules should prove to be successful in harmonizing national enforcement systems and ensuring functional cross-border enforcement under the Brussels Ia Regulation, this development could also provide an incentive for introduction of a similar approach in EU instruments, which for now have not been touched by similar developments.¹⁵ At the same time, it might add to the deepening of discrepancies between enforcement systems in Member States. This problem is reflected in Art. 41 which provides for the application of the national grounds for refusal under the law of the Member State, only if they are not incompatible with the grounds provided in Art. 45 of the Brussels Ia Regulation. For the understanding of the problem it is vital to take into account the jurisprudence of the CJEU (Linton, 2016: 280). Further, according to academic literature the same can be said for the obligation of adaptation of measure or order prescribed in Art. 54 of the Brussels Ia Regulation. Given that obligation of adaptation is seen by some legal theorists as a weakness in the new cross-border enforcement system, it is necessary to examine how it will be implemented in Croatian legal system. For better understanding of the context in which the adaptation mechanism will operate, the framework under which abolition of *exequatur* under Brussels Ia Regulation is introduced will be presented.

Abolition of *exequatur* (a formal approval procedure) is considered to be the most important development in the recast of Brussels I Regulation. However, from the point of view of Croatian legal theory it would also be possible to speak of abolition of delibation procedure¹⁶, a procedure in which requirements are examined for recognition of the *res iudicata* effect (and enforceability) in territory of Croatia as a state in which the delibation procedure is conducted. Thereby, delibation procedure could be defined as proceedings consisting of two stages: *exequatur* being one of them. Namely, in Croatian legal theory the term *exequatur* refers to intermediary (judicial) proceedings for review of requirements for rendering a writ of execution (*garnisheeorde*) on the basis of a foreign condemnatory judgement.¹⁷ By its nature, the writ of execution is a decision of the court in which enforcement is being sought that a foreign judgement is (*ipso jure*) capable of enforcement. Nevertheless, *exequatur* should not be equated to the enforcement of a foreign judgement. Unlike foreign condemnatory judgement for which both recognition and enforcement is sought, a review performed of foreign declaratory and constitutive judgments in the delibation procedure is limited to the recognition of the judgment (Vuković & Kunštek, 2005: 419; Triva & Dika, 2004: 110).

The suggested approach from Croatian legal theory should be understood in the light of a view that it is more appropriate to deliberate on recognition of the effects of foreign judgments than recognition and enforcement (Vuković & Kunštek,

2005: 419). In general, Brussels I regime acknowledges that in its broadest meaning recognition encompasses all legal effects of a judgement including the enforceability of its provisions. Nevertheless, recognition and enforcement are treated as separate concepts. In this sense, the Brussels Ia Regulation contains separate set of rules for recognition and for enforcement (Dickinson, Lein (eds.), 2015: 375–376). However, on application for refusal of enforcement of a judgment grounds for refusal of recognition provided in Art. 45 of the Brussels Ia Regulation are referred to, so connection between recognition and enforcement is still preserved (Adolphsen, 2014: 169). Under the Brussels I regime enforcement is at issue if a judgment is relied upon for the adoption of measures implying some form of coercion (seizure, confiscation, sequestration, attachment) (Dickinson, Lein (eds.), 2015: 375–376).

Under Art 36 (1) of the Brussels Ia Regulation a judgment given in a Member State shall be recognised in the other Member State without any special procedure being required. Cross-border movement of judgement is thus facilitated by the requirement that court or authority before which a (recognizable) judgment is invoked must recognize the judgement *ex officio*, if conditions set out in Art. 37 of the Brussels Ia Regulation are satisfied. The new enforcement regime under Art 39-44 of the Brussels Ia Regulation does not require a declaration of enforceability of a judgment given in a Member State (and also enforceable in that Member State) in order for that judgment to be enforced in another Member State. Provision of Art 39 can be said to be an expression of abolition of *exequatur*. Instead of seizing a court of a Member State addressed in order to obtain a declaration of enforceability of the judgement creditor proceeds directly to the competent enforcement authority. Although the need for obtaining declaration of enforceability of the judgment no longer exists, and there is no possibility to challenge the declaration of enforceability on appeal and possible further appeal, according to Art. 46 of the Brussels Ia Regulation grounds for refusal of enforcement can still be examined, but only on application of a person against whom enforcement is sought. It appears as if the procedure for obtaining declaration of enforceability and procedure for examining grounds for refusal of recognition have merged under the Brussels Ia Regulation (Adolphsen, 2014: 180).

Cross-border enforcement regime introduced under the Brussels Ia Regulation is established on the interplay between rules on enforcement laid down in the Regulation and national enforcement law (Dickinson & Lein (eds.), 2015: 416). In this sense, Art. 41 (1) of the Brussels Ia Regulation envisages that the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. Having in mind that there are differences among enforcement laws in terms of entities (agencies) involved, methods, means and terms of enforcement as well as enforcement and limitation measures, the European legislator has introduced certain limitations of application

of national enforcement law in the Brussels Ia Regulation. This mainly concern formalities that need to be fulfilled prior to enforcement, such as documents provided by the creditor, service prior to enforcement and translation of documents. Also, there is a set of common provisions aimed at ensuring flawless operation of the cross-border enforcement regime under the Brussels Ia Regulation (Dickinson, Lein [eds.], 2015: 418, 497). Among these rules special attention should be given to application of Art. 54 of the Brussels Ia Regulation which introduces an obligation of the relevant court or authority to adapt measures not known in the Member State addressed.

3 Adaptation of measure or order (Art. 54 of the Brussels Ia Regulation)

“Obligation of reasonable adaptation“ (Dickinson & Lein (eds.), 2015: 506) provided in Art 54 of the Brussels Ia Regulation should be understood as a mechanism which ensures that a foreign judgment will produce full effect in the Member State addressed. Namely, as stated in Recital (28) the court or authority should adapt a measure or order, including any rights indicated therein to the extent possible to reflect a national measure or order which under the law of that Member State has equivalent effect and pursues similar aims.

However, the fact that Recital (28) leaves the determination of how and by whom the adaptation is to be carried out to each Member State will certainly bring divergences in its operation in Member States. As already highlighted by legal theorists, there are open issues regarding the application of Art 54 of the Brussels Ia Regulation so a search for different solutions across Member States can be expected. In order to provide for a safeguard against insufficiencies of implementing procedures introduced by Member States, Art 54 (2) of the Brussels Ia Regulation provides for a possibility of an appeal against adaptation decision. However, not only the possibility of an appeal as a means by which the adequacy of an adaptation is inspected, but the fact that a party has lodged an appeal may provide additional benefits for the party. Namely, the fact that adaptation of a measure or order is often judicially challenged before a court in a Member State can provide an incentive for examination of the Member State's implementing procedure by the CJEU (Dickinson & Lein [eds.], 2015: 510).

In order to examine how the adaptation of measure or order under Art.54 of the Brussels Ia Regulation should operate in Croatia, practical aspects of how enforcement of judgments given in another Member State shall be governed under the Brussels Ia Regulation should also be addressed.

Under the Brussels I Regulation the creditor had to request *exequatur* before proceeding to enforcement of a judgment. In the *exequatur* procedure the court seized in Croatia examined *ex officio* the application of the creditor and the

requirements for recognition and enforcement set therein under Art.38–43 of the Croatian PIL Act. The abolition of *exequatur* under the Brussels Ia Regulation enables the creditor to directly proceed to the enforcement authority in Croatia. There is no need to obtain a declaration of enforceability in Croatian court. With the application for enforcement measures the creditor will submit documents in support of his enforcement application, a copy of the judgment which satisfies the conditions necessary to establish its authenticity and the certificate issued pursuant to Art. 53 of the Brussels Ia Regulation certifying that the judgment is enforceable and containing an extract of the judgment. However, an issue arises, as regards the adaptation of a measure or order according to Art 54 of the Brussels Ia Regulation in Croatia. Originally, provision provided in Art. 54 of the Brussels Ia Regulation was intended to apply only in (exceptional) cases for which the *exequatur* was intended to be retained, so the question of the implementation of the provision and its operation was not regarded as problematic (Dickinson & Lein (eds.), 2015: 505). Namely, within a complex function of *exequatur*, its first purpose being to authorize the enforcement authorities to act (“title import”) and the second being to clarify how the enforcement authorities should act, the latter would have been of importance for the application of Art. 54 of the Brussels Ia Regulation. During the *exequatur* procedure the court would have been able to transform the measure or order unknown to the Member State into a title that can be enforced with the available enforcement measures (“title transformation“). However, with the introduction of Art 54 in the Brussels Ia Regulation which abolishes *exequatur* entirely, concerns have been raised that enforcement authorities may have difficulty adapting the foreign judgment, which could indicate the benefit of maintaining *exequatur* (Schramm, 2013/2014: 148).¹⁸

In Croatian law, no implementing rules or implementing acts regarding the Brussels Ia Regulation have been adopted. So far, as requested in Art 75 of the Brussels Ia Regulation Croatia has only communicated to the Commission the courts to which the application for refusal of enforcement is to be submitted pursuant to Art. 47(1), the courts with which an appeal against the decision on the application for refusal of enforcement is to be lodged pursuant to Art.49(2), the courts with which any further appeal is to be lodged pursuant to Art 50 and the languages accepted for translations of the forms. Information was made available through the European Judicial Network, in particular the e-Justice Portal.¹⁹At the same time it is not clear whether Croatia missed the opportunity to provide a description of national rules and procedures concerning enforcement, including authorities competent for enforcement, and information on any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods within the framework of the European Judicial Network as requested in Art. 74 of the Brussels Ia Regulation, because these information are not available to the public through the e-Justice Portal. Together with the implementation rules, the information provided under Art 74 would facilitate operation of Art 54 of the Brussels Ia Regulation in Croatia. In this circumstance, it is unfortunate that an

obligation of the Member States to inform the Commission of both the procedures drafted for adaptation and the authorities competent to effect such adaptation, which was included in Art 66 (2) of the draft of the Regulation, was not included in the final version of the Brussels Ia Regulation (Dickinson & Lein (eds.), 2015: 507).

According to Art 41(1) of the Brussels Ia Regulation the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed. In Croatia, according to Art 1 of the Enforcement Act²⁰ municipal courts are authorized to conduct enforcement in all cases apart from cases in which deciding on enforcement has been explicitly vested in other courts or other authorities. As provided in Art.19 of the Enforcement Act enforcement of a foreign judgment, foreign administrative authority or other authority, including foreign administrative acts may be ordered and carried out by court in Croatia, if requirements for recognition are fulfilled or if prescribed by law, international treaty or legal instrument of the EU which is directly applicable in Croatia. As provided in Art. 41 of the Enforcement Act a Croatian judge issues a writ of execution on the basis of an application for execution and an enforceable judgment. According to Art 303 (1) of the Rules of procedure for the court²¹ actions for execution of a judgment are carried out by the enforcement courts directly or by the court officers (bailiffs) by order of the enforcement judge.

With regard to Croatian rules on enforcement it seems that abolition of *exequatur* should not entail denial of protection of the debtor which is the basic function of the *exequatur*. Since in *exequatur* procedure the national courts do not decide on the merits of the foreign judgment, but only examine whether the conditions for execution of the judgment have been met, the enforcement judge while verifying the conditions for issuing a writ of execution *ex officio* will provide the same level of protection for the debtor (Schramm, 2013/2014: 149, Oberhammer, 2010: 197–199).²²

On a practical level, in order to enforce a foreign judgment in Croatia judgment creditor can proceed to the enforcement authority in the Member State of enforcement and submit an application for execution of a judgment, a copy of a judgment and a certificate referred to in Art. 53 of the Brussels Ia Regulation. In accordance with Art 52 (2) of the Brussels Ia Regulation Croatian court as the court of the Member State addressed shall not be entitled to review a judgment as to its substance. Croatian court shall only be entitled to confirm that requirements for issuing a writ of execution as provided in Art. 277 (2) and Arts 280-283 of the Civil Procedure Act²³ have been fulfilled. Thus, if a foreign judgment which is to be executed in Croatia contains a measure or order which is not known in Croatian

law, enforcement judge pursuant to Art. 54 (1) of the Brussels Ia Regulation should be entitled to adapt a measure or order to the extent possible. If such solution should be adopted in Croatian law, it would adhere to the expectations voiced in the academic literature on how the adaptation should be accommodated in the legal systems of Member States. Although there were suggestions to specify that adaptation according to Art. 54 should be carried out by a court, some Member States have decided to put their trust in officials other than judges.²⁴

In Croatia, the manner in which enforcement procedure is conducted differs from the manner in which ordinary civil procedure operates. Overall, enforcement procedure is conducted pursuant to a different set of rules than ordinary civil procedure. Enforcement procedure is a more formal procedure which consists of a range of interconnected and functionally coordinated legal acts taken by court, parties and other participants in the proceedings. It is usually resolved by means short of adversarial proceedings (Dika, 2007: 8, 52). In this sense, enforcement judges do not enjoy great latitude in the way they conduct the litigation and issue a writ of execution. So, it is to be hoped that lack of experience in delivering judgments based on a free evaluation of facts and evidence and insufficient knowledge relevant for delivering decisions of judicial character would not be a daunting obstacle for enforcement judges in fulfilling the obligation of adaptation of a measure or order pursuant to Art. 54 of the Brussels Ia Regulation. So, what are potentially challenging features of the obligation of adaptation for the Croatian enforcement judge which should be considered?

First, the nature of the measure or order which requires adaptation should be considered. The academic literature mentions the concept of usufruct, or interim measures in the form of freezing orders or search orders that do not exist in all Member States (Schramm, 2013/2014: 148). The mentioned examples seem to suggest that the adaptation should concern non-monetary measures or orders. However, the possibility of adaptation of monetary measures or orders should not be disregarded (Dickinson, Lein [eds.], 2015: 506). As suggested by the CJEU in *Szyrocka* case²⁵, at least a problem of fixing the interest rate in the field of monetary obligations will arise, because in comparison to the capital which is usually fixed either expressly in the operative part of a judicial decision or at least in the statement of reasons, other approach is generally chosen for default or other interests and that might cause problems to national enforcement judges. It seems that cross border enforcement of condemnatory judgments ordering a specific performance of obligations, regardless whether they consists in *dare, facere* and *praestare* will provide the need for enforcement judges or non-judicial authorities in the course of the enforcement procedures to adapt a foreign measure or order unknown in the Member State (Sladič, 2013: 354).

Secondly, the question arises whether the judgment creditor should request the adaptation of a measure or order when submitting the application for execution of

a judgment. Namely, according to Art 39 of the Enforcement Act the enforcement procedure is initiated by submitting an application for execution of a judgment which should contain all information/evidence under the corresponding provision.²⁶As there are no relevant implementation provisions in Croatian law, Art. 54 of the Brussels Ia Regulation must be consulted. However, Art.54 is silent on whether the court or a non-judicial authority should adapt a measure or order *ex officio* or only at a request of the judgment creditor. With regard to the drafting of Art 54 (1) employed, as well as the intended purpose of the provision in facilitating the free cross-border movement of judgments, it seems safe to assume that for a judge or a non-judicial authority it should be mandatory to adapt a measure or order contained in the judgment, if such a measure or order is not known in Croatia (Dickinson & Lein (eds.), 2015: 507).

Finally, if adaptation of a measure or order pursuant to Art. 54 of the Brussels Ia Regulation should be carried out at the request of the parties, who would be potential applicants of such a request? Again, there are no implementation provisions in Croatian law which provide an answer to this question. The text of Art 54 of the Brussels Ia Regulation does not impose limitations to any party to the proceedings in regard to submitting such a request. However, restrictions of a possibility of a judgment debtor to request adaptation of a measure or order which has been carried out by a Croatian enforcement judge derive from the national enforcement procedure. As a general rule, a writ of execution of a judgment is issued and even the execution of a judgment is carried out before the judgment debtor was provided with an opportunity to give a statement about it. As a result, although the judgment debtor could have knowledge of the full content of the judgment and the judgment creditor's intention to initiate enforcement in a Member State other than the Member State of origin pursuant to Art. 43 (1) of the Brussels Ia Regulation, still the fact that the writ of execution of the judgment is issued without his knowledge disables him from requesting the adaptation of a measure or order. However, there is still a possibility for a judgment debtor to challenge the adaptation before a court. But only if the judgment debtor would appeal against the decision of the court on refusal of adaptation, his lodging of appeal could have an effect similar to a request for adaptation of a measure or order pursuant to Art 54 (1) of the Brussels Ia Regulation.

If Croatian judge, when issuing a writ of execution of a judgment had to adapt a measure or order, the reasoning should contain the method and manner by which the rights conferred by the judgment are implemented in the operative part of the judgment (Dickinson & Lein (eds.), 2015: 508). Given the fact that Art 54 (2) of the Brussels Ia Regulation allows parties to challenge the adaptation of a measure or order, the reasoning should provide for relevant information on how the obligation of adaptation has been carried out.

According to Art 72 of the Rules of procedure for the court the enforcement court may accept a request for execution of a judgment and deliver a writ of execution by putting a seal on the copy of the brief for the court, when the brief is made in such a manner that the content of the request in entirety responds the text of the writ of execution. However, in regard to the adaptation of a measure or order, issuing a writ of execution in this manner would not be adequate, especially because it would not contain reasoning of the judgment.

The possibility to challenge the adaptation of a measure or order before court is consistent with the aim of removing the obstacles for a free cross-border movement of judgments. Namely, the possibility to appeal against adaptation of a measure or order ensures adequacy of the provided adaptation which has been entrusted on judges or non-judicial authorities from a Member State other than the Member State of origin of the judgment. At the same time, as noted by the academic literature, it also contains potential to prolong the secondary litigation concerning the actual recognition or enforcement of a judgment and thereby to obstruct, rather than expedite the free movement of judgments in the EU (Dickinson & Lein (eds.), 2015: 508). So, it is of importance to ensure that both the adaptation and the appeal are entrusted to authorities adequately equipped to conduct the proceedings.

Assuming that in Croatia, the appeal challenging the adaptation should be lodged to county courts as courts of second instance with which appeal against a writ of execution of the judgment is to be lodged, what would be the nature and the scope of the appeal? Whether the appeal on adaptation could be lodged together with an appeal against the writ of execution of the judgment or separately?

Some guidance can be found in German law where Art. 1114 of the German Civil Procedure Act prescribes reasons for appeal against the adaptation of a measure or order carried out in Germany as the Member State addressed. According to Art 1114 of the German Civil Procedure Act an appeal against the adaptation of a measure or order may be lodged related to measures granted by a court officer (bailiff) or enforcement court (according to Art. 766 the appeal must concern the way in which execution was carried out), measures granted by the enforcement court or measures granted by a procedural court (according to Art. 793 the appeal must concern rendering of a decision without hearing of the parties) and measures granted by a land registry (according to Art 71 the appeal must concern decisions rendered by a land registry and requests for registration deletion). According to the implementation provision in Art 1114 of the German Civil Procedure Act only appeal against a positive decision on adaptation seems possible. However, as elaborated earlier, there are also arguments in favour of opting for a broader interpretation of Art. 54 (2) of the Brussels Ia Regulation which would also provide the possibility of an appeal against the refusal of adaptation.

The lack of implementation provisions regarding Art 54 (2) of the Brussels Ia Regulation in Croatian law raises concern over the effect of the successful request of the parties to annul the adaptation. Namely, the academic literature warns of the need for the Member States implementing legislation to define the potential influence that the appeal against adaptation of a measure or order may have on recognition and enforcement proceedings in the Member State addressed (Dickinson & Lein (eds.), 2015: 510). In the absence of implementation provisions in Croatian law it could only be hoped that guidance from the CJEU on the matter will be provided in the near future.

4 Conclusion

The abolition of *exequatur* under the Brussels Ia Regulation was aimed at removing the obstacles to the free circulation of judgments in line with the principle of mutual recognition. In order to achieve that aim the controls in the Member States with respect to foreign judgments have been lowered. However, this does not mean that “import” of a foreign judgment in the Member State addressed should be done unconditionally. So, a certain level of control apart from public policy control was retained by Member States through a new adaptation obligation pursuant to Art. 54 (1) of the Brussels Ia Regulation.

Due to the fact that the Brussels Ia Regulation has entered into force on 10 January 2015, and its provisions on enforcement apply to decisions that were rendered in legal proceedings instituted on or after 10 January 2015, the analysis of operation of Art. 54 of the Brussels Ia Regulation provided in the paper is limited to aspects deriving from the lack of implementation provisions in Croatian law. Namely, at the moment, there is no experience with the application of Art. 54 of the Brussels Ia Regulation in Croatia, so it can be presumed that it will still take some time to reveal all of the obstacles to its operation in Croatian legal system. All of the open issues regarding adaptation of a measure or order contained in a foreign judgment in Croatia can be addressed and resolved in implementation provisions which would define:

- the courts competent to adapt a measure or order contained in a foreign judgment,
- the courts before which the adaptation of a measure or order may be challenged,
- if adaptation of measure or order is carried out *ex officio* or at the request of the parties; and in the case of the latter, if both parties are entitled to request adaptation,
- who would be entitled to challenge the adaptation of a measure or order before court,
- would the appeal against adaptation be lodged separate from the appeal against a writ of execution of a judgment,
- what are reasons for appeal against the adaptation of a measure or order,

- what are the time limits concerning an appeal against the adaptation of a measure or order.

Presuming that these open issues regarding the operation of Art 54 of the Brussels Ia Regulation in Croatia would be resolved by implementation legislation, there still remain challenges in ensuring that adaptation of measure or order will be carried out properly.

Interventions in terms of additional education and training of enforcement judges, especially in the field of EU legislation is among key tools to ensure the smooth functioning of adaptation of a measure or order pursuant to Art 54 of the Brussels Ia Regulation. Also, in order for the enforcement court to be able to give full effect to an incoming judgment within Croatian legal system, the enforcement judge will have to tailor a measure or order unknown under Croatian law to the equivalent domestic measure or order based on the information provided in the judgment and the certificate presented by a judgment creditor. This can be achieved only if the enforcement judge has sufficient knowledge of the operation of the measure or order contained in the foreign judgment as well as the motivation and skills to imply such a comparative evaluation and transformation. Additionally, enforcement judges should be directed towards the greater use of cooperation instruments provided under the European Judicial Network and the information available through the e-Justice Portal. Given the standards which need to be provided in order for the adaptation of a measure or order to be carried out, the question whether only certain (specialized) courts in Croatia should be entrusted with the obligation of adaptation should be addressed in the implementation legislation.

As appears from the analysis, there are open issues regarding the operation of Art 54 of the Brussels Ia Regulation in Croatia and some of them have been addressed in detail in the paper. It is to be hoped that a methodical approach of Croatian legislator will be employed and that implementation provisions regarding the adaptation device under Art 54 of the Brussels Ia Regulation will not only provide answers to the issues highlighted in the paper but also provide a sound framework under which recognition and enforcement proceedings of foreign judgments subject to Croatian law will operate without obstacles.

Notes

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

² Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20. 12. 2012, p. 1–32.

³ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, p. 32–42.

⁴ Regulation No 1346/2000 on insolvency proceedings, OJ L 160, 30. 6. 2000. p. 1–18.

⁵ Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12, 16. 1. 2001, p. 1–23.

⁶ Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23. 12. 2003, p.1–29.

⁷ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24. 5. 2008, p. 3–8.

⁸ Regulation No 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, OJ L 7, 10. 1. 2009, p. 1–79.

⁹ Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27. 7. 2012, p. 107–134.

¹⁰ Regulation No 805/2004 creating a European Enforcement Order for Uncontested Claims, OJ L 143, 30. 4. 2004, p. 15–39.

¹¹ Regulation No 1896/2006 creating a European Order for Payment Procedure, OJ L 399, 30. 12. 2006, p. 1–32.

¹² Regulation No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1–22.

¹³ Conflicts of Law Act Concerning the Resolution of Conflicts of Laws with the Provisions of other Countries in Certain Matters (Official Gazette of ex SFRY nos. 43/82, 72/82, Official Gazette no. 53/91).

¹⁴ Zivilprozessordnung from 5 December 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), last changes in Art. from 11 March 2016 (BGBl. I S. 396).

¹⁵ Similar approach can also be found in Maintenance Regulation (Linton, 2016: 280).

¹⁶ In the legal tradition of Croatia as well as legal systems of other SEE countries there was a special delibation procedure for recognition and enforcement of foreign judgements which was designed after the Roman model (Vuković & Kunštek, 2005: 420; Adolphsen, 2014: 179).

¹⁷ The requirements are prescribed in Art. 89-93 of the Croatian PIL Act.

¹⁸ See the concern in the Stellungnahme des Bundesministeriums der Justiz (Deutschland) zum Grünbuch Überprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/germany_de.pdf>, p. 3.

¹⁹ Information available at the e-Justice Portal.

²⁰ Enforcement Act (Official Gazette no. 112/12, 25/13, 93/14).

²¹ Rules of procedure for the court (Official Gazette no. 37/14, 49/14, 08/15, 35/15, 123/15).

²² See also Recital (26) of the Brussels Ia Regulation.

²³ Civil Procedure Act (Official Gazette no. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14).

²⁴ The German delegation unsuccessfully proposed that Art. 54 should specify that its adaptation be carried out by a court unless the relevant Member State authority was competent to make the adaptation (Council document 9758/12 [10 May 2012], 3).

²⁵ Judgment in *Szyrocka*, C-215/11, ECLI:EU:C:2012:794.

²⁶ According to Art 39 of the Enforcement Act application for execution have to include a request for execution specifying the enforcement or trustworthy document serving as basis for demanding execution, the execution creditor and the execution debtor, the claim whose fulfilment is demanded, and the means by which execution is to be enforced and, if necessary, the object with respect to which it is to be enforced. The motion also has to include other prescribed data required to enforce execution.

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