Ius Gentium: Comparative Perspectives on Law and Justice 111

Vesna Rijavec
Wendy Kennett
Tomaž Keresteš
Tjaša Ivanc *Editors*

Diversity of Enforcement Titles in the EU

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Foreword

I was happy to accept an invitation to write a foreword to this book. Academics and practitioners owe the elaboration of this (further) work to Prof. Dr. h.c. dr Vesna Rijavec. For many decades, she has creatively initiated and implemented international projects thanks to her energy and perseverance. Voices from smaller EU Member States have obtained and continue to obtain a surprisingly significant hearing in these projects. These voices deserve to be heard. For it is especially in places where the distance to the border—and therefore to a neighboring country—is short that people gain experience of everyday cross-border issues that, although apparently minor, nevertheless prove quite complicated to resolve.

Such experience has a positive effect when there is trust between those involved and common solutions can be found. This is made easier by a willingness to get to know and to understand the procedural law and procedural reality of the "other" states. When it comes to questions of enforcement, this is both necessary and arduous: the enforcement laws of the individual states are extremely diverse (including in terms of the way that they are implemented in practice). And this means that the ways that EU civil procedural law interacts with the enforcement laws of the Member States are also diverse. It is important to foster a proper understanding of these interrelationships in order to resolve the problems that arise. These are the objectives that inspired the experts who contributed to this book: contributions for which they deserve thanks and appreciation.

Graz, Austria
December 2022

Wolfgang Jelinek

Preface

Due to a persisting lack of mutual trust, national authorities of EU Member States continue to treat enforcement titles from other Member States with reservations and mistrust. The diversity of national rules on the enforcement titles significantly contributes to this problem. Accordingly, the main objective of the book is to address judgments, court settlements, and authentic instruments, their types, structure, contents, and effects, from a comparative legal perspective, in interplay with the rules on recognition and enforcement under the Brussels I bis Regulation. We consider it as an important scientific contribution, that the chapters provide a general overview of enforcement titles with an attempt at their systemization. On the other hand, the book offers several chapters with a more in-depth legal analysis of the elements of the system. The authors approach the research topic from both a practical and theoretical angle, offering important insight for academia as well as practice. Special contribution to the theory of civil procedure is reflected in discussions on the effects of enforcement titles; these expert discussions reveal the existence of a universal character of the binding effects of enforcement titles, which can be understood by equal arguments. To ensure a holistic understanding of the research topic, select contributions focus on the *lis pendens* effect and the effect of related actions, which are innately linked to the effect of *res judicata* judgments. Namely, the rules on the rejection of recognition and enforcement of foreign titles in Brussels I bis also include the irreconcilability of two enforcement titles. It thus raises the question of the identity of two titles, which has to be systematically and coherently explained in the rules that the Brussels I bis includes for preventing the existence of multiple titles. Altogether these rules address the thorny question of the identity of claims, which the CJEU often must deal with.

The book draws heavily from a rich source of national reports, case-law, and theory and intertwines the domestic approaches with supranational (cross-border) considerations. In this respect, the research findings may be of particular importance for any further (non)legislative intervention at both domestic and EU level, since they identify existing problems and seldom attempt to provide solutions for a more effective free movement of judgments within the EU—the silent, yet paramount

element for the proper functioning of the internal market and a cornerstone of effective judicial protection.

The research findings are based on the outputs of the "Diversity of enforcement titles in cross-border debt collection in the EU" project (831628—EU-En4s—JUST-JCOO-AG-2018). The content of this book represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for the use that may be made of the information it contains. The project was coordinated by the University of Maribor and performed jointly by a large consortium of partner institutions, chiefly among them universities. The tried and tested methods employed in the project have provided a bedrock of information and accumulated knowledge that was used in the preparation of the present book.

Maribor, Slovenia Vesna Rijavec
September 2023

Contents

Part I General Considerations and Classification of Enforcement Titles

Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks 3
Vesna Rijavec

Enforcement Titles in the EU: Common Core After All? 71
José Caramelo Gomes and Tomaž Keresteš

Part II Judgment

Types of Judgments According to Different Criteria 85
Eric Bylander and Marie Linton

Is a Judgment Always a Judgment? A Dutch-Belgian Comparative Perspective 101
Marielène Wertenbroek and Marta Pertegás Sender

Comparative View on the Divergence of Structure and Substance of Judgements 111
Katja Drnovšek

Comparative Issues Concerning the Determination of Interest 153
Maria Dymitruk and Maria Kaczorowska

Part III Effects of Judgments

Effects of Judgments in Cross-Border Perspective 173
Wendy Kennett

Searching for *Res Judicata* at the Edges of National Procedural Autonomy 195
Denis Baghrizabehi

The Effects of Judgments and Court Settlements in Cross-border Collective Redress and the Brussels I bis Regulation: Houston, We Have a Problem! 229
Jerca Kramberger Škerl

Enforceability and Enforcement Appeals: Continental Law 249
Bettina Nunner-Krautgasser

Pendency Rules 267
Vesna Rijavec

Related Actions 289
Denis Baghrizabehi and Tjaša Ivanc

Provisional Measures with a Cross-Border Element: Their Issuance, Co-existence, Recognition, and Enforcement 305
Neža Pogorelčnik Vogrinc

Part IV Court Settlements and Authentic Instruments

The European Dimension of Court Settlements: Open Issues and Regulatory Needs 333
Philipp Anzenberger

Authentic Instruments 351
Piotr Rodziewicz

Part V Other Cross-Border Considerations

Due Process and Cross-Border Enforcement in Lithuania and Portugal 365
Eugénio Pereira Lucas, Mykolas Kirkutis, Dalia Višinskytė, Remigijus Jokubauskas, and Darius Bolzanas

Recognition and Enforcement of EU Enforcement Titles in Albania as '3rd Country' and *Vice-Versa* 385
Flutura Kola Tafaj

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The European Dimension of Court Settlements: Open Issues and Regulatory Needs

Philipp Anzenberger

Abstract The legal framework on the international aspects of court settlements is currently rather scarce and inhomogeneous, which can cause a variety of problems: The European Regulations, to start with, contain no satisfactory definition of a court settlement, so that it is not clear for all legal acts in question whether the rules on judicial settlement apply to them. Furthermore, the lack of a uniform regulatory framework raises questions on the applicable regime for recognition and enforcement when rights and legal relationships from different areas of law are laid down in a single court settlement. Other open questions concern international jurisdiction for the conclusion of court settlements as well as the possible effects of *lis pendens* on the admissibility of a court settlement. And finally, the different European Regulations contain a rather divergent set of rules on recognition and enforcement of court settlements, which can be questioned from the perspective of legal policy. All these topics shall be addressed in this article.

1 Introduction

Court settlements are one of the core instruments for amicable dispute resolution before court in many European countries.[1] A European legislator that aims to promote consensual conflict resolution must therefore *enable the free circulation of court settlements* within the European area of justice. The legal situation in the individual Member States is very heterogeneous in this regard: there is a multitude of different mechanisms for amicable dispute resolution before court in the respective procedural systems, not only regarding the formal rules for their conclusion (such as

[1] For Austria cf. Anzenberger (2020a), p. 1; for Germany cf. Wolfsteiner (2020), para 794 ZPO, margin 1.

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'consent judgments' or amicable settlements during or even before the proceedings), but also in their dogmatic construction (often, but not necessarily, court settlements are understood as dual-functional procedural acts,[2] meaning, that they consist of a procedural and a substantive part). However, the regulatory framework on a European level is rather loose regarding court settlements, which can be problematic in certain scenarios (although in many cases the parties will comply with the settlements they concluded, so that the current deficiencies often do not come to light). This article will outline some of the issues that may occur during the conclusion and circulation of court settlements in a cross-border context and will analyze whether and to what extent the current regulatory framework offers satisfactory solutions. More precisely, we will address questions of the *legislative technique* of the European Regulations (Sect. 2), issues arising during the *conclusion of court settlements* in a cross-border context (Sect. 3; such as the question of international jurisdiction), as well as problems with the *cross-border circulation of court settlements* (Sect. 4; especially regarding their cross-border enforceability, but also the possible transfer of other effects of a court settlement).

2 Issues Regarding the Legislative Technique

2.1 No Uniform Regulatory Framework

Typically, the national legislators allow the conclusion of court settlements in many *different areas of private law*.[3] Since the procedural provisions for those different areas of law are laid down in separate regulations, the European legislator has therefore also assigned rules on recognition and enforcement of court settlements to those respective regulations: Rules on enforcement (and partly also on recognition) can be found in Art. 59 Brussels Ia-Regulation,[4] Art. 65 Brussels

[2] For example, in Bulgaria (National report for Bulgaria, p. 66), in Germany (National report for Germany, p. 118), or in Slovenia (National report for Slovenia, p. 86); also cf. Anzenberger (2020a), pp. 24–71; Klicka (2015), para 206 ZPO, margin 8; Rechberger and Simotta (2017), margin 689.

[3] Cf. National report for Bulgaria, pp. 67–68; National report for Croatia, p. 45; National report for Cyprus, p. 58; National report for Czech, p. 33; National report for Germany, p. 122; National report for Italy, p. 50; National report for Poland, p. 63; National report for Slovenia, p. 87; National report for Sweden, p. 36.

[4] Regulation (EU) 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, OJ L 351, 20.12.2012.

IIb-Regulation,[5] Art. 24 of the Enforcement Order Regulation,[6] Art. 48 of the Regulation on Maintenance Obligations,[7] Art. 61 of the Regulation on Matters of Succession,[8] Art. 60 of the Regulation on Matrimonial Property Regimes[9] and Art. 60 of the Regulation on Property Consequences of Registered Partnerships.[10] This leads to *considerable fragmentation of the legal framework* for court settlements on a European level: While some regulations, for example, explicitly provide for the recognition of court settlements (e.g., Art. 65 Brussels IIb-Regulation; Art. 48 para. 1 of the Regulation on Maintenance Obligations), others merely contain rules on the enforcement of court settlements. Also, the modalities of enforcement vary significantly between the regulations: This concerns, in particular, the necessity of a declaration of enforceability, but also the grounds for a refusal of enforcement in another Member State (cf. in more detail Sect. 4.1).

This fragmentation can cause practical problems: As a matter of fact, it is possible for court settlements to regulate several rights and legal relationships that, if regulated separately, would *fall within the scope of different European regulations.*[11] Under Austrian law, for example, a single court settlement could contain claims arising from a bike accident and maintenance claims between two divorced spouses.[12] In such a case, it is necessary to identify which rules apply to the enforcement (and possibly to the recognition[13]) of this specific settlement. As long as the respective rights and legal relationships can be identified and separated (e.g., because they are listed individually in the court settlement), each claim can be assigned to the corresponding European Regulation and subjected to the respective

[5] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23.12.2003.

[6] Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004.

[7] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009.

[8] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 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.

[9] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016.

[10] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016.

[11] Cf. Anzenberger (2020a), pp. 143–144; Anzenberger (2020b), pp. 149, 154; cf. National report for Belgium, pp. 73–74.

[12] Anzenberger (2020a), pp. 220–222.

[13] Cf. Sect. 4.2.

enforcement regime.[14] This is due to the possibility of partial recognition and partial enforcement of enforcement titles.[15] A more complicated situation arises, however, where the *claim in question cannot easily be assigned to one single regulation*, e.g., where the payment of a sum of money has been agreed on, settling two different original claims (in the above example, claims arising from a bike accident and maintenance claims). In this case, literature suggests that the applicable regulation should depend on the 'main emphasis' of the settlement in each individual case.[16] If there is no clear main emphasis, some authors propose that the more specific regulation should apply,[17] which—according to this view—is methodically achieved by a 'generous interpretation' of the exceptions in Art. 1 para. 2 Brussels Ia-Regulation.[18] While these proposals can lead to satisfactory results in some cases, they can also raise demarcation problems in other cases. For example, there may be situations where it is not apparent which of the original claims forms the 'main emphasis' of the settlement. And there will be other situations where it is not clear which European regulation is more 'specific'. In the author's view, it would be more consistent to simply assume the emergence of a new civil claim (for the purposes of the Regulations on International Civil Procedure Law) in cases where the original claims are 'blended beyond recognition'.[19] This 'new' civil claim would then—in the absence of a specific legal nature—fall within the scope of application of the Brussels Ia-Regulation (cf. Art. 1 para. 1 Brussels Ia-Regulation). From the parties' point of view, this should not be problematic: if they wish to retain the enforcement rules provided for their original claims, they can structure the settlement according to their own ideas (and thus formulate the claims in a separable manner).

From the perspective of legal policy, this raises the question of the *necessity of such an artificial fragmentation*. The general reason for the existence of divergent procedural rules for various legal matters (both at a national and a European level) is that the societal values and interests involved in the clarification of facts can be different, depending on the subject of matter that needs to be investigated.[20] In some legal matters, for example, it may be desirable to have the court investigate circumstances *ex officio*, while in other matters, it may be preferable to place the responsibility for establishing the substantive truth in the hands of the parties. Also, displaying the substantive legal situation in a procedure may require different

[14] Brenn (2010), Article 58 EuGVVO, margin 5; Geimer et al. (2020), Article 59 EuGVVO, margin 9; Staudinger (2021), Article 59 Brüssel Ia-VO, margin 6.

[15] For the Brussels Ia-Regulation cf. Kodek (2014), Article 36 EuGVVO, margin 31; Leible (2021), Article 36 Brüssel Ia-VO, margin 14.

[16] Staudinger (2021), Article 59 Brüssel Ia-VO, margin 6.

[17] Mankowski (2021), Article 1 Brüssel Ia-VO, margin 79; Staudinger (2021), Article 59 Brüssel Ia-VO, margin 6.

[18] Mankowski (2021), Article 1 Brüssel Ia-VO, margin 79.

[19] Anzenberger (2020b), p. 155.

[20] Anzenberger (2020a), p. 218; Ballon (1980), pp. 45 et seq.

'technical' approaches, depending on the respective substantive law. In some legal matters—e.g., in inheritance matters—it may be necessary to involve several persons as parties to the proceedings, while questions in other fields of civil law may be better clarified in a two-party proceeding. In this respect, it is quite plausible that European Civil Procedure Law also provides for different rules for issues belonging to different substantive areas of law. However, there are good reasons for *questioning this sharp separation* of legal matters when concluding (and enforcing) a court settlement. In most European legal systems, the core of a court settlement is an agreement between the parties regarding rights or legal relationships,[21] which is approved or certified by a court in some way (cf. Sect. 2.2.2).[22] However, many aspects of a procedural system suddenly lose their justification when 'only' a court settlement is concluded (for example, protective considerations in favour of one party when determining jurisdiction). In Austria, for example, it is argued that a court settlement can also include claims belonging to different types of civil proceedings[23] and that the local jurisdiction regime can be disregarded when concluding a court settlement.[24] The same is true on a European level: since the procedural differences of the individual legal matters lose importance when the parties decide to conclude a court settlement, it would make sense to make the recognition and enforcement of court settlements *subject to a uniform regime* (for example, in one single European Regulation), regardless of the legal matter of (civil) rights and legal relationships laid down in the settlement. This would eliminate the divergences in the handling of court settlements in the various European Regulations and, at the same time, increase clarity and legal certainty for their cross-border circulation.

2.2 *Lack of a Precise Definition*

2.2.1 The Current Legal Situation in the European Regulations

Most of the European Regulations (in International Civil Procedure Law) not only contain explicit rules on the enforceability of court settlements but also provide a *definition* of this legal instrument: According to Art. 2 lit. b Brussels Ia-Regulation,

[21] National report for Belgium, p. 69; National report for Bulgaria, pp. 66–67; National report for Croatia, pp. 44–45; National report for Cyprus, p. 57; National report for the Netherlands, p. 39; National report for Germany, p. 118; National report for Poland, p. 62; National report for Slovenia, p. 87.

[22] National report for Belgium, p. 68; National report for Cyprus, p. 57; National report for Germany, p. 117; National report for Italy, pp. 49–50; National report for Lithuania, p. 32; National report for Spain, p. 59; National report for Sweden, p. 36; National report for Slovenia, p. 86; cf. National report for Croatia, p. 45.

[23] Anzenberger (2020a), pp. 220 et seq.; Fucik and Kloiber (2005), para 30 AußStrG, margin 1; Gitschthaler (2019b), para 30 AußStrG, margin 15.

[24] Anzenberger (2020a), p. 231; Fasching (1990), margin 1329; Gitschthaler (2019a), para 204–206 ZPO, margin 17; Kodek (2018), para 433 ZPO, margin 8.

for example, a court settlement is a 'settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings'. The definitions in Art. 2 para. 1 subpara. 2 of the Regulation on Maintenance Obligations, Art. 3 para. 1 lit. h of the Regulation on Matters of Succession, Art. 4 para. 9 of the Regulation on a European Account Preservation Order,[25] Art. 3 para. 1 lit. e of the Regulation on Matrimonial Property Regimes and Art. 3 para. 1 lit. f of the Regulation on Property Consequences of Registered Partnerships are almost identical. However, no explicit definition (but a very similar understanding of court settlements) can be found in Art. 24 of the Enforcement Order Regulation. In the Brussels IIb-Regulation the term 'court settlement' is not used at all; instead, Art. 65 Brussels IIb-Regulation speaks of 'agreements on legal separation and divorce which have binding legal effect in the Member State of origin' and 'agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin'.

A closer look at those definitions shows that they are quite vague and rather suboptimal from a legislative point of view. Not only is the term being defined actually used in the definition (thereby creating a circular logic), but there are also no positive criteria for identifying what legal acts may be considered a court settlement.[26] Some answers to these deficiencies can at least be derived from the case law of the ECJ, according to which 'settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention'.[27] The *lack of a sharp definition* may not be a problem in many cases because the concept of a court settlement is well-known in most Member States (although its concrete form varies between the different Member States and can be controversial in some of them, cf. Sect. 2.2.2). In some Member States, however, there are legal acts whose classification as 'court settlement' (Art. 2 lit. b Brussels Ia-Regulation) or as 'judgment' (Art. 2 lit. a Brussels Ia-Regulation) is less obvious, for example in Belgium, where there is the 'amicable settlement' (minnelijke schikking) as well as the 'consent judgment' (akkoordvonnis), which can be reached via settlement, via mediation or via collaborative negotiations.[28]

Scientific literature has proposed several *possible 'demarcation lines'* that might be used to distinguish between a court settlement and a judgment. One such proposition uses a mere formal distinction, according to which it should depend on whether the act in question takes the form of a judgment or a decision,[29] in which

[25] Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014.

[26] Cf. Frische (2006), p. 137 on the same problem regarding the definition of a judgment.

[27] Case C-414/92, Solo Kleinmotoren GmbH v. Emilio Boch, 2.6.1994, ECLI:EU:C:1994:221.

[28] National report for Belgium, pp. 67–69.

[29] Von Hoffmann and Hau (1995), pp. 217, 218; Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 6.

case it should not be considered a court settlement. Another criterion proposed in literature focuses on the functional role of the court, i.e., whether the court only documents the 'court settlement' and examines it in the light of certain minimum legal requirements or whether it takes a decision on the substance.[30] Finally, some authors suggest a distinction based on the effects of the act in question, where 'judgment-like' effects, such as a *res judicata*-effect, shall indicate that it is a judgment.[31] From the author's point of view, the most important factor for distinguishing a judgment and a court settlement is whether the legal act created is predominantly of a contractual nature (which also includes procedural contracts) or predominantly a sovereign decision.[32] This assessment takes into account both the formal form of the legal act and the functional role of the court.[33] The effects of the acts in question, however, do not constitute a suitable criterion for demarcation in the author's opinion, not only because the effects of judgments—as well as the ones of court settlements—can vary strongly in different Member States (and therefore there are no 'exclusive' effects that determine when to consider an act a 'judgment' or a 'court settlement'), but also because court settlements are perceived as 'judgment surrogates' in some legal systems, potentially generating the same legal effects as judgments.[34] Following this understanding, if the court of law takes a sovereign decision, then—as a rule of thumb—this legal act is to be considered a 'judgment' for the purposes of the Brussels Ia-Regulation, even if it was reached by consensus in the proceedings (for example, if one party admits the claim or if the parties can predetermine the facts on which the decision is based).

2.2.2 Common Core in the Member States?

When considering a possible definition of a court settlement on a European level, what comes to mind is to search for a *common core* in the various national legal systems. The national reports of this scientific research do indeed show that some characteristics are similar in all investigated Member States: The first noteworthy characteristic is that there has to be some sort of *agreement between the parties*: While—as one would expect—there are differences in the questions which substantive rights and legal relationships can be subject to a court settlement[35] (some

[30] Kropholler and von Hein (2011), Article 58 EuGVO, margin 1b.

[31] Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 9; Loyal (2022), Article 2 Brüssel Ia-VO, margin 22.

[32] Kropholler and von Hein (2011), Article 58 EuGVO, margin 1a.

[33] Anzenberger (2020b), pp. 153–154.

[34] In Slovenia, for example, court settlements are considered to have a res judicata effect (National report for Slovenia, p. 89).

[35] Cf. National report for Bulgaria, pp. 67–68; National report for Croatia, p. 45; National report for Cyprus, p. 58; National report for Czech, p. 33; National report for Germany, p. 122; National report for Italy, p. 50; National report for Poland, p. 63; National report for Slovenia, p. 87; National report for Sweden, p. 36.

legislations, for example, prohibit settlements on parental rights or maintenance between former spouses,[36] on matters of personal status[37] or marriage itself[38]) or regarding the question whether there actually has to be a dispute between the parties in order to conclude a settlement,[39] it appears that all investigated legal systems require a *consensus between the parties on the content of certain rights or legal relationships*.[40] However, it is noteworthy that, in some legal systems, a court settlement can also be concluded by merely agreeing on the termination of the proceedings (as some authors in Germany[41] and also in Austria[42] claim). Now, one could argue that the termination of the proceedings ends the current 'procedural relationship' between the parties and that these settlements would fall under the 'common core' as described above. However, even if a common definition of the court settlement would restrict its content to an agreement 'on the merits' of a possible procedure (and therefore exclude national 'court settlements' that merely lead to the termination of a procedure), no real harm would be done: If the only effect of a 'court settlement' is the termination of an ongoing proceeding, there is no real need for a transfer of effects to other Member States (since even the omission of *lis pendens* would not be a 'direct' effect, but rather a 'reflex' of concluding a court settlement, which means, that there is no need to 'export' the effect of termination a proceeding to other Member States).

The second characteristic found in every Member State is the necessity of some sort of *involvement of a court* when concluding the court settlement.[43] Again, there are various possibilities on how a court can be involved (for example, already before an action was brought in[44] or during proceedings;[45] in the presence of the parties[46] or

[36] National report for Bulgaria, p. 68.

[37] National report for Czech, p. 33; National report for Spain, p. 59.

[38] National report for Spain, p. 59.

[39] National report for Bulgaria, p. 66.

[40] National report for Belgium, p. 69; National report for Bulgaria, pp. 66–67; National report for Croatia, pp. 44–45; National report for Cyprus, p. 57; National report for the Netherlands, p. 39; National report for Germany, p. 118; National report for Poland, p. 62; National report for Slovenia, p. 87.

[41] National report for Germany, p. 118; Henckel (1970), p. 39; Mende (1976), pp. 30 et seq.; Paulus (2015), para 794 ZPO, margin 12.

[42] Klicka (2015), para 204–206 ZPO, margin 9; Trenker (2020), pp. 299 et seq.; differently Anzenberger (2020a), p. 55.

[43] National report for Belgium, p. 68; National report for Cyprus, p. 57; National report for Germany, p. 117; National report for Italy, pp. 49–50; National report for Lithuania, p. 32; National report for Spain, p. 59; National report for Sweden, p. 36; National report for Slovenia, p. 86; cf. National report for Croatia, p. 45.

[44] National report for Croatia, p. 44; National report for Poland, p. 62; National report for Slovenia, p. 86.

[45] National report for Croatia, p. 44; National report for Poland, p. 62; National report for Spain, p. 58; National report for Slovenia, p. 86.

[46] National report for Bulgaria, p. 67; cf. Anzenberger (2020a), p. 361.

by a mere written contract submitted to the court;[47] or regarding the mediatory role of the court[48]), but there seems to be the *necessity of* some sort of *approval by the court* before a court settlement can be validly concluded. The role of the court needs to be marked very clearly, though, since the *line between 'mere' court settlements and 'actual' consent judgments* seems to be drawn quite differently (and maybe not always very sharply) in the investigated Member States;[49] some Member States don't even know the concept of a consent judgment (or only in the forms of a "recognition judgment" or 'waiver judgment'[50]). Therefore, for the purposes of the European Regulations, it seems necessary to create a sharper demarcation line between court settlements and judgments.

In *other aspects* (such as the question of whether there needs to be a current dispute to conclude a settlement[51]), there are quite some *divergencies* among different Member States. This is generally not really problematic since creating international provisions for the transfer of effects of legal instruments does not require a complete identity of the prerequisites and effects of the legal instruments in question. Instead, it seems sufficient to find the core elements that determine court settlements for the purposes of the regulations and mark down its concept in comparison to other legal instruments (like decisions or other enforceable instruments). Therefore, a definition should be rather broad in this context to facilitate the cross-border circulation of court settlements and make it an attractive option of amicable dispute resolution in cross-border cases. Nevertheless, for reasons of practicability and predictability, the definition needs to be precise enough to know when exactly the rules relevant to court settlements are to be applied. It should therefore contain elements of the two characteristics that were found *a common core in the European Member States*, being a *consensus between the parties on the content of rights or legal relationships*, as well as the *involvement of a court* (either because the court approved the settlement or because it was concluded there in the course of the proceeding), and provide a *clear demarcation line to other legal instruments* (especially judgments).

[47] Foerste (2023), para 278 ZPO, margins 16 et seq.; Prütting (2020), para 278 ZPO, margins 44 et seq.; Saenger (2023), para 278 ZPO, margins 21 et seq.

[48] Cf. National report for Slovenia, p. 87.

[49] Cf. National report for Cyprus, p. 57; National report for Lithuania, p. 32.

[50] Deixler-Hübner (2018), para 394 ZPO, margins 1 et seq. and para 395 ZPO, margins 1 et seq.

[51] In Germany, for instance, a civil settlement can be transformed into a court settlement (National report for Germany, p. 119), which indicates that a court settlement can be concluded even if there is no (more) dispute; in the Dutch and Spanish legal system, however, the core of a court settlement is a dispute between the parties (National report for the Netherlands, p. 39; National report for Spain, p. 58); in Austria, a praetorian settlement can be concluded before the start of a legal dispute with judicial mediation before a district court (Anzenberger 2020b, p. 152).

3 Issues Regarding the Conclusion of Court Settlements

3.1 International Jurisdiction

The question of *international jurisdiction for the conclusion of court settlements* is rarely addressed in scientific literature, which is probably due to the fact that it is not explicitly mentioned in the European Regulations and rarely causes problems in practice. Nevertheless, it can gain importance where *rights and legal relationships that are not a subject of the dispute* are also to be settled in a procedural settlement (for example, in a so-called 'general settlement', where all open disputes shall be settled) and where some of these rights and legal relationships would fall under the exclusive jurisdiction of another Member State (for example, according to Art. 24 Brussels Ia-Regulation). For the scope of the Brussels Ia-Regulation, according to the prevailing doctrine in Germany and Austria, the *regime of international jurisdiction does not apply to court settlements*,[52] which means that court settlements could be concluded in every Member State, even despite the 'contrary' exclusive jurisdiction of a specific Member State. When looking at the wording of the provisions on jurisdiction in Chapter II of the Brussels Ia-Regulation, it is noticeable that they not only refer to 'judgments' in the sense of Art. 2 lit. a of the Brussels Ia-Regulation but use more general terms, such as 'suing' (Art. 4 para. 1, Art. 7 and 11 Brussels Ia-Regulation), 'in matters relating to' (Art. 17 para. 1 Brussels Ia-Regulation) or 'proceedings' (Art. 24 Brussels Ia-Regulation),[53] which could indicate applicability to court settlements. However, the enforcement of court settlements may only be refused due to a violation of public policy (*ordre public*; Art. 59 in conjunction with Art. 58 para. 1 Brussels Ia-Regulation), but not because of violations of exclusive jurisdiction (in contrast to 'judgments' according to Art. 45 para. 1 lit. e Brussels Ia-Regulation). If the European legislator had wanted the rules on international jurisdiction (and especially on exclusive jurisdiction) to be applied to the conclusion of court settlements, he would most likely not have reduced the grounds for a refusal to an infringement of public policy.[54] This argument, as well as the lack of any necessity to protect the parties[55] (who voluntarily decide to settle amicably), do in fact speak in favour of leaving aside the rules on international jurisdiction of the Brussels Ia-Regulation when concluding a court settlement. The same arguments can be brought forward with respect to the other European

[52] Cf. Anzenberger (2020a), pp. 231–233; Geimer et al. (2020), Article 59 EuGVVO, margin 9; Hess (2021), Article 2 EuGVVO, margin 23; Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 17; cf. for the mediation settlement Frauenberger-Pfeiler and Risak (2012), pp. 798, 801; differently Staudinger (2021), Article 59 EuGVVO, margin 8.

[53] Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 17.

[54] Anzenberger (2020a), p. 232; Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 17.

[55] Cf. Geimer (2000), pp. 366, 369; Peiffer and Peiffer (2023), Article 59 VO [EU] Nr. 1215/2012, margin 17.

Regulations as well: the grounds for refusal of enforcement of court settlements are very limited in all the Regulations (cf. Sect. 4.1), and the infringement of exclusive jurisdiction rules is not listed in any of them. Therefore, from the author's point of view, it is very convincing to *disregard the rules on international jurisdiction when concluding a court settlement* not only in the context of Brussels Ia-Regulation, but within the *scope of all European Regulations*.

3.2 *Lis Pendens as an Obstacle to the Conclusion of a Settlement?*

Another question that has received only little attention in legal literature is whether the European *lis pendens* also affects the conclusion of court settlements. This concerns in particular court settlements which are concluded outside of pending civil proceedings (for example, the Austrian praetorian court settlement according to para. 433 ZPO (Zivilprozessordnung[56]) or the mediation settlement according to para. 433a ZPO[57]). The admissibility of such a settlement despite *lis pendens* is—within the scope of application of the Brussels Ia-Regulation—supported by the wording of Art. 29 para. 1 Brussels Ia-Regulation, according to which the *lis pendens* shall affect *'proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States'*. The 'mere' conclusion of a court settlement outside of a 'regular' civil proceeding can—from the author's point of view—not be considered a separate 'proceeding' in the sense of Art. 29 para. 1 Brussels Ia-Regulation (the same is true for the wording of Art. 30 para. 1 Brussels Ia-Regulation: *'Where related actions are pending'*). Also, according to Recital 21 Brussels Ia-Regulation, parallel proceedings should be avoided '*in the interests of the harmonious administration of justice*' in order to avoid irreconcilable decisions in the different Member States. From this viewpoint as well, it seems preferable to allow court settlements despite *lis pendens* because they do not burden the administration of justice, but rather—due to the quick and amicable resolution of the dispute—significantly relieve it and therefore free up resources. In addition, provisions on a *lis pendens* (at least in general) also serve to protect the parties from repeated simultaneous claims by the other party.[58] However, such a purpose is not necessary during the conclusion of a court settlement (since the parties deliberately decide to do so). This is why, for example, the prevailing doctrine in Austria assumes the admissibility of a settlement conclusion despite

[56] Civil Procedure Code.

[57] Cf. Anzenberger (2020a), p. 152.

[58] Eichel (2023), Article 29 Brüssel Ia-VO, margins 9–10; Gottwald (2022), Article 2 Brüssel Ia-VO, margin 2; Mayr (2020), Article 29 EuGVVO, margin 1.

the national *lis pendens* in other proceedings.[59] Overall, it is therefore convincing not to consider *lis pendens* an obstacle for the conclusion of a court settlement in another Member State.

4 Issues Regarding the Cross-Border Circulation of Court Settlements

4.1 Divergencies in the European Regulations Regarding Enforcement

Probably the most important (procedural) function of a court settlement in practice is its *role as an enforcement title*.[60] Therefore, it is not surprising that all the aforementioned regulations (cf. Sect. 2.1) contain provisions on its cross-border enforceability. However, the respective modalities of enforcement, as well as possibilities for the debtor to object enforcement, can strongly vary in the respective regulations. While a *declaration of enforceability* is no longer required within the scope of the Brussels Ia-Regulation, the Brussels IIb-Regulation and the Enforcement Order Regulation (Art. 59 Brussels Ia-Regulation; Art. 65 para. 2 Brussels IIb-Regulation; Art. 24 para. 2 of the Enforcement Order Regulation), the creditor still needs this formal act within the scope of the other regulations (cf. e.g., Art. 48 para. 1 in conjunction with Art. 28 of the Regulation on Maintenance Obligations; Art. 61 para. 1 in conjunction with Art. 43 of the Regulation on Matters of Succession; Art. 60 para. 1 of the Regulation on Matrimonial Property Regimes; Art. 60 para. 1 of the Regulation on Property Consequences of Registered Partnerships).

There are also major *differences regarding the grounds for refusal of enforcement*: While according to most regulations, the enforcement of court settlements can only be objected due to an *infringement of public policy* (Art. 59 in conjunction with Art. 58 para. 1 Brussels Ia-Regulation; Art. 61 para. 3 of the Regulation on Matters of Succession; Art. 60 para. 3 of the Regulation on Matrimonial Property Regimes and Art. 60 para. 3 of the Regulation on Property Consequences of Registered Partnerships), some other Regulations (at least 'formally'—due to the *reference technique* of these individual provisions) allow an objection due to the untimely service of the document initiating the proceedings (Art. 24 lit. b of the Regulation on Maintenance Obligations), the incompatibility with an earlier decision (Art. 24 lit. c

[59] Anzenberger (2020a), p. 262; Ballon et al. (2018), margin 438; Klicka (2015), para 204–206 ZPO, margin 10; Kodek (2018), para 433 ZPO, margin 14; Schneider (2019), para 30 AußStrG, margin 6.

[60] Anzenberger (2020a), p. 22; Ballon et al. (2018), margin 439; National report for Austria, p. 64; National report for Croatia, p. 44; National report for Germany, p. 122; National report for Italy, p. 49.

and d of the Regulation on Maintenance Obligations; Art. 68 para. 1 lit. b and c as well as para. 2 lit. c and d Brussels IIb-Regulation) or even other grounds (cf. Art. 68 para. 2 lit. b Brussels IIb-Regulation). With regard to these last-mentioned grounds for refusal, however, it is quite questionable whether they can really be raised against the enforcement of a court settlement: After all, it is not very plausible to invoke an infringement of the right to be heard when concluding a settlement. Moreover, the irreconcilability with earlier decisions is also quite unlikely to play a considerable role in many constellations (since a court settlement will often also have a novation effect). If, on the other hand, a court settlement has been confirmed as a *European Enforcement Order*, according to Art. 24 para. 2 of the Enforcement Order Regulation, its enforcement can no longer be challenged at all.[61]

These divergencies between the individual regulations can be explained historically[62] and are to be accepted under the current legal situation. *De lege ferenda*, however, a *standardization of the legal situation between the individual regulations* would be desirable, especially since these distinctions have no factual justification as far as court settlements are concerned. This would—at the same time—increase clarity and legal certainty for cross-border circulation of court settlements and overall increase their attractiveness as a means for amicable dispute resolution.

4.2 Necessity to Transfer Other Effects of Court Settlements?

It remains to be discussed how other effects of a court settlement are to be dealt with in cross-border situations. In some Member States court settlements have *a res judicata-effect* (e.g., in Slovenia;[63] this is also advocated by some voices in Austria[64]), an *effect of substituting formal requirements*[65] (meaning that they replace other formal requirements for the conclusion of certain contracts), or a *constitutive effect*[66] (even regarding legal relationships that are not actually subject to the party's substantive power of disposal). The cross-border transfer of the effects of a legal act traditionally happens via recognition.[67] So, if a court settlement is recognized in the other Member States, its effects (for example, a *res judicata*-effect) extend to the

[61] Adolphsen (2022), Article 24 EuVTVO, margin 8; Rechberger (2008), Article 24 EuVTVO, margin 6.

[62] Neumayr and Nunner-Krautgasser (2018), pp. 116 et seq.; Rechberger and Simotta (2017), margins 1286 et seq.

[63] National report for Slovenia, p. 88.

[64] Anzenberger (2020a), pp. 115–144.

[65] Anzenberger (2020a), pp. 107–115.

[66] Cf. Anzenberger (2020a), pp. 144–146.

[67] Rassi (2020), Article 36 EuGVVO, margin 2; Rechberger and Simotta (2017), margin 1291.

recognizing state.[68] Therefore, the question of the possible *recognition of court settlements* can be of great significance.

Within the scopes of the *Brussels IIb-Regulation* and the *Regulation on Maintenance Obligations*, court settlements are *explicitly recognizable* (Art. 65 Brussels IIb-Regulation and Art. 48 para. 1 of the Regulation on Maintenance Obligations),[69] so that not only the effect of enforceability but also all other settlement effects extend to the other Member States. According to the ECJ[70] as well as the prevailing doctrine,[71] however, this is not the case within the scope of the *Brussels Ia-Regulation*: This doctrine is based on the fact that court settlements do not constitute judgments according to Art. 2 lit. a Brussels Ia-Regulation, so that the provisions on recognition (explicitly referring to judgments) do not apply. This doctrine is also supported by the systematic argument that the enforceability of court settlements is regulated in Art. 59 of the Brussels Ia-Regulation and that there is no reference to the applicability of the provisions on recognition in Art. 58 of the Brussels Ia-Regulation. A similar situation can be found in the *Regulation on Matters of Succession*: Art. 61 of this Regulation only contains rules for the enforceability of court settlements, provisions on a (possible) recognition are missing. Therefore, one could investigate the suspicion that the lack of rules on recognition may have been unintentional: Recital 8 of the Regulation explicitly states that, in *'order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, on applicable law, on* recognition[72] *or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession'*. A similar wording can also be found in Recital 59 of this Regulation. In the author's opinion, the wording '*or, as the case may be, acceptance*' (which, according to the intention of the European legislator, should represent a kind of 'weakened recognition'[73]), however, expresses that not every type of transfer of effects is to be applied to every listed legal act (but only insofar as the Regulation expressly provides for it).[74] So, in an overall assessment of this wording, from the author's point of view, there is *no clear indication* that the European legislator *wanted to allow the recognition of court settlements* within the regime of the Regulation on Matters of Succession. These considerations can be transferred to the regimes of the *Regulation on Matrimonial Property* and the *Regulation on Property Consequences of Registered Partnerships*. In these two

[68] Cf. Hess (2021), Article 36 EuGVVO, margins 2–3; Kodek (2014), Article 36 EuGVVO, margin 32; Neumayr (2023), margin 3.945; Nunner-Krautgasser (2010), pp. 794, 797; Oberhammer (2018), pp. 323 et seq.

[69] Sengstschmid (2010), Article 46 EuEheKindVO, margins 13 et seq.

[70] Case C-414/92, Solo Kleinmotoren GmbH v. Emilio Boch, 2.6.1994, ECLI:EU:C:1994:221.

[71] Kodek (2014), Article 36 EuGVVO, margin 22; Neumayr (2023), margins 3.939 and 3.949; differentiating and in much detail Frische (2006), pp. 130 et seq.

[72] The emphasis was inserted by the author.

[73] Cf. Franzmann and Schwerin (2023), Article 59 EuErbVO, margins 7–8.

[74] Anzenberger (2020a), p. 143.

Regulations, there are no explicit rules on recognition either (cf. Art. 60 of the Regulation on Matrimonial Property and Art. 60 of the Regulation on Property Consequences of Registered Partnerships), and there is an almost identical wording in Recital 16 of the Regulation on Matrimonial Property and Recital 16 of the Regulation on Property Consequences of Registered Partnerships.

So again, the '*picture' is fragmented* across the different European Regulations. And again, this is problematic for several reasons: It is possible that one single court settlement falls within the scope of multiple European Regulations and therefore is subject to different recognition regimes, which entails the problems and legal uncertainties already laid down in Sect. 2.1. Also, the 'non-recognizability' of settlements within the scope of some of the regulations weakens the attractiveness of court settlements as such in cross-border constellations, which is diametrically opposed to the tendency of the European legislator to promote amicable dispute resolution (as can be noticed, for example, in the creation of the Mediation Directive,[75] the Directive on Consumer ADR[76] or the Regulation on Consumer Online Dispute Resolution[77]). Therefore, from a legislative point of view, consideration should be given to the possibility of *standardizing and expanding the options for the recognition* of court settlements across the European Regulations.

5 Summary

Despite its practical relevance, the legal framework on international aspects of court settlements is rather inhomogeneous. There is currently *no sharp definition* of court settlements in any of the European Regulations, which is problematic due to the diversity of amicable conflict resolution instruments in the individual Member States. A closer look at the provisions on *international jurisdiction* and *lis pendens* shows that the respective rules cannot apply to court settlements. The rules on *recognition and enforcement*, on the other hand, are scattered among the different regulations (with a questionable substantial justification) and are designed rather heterogeneously regarding the scope and the modalities of the extension of the effects. From a legislative point of view, it would therefore be desirable to *harmonize the law* on the one hand and to *clarify the rules in force* on the other hand for the area of court settlements.

[75] 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.

[76] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013.

[77] Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013.

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