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Adaptation in the Intra-EU Enforcement of Civil and Commercial Judgments

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Abstract: This dissertation delves into the implementation and practical application of Article 54 of the Brussels Ibis Regulation, exploring its impact on the free movement of civil and commercial judgments across the European Union (EU). Through a comprehensive examination of the adaptation rule, it seeks to navigate the complexities arising from the diversity of national enforcement systems and the allocation of responsibilities between parties, (non)-judicial enforcement authorities and judges in the process of enforcing civil and commercial judgements.

Table of Contents

I.	Introduction	1
II.	Background	2
III.	Objective and Research Question	3
IV.	Methods	4
V.	Structure	5
VI.	Provisional Overview of Chapters	5
VII.	Provisional Planning	7
VIII.	Provisional List of Literature	8

I. Introduction

The cross-border enforcement of civil and commercial judgments across within the European Union (EU) is a process influenced by a multitude of legal, procedural, and institutional factors. As pointed out by Kennet, it “raises issues of European, private international and domestic civil procedure/enforcement law.”¹ At the heart of this process is often the Brussels *Ibis* Regulation,² which aims to facilitate the free movement of judgments among Member States.³ A judgment given in a Member State is recognised *ipso iure* in all Member States and can be enforced once it becomes enforceable in the Member State of origin. A creditor no longer needs a declaration of enforceability (*exequatur*) in the Member State of enforcement. In principle, a judgment given in another Member State must be enforced under the same conditions as a judgment given in the Member State of origin, although the law of the Member State where enforcement is sought governs the procedure. The implementation of the Brussels *Ibis* Regulation nonetheless varies significantly among the Member States due to divergent national legal systems, cultures, and practices in its 27 Member States, which may make political objectives such as attaining a ‘free movement’ of judgments difficult to implement in practice.⁴

¹ W Kennett, ‘Different National Enforcement Structures and Their Consequences for Cross-Border Enforcement’ in V Rijavec et al (eds), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (Wolters Kluwer 2018) 301, 353.

² Regulation 1215/2012/EU 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 (OJ L 351, 20.12.2012).

³ The aim to facilitate, as far as possible, the free movement of judgments was already expressed in the *Jenard*, Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C59/1, 5.3.1979) 43 (hereafter: *Jenard* Report) and later incorporated in Recital 6 of both the Brussels I Regulation and the Brussels *Ibis* Regulation.

⁴ See W Kennett, ‘Brussels I Recast: General Context of Enforcement Systems’ in V Rijavec et al (eds), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (Wolters Kluwer 2018) 273, 282-283.

This research aims to contribute to a deeper understanding of the complexities surrounding the cross-border enforcement of civil and commercial judgments within the EU, with a focus on the role and impact of the adaptation rule in Article 54 of the Brussels *Ibis* Regulation (II). The central inquiry revolves around understanding how this provision influences the free movement of civil and commercial judgments across the EU, particularly considering the diverse national enforcement systems and the allocation of responsibilities between the parties (non-)judicial enforcement agents and judges (III). By examining both legal frameworks and enforcement practices, it seeks to identify avenues for improving the efficiency and effectiveness of EU private international law and cooperation between domestic authorities (IV).

II. Background

Enforcement can be defined from a functional point of view as “the putting into effect of court decisions, and other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged.”⁵ Enforcement law in general is a terrain that is marked by significant divergences in national legal systems, procedural frameworks and specialised institutions. These disparities are emblematic of the diverse historical roots, principles, and underlying philosophies that shape the national organization of civil enforcement, including the allocation of responsibilities between parties, (non-)judicial enforcement agents and judges.

Within the EU, at least four distinct types of national enforcement systems can be identified.⁶ Bailiff-oriented systems, prevalent in countries like France and the Netherlands, afford a pivotal role to private enforcement agents in enforcing judgments. Court-oriented systems, such as those in Austria and Spain, instead place judges and judicial officers at the forefront of enforcement activities. Administrative systems, exemplified only by Sweden and Finland, delegate enforcement responsibilities to an administrative authority. Mixed systems, like that of Germany, involve a blend of judicial and non-judicial enforcement agents. Differences between enforcement systems, including between those that appear to belong to the same type,⁷ may give rise to legal and practical difficulties in cross-border enforcement,⁸ which is up to a certain extent anticipated by the newly introduced ‘adaptation rule’ in Article 54 Brussels *Ibis*.⁹

Article 54(1) Brussels *Ibis* provides that, if a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall – to the extent possible – be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin. Recital (28) highlights that rights indicated in a measure or in an order may also be

⁵ This definition is borrowed from the Council of Europe’s Commission for the Efficiency of Justice (CEPEJ) Recommendation Rec(2003) 17 of the Committee of Ministers to member states on enforcement.

⁶ See B Hess, ‘Comparative Analysis of the National Reports’ in M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe*, 2006, 35, 31-36; B Hess, ‘Different Enforcement Structures’ in CH van Rhee and A Uzelac (eds), *Enforcement and Enforceability* (Intersentia 2010) 41, 44-48; Kennett (n. 4), 287-294; W Kennett, *Civil Enforcement in a Comparative Perspective* (Intersentia 2021) 9-10, 36-60.

⁷ The Spanish enforcement system, for example, functions in a manner that is different from the Austrian system, even though both can be considered as Court-oriented systems from an institutional and comparative perspective.

⁸ Kennett (n 6) 587-590.

⁹ See W Kennett, ‘Adaptation Measures: Articles 54-55 Brussels I Recast’ in V Rijavec et al (eds), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (Wolters Kluwer 2018) 149-150.

subject to adaptation, as well as that how – and by whom – the adaptation is to be carried out is to be determined by each Member States. In addition, Article 54(2) Brussels *Ibis* provides any party the right to challenge the adaptation before a court.

The legislative origins of this provision are not clear,¹⁰ although it is generally presumed that it was introduced with the intention of enhancing the effectiveness of cross-border enforcement following the abolition of the *exequatur*. The aim seems to be ensuring that Member State judgments are given effect to the greatest extent possible, promoting the principle of mutual trust and facilitating judicial cooperation within the European Judicial Area.¹¹ Disparities between national enforcement systems, however, did not disappear with the abolition of the *exequatur* and may pose challenges for litigants seeking to enforce their rights across borders in the EU.¹²

The formulation of Article 54 Brussels *Ibis* has raised questions in legal scholarship regarding its potential scope, which may encompass a wide array of monetary and non-monetary judgments entering the free circulation of judgments within the EU.¹³ Moreover, scholars have highlighted the likelihood that (non-)judicial enforcement agents, rather than judges, may become responsible for assessing foreign measures and making necessary adaptations.¹⁴ The manner in which Member States have implemented their duties under Article 54 Brussels *Ibis*, as well as the practical challenges encountered in cross-border enforcement, however, remains largely unexamined. Empirical evidence on the problems faced by domestic authorities in enforcing judgments from other EU Member States is lacking,¹⁵ hindering a comprehensive understanding of how this provision affects the free movement of judgments in practice.

III. Objective and Research Question

This dissertation aims to examine the implementation and practical application of Article 54 of the Brussels *Ibis* Regulation. This provision plays a critical role in shaping the cross-border enforcement of civil and commercial judgments within the EU. The main question is how this provision influences the free movement judgments across the EU, particularly considering the diverse national enforcement systems and the allocation of responsibilities between the parties, (non-)judicial enforcement agents and judges.

To address the research question posed and achieve a comprehensive understanding of the implementation and practical application of Article 54 of the Brussels *Ibis* Regulation, a multi-

¹⁰ Kennett (n 9) 150-151. See also J Fitchen, 'Article 54' in A Dickinson and E Lein (eds), *The Brussels I Regulation recast* (Oxford University Press 2015) para 13.482.

¹¹ See, *inter alia*, Fitchen (n 10) paras 13.483-484; M Linton, 'The Concepts of Recognition and Enforcement: Bees in the European Bonnet' V Rijavec et al (eds), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (Wolters Kluwer 2018) 63, 72-73; V Lazić and P Mankowski, *The Brussels I-bis Regulation: interpretation and implementation* (Edward Elgar 2023) paras 7.271-274.

¹² TAG Bens, 'Mind the Gaps: Adaptation Mechanisms in the Intra-EU Enforcement of Judgments in Civil and Commercial Matters' in F Heindler and M Melcher (eds), *Die Achtung des Fremden* (Mohr Siebeck 2024) 17 ff.

¹³ See Kennett (n 9) 159-174; XA Kramer, 'Article 54' in Magnus U and Mankowski P (eds), *Brussels Ibis Regulation* (2nd edn, Otto Schmidt 2022) paras 1-8; C Koller, 'Article 54' Stein F and Jonas M, *Kommentar zur Zivilprozessordnung: Band 12 EuGVVO* (23rd edn, Mohr Siebeck 2022) paras 2-15.

¹⁴ See, *inter alia*, LJE Timmer, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?' (2013) *Journal of Private International Law*, 129, 138-139; Fitchen (n 10) paras 13.487-488; T Kruger 'The disorderly infiltration of EU law in civil procedure' (2016) *Netherlands international law review* 1, 17; Koller (n 13) para 16; Kramer (n 13) paras 14-15; Lazić and P Mankowski (n 11) para 7.274.

¹⁵ See Kennett (n 9) 151-152; Kennett (n 4) 283; Lazić and P Mankowski (n 11) para 7.440.

faceted methodology combining comparative and empirical approaches will be employed. This methodology is designed to analyse the national enforcement systems of selected EU Member States, examine the scope of Article 54 Brussels *Ibis* and its implementation, and investigate its application by their national enforcement authorities.

Austria, Germany, the Netherlands, and Sweden have been selected as the focus Member States for the purpose of this research, as they represent different ‘ideal types’ of enforcement systems within a rich tapestry of national enforcement cultures. The limitation to these Member States is justified by the resources available for this research, but it is important to keep in mind that the Brussels *Ibis* Regulation is applied in 28 heterogeneous domestic contexts.

IV. Methods

A comparative overview of the diverse national enforcement systems within the EU and the national enforcement systems of the selected EU Member States will be provided. A lot of work of comparative work has been done in the past 30 years to identifying commonalities and differences in the organisation of enforcement systems,¹⁶ the status and training of enforcement agents,¹⁷ the availability and effects of (non-)judicial enforcement titles,¹⁸ as well as the (in)direct methods and procedures for enforcement in the Member States.¹⁹ Literature and comparative reports will be examined with a particular view to the cross-border enforcement.

The framework of the ‘Brussels Regime’ and the scope of Article 54 Brussels *Ibis* will be addressed from a historical and analytical perspective. Analysis of official reports, policy documents, and commentaries by legal experts will be undertaken to elucidate the legislative intent behind the adoption of Article 54 Brussels *Ibis*. The analyses of the the legislative and procedural frameworks adopted by Austria, Germany, the Netherlands, and Sweden regarding the implementation of Article 54 Brussels *Ibis* similarly involves a detailed examination of legal texts, including domestic legislation, regulations, and case law relevant to the adaptation rule.

Semi-structured interviews with key stakeholders, including judges, court officers, bailiffs, and other enforcement personnel, will be conducted to gain deeper insights into their experiences with Article 54 Brussels *Ibis* and their perspectives on its effectiveness in facilitating the free movement of judgments. The structure of the interviews will be informed by the comparative part. Semi-structured interviews leave room for mapping the potential national divergence in the application of Article 54 Brussels *Ibis*, even when reliable quantitative data is absent.²⁰

The findings from the comparative and empirical analyses will be integrated to provide a comprehensive understanding of the implementation and practical application of Article 54 Brussels

¹⁶ See KD Kerameus, ‘Enforcement in the International Context (Volume 264)’ in: *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 1997); KD Kerameus, ‘Enforcement proceedings’ in *International Encyclopaedia of Comparative Law. Volume XVI, Civil Procedure* (Martinus Nijhoff Publishers 2002); W Kennett, *The Enforcement of Judgments in Europe* (Oxford University Press 2002); M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (BIICL 2005); V Rijavec et al (eds), *Remedies Concerning Enforcement of Foreign Judgments: Brussels I Recast* (Wolters Kluwer 2018); Kennett (n 6).

¹⁷ CEPEJ for example keeps track of statistics on the training of enforcement agents (www.coe.int/en/web/cepej).

¹⁸ See V Rijavec et al (eds), *Diversity of enforcement titles in the EU* (Springer 2023).

¹⁹ See for example the EU Enforcement Atlas (www.enforcementatlas.eu).

²⁰ See for an interesting example of the use of semi-structured interviews to deal with a similar lack of quantitative data E Edwardson and H Wockelberg, ‘European Legal Method in Denmark and Sweden – Using Social Science Theory and Methodology to Describe the Implementation of EU Law’ (2013) *European Law Journal* 364.

Ibis. Comparative insights will be used to contextualize the empirical findings, allowing for a nuanced assessment of the adaptation rule's impact on cross-border enforcement within the EU. Discrepancies or contradictions between the different strands of analysis will be identified and critically evaluated to ensure the reliability and validity of the research findings.

By employing this multi-methodological approach, the research aims to generate novel insights into the implementation and practical application of Article 54 Brussels *Ibis* Regulation, thereby contributing to the ongoing discourse on removing obstacles to the free movement of judgments within the EU. Through examining both legal frameworks and practical enforcement practices, it seeks to identify avenues for improving the efficiency and effectiveness of EU private international law and promoting cooperation.

Limitations of these methods may include the availability of relevant legal texts and data, as well as the willingness of enforcement authorities to participate in interviews. Efforts will be made to mitigate these limitations through comprehensive literature review, purposive sampling and building relationships with key stakeholders.

V. Structure

Chapter 1 introduces the topic of this dissertation and outlines the research questions, as well as the methods that will be used to answer them. It will also address the reasons for limiting the scope of the empirical part of this research to Austria, Germany, the Netherlands, and Sweden.

Chapter 2 provides a comparative and contextual overview of the diverse national enforcement systems within the EU of the national enforcement systems of the selected EU Member States

Chapter 3 delves into the provisions of the Brussels *Ibis* Regulation, focusing on Article 54 and its significance in promoting the free movement of judgments.

Chapter 4 analyses the legislative and procedural frameworks adopted by the selected Member States regarding the implementation of Article 54 Brussels *Ibis*.

Chapter 5 presents empirical findings concerning the application of Article 54 Brussels *Ibis* by enforcement authorities in the selected Member States, shedding light on operational challenges and best practices.

Chapter 6 synthesizes the findings, evaluates the effectiveness of Article 54 Brussels *Ibis* in achieving its objectives, and proposes recommendations for enhancing the harmonization of civil enforcement across the EU.

VI. Provisional Overview of Chapters

Chapter 1: Introduction

- A. Adaptation in the intra-EU enforcement of civil and commercial judgments
- B. Objectives and research questions
- C. Methodology
- D. Limitations

Chapter 2: Comparative Analysis of National Enforcement Systems

- A. Comparative overview of national enforcement systems within the EU
- B. The national enforcement systems of Austria, Germany, the Netherlands, and Sweden
- C. Analysis of similarities and differences in enforcement procedures and practices
- D. Discussion on the implications of these differences for cross-border enforcement

Chapter 3: The Brussels *Ibis* Regulation and Article 54

- A. Background and history of the Brussels/Lugano regime
- B. The consequences of the abolition of the *exequatur*
- C. The legislative intent behind the adoption of Article 54
- D. The scope of Article 54
- E. The (in)significance of Article 54 in facilitating the free movement of judgments

Chapter 4: Legislative and Procedural Frameworks in Selected Member States

- A. Analysis of the legislative and procedural frameworks adopted by Austria, Germany, the Netherlands, and Sweden regarding the implementation of Article 54
- B. Examination of further relevant domestic legislation, regulations, and case law
- C. The impact of domestic legal and procedural implementing measures for the effective cross-border enforcement of judgments

Chapter 5: Empirical Findings on the Application of Article 54 Brussels *Ibis*

- A. Presentation of empirical findings on the application of Article 54 by enforcement authorities in the selected Member States
- B. Further insights from interviews administered to national enforcement authorities
- C. Analysis of operational challenges and best practices encountered in enforcing judgments across borders
- D. Discussion on the effectiveness of Article 54 in promoting harmonization of civil enforcement

Chapter 6: Synthesis, Evaluation, and Recommendations

- A. Synthesis of comparative and empirical findings
- B. Evaluation of the effectiveness of Article 54
- C. Recommendations for enhancing the harmonization of civil enforcement across the EU
- D. Suggestions for future research and policy implications

Bibliography

List of case law

Appendices

VII. Provisional Planning

- WS 2023/2024: - Preparation of exposé
 - Seminar to present and discuss intended doctoral project
- SS 2024: - Lecture on applied legal methods
 - Seminars in the field of doctoral research
- WS 2024/2025: - Research and drafting of doctoral thesis
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- SS 2025: - Research and drafting of doctoral thesis
 - Summer course The Hague Academy of International Law
- WS 2025/2026: - Research and drafting of doctoral thesis
 - Preparation of semi-structured interviews for doctoral thesis
- SS 2026: - Conduct and process semi-structured interviews for doctoral thesis
- WS 2026/2027: - Draft conclusions and re-writing of doctoral thesis
- SS 2027: - Completion, submission, and defence of doctoral thesis

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