UNIVERSITÀ DEGLI STUDI DI MILANO

DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU EFFORTS

Project JUST-JCOO-AG-2019-881802

https://efforts.unimi.it

With financial support from the Civil Justice Programme of the European Union

Max Planck Institute LUXEMBOURG for Procedural Law

UNIVERSITÄT HEIDELBERG ZUKUNFT SEIT 1386

VRIJE UNIVERSITEIT BRUSSEL

In partnership with:

***Disclaimer**. This Final study is the result of a scientific research project elaborated for educational and general information purposes. It has not been tested in legal practice, and is neither intended to provide specific legal advice nor as a substitute for competent legal advice from a licensed attorney. The views, information, or opinions expressed herein are those of the authors and do not reflect the official opinion or position of the European Commission. The authors and the European Commission do not guarantee the accuracy, relevance, timeliness, completeness or the results from the use of the information herein. Any action taken upon the information in this document is strictly at the user's own risk. Both the Commission and the authors of this document disclaim any responsibility and/or liability for any use of the contents in legal practice.* This Final Study has been updated as of

30 October 2022.

UNIVERSITÀ DEGLI STUDI DI MILANO

DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU – "EFFORTS"

Final Study

edited by

Francesca C. Villata - Burkhard Hess

Introduction

The EFFORTS Project ("Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU") is aimed at improving the enforcement of claims by fostering better procedures, case-handling and cooperation in cross-border disputes. It tackles the Brussels Ia Regulation and the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order (hereinafter: "the EFFORTS Regulations") and their implementation in national procedural law in 7 Member States, i.e. Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg. To date, enforcement procedures are still mainly governed by domestic Member States laws. This results in fragmentation and inconsistency in the law: the different EU-instruments are horizontally inconsistent and they refer vertically to the different enforcement laws of the 27 Member States. The interaction of said EU and national rules signifies a major weakness of the system, making it difficult for practitioners, and even more for consumers and businesses, to be aware of the mere existence and practical functioning of the available mechanisms. The Report of a Consortium of EU Universities led by the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law JUST/2014/RCON/PR/CIVI/0082 (preceded by a Study conducted by Heidelberg University in 2002, JAI/A3/2002/02), identified a number of defects and divergences in Member States legislations which impair the effectiveness of said EU rules, as further confirmed by the 2014 Report on the enforcement of court decisions in Europe drafted by the European Commission for the Efficiency of Justice. Moreover, the 2010 Special Eurobarometer 351, Civil Justice Report had previously showed that (i) in cross-border cases 48% of the respondents felt that identifying the authorities competent for enforcement was the main difficulty, followed by language (40%) and costs (35%), as well as that (ii) awareness of the EU's uniform procedures was limited and their use was very low.

Against this background, a consortium of six Partners – University of Milan (coord.), Max Planck Institute Luxembourg, Heidelberg University, Vrije Universiteit Brussel, Pravni fakultet Sveučilišta u Zagrebu, and Vilnius University – have been conducting the EFFORTS Project, tackling the interaction of the EFFORTS Regulations with the targeted Member States laws on enforcement procedures. In their endeavor, the Project Partners have been lucky enough to be able to count on the cooperation of the Italian, Croatian and Lithuanian Ministries of Justice, together with national (Bundesrechtsanwaltskammer/German Federal Bar, Law-Made in Germany, Working-Group for International Commercial Law of the German Bar Association, Chamber of Judicial Officers of Lithuania, Bar Council of Milan, Italian Association of Family Layers) and cross-border associations of practitioners (International Bar Association-Litigation Committee, EuroCollectNet Lawyers). The Consortium is, of course, most thankful to the representatives of those entities for their steadfast support and ongoing mutual dialogue.

Notably, the Project pursued the following main objectives:

(I) to identify (a) the specific difficulties met by operators in applying the EFFORTS Regulations because of uncertainties/gaps/defects in national implementing rules, and (b) how the current practice addresses those difficulties, by means of analytical reports on the status quo of the Member States implementing rules and practice;

(II) to provide support and guidance to practice and policy-makers by elaborating (a) practice tools facilitating the application of the rules and mechanisms provided under the EFFORTS Regulations, with a strong emphasis on the aspects which are governed by Member States, (b) legislative recommendations for national-policymakers and EU policy-makers, and (c) one Report concerning digitalization of the relevant procedures;

(III) to spread awareness and trust in the procedures provided under the EFFORTS Regulations by (a) circulating the outcomes of the Project via the Project Website and dedicated social media accounts (Facebook, LinkedIn), (b) progressively building the "EFFORTS Network", including professionals and academics involved in the matter of cross-border enforcement of claims, (c) disseminating the final outcomes of the Project in a Final Conference which took place at the University of Milan in a hybrid format on 20 September 2022 and through this Final Study.

Overall, the aim of this Study is twofold. On one hand, the papers herein contained aim at presenting the scientific outcomes of the analysis of the obstacles and challenges to the implementation of the EFFORTS Regulations, posed by Member States' national implementing rules (or the lack of said rules). On the other hand, some solutions and approaches to overcome said challenges have been advanced by means of the Project deliverables: the theoretical assumptions and reasoning behind such deliverables can be found in the present collective study. Building upon the previous Project deliverables, the authors of the papers – Project team members and external experts – were invited to address selected crucial topics, identified as "horizontal" issues in the implementation of the EFFORTS Regulations. The Editors wish to thank each and every contributor for accepting the challenge and sharing their insightful views.

Our deepest gratitude goes, of course, to the Justice Programme (JUST) of the European Commission for enabling the EFFORTS consortium to walk those pathways and to bring its contribution to a swifter and more efficient cross-border enforcement of claims in civil and commercial matters.

Milan-Luxembourg-Heidelberg, Brussels, Vilnius, Zagreb, 28 October 2022

FRANCESCA C. VILLATA BURKHARD HESS

Current challenges in the EU rules on cross-border enforcement of claims

1. The certification of judgments under the EFFORTS Regulations

Marco Buzzoni *

Together with the abolition of exequatur, the use of standard forms intended to facilitate the circulation of titles across the Member States represents one of the main features of the EFFORTS Regulations. Indeed, the issue of uniform certificates of enforceability by the competent authorities of the Member State of origin represents a necessary step for the direct cross-border enforcement of domestic titles under both the EEO and Brussels I bis Regulations, as well as for the circulation of the decisions resulting from the harmonised procedures set out by the EOP, ESCP, and EAPO Regulations. Despite the ever-growing importance of certificates under European procedural law, however, very little attention has so far been paid to the actual rules governing this particular aspect of cross-border civil litigation.

The reasons for this (relative) lack of interest are easily identifiable: as European law remains almost entirely silent as to the legal regime governing certification, issues such as the procedure for issuing, the effects of, and the remedies available against certificates of execution fall almost entirely within the competence of national legislatures. As a result, not only does the legal regime surrounding certification remain highly fragmented among the 27 Member States, but difficulties that might arise regarding the use of standard forms are often overshadowed by more visible questions surrounding the interpretation of the uniform rules laid out in the Regulations themselves.

Against this backdrop, the research conducted during the EFFORTS Project cast light on several practical issues concerning the circulation of certificates of enforceability under the European Regulations. In particular, this presentation will focus on the certification of domestic judgments under the provisions of the EEO and Brussels I bis Regulations with a view to their enforcement in another European Member State. By way of background, Part I will provide a general overview of the common trends and distinctive features of uniform European certificates under these Regulations. Part II will then highlight some of the emerging tensions that have been exposed by the study of international practice and by the recent case law of the CJEU, especially regarding the new system set up by the Brussels I bis Regulation. Finally, Part III will lay out

* Research Fellow, MPI Luxembourg. This contribution preserves the oral style of the original presentation.

some good practices that have been brought to light in the course of EFFORTS and formulate some reform proposals.

I. From the EEO to Brussels I bis: Common trends and distinctive features of EU certificates

Even though the use of standard forms serves the same overarching goal under both the Brussels I bis and EEO Regulations – namely, allowing for the direct cross-border enforcement of titles within the EU – these two instruments have done so through the use of diverging legislative techniques. Beyond some common features, the two Regulations therefore differ quite significantly as to the rules governing the certification of titles falling within their scope.

Undoubtedly, the certification of titles pursues similar overall interests under the EEO and Brussels I bis Regulations. In fact, both Regulations compensated for the abolition of the exequatur stage in the Member State of enforcement by requiring the competent authorities in the Member State of origin to issue a certificate of enforceability designed to describe the title's content and to provide 'key information' to the competent enforcement authorities in the Member State of enforcement. Under Brussels I bis as well as under the EEO Regulation, the use of standard forms has therefore been conceived as a way to ensure the 'transportation' of the title from one Member State to another without sustaining some of the delays and costs associated with the exequatur stage – particularly those linked to translations and legal representation in the Member State addressed.

Beyond this common objective, however, the extent to which the European legislature has regulated the certification procedure differs quite significantly from one instrument to the other. On the one hand, in fact, the certification of judgments under the EEO Regulation must comply with the explicit requirements set out in Article 6 EEOR – which are designed to ensure that the title fulfils the definition of 'uncontested claims' and that the underlying procedure comports with the minimum standards set out in the Regulation – and remains subject to a uniform remedy set out in Article 10 EEOR. On the other hand, the Brussels I bis Regulation remains silent on the conditions that domestic judgments must fulfil to be certified under the Regulation, and Article 53 in particular does not provide any guidance as to the remedies that could be available in the Member State of origin, as well as any possible challenges against recognition or enforcement in the Member State of enforcement.

Despite these structural differences, the CJEU has nonetheless held – in cases such as *Buak v Korana* and *Salvoni v Fiermonte* – that the issue of certificates under the Brussels I bis Regulation constitutes, much like the certification as a European enforcement order under the EEO Regulation, a 'judicial act' that may be subject to review in preliminary references proceedings. The Court therefore suggested that the

certification of judgments under Article 53 Brussels I bis should not be regarded as a mere rubber stamp, but rather as an important part of the European regime governing the circulation of judgments under the EFFORTS Regulations. However, this recognition has also raised questions about the adequacy of Article 53 Brussels I bis and its implementation at the national level.

II. Emerging tensions under the current Brussels I bis regime

In particular, the research conducted during the EFFORTS Project has highlighted some tensions between the rules applicable to the issue of certificates under Article 53 of the Brussels I bis Regulation and the current principles governing the recognition and enforcement of judgments under this Regulation.

In the Member State of origin, the lack of any explicit rule governing certification of judgements has, for instance, given rise to some difficulties regarding the appropriate level of scrutiny that the competent authorities should apply to domestic judgments before issuing a certificate under Article 53 Brussels I bis. On the one hand, the general aim of simplifying the circulation of judgments within the EU implies that the issue of certificates should be 'almost automatic' (see AG Bobek in C-347/18, *Salvoni*, paras 56-57) and should not have the effect of replacing the abolition of exequatur with another intermediate procedure. Accordingly, these principles suggest that the Member States should handle certification through informal, *ex parte* procedures that do not 'shift' to the Member State of origin the checks that were previously made in the Member State of enforcement. On the other hand, however, certification also represents one of the main tools for implementing the so-called principle of 'extension of effects' (see Case 145/86, *Hoffmann*, art 54 Brussels I bis), according to which 'a judgment recognised or enforced under Brussels I bis should in principle be granted the same effects it enjoys in the State of origin'.

Against this background, some of the practices developed in the EFFORTS Member States revealed that the general directives given to Member States to deal with certification informally and expeditiously could sometimes conflict with the need to ensure that certificates circulating under the Brussels I bis accurately represent the content of the underlying decision. Indeed, national certification procedures may at times sometimes undermine this latter requirement, either because national law leaves the task of issuing certificates under the Brussels I bis Regulation to clerks or other court officers or because the certificates are filled in directly by the creditors and simply signed by the court of origin.

Furthermore, the lack of sufficient guarantees surrounding the certification of judgments under Article 53 Brussels I bis is also likely to have some additional spillover effects at the enforcement stage. On the one hand, in fact, the Brussels I bis Regulation itself does not provide any specific remedy against an erroneous

certification in the Member State of origin. On the other hand, Article 45 Brussels I bis does not list the issue of an inaccurate and/or unlawful certificate among the grounds of refusal set out in Article 45 Brussels I bis. As a result, it is unclear whether the recognition of a foreign judgment could be refused on the ground that the court of origin had wrongly issued the Article-53 certificate or whether, in that case, the creditor should be required to challenge the certificate in the Member State of origin (on this problem, see CJEU, C-568/20, *H Limited*).

III. Good practices and reform proposals

In order to fill the gaps left open by the European legislature and better deal with the difficulties that might arise in connection with the certification of judgments under the Brussels I bis Regulation, Member States should, at the very least, enact some implementing legislation laying out explicitly the procedure for certification and the remedies available under national law. In doing so, Member States should consider adopting some good practices highlighted by the Research Partners, such as conferring the power to issue certificates under Article 53 Brussels I bis to the same judge who decided the merits of the case and allow parties to apply for certification at the outset of the proceedings. This solution would indeed serve the interest of procedural economy while also conferring the authority to decide on the issue of the Article-53 certificate to the authority which is most familiar with the case.

At the European level, future reforms should consider amending the standard forms to provide more specific guidance to the issuing authorities and lay out explicit rules regarding the reviewability of the certificate both in the Member State of origin and in the State of enforcement. Additionally, the European legislature should consider expanding the forms to give full force to the doctrine of extension of effects, e.g. by allowing the certifying authority to liquidate the amount of a penalty ordered by the judgment (see art 55, cf C-4/14, *Bohez v Wiertz*) and/or to specify the *res judicata* effect of the judgment in the MS of origin (cf, on matters regarding consumer contracts, C-693/19 and C-831/19, *SPV Project*). Taken together, these modifications would help clarifying the role and value of Article-53 certificates and thus ensure better circulation of enforceable titles across the European Union.

Building on the deliverables drawn up in the framework of the EFFORTS Project,[1] the present Report formulates policy guidelines that the EU legislature and policymakers

[1] *Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU – EFFORTS* (Project JUST-JCOO-AG-2019-881802), with financial support from the Civil Justice Programme of the European Union. The EFFORTS Project is conducted by an international consortium including the Max Planck Institute Luxembourg and the Universities of Milan (coord.), Heidelberg, Brussels VUB, Vilnius and Zagreb (collectively referred to as the

may wish to take into consideration with a view to removing the obstacles that still affect the cross-border enforcement of judicial and extrajudicial titles in civil and commercial matters within the EU, and thus hinder the free movements of persons, capitals, goods, services, and judgments in the Area of Freedom, Security and Justice.

Against this background, this Report targets, in particular, problems that originate from the interaction between national procedural rules and five European Regulations allowing for cross-border debt recovery across the Member States, namely the Brussels I bis Regulation and the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order (collectively referred to as 'the Regulations').[2]

The interplay of these EU instruments with national rules signify, in fact, a major weakness of the current system, making it difficult for practitioners, and even more for consumers and businesses, to be cognizant of the mere existence and practical functioning of the available procedures and mechanisms in the different Member States.[3]

'**Project partners**'). For more information, see the Project's official website at 'Efforts', <https://efforts.unimi.it/>. With regards to the relevant Reports, see in particular the National Reports on Implementing Rules and Case Law, published under 'Reports' (*Efforts*), <https://efforts.unimi.it/research-outputs/reports/>; the National and International Exchange Seminar organised by the Project Partners between September 2021 and February 2022, published under 'Events' (*Efforts*), <https://efforts.unimi.it/events/>; and Marco Buzzoni and Carlos Santaló Goris. 'Report on Practices in Comparative and Cross-Border Perspective' <https://efforts.unimi.it/research-outputs/reports/> published under 'Reports' (*Efforts*). All the links cited in the present Report were last accessed 26 August 2022.

[2] i.e. Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, '**Brussels I bis Regulation**' or '**Brussels I bis**'): see esp. Burkhard Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu]; 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 (hereinafter, '**EEO Regulation**' or '**EEOR**'); Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the '**EPO Regulation**' or '**EPOR**'); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the '**ESCP Regulation**' or '**ESCPR**'); and 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 (hereinafter, the '**EAPO Regulation**' or '**EAPOR**').

[3] This was also evidenced in a 2002 Study conducted by Prof. Dr. Dres. h.c. Burkhard Hess on improving efficiency of enforcement of judicial decisions within the European Union upon

Having pursued clarity by identifying general trends and highlighting recurring issues affecting the cross-border enforcement of claims within the EU in the targeted Member States (namely, Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg)[4] and having fostered the improvement of existing national legislation by drafting Policy recommendations for national legislatures,[5] with the present Report the Project partners strive to contribute also to the improvement of existing EU legislation by drafting Policy guidelines for the EU legislature and policymakers.

In order to establish an efficient and agile mapping of the critical points and the envisioned path(s) forward, the following sections tackle the pertinent issues into homogeneous groups as follows:

- the Brussels I bis and the EEO Regulations (section II): as illustrated infra, all the Member States encompassed by EFFORTS followed a minimalist approach regarding the implementation of the Brussels I bis and EEO Regulations, to the point that several of them (Belgium, Croatia, and Italy) have not enacted any specific provisions in their national law yet. This approach has resulted in some significant uncertainties affecting both the certification of outgoing titles (II.A and II.B) and the direct enforcement of foreign judgments, court settlements and authentic instruments (II.C);
- the EPO and ESCP Regulations (section III): this association is premised on the fact that – unlike the Brussels I bis and EEO Regulations, which allow for the automatic recognition and enforcement of titles issued within the context of national procedures – the EPOR and the ESCPR embody fully fledged harmonised European procedures;[6]
- the EAPO Regulation, which will be addressed separately in light of its unique features (section IV);

---

request of the EU Commission: see Study No JAI/A3/2002/02 on Making More Efficient the Enforcement of Judicial Decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures. Illustrating that little harmonization occurred thereafter, see Fernando Gascón Inchausti and Marta Requejo Isidro, 'A Classic Cross-Border Case: The Usual Situation in the First Instance', in *Impediments of National Procedural Law to the Free Movement of Judgments*. *Luxembourg Report on European Procedural Law* vol. I, B. Hess and P. Ortolani (eds), (Beck/Hart/Nomos 2019) p 68 et seq.

[4] See 'Reports' (*Efforts*) <https://efforts.unimi.it/research-outputs/reports/>.

[5] See 'Policy Proposals' (*Efforts*) <https://efforts.unimi.it/research-outputs/policy-proposals/>.

[6] See, in part., Xandra Kramer, 'Specific Instruments', in *Impediments of National Procedural Law to the Free Movement of Judgments*. *Luxembourg Report on European Procedural Law* vol. I, B. Hess and P. Ortolani (eds), (Beck/Hart/Nomos 2019), p 207 et seq.

- finally, this Report lays out some cross-cutting initiatives that European institutions could pursue to strengthen the overall regime of cross-border enforcement within the EU (section V).

The Brussels I bis and EEO Regulations

By abolishing the exequatur proceedings across Member States for titles based on uncontested claims, the adoption of the EEO Regulation introduced what arguably remains the most significant innovation in the field of European judicial cooperation since the adoption of the Brussels Convention in 1968.[7] Since then, the principle of the direct cross-border enforcement of titles within the EU has progressively spread to other specific procedures[8] and sectorial instruments[9] before gaining a general consecration in the Brussels I bis Regulation. As a result, creditors with an enforcement title issued by one Member State can now directly pursue the enforcement of their claim in another EU State without first obtaining a declaration of enforceability in the Member State of enforcement.[10] In exchange, the EEO and Brussels I bis Regulations lay out the formal requirements designed to facilitate the circulation of titles from one Member State to another and afford some guarantees to the persons against whom the enforcement is sought.

The enforcement regime set up by the EEO and Brussels I bis Regulations rests on two basic pillars: firstly, these instruments require the competent authorities of the Member State of origin to issue a certificate[11] designed to provide the competent authorities of the Member State of enforcement with detailed information regarding the parties, the underlying claim, and any additional conditions that might be relevant for its enforcement; secondly, the Regulations describe the challenges available in the Member State of enforcement and set out a list of limited grounds of refusal that can be raised against the recognition and/or enforcement of an incoming title.[12]

---

[7] See Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968), *OJ* L 299, 31.12.1972, pp 32–42.

[8] See infra, sections III and IV.

[9] Most notably, see Regulation 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, pp 1–79.

[10] See art 5 EEOR, and art 39 Brussels I bis.

[11] See in particular arts 6, 9, 24, and 25 EEOR, and arts 53 and 60 Brussels I bis.

[12] Beyond this underlying structure, the two instruments still present some considerable differences. Most noticeably, the Regulations differ both with respect to their scope of application – the EEO Regulation being limited to the cross-border enforcement of uncontested monetary claims (see arts 1 and 3 EEOR) – and with regard to the grounds for of refusal of recognition and enforcement. Specifically, refusal of enforcement under the EEO Regulation is

However, the EEO and Brussels I bis Regulations do not go so far as to harmonise the rules governing the enforcement proceedings across the Member States. Rather, Articles 20 EEOR and 41 Brussels I bis explicitly state that the enforcement procedures remain governed by the law of the Member State of enforcement. Thus, significant differences still exist as to the requirements that creditors must meet to benefit from the direct cross-border enforcement regime set up by the European Regulations.

This 'diluted' harmonisation[13] of the enforcement phase may result in additional – and sometimes unnecessary – complications, and in an increase in costs for creditors and debtors alike. As such, it may ultimately lead to a failure of enforcement and even amount to a denial of justice. Apart from the inherent complexity of national civil procedures, these difficulties may especially stem from gaps and inconsistencies within the Regulations themselves. Indeed, lack of guidance and coordination at the European level adds a layer of difficulty to the proper identification and understanding of the process of enforcement by national authorities,[14] which may in turn lead to outcomes that deter economic operators from entering into cross-border relationships and hinder the very purpose of the European judicial cooperation in civil and commercial matters.

Against this background, the analysis of national rules and practices in the Member States studied has cast light on three main areas where the interaction between European and national law needs to be improved: the designation of the competent authorities and the applicable procedure regarding the certification of domestic titles with a view to their enforcement in another Member State (infra, II.A); the remedies available in the event of an erroneous or improper decision by the certifying authority (infra, II.B); and the rules governing the challenges against enforcement in the Member State addressed (infra, II.C). As illustrated, in particular, in the Report on Practices in Comparative and Cross-Border Perspectives, inconsistent positions across the seven Member States arise in these areas due to inadequate or insufficient guidance in the Regulations themselves and the scarcity of national implementation rules.

IV. Certification of outgoing titles: Issuance of certificates and governing procedure

limited to the irreconcilability between the incoming title and another title issued or recognised in the Member State of enforcement (cf arts 21 EEOR and 45 Brussels I bis).

[13] The expression is taken from Gascón Inchausti and Requejo Isidro (cit n 3), p 81.

[14] See Gascón Inchausti and Requejo Isidro (cit n 3), p 81, noting that: 'It is deplorable that the instructions given by the Regulation itself as to how to implement the rules are too vague'.

Under Articles 20 EEOR and 42 Brussels I bis, creditors who wish to avail themselves of the provisions of the EEO or Brussels I bis Regulation have to provide the enforcement authorities of the Member State of enforcement with the relevant certificate established by the competent authority in the Member State of origin.[15] These certificates play an essential role in the circulation of titles within the EU, as they contribute to the rapid and efficient enforcement of titles delivered abroad by providing 'key information' to the competent enforcement authorities and any interested party.[16] Despite the importance of certificates within the overall enforcement regime set out in the EEO and Brussels I bis Regulations, European rules nonetheless provide very little guidance as to the procedural standards that should govern their issuance in the Member State of origin.

Unsurprisingly, this situation has already raised serious interpretative issues and has led to a fragmented legal landscape across the Member States covered by the Project.[17] In light of these difficulties, deeper harmonisation in this area seems appropriate to avoid further impediments to the free circulation of titles within the EU.

Specifically, the first issue that would need to be clarified concerns the identification of the authority responsible for the certification of judgments covered by the EEO and Brussels I bis Regulations. On this point, Articles 6 EEOR and 53 Brussels I bis merely provide that the certificate should be delivered by the 'court of origin' without specifying the person or body who, within this court, should have the actual power to deliver the certificate.

In Case C-300/14,[18] the CJEU nevertheless ruled that the certification of domestic titles as an EEO requires 'a judicial examination' of all the requirements laid down in the Regulation and that, therefore, it could be carried out only by a judge.[19] The Court reached its conclusion by reasoning, on the one hand, that the 'legal qualifications of a judge are essential to the correct assessment — in a context of uncertainty as to the observance of the minimum requirements intended to safeguard the debtor's rights of defence and the right to a fair trial — of the remedies under national law in accordance with [the Regulation]'[20] and, on the other hand, that 'only a court or tribunal within the meaning of Article 267 TFEU is capable of ensuring, by means of a reference for a

[15] See arts 9 EEOR and 53, 60 Brussels I bis.

[16] Opinion of AG Bobek in Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:370, para 50, describing the role of the certificate set out in art 53 Brussels I bis.

[17] See Buzzoni and Santaló Goris (cit n. 1), sections II and III.

[18] Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, EU:C:2015:825, para 46.

[19] Ibid, holding.

[20] Ibid, para 47.

preliminary ruling to the Court of Justice, that the minimum requirements laid down by Regulation No 805/2004 are interpreted and applied uniformly throughout the European Union'.[21]

More recently, the CJEU also had twice the opportunity to affirm the 'judicial character' of the certification proceedings under Article 53 Brussels I bis.[22] However, it only addressed this issue at the threshold stage of admissibility and did not reach the question of whether the same rationales applicable under the EEO Regulations should also extend to certificates issued under Article 53 Brussels I bis.

As the research conducted by the Project Partners has shown, the Member States covered by the EFFORTS Project have drawn very different conclusions from the CJEU's case law. In a slight majority of States, the certification of titles under both the EEO and Brussels I bis Regulation is treated as a judicial function that has to be performed by a judge.[23] Some other States, however, may still distinguish between

---

[21] Ibid.

[22] Case C-579/17, *BUAK Bauarbeiter-Urlaubs - u Abfertigungskasse v Gradbeništvo Korana doo*, EU:C:2019:162, para 41; Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:661, para 31.

[23] See **Croatia**, **Italy**, **Lithuania** and **Luxembourg**, although with differences both in terms of the underlying logic and the practical implementation of this principle. As to the underlying logic, Croatia and Lithuania appear to have opted for an application by analogy of the domestic procedural rules applicable to writs of execution. In **Croatia**, see in particular art 36 of the Croatian Enforcement Act (*Ovršni zakon*); *adde* Alan Uzelac, Marko Bratković and Juraj Brozović, 'Collection of Croatian implementing rules' EFFORTS Collection of national implementing rules, pp 1–3, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Croatian-implementing-rules.pdf>; Ivana Kunda, 'Enforcement in national law and under the Brussels I bis: National report for Croatia' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), para 3.1 ff, <https://www.pf.um.si/site/assets/files/3539/national_report_croatia.pdf>. For **Lithuania**, see art 646 of the Lithuanian Code of Civil Procedure; adde, generally, Simantas Simaitis, Vigita Vebraite and Milda Markeviciute, 'Collection of Lithuanian Implementing Rules' EFFORTS Collection of national implementing rules, p 1, <https://efforts.unimi.it/wp-content. Conversely, the Italian and Luxembourgish solutions have been inspired by the recent case law of the CJEU on certification under the EEO Regulation (see Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, EU:C:2015:825, para 46) and Brussels I bis Regulation (see Case C-579/17, *BUAK Bauarbeiter-Urlaubs - u Abfertigungskasse v Gradbeništvo Korana doo*, EU:C:2019:162, para 41; Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:661, para 31). In **Luxembourg**, the judgment in *Imtech Marine* was explicitly mentioned as the reason for the latest reform of art 87 of the Amended Law on Judicial Organisation (*Loi modifiée sur l'organisation judiciaire*), which was enacted by the Luxembourgish Law of 15 July 2021 aiming at strengthening the efficiency of civil and commercial justice (*Loi du 15 juillet 2021 ayant pour objet le renforcement de l'efficacité de la justice civile et commerciale*). Accordingly, art 87 now provides that the certification must be performed by a judge rather than the chief court clerk (on

EEO certificates and certificates issued under Article 53 Brussels I bis[24] or consider that the certification is a task that can be performed by court officers, provided that they have received appropriate legal training.[25]

Against this fragmented background, the circulation of titles within the EU would greatly benefit from an explicit extension of the CJEU's holding in Case C-300/14 to

---

the previous regime, see Veerle Van Den Eeckhout, 'Collection of Luxembourg Implementation Rules' EFFORTS Collection of national implementing rules, p 7, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.8-Collection-of-Luxembourg-implementing-rules.pdf>). In favour of a similar interpretation in **Italy**, see Francesca C. Villata and others, 'Collection of Italian Implementation Rules' EFFORTS Collection of national implementing rules, p 6, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.2-Collection-of-Italian-implementing-rules-1.pdf>, and the references cited therein, n 3. Regarding the practical implementation of the principle, different views have been expressed as to whether due process should prevent the same judge who decided the dispute on the merits from examining the application for certification. For an overview of this debate in the context of the EEO Regulation, see Villata and others (supra, in this fn) n 51. In Luxembourg, the new art 87 of the Amended Law on Judicial Organisation weighs in favour of conferring the authority to certify a judgment to a different judge, as it provides that the certificate should be issued by 'the president or managing judge of the court that issued the judicial decision or the judge who replaces him/her'.

[24] In favour of an interpretation: **France** – which enacted specific rules conferring the power to issue EEO certificates to the judge who rendered the decision, but left the power to grant certificates under Article 53 Brussels I bis to the *Directeur de greffe* – as well as **Belgium** – despite the absence of any implementing legislation. In particular, for France, see Art 509-1 of the French Code of Civil Procedure, commented in Marco Buzzoni and Veerle Van Den Eeckhout, 'Collection of French Implementing Rules' EFFORTS Collection of national implementing rules, p 8, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf>. With regards to Belgium, the Belgian Circular of 22 June 2005 also granted the authority to issue or certify outgoing EEOs to the court's chief clerk of the court that delivered the judgment or approved the settlement. However, it is highly controversial whether this solution still applies following the CJEU's decision in *Imtech Marine.* See Kim Van der Borght and others, 'Collection of Belgian Implementing Rules' EFFORTS Collection of national implementing rules, p 2, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Belgian-implementing-rules.pdf>; on this debate, see also Thalia Kruger and Fieke Van Overbeeke, 'European Enforcement Order' in Jan von Hein and Thalia Kruger (eds), *Informed choices in cross-border enforcement: the European state of the art and future perspectives* (Intersentia 2021), pp 51–63 and the Belgian National Report written by Fieke Van Overbeeke at pp 161–190.

[25] This is the case in **Germany**, see § 1110 of the German Code of Civil Procedure, in connection with § 20(1) No 11 of the Judicial Officer Act (*Rechtspflegergesetz*). On these provisions, see Lobach and Reich (cit n 6) pp 4 and 8, noting that the rule predates the CJEU's judgment in *Imtech Marine* and that 'the question has arisen in the literature whether the German implementation rules, which provide for a certification by the judicial officer, are in full conformity with the EEOR'.

certificates issued under Article 53 Brussels I bis. Indeed, this solution would not only foster consistency among different instruments and avoid the multiplication of certification proceedings at the national level, but would also better fit the purposes of the certificate laid out in Article 53 Brussels I bis. In fact, even though the requirements for issuing such a certificate differ from those laid out in the EEO Regulation, it is indisputable that the certification of a title under Brussels I bis might also require the competent authorities of the Member State of origin to perform some fairly complex verifications. To give just a few examples, the court of origin should be able to assess whether the underlying decision falls within the temporal and material scope of the Regulation (including whether it corresponds to the definition of 'judgment'[26] set out in the Regulation and whether it was issued by a proper 'court'[27]) and correctly describe the legal effect of the decision in the Member State of origin (including, if applicable, the costs and interests) even if they do not explicitly appear in the decision itself.[28] Moreover, the certifying authority may also be required to verify that the court of origin had jurisdiction any time that the decision concerns a judgment ordering a provisional, including a protective, measure.[29] Taking into account the foregoing, the European legislature may consider amending the Brussels I bis Regulation to explicitly state that the authority to certify domestic titles with a view to their enforcement abroad should be conferred upon a judicial body designed in accordance with national law.

Furthermore, the amendment should also take the opportunity to clarify some of the uncertainties that have emerged with regard to the procedural issues governing the certification proceedings. In this regard, some national rapporteurs have questioned whether the principle of due process should prevent the same judge who decided the dispute on the merits from examining the application for certification,[30] and whether an application for certification may be lodged at the outset of the proceedings.[31]

---

[26] See CJEU, case *C-568/20, J v. H Limited,* EU:C:2022:264. On this judgment see, in part., Burkhard Hess, 'Exequatur sur exequatur (ne) vaut?', *IPRax* 2022, p 349*. See further CJEU,* Case C-579/17, *BUAK Bauarbeiter-Urlaubs - u Abfertigungskasse v Gradbeništvo Korana doo*, EU:C:2019:162. *On the difficult issues that may arise in connection with this question see, very recently: CJEU,* case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association v. Kingdom of Spain*, EU:C:2022:488. Cf Burkhard Hess, 'Annotation to CJEU, 20 June 2022, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*', *CMLR* 2022 (forthcoming).

[27] See CJEU, case C-551/15, *Pula Parking d.o.o. v Sven Klaus Tederahn*, EU:C:2017:193.

[28] See art 54 Brussels I bis and points 4 and ff of the standard certificates reproduced in Annex I of the Regulation.

[29] See art 42(2) Brussels I bis.

[30] For an overview of this debate in the context of the EEO Regulation, see Francesca Villata and others, 'Report on Italian Case Law' EFFORTS Collection of national case law <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/04/D2.9-Report-on-Italian-Case-

In our view, these questions should be answered by taking into account the principle of procedural economy and the fact that the judge who is called upon to issue the underlying decision is often best situated to assess whether the latter fulfils the certification requirements set out in the Regulation. Accordingly, parties should be explicitly allowed to apply for certification at the outset of the proceedings and submit their request to the same judge who renders the decision on the merits. This solution also has the advantage of striking a reasonable balance between the need to ensure compliance with the requirements set out in the Regulations and the importance of not replacing the exequatur proceedings in the Member State of enforcement with mirroring procedures in the Member State of origin.[32] Indeed, the certification requirement should not be understood as an additional opportunity for the debtor to call into question the regularity of the procedure followed in the Member State of origin.[33]

V. The viable challenges against the certificate for enforcement pursuant to the Brussels I bis and the EEO Regulations

A second area of the law where additional harmonisation at the European level has the potential to streamline the legal regime of cross-border enforcement under the EEO and Brussels I bis Regulations concerns the challenges available against erroneous, improper, or outdated certificates issued under these Regulations. As the research conducted by the Project Partners has shown, the current framework set out by these instruments seems remarkably inconsistent and unnecessarily complex. In our view, European law would thus greatly benefit from further simplification.

On the one hand, the EEO Regulation set up a very complicated system to deal with the question of erroneous, improper, or outdated EEO certificates issued in the Member State of origin. In order to deal with these issues, Articles 6 and 9 EEOR distinguish no less than four different scenarios that may give rise to three different

---

law.pdf> p 48. In **Luxembourg**, the new art 87 of the Amended Law on Judicial Organisation weighs in favour of conferring the authority to certify a judgment to a different judge, as it provides that the certificate should be issued by 'the president or managing judge of the court that issued the judicial decision or the judge who replaces him/her'.

[31] On this question, see in particular art 6 EEOR, as well as the discussions in Buzzoni and Santaló Goris (cit n. 1), pp 37–39.

[32] On this point, see also Opinion of AG Bobek in Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:370, para 54.

[33] See ibid, para 58: 'More particularly, the court of origin may not re-evaluate the substantive and jurisdictional issues that have been settled in the judgment the enforcement of which is sought'.

kinds of certificates.[34] Against this background, several uncertainties have arisen regarding the implementation of these provisions in national law.

For example, the national rapporteurs have raised concerns regarding the fact that, while EEO Regulation invariably refers to 'the court of origin' as the certifying authority, the different certificates laid out by the EEO Regulation may, in practice, rest on a plurality of court decisions rendered by different courts. Therefore, the reference to the 'court of origin' becomes ambiguous any time the relevant decision is issued by a court different from the one that issued the initial EEO.[35] The situation becomes even more

[34] Firstly, art 6(2) EEOR provides that the debtor should be allowed to apply for a certificate indicating the lack or limitation of enforceability any time that a judgment certified as an EEO has ceased to be enforceable or its enforceability has been suspended or limited (including, presumably, where this judgment has been subject to a successful review in accordance with art 19 EEOR); secondly, Article 6(3) provides that a 'replacement certificate' should be issued where a decision has been delivered following a challenge to a judgment certified as an EEO; finally, art 10 EEOR provides that a third kind of certificate that must be used by parties applying for the rectification or withdrawal of an EEO which contains a material error or was 'clearly erroneously granted' (a concept that is not defined in the Regulation itself).

[35] See Villata and others (cit n 22) pp 22–23 citing art 283 of the Italian Code of Civil Procedure. For an example of the litigation that these kinds of ambiguities may spark, see Cour de cassation, Civ. 2, 06.01.2012, No 10-23.518, cited in reported in Marco Buzzoni, 'Report on French Case Law' EFFORTS Collection of national case law, p 19, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/12/D2.11-Report-on-French-case-lawCONFIRMED.pdf>, p 41 (involving the enforcement of an incoming EEO). Analogous problems may also arise where the application to issue the certificate is initially denied, but then granted following a challenge that may be provided under national law. Similar difficulties may finally arise in connection with replacement certificates issued following a challenge to a judgment certified as a EEO. Indeed, art 6(3) EEOR does not itself specify the court to which the application for a replacement certificate should be addressed. Similarly, in Croatia, Article 357 of the Enforcement Act grants the power to issue EEO certificates to 'the competent courts, administrative bodies, notaries public and legal or natural persons with public powers'. As the rapporteurs noted, this reference should normally encompass both municipal and commercial courts, depending on the one which 'has rendered the decision on the merits'. See Uzelac, Bratković and Brozović (cit n 22), <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Croatian-implementing-rules.pdf>, pp 4–5. Until very recently, however, the communication made by the Croatian Government on the European e-Justice Portal only mentioned the former as the competent authorities for (re)issuance and suspension of the EEO. See ibid 5. Noticeably, the Croatian Government has since updated its communication to specify that: 'An application for rectification or withdrawal of a court certificate must be submitted to (…) the court that issued the certificate' (see 'European e-Justice Portal - European enforcement order (Croatia)', <https://e-justice.europa.eu/376/EN/european_enforcement_order?CROATIA&member=1>.

uncertain if one considers that standard forms implicitly suggest that the issuing authority may differ from the court that rendered the initial title.[36]

Furthermore, an additional set of issues raised by national rapporteurs concerns the creditor's right to appeal against a refusal to issue certificates under the EEO Regulation. In Italy, for instance, courts have come to inconsistent solutions on whether, in the absence of any specific remedy in the Regulation, creditors should be allowed to renew their applications or rather be required to challenge the refusal before the Court of Appeal following the relevant rules of domestic civil procedure.[37] Similarly, Italian courts were also confronted with the question of the remedies that, as a matter of Italian procedural law, should be available to debtors in cases where an initial application to withdraw the EEO has been rejected.[38] Overall, these cases not only show the importance of implementing explicit national rules to complement the provisions of the EEO Regulation, but also call for clearer and leaner guidance at the European level.[39]

By comparison to the cumbersome system of remedies set out by the EEO Regulation, the Brussels I bis Regulation seems, on the other hand, to have ended up to the opposite extreme of the spectrum. In fact, the provisions of this Regulation remain completely silent on the remedies available to the parties in case of a wrongful or erroneous decision on certification. However, despite the pivotal role of this area of enforcement law in the context of the cross-border circulation of titles across the EU, only two Member States enacted explicit provisions to tackle – to some extent – these issues in their national procedural laws vis-à-vis the Brussels I bis Regulation.[40]

---

[36] See point 3 of the standard forms set out in Annexes I to VI EEOR. On this possibility, see also André Huet, 'Titre exécutoire européen' (2020) Répertoire Dalloz droit international, No 43.

[37] On this debate, see Villata and others (cit n 29) p 48, and the cases cited therein.

[38] See Villata and others (cit n 34) p 48 and the references cited therein, suggesting that a challenge could be brought before the Court of Appeal, but that no further challenge is available before the Italian Court of Cassation.

[39] For some illustrations, see in particular Uzelac, Bratković and Brozović (cit n 22) p 5 (**Croatia**); Quincy C Lobach and Isabell Reich, 'Report on German Case Law' EFFORTS Collection of national case law, p 3, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/02/D2.10-Report-on-German-case-law.pdf>, p 5 (**Germany**). In **France**, art 509-7 of the Code of Civil Procedure only allows to challenge the refusal of certification if the determination has not been made by a judge. Therefore, this remedy is no longer available for the certification of judgments as EEOs since the adoption of Decree No 2017-892 of 6 May 2017, which transferred the authority to certify judgments from the chief court to the judge who issued the decision.

[40] In France art 509-7 of the Code of Civil Procedure provides that the refusal to issue the certificate under arts 53 and 60 Brussels I bis may be challenged before the President of the Regional Court (*Tribunal judiciaire*), which rules on the certification after hearing both the

Hence, the question of the remedies available against outgoing certificates and/or refusals of certification under the Brussels I bis Regulation remains pending in the majority of the Member States covered by the EFFORTS Project.[41]

In the meantime, the absence of clear guidance on this point, either at the European or domestic level has already exposed some serious flaws of the current regime. In France and Germany, in particular, courts have already had to rule on whether the authorities in the Member State of enforcement have the power to disregard the allegedly erroneous information contained in a foreign certificate, coming to partially inconsistent conclusions.[42] These decisions underline the importance of providing a

---

applicant and the requested authority. Conversely, however, the French Code of Civil Procedure does not include any explicit remedy for debtors or other interested parties who might want to challenge the issuance of the certificate. Similarly, French law does not specify how to apply for the rectification of material errors in the certificate that might affect recognition and enforcement under Brussels I bis (on this point, see also 'National Report: France' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), pp 11–12, https://www.pf.um.si/site/assets/files/3539/national_report_france.pdf). In Germany, on the other hand, § 1111(2) of the Code of Civil Procedure provides that the decision to issue a certificate under § 1111(1) may be contested through the same procedures as those available to challenge a court certificate of enforceability (*Vollstreckungsklausel*) under domestic law. Accordingly, German law did not set up any specific remedies for challenging the issuance or denial of certificates under the Brussels I bis Regulation but rather opted for the application by analogy of pre-extisting domestic procedural rules. Hence, the appropriate remedy may vary depending on the title whose enforcement is sought, the identity of the parties, and the kind of grounds (formal or substantive) raised by the applicant (see Lobach and Reich (cit n 6) p 2).

[41] For **Belgium**, see eg Stefaan Voet and Pieter Gillaerts, 'Interplay of Brussels IA Regulation and National Rules: National Report for Belgium' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), p 30, <https://www.pf.um.si/site/assets/files/3539/national_report_belgium.pdf> (suggesting that, in Belgium, national rules on the correction and the interpretation of judgments could also apply to certificates under the Brussels I bis Regulation); for **Croatia**, cf Kunda (cit n 22) pp 23–25, discussing the remedies that might be available under Croatian law; for **Lithuania**, cf 'National Report: Lithuania (part I)' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), pp 25–26, <https://www.pf.um.si/site/assets/files/3539/national_report_lithuania_-_part_1.pdf>, expressing the view that 'there is no specific legal remedy to challenge and/or withdraw the certificate of enforceability' in Lithuania.

[42] In France, three judgments issued in three different cases had to decide whether the enforcement of a foreign judgment certified under art 53 Brussels I bis could be refused because the underlying title fell outside the temporal scope of application of the Brussels I bis Regulation. In two out of three decisions, French courts held that they could not halt the enforcement because they lacked the authority to review the validity of a certificate issued in another Member State (see Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771, and Tribunal judiciaire de Paris, 17.09.2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion*; contra, see Cour d'appel de Paris, pôle 1 ch. 10, 04.03.2021, No 20/02881, all cited in Buzzoni

remedy to challenge the issuance of the Article 53 certificate in the Member State of origin in order to avoid the possibility of parties being treated differently depending on the State in which enforcement is sought.

In this context, future reforms of the European rules applicable to the cross-border enforcement of claims should consider two different options in order to break down some of the barriers that still impede the free circulation of titles within the EU.

The first option – and the most consequential one – would be to acknowledge that the development of the European instruments allowing for the direct enforcement of titles across Member States has simply outgrown the provisions of the EEO Regulation. Although the abolition of exequatur by the EEO Regulation was rightly seen as a major turning point in this process, the modalities of implementation of this principle have not been fully satisfactory. Additionally, the added value of this Regulation within the overall framework of the EFFORTS Regulation has considerably diminished since the adoption of the EPO Regulation – which provides a more streamlined procedure for the direct cross-border enforcement of uncontested claims – and the abolition of the exequatur in the Brussels I bis Regulation – which provides a general instrument applicable to most civil and commercial judgments, authentic instruments, and court settlements. As a result, the time might be ripe to adopt the Commission's proposal dating back to the recast of Regulation 44/2001,[43] finally abandoning the EEO Regulation and instead focusing on better regulating the certification process under the Brussels I bis Regulation.

The second option – which constitutes a more moderate alternative – would be to amend the EEO and Brussels I bis Regulations with a view to reducing the significant inconsistencies that currently affect these two Regulations. Specifically, the European legislature should work towards reducing and systematising the remedies available with respect to EEO certificates, on the one hand, and introducing a unique, simple remedy against certification decisions issued under the Brussels I bis Regulation. Ultimately, these remedies should be sufficiently aligned so as to permit national legislatures to act a unique set of implementing rules applicable to both Regulations. This solution would facilitate the work of national courts and legal practitioners, would

---

(cit n 52) pp 15, 20–23, 26–27). Confronted with a slightly different scenario, however, the Higher Regional Court in Munich rightly held that the enforcement of an Italian judgment ordering a provisional measure should be refused in a case where the foreign certificate did not include any description of the measure and did not specify whether the court had jurisdiction on the substance of the matter (Oberlandesgericht München, 09.11.2020, 7 W 1210/20, BeckRS 2020, 29974, cited in Lobach and Reich (cit n 36) p 5).

[43] See art 92 of the Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM(2010) 748.

reduce the risk of regulatory arbitrage, and would foster consistency and predictability at the European and national levels.

VI. Enforcement of foreign titles

Following a seemingly uncontroversial rule, the enforceability of a title falling within the scope of the Brussels I bis Regulation is, in principle, subject to the law of the Member State of origin.[44] Accordingly, Article 44(2) Brussels I bis provides that, where the enforceability of a judgment is suspended in the Member State of origin, the competent authority in the Member State of enforcement shall suspend the enforcement proceedings upon application of the person against whom enforcement is sought.

Nonetheless, among the main issues concerning national procedural obstacles to the circulation of judgments and extrajudicial titles are the obstacles to enforcement that arise in the interaction between EU law and domestic law, on the one hand, and between the national laws of the Member State of origin and that of enforcement, on the other.[45]

I. The relationship between claims for refusal of recognition and of enforcement

The first set of issues in this regard specifically concerns the relationship between claims for refusal of recognition and of enforcement under the Brussels I bis Regulation. On this point, Articles 45 and 46 Brussels I bis set out two different remedies (refusal of recognition and refusal of enforcement). These remedies appear to have the same object ('Grounds for refusal' in Article 45 Brussels I bis), but are subject to procedural rules that differ in part.

From the eminently procedural pointview, the underlying question is whether the ones mentioned above amount to two remedies with two different claims with partly different objects or to one claim for refusal with two different remedies and partly different procedures. Some Member States (e.g., France, Italy) have tackled the distinction between the refusal of recognition and enforcement; others (e.g., Germany, Luxembourg) have not explicitly addressed them. Based on French case law, such distinction has procedural consequences: the refusal of recognition normally exceeds the powers of the enforcement judge but can be considered as an incidental application

[44] See art 39 Brussels I bis. See also Buzzoni and Santaló Goris (cit n 1) p. 17 et seq.

[45] See, esp., Michele Casi, 'National Procedural Impediments to the Circulation of Judgments and Extrajudicial Titles', in 'EFFORTS International Exchange Seminar', on file with the author.

based on Article 36(3) Brussels I bis.[46] Based on this interpretation, one can question whether the two refusals are actually different and subject to different procedural rules.

Clarity in this regard would be beneficial, especially as to how the two refusals could be coordinated. To the extent that the answer to this question appears to be predicated on the time of the commencement of enforcement proceedings, there may be merit in defining this aspect via an harminized solution at the European level. Indeed, the guidance contained in Article 43 and Recital 32 Brussels I bis[47] seems insufficient on this point.[48]

II. Effects of the decision on the claim for refusal

The second issue concerns the effects of the decision on the claim for refusal under Brussels I bis, in particular the extension of the matters covered by *res judicata*. Article 38(b) Brussels I bis clearly distinguishes between these two kinds of decisions. Up to now, the extension of matters covered by *res judicata* has fallen under the competence of the national legislatures, which mostly shaped their legislative actions on general principles and rules of national civil procedure law.

The argument in favour of leaving these questions to the Member States rests on the fact that the need to coordinate different proceedings normally arises within a single legal system. For example, if the court in the Member State of enforcement rejects a first application seeking the refusal of recognition based on Article 45(1)(b), the question of the admissibility of a second application for refusal (of recognition or of enforcement) based on a different ground before the courts of that same Member State is a purely domestic one.

Nevertheless, the claim for refusal could also concern cross-border cases. For example, if a court in one Member State rejects a claim for refusal of recognition under Article 45(1)(b), one might wonder whether this question should be binding on the courts in a different Member State. In Case C-129/92,[49] the CJEU seemed to have ruled out this possibility by relying on the maxime '*exequatur sur exequatur ne vaut*';

[46] On this point, see e.g. *juge de l'exécution* Paris, 21.07.2021, No 21/20506.

[47] 'In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service'.

[48] For an illustration, see Buzzoni and Van Den Eeckhout (cit n 23), pp 17–19.

[49] CJEU, case C-129/92, *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.*, EU:C:1994:13, paras 29–31; see also the Opinion of AG Lenz in the same case, EU:C:1993:363, paras 21–23.

more recently, however, the CJEU's judgment in Case C-568/20[50] cast some doubt on this solution.

Similarly, serious interpretative issues have also emerged about the interplay between claims for refusal of recognition or enforcement grounded in Article 45 Brussels I bis and ordinary challenges to enforcement that might be available under national procedural law.[51] In Germany, for instance, some doubts have been raised concerning the jurisdiction, admissibility, and scope of challenges brought against foreign titles under § 767 ZPO, which generally allows debtors to file an action raising a substantive objection to enforcement. Specifically, it has been questioned whether the effects of such challenges might extend beyond the territory of the Member State addressed.

As a result, one might wonder whether, in order to avoid an unwelcomed legal fragmentation within the Area of Freedom, Security, and Justice, EU law should directly lay out general rules governing the *res judicata* effect of judgments ruling on applications for refusal of recognition and enforcement.

III. The relationship between enforceability and enforcement

Finally, another issue concerns the conditions for enforcement set out in Article 41 Brussels I bis. This mainly regards the interplay between the conditions of *enforceability* of a title applicable in the Member State of origin and the requirements for its actual *enforcement* in the Member State addressed.[52] Indeed, several courts have denied enforcement of a foreign titles based on the fact that either of these requirements were not fulfilled.[53] Therefore, enforcement under the Brussels I bis Regulation is based on a two-step analysis, meaning that the judgment is only enforceable if it is still enforceable under the law of the Member State of origin and fulfils the conditions for its enforcement in the Member State addressed. Furthermore, a very recent case (still pending before the CJEU)[54] demonstrates that the same kind of difficulties may also arise under the EEO Regulation, and may equally affect claims for the suspension of the enforceability (or the enforcement) of a title issued in another Member State.

---

[50] CJEU, case *C-568/20, J v. H Limited,* EU:C:2022:264, paras 33–39.

[51] See art 41(2) Brussels I bis, providing that: 'the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45'.

[52] On these difficulties, see in particular Buzzoni and Santaló Goris (cit n 1), p 16 ff.

[53] See *e.g*. *Bundesgerichtshof*, 25.01.2018, IX ZB 89/16, BeckRS 2018, 1121, reported in Lobach and Reich (cit n 36) p 3 (the case concerned a German judgment whose enforceability had been declared conditional upon the posting of security), and Cass. civ. 2, 02.12.2021, No 20-14.092, cited in Buzzoni and Santaló Goris (cit n 1), p 17.

[54] See CJEU, case C-393/21, *Lufthansa Technik AERO Alzey* (pending).

As these examples show, the difficult differentiation of the concepts of enforcement and enforceability lead to legal uncertainty and considerable delay for the parties. In this respect, the EU legislature and policymakers may consider to intervene by determining the law applicable to each of the conditions for enforcement.

The EPO and ESCP Regulations

The adoption of the EPO and ESCP Regulations marked a new stage in the harmonisation of European civil procedure. Indeed, these instruments were the first to set up uniform procedures which allow creditors to obtain an enforceable title valid in all Member States (except Denmark) at the end of rapid documentary proceedings, largely relying on standard forms and primarily governed by uniform European rules.

Applicable as of 18 December 2008 and 1 January 2009, respectively, the EPO and ESCP Regulations have already been subject to a periodical review by the European Commission, resulting in their partial reform by way of Regulation No 2015/2421. These amendments mostly concerned the ESCP Regulation and pursued three main goals: to encourage the use of the ESCP by broadening its scope of application and by harmonising and capping the costs of the procedure; to simplify the ESCP, in particular by reinforcing the written nature of the proceedings, promoting the use of new technologies and clarifying the remedies available to the debtor; and, finally, to improve the coordination between the ESCP and the EPO Regulations.

Despite these considerable ambitions, the research conducted within the context of the EFFORTS Project has shown that the actual use of the EPO and ESCP Regulation remains somewhat limited to this date.[55] With the notable exception of the EPO Regulation in Germany[56] and, to a lesser extent, the ESCP Regulation in Luxembourg,[57] the national reports all emphasise that these instruments struggled to meet the expectations set by the Commission and that most judges, legal practitioners and economic operators remain to this date largely unfamiliar with the rules governing these procedures.

Specifically, the national rapporteurs have pointed to deficiencies in national implementation strategies, as well as the lack of coordination with other available mechanisms for the cross-border debt recovery within the EU, as the two main factors hindering the success of the EPO and ESCP Regulations in the Member States covered by the Project. Future reforms should therefore take these elements into account in order to ensure better coordination between European uniform rules and national legislatures in this area (infra, III.A) and devise a more comprehensive strategy

[55] Buzzoni and Santaló Goris (cit n. 1), sections IV and V, respectively.

[56] Lobach and Reich (cit n 6), section IV.

[57] Van Den Eeckhout (cit n 22), pp 29–30.

to foster complementarity between the EPO and ESCP Regulations and alternative tools of European judicial cooperation (infra, III.B).

I. Improving the coordination between uniform European procedures and national rules

The research conducted within the framework of the EFFORTS Project points to deficiencies in national implementing rules as one of the main obstacles hindering the success of the EPO and ESCP Regulations in the national legal systems of the Member States addressed. Indeed, even though these instruments were designed to provide a set of harmonised provisions governing the examination, issuance, and challenges against the enforcement of uniform European titles, Member States still retain a considerable margin of discretion on several important matters, starting from the designation of the courts before which the procedure should be initiated to the rules governing the enforcement procedure of incoming titles. Similarly, the service of documents and other communications between the court and the parties remains largely governed by national law[58]. Indeed, the EPO and ESCP Regulation often set minimum standards that the Member States have to comply with rather than exhaustively regulate all the procedural aspects leading to the issuance of an enforceable title.

In all these instances, the presence of explicit implementing rules might prove very helpful, especially where the rules laid down in the Regulations depart from the general principles that would apply in a purely domestic setting. To cite but one example, Article 5(1a) ESCPR provides that: 'The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests'. Furthermore, Article 8 ESCPR also encourages the use of distance communication technology in order to allow the parties to participate in the proceedings without being physically present. However, even though these provisions perfectly fit the needs of cross-border dispute resolution, they may create friction with the traditional principles of orality and proximity that often inspire small claims procedures at the domestic level and thus require some accommodations from national legislatures.

Against this background, the analysis of national legislation and case law in the seven Member States covered by the EFFORTS project has nonetheless highlighted several shortcomings affecting the national approaches to the implementation of the EPO and ESCP Regulations into the national legal systems. In Belgium and Italy, the national rapporteurs have therefore pointed to the complete lack of domestic implementing

[58] See recitals nos 19–22 EPOR.

legislation as a major source of legal uncertainty and a powerful force against the development of a uniform approach to these instruments at the national level. In Croatia, France, and Lithuania, by contrast, national implementing rules governing uniform European procedures have been described as too technical or confusing compared to their domestic equivalents, thus potentially discouraging prospective users from initiating proceedings under the EPO and ESCP Regulations rather than national law.

The absence of clear and consistent guidance as to the application of the EPO and ESCP Regulations in the national legal systems becomes especially problematic in light of some decisions of the CJEU, which have left to national law the task of regulating some important issues that are not explicitly governed by the harmonised rules of the EPO and ESCP Regulations.

In Cases C-119/13 and C-120/13[59], for instance, the CJEU held that where an EPO has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of the Regulation and the irregularity is exposed only after the court of origin has declared the order enforceable, the provisions of the Regulation do not apply, but the defendant must have the opportunity to raise that irregularity under national law. Similarly, in Cases C-453/18 and C-494/18[60], the CJEU held that Article 7(2)(d) and (e) EPOR should be interpreted to allow a court seised with an EPO application to request additional information from the creditor in order to carry out an *ex officio* review of the possible unfairness of the terms contained in a consumer contract, but did not reach the question of the remedies available if the court failed to conduct such a review. Regarding the ESCP Regulation, the CJEU held[61], finally, that the harmonised rules do not contain any guidance as to how the costs of the ESCP procedure should be allocated in cases where a party succeeds only in part and that the court may proceed according to national law, provided that it complies with the principles of equivalence and effectiveness of European law.

These cases further underscore the critical role that national law still plays in ensuring the smooth functioning of the EPO and ESCP Regulations. Nonetheless, the research conducted within the context of the EFFORTS Project has shown that so far only Germany has enacted a specific provision in order to implement the CJEU's holding in Cases C-119/13 and C-120/13. In all other cases, questions raised by European case law will have to be solved by interpreting national rules of general application, whose

[59] CJEU, joined cases C-119/13 and C-120/13, 4 September 2014, *eco cosmetics GmbH & Co. KG*, EU:C:2014:2144, paras 45–47.

[60] CJEU, joined cases C-453/18 and C-494/18, *Bondora AS,* EU:C:2019:1118, paras 47 et seq.

[61] CJEU, case C-554/17, *Rebecka Jonsson*, EU:C:2019:124, paras 26–29.

application in this area may sometimes be unclear and potentially lead to divergent results across the Member States.

In order to address the potential problems that may arise in connection with the national legislatures' inaction or inefficiency, the European Union should therefore consider using one or more of the policy tools at its disposal to bolster the effectiveness of the EPO and ESCP Regulations and further promote the use of these uniform European procedures. In our opinion, the European Union's action in this area could take the form of three different tools.

Firstly, and most obviously, the European legislature should strive to close the most noticeable gaps that have emerged within the context of the EPO and ESCP Regulations.

On the one hand, Article 20(1) EPOR should accordingly be amended to provide a uniform remedy in cases where an EPO has been declared enforceable even though the initial order was not regularly served on the debtor following the minimum standards set out in the Regulation. In our opinion, the European legislature should model the new Article 20(1) EPOR after Article 18 ESCPR to foster consistency across the Regulations. On the same occasion, Article 20(2) EPOR should also be redrafted to provide an additional remedy in cases where an EPO based on a consumer contract has been declared enforceable without the court first reviewing the possible unfairness of the terms.

On the other hand, the European legislature should tackle national differences regarding the costs of the ESCP Regulations by providing more detailed rules regarding the kinds of fees that may actually be charged by national authorities and their allocation between the parties. In this respect, it is important to note that significant differences may still subsist among Member States regarding court fees and other associated costs (such as translation and enforcement costs). To the extent possible, prospective users of the ESCP (especially parties established in a Member State other than the court seised) should be able to assess beforehand the maximum amount of money they could be required to pay as a consequence of this procedure. A possible solution in this regard would be to set a uniform cap that would apply across the European Union, and that would be calculated based on a comparative assessment of the rules that are currently applicable in the different Member States.

Secondly, the European Commission could also make use of the authority granted to it by Articles 30 EPOR and 26 ESCPR. According to these provisions, in fact, the Commission is empowered to adopt delegated acts that amend the standard forms on which these uniform procedures are based. In our opinion, these provisions might offer a leaner and less intrusive solution to deepen the harmonisation of European procedural law without relying on national interventions. For instance, the European Commission could take stock of the CJEU's judgment in Cases C-453/18 and C-494/18 and provide further guidance to creditors regarding the information and supporting documents that should be provided to the court at the time of the initial application for

an EPO, especially where the dispute concerns a claim based on a consumer contract. This could be done by amending Form A reproduced in Annex I EPOR, and the same approach should also be extended to the Claim Form established under the ESCP Regulation.

Finally, the European legislature should also consider strengthening the Member States' duties regarding the application of the EPO and ESCP into their national law by replacing the information system set up by Articles 29 EPOR and 25 ESCPR with a more stringent implementation mechanism. Currently, Member States are only required to communicate to the Commission a limited number of details regarding the application of these uniform provisions in their national legal system with a view to their dissemination through the *e-Justice Portal*. However, the research conducted within the context of the EFFORTS Project has shown that the Member States often overlook this obligation and that the data published on the *e-Justice Portal* is often insufficient, inconsistent, and/or outdated. Against this background, it could therefore be helpful to amend the Regulations to include positive obligations for the Member State to enact explicit provisions on the most crucial issues affecting the functioning of the European procedures. By way of example, the European legislature could impose a minimum amount of digitalisation of the procedure or require States to concentrate the jurisdiction to hear EPO and ESCP proceedings before a single national court. This approach would encourage the Member States to tackle some of the outstanding gaps that currently hamper the functioning of the EPO and ESCP procedures at the national level while also better serving the priorities set by the European Union's overall strategy.

II. Working towards a more comprehensive strategy in the field of cross-border enforcement

The second recurring issue that has been identified with regard to the implementation of the EPO and ESCP Regulations in the seven Member States covered by the EFFORTS Project concerns the significant overlap between these uniform procedures and their domestic counterparts. In this regard, several National Reports have underscored that creditors might find it preferable to rely on national law and then seek the certification of the resulting title under the Brussels I bis or EEO Regulations rather than testing the relatively less known procedures laid out in the EPO and ESCP Regulations.[62] Conversely, the research conducted within the EFFORTS Project has

[62] See in particular Uzelac, Bratković and Brozović (cit n 22) pp 15 and 20 (critical assessments under EPO and ESCP); Buzzoni and Van Den Eeckhout (cit n 23) p 46 (critical assessment EPO); Simaitis, Vebraite and Markeviciute (cit n 22) p 10 (critical assessment ESCP).

also shown that the absence of a readily accessible alternative at the national level may significantly boost the use of uniform European procedures in the Member States addressed.[63]

In light of these considerations, any further reform of the EPO and ESCP Regulations should necessarily be seen in the broader context of European instruments that allow for direct cross-border debt recovery across the Member States.

Firstly, the European legislature could consider strengthening the complementarity between the EPO and ESCP Regulations and the other EFFORTS Regulations by focusing on their specific features. At their core, these procedures were designed to offer rapid, mostly written procedures that would lower procedural and linguistic barriers to the recovery of debts by relying on standard forms and documentary evidence. As such, the EPO and ESCP procedures are especially suited to be conducted through e-mail and other appropriate distance communication technology, such as videoconferencing (in cases where a hearing would be required). Although Regulation No 2015/2421 has already encouraged some digitisation under the ESCP Regulation, the time has come for the European legislature to act more decisively in this direction and make the use of digital means of communication compulsory under both the EPO and ESCP Regulations. In our view, two elements suggest that the time is ripe for this new step: on the one hand, the COVID-19 pandemic has created the right context for the accelerated development of the digitisation of civil procedure across the Member States; on the other hand, the specific features of these uniform European procedures, which offer simplified instruments for the recovery of claims, provide a particularly favourable environment for the future large-scale deployment of the e-CODEX Project promoted by the European Commission.[64]

Secondly, the European Union could also try to reduce the competition between the EPO and ESCP Regulations, on the one hand, and their domestic equivalents, on the other, by encouraging the Member State to make these procedures available to creditors engaged in purely domestic transactions. In this regard, it is worth noting, for instance, that French Law No 222-2019 of 23 March 2019 did contemplate the

[63] Van Den Eeckhout (cit n 22), pp 29–30.

[64] <https://www.e-codex.eu/>. See Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726. The e-CODEX system was originally launched under the Multiannual e-Justice Action Plan 2009-2013; it was developed in the framework of e-Justice Communication via On-line Data Exchange between 2010 and 2016 by 21 Member States with the participation of other third countries/territories and organisations. To date, the system is managed by a consortium of Member States and other organisations, financed by an EU grant.

introduction of a national digital procedure for small claims[65] , which was explicitly 'inspired by the European Small Claims Procedure'.[66] Arguably, however, this approach represents a sub-optimal solution compared to the simple extension of the ESCP to domestic disputes, as it has the effect of duplicating mechanisms pursuing similar goals rather than simplifying the procedural landscape. In order to avoid these kinds of scenarios, the European legislatures should reconsider the European Commission's proposal put forward in 2013 within the context of the reform of the ESCP Regulation[67] and extend the scope of the uniform European procedures to a larger set of disputes by amending the current definition of 'cross-border cases'.[68] Furthermore, the European legislature could also explicitly offer the Member States the possibility to extend the applicability of the ESCP and EPO Regulations to purely domestic cases on an opt-in basis.

Finally, a third – and possibly more radical – solution would be to establish a clear differentiation among the existing Regulations allowing for the direct cross-border enforcement of titles within the European Union. This approach would reduce the overlap between the EEO and Brussels I bis Regulations, on the one hand, and the EPO and ESCP Regulations, on the other, thus expanding the role of uniform European procedures in this area of the law. In order to achieve this result, domestic orders for payment procedures would need to be excluded from the scope of the Brussels I bis and EEO Regulations – a solution which would at the same time reduce the difficulties related to the existence of a wide variety of simplified procedures across the different Member States[69] and encourage economic operators to turn themselves to the EPO and the ESCP.

Moreover, the ESCP Regulation could also be expanded in order to provide additional uniform rules allowing for an optional pre-trial ADR mechanism that could result in an amicable settlement between the parties, which could then circulate as an enforceable

---

[65] 'Procédure dématérialisée pour les petits litiges' (*justice.gouv.fr*) <http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/procedure-dematerialisee-pour-les-petits-litiges-33579.html>.

[66] 'European E-Justice Portal - Small Claims' <https://e-justice.europa.eu/42/EN/small_claims?FRANCE&member=1>.

[67] COM(2013) 794 final.

[68] See art 3 EPOR and art 3 ESCPR.

[69] See the hesitations surronding the meaning of 'court' for the purposes of determining whether Croatian notaries may issue domestic orders for payment eligible to circulate under the EEO and Brussels I bis Regulations in CJEU, case C-484/15, *Ibrica Zulfikarpašić v. Slaven Gajer*, EU:C:2017:199 (EEO) and case C-551/15, *Pula Parking d.o.o. v. Sven Klaus Tederahn*, EU:C:2017:193 (Brussels I bis), as well as problems arising from the differences concerning the time limits to file a statement of opposition under domestic law (case C-7/21, *LKW WALTER Internationale Transportorganisation AG v. CB and Others*, EU:C:2022:527).

title within the European Union. This way, the ESCP could evolve into a full-fledged hybrid dispute resolution mechanism without any exact equivalent in other European Regulations.

The EAPO Regulation

The text of the EAPO Regulation references two potential changes that shall be considered in the event of a recast. The first tackles whether the EAPO should allow the attachment of 'financial instruments' and not only of funds in the debtors' bank accounts.[70] The second deals with whether the 'amounts credited to the debtor's account after the implementation of the Preservation Order could be made subject to preservation under the Order'.[71] Nonetheless, other changes may prove to be desirable on the grounds of the comparative analysis of the EAPO national case law.[72] More concretely, the EU legislature and policymakers may consider amendments to, respectively, the EAPO's regime on jurisdiction;[73] the *periculum in mora* prerequisite;[74] and the information mechanism to search for the debtors' bank accounts.[75]

III. Potential amendments to jurisdiction

1. A more flexible jurisdictional regime for creditors with an enforceable title?

Once creditors have obtained an enforceable judgment, court settlement or authentic instrument, the jurisdiction to grant an EAPO lies with the courts of the Member State where the judgment was rendered, or court settlement approved,[76] or the authentic instrument drawn up.[77] Case law in Luxembourg shows that this just jurisdictional rule might be too rigid for creditors.

There were at least two cases in which creditors applied for EAPOs before the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) based on titles

[70] Art 53(1)(a) EAPOR.

[71] Art 53(1)(b) EAPOR.

[72] Buzzoni and Santaló Goris (cit n. 1), 59-62.

[73] Art 6 EAPOR.

[74] Art 7(1) EAPOR.

[75] Art 14(1) EAPOR.

[76] Art 6(3) EAPOR.

[77] Art 6(4) EAPOR.

obtained in Spain and France.[78] Luxembourg was the Member State were the debtors' bank accounts were located. Most likely based on this reason, the creditors applied for an EAPO in Luxembourg instead of the Member State were the title was obtained. Had the European legislature adopted the EAPO Commission Proposal, it would have been possible to obtain the EAPO directly in Luxembourg. In fact, the Commission Proposal contained a double-track jurisdictional system[79] whereby creditors could apply for the EAPO before the Member State were the title had been obtained or before the courts of the Member State where the EAPO was meant to be enforced. However, the effects of the EAPOs requested in the Member State of enforcement were territorially limited to that Member State.[80] This means that, unlike the EAPOs granted by the courts of the Member State where the title was obtained, the EAPOs obtained in the Member State of enforcement could not have been recognised and enforced outside that Member State. Furthermore, in accordance with the Commission Proposal, creditors who applied for an EAPO were required to inform about other EAPO requests.[81]

Based on the case law referred above, the double-track jurisdictional system, as laid out in the EAPO Commission Proposal, may be taken into consideration for future amendments to the EAPOR.[82] The creditor would also be required to inform about other EAPO applications when applying for an EAPO. By allowing creditors to request an EAPO in the Member State of enforcement, the EAPO would respond better to the 'urgent need' that accompanies this proceeding.[83] Whereas EAPOs can be enforced in other Member States without exequatur,[84] transmitting the EAPO from one Member State to another takes longer than if the EAPO is requested directly where the bank

[78] Tribunal d'arrondissement de Luxembourg, Ordonnance du 15.03.2022. The case concerning the request of an EAPO request based on a French enforceable title was reported by a Luxembourgish judge: Interview with a Luxembourgish judge held on 30 April 2021 (notes on file with the author). Outside the scrutinized jurisdictions in the EFFORTs Project, in Slovakia, the District Court of Bratislava I (*Okresný súd Bratislava I*) received a request for an EAPO based on an payment order granted in Germany: *Okresný súd Bratislava* I, 31.05.2021, 25Cbcud/7/2020, SK:OSBA1:2020:1120216618.1.

[79] Art 14(3) COM(2011) 445 final.

[80] Art 23 COM(2011) 445 final.

[81] Art 15(2)(h) COM(2011) 445 final.

[82] This would also approach the EAPO to the Brussels I bis Regulation, which states that claimants can apply for protective measures in the Member State of enforcement when they have obtained an enforceable title in the Member State of origin: Article 40 Brussels I bis Regulation.

[83] Art 7(1) EAPOR.

[84] Art 21 EAPOR.

accounts are located. Additional delays are caused, among others, by the service of those documents or their translation.

Introducing a new ground for jurisdiction in the Member State of enforcement would not cause an impairment of the debtors' position. The debtor would be protected by the creditors' obligation to request the release of the funds attached that exceed the amount of the claim,[85] as well as by the liability regime for the damages that the EAPO might cause to the creditor.[86] In this framework, the debtor is also entitled to request the liberation of those funds.[87]

IV. The boundaries of the arbitration exclusion: The need for clarification

Arbitration is among the subject matters excluded from the EAPOR.[88] Most scholars understand this exclusion to mean that, the moment parties decide to bring their claim before an arbitral tribunal, the EAPO cannot be used to protect such claim.[89] Despite this widespread interpretation, EAPO requests regarding claims pending before arbitral tribunals were brought before Lithuanian and Luxembourgish courts. In Lithuania, an EAPO was requested while the arbitral proceeding was still pending.[90] The Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) did not find that the arbitration exclusion barred using an EAPO to protect that claim. Instead, it explored whether it was possible to grant the EAPO to guarantee the claim brought before an arbitral tribunal relying on the domestic jurisdictional rules. In Luxembourg, the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) accepted as a valid title to grant an EAPO a Luxembourgish decision granting a provisional measure (*saisie arrêt)* the basis of an arbitral award.[91]

The discrepancies and uncertainties surrounding the exclusion of arbitration call for clarification. At least, a clarification as to the meaning of the arbitration exclusion

---

[85] Art 27 EAPOR.

[86] Art 13 EAPOR.

[87] Art 33(1)(d) EAPOR and art 34(1)(b)(iv) EAPOR.

[88] Art 2(2)(e) EAPOR.

[89] Denise Wiedemann, 'The European Account Preservation Order' in Jan von Hein and Thalia Kruger (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021), pp 109–111.

[90] Simantas Simaitis, Vigita Vebraite and Milda Markeviciute, 'Report on Lithuanian Case Law' EFFORTS Collection of national case law, p 2, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/01/D2.14-Report-on-Lithuanian-case-law.pdf> pp 2–3.

[91] Buzzoni and Santaló Goris (cit n. 1) pp 71–73.

should be included a Recital.[92] In this respect, the European legislature may follow two options. On the one hand, it could opt in favour of the total exclusion of the EAPO in claims brought before an arbitral court.[93] However, this is not the approach that the CJEU followed in its *van Uden* judgment as concerns the possibility of requesting 'provisional, including protective measures' under the Brussels system, where the CJEU understood that arbitration was excluded as a subject matter[94] (for instance, when the claim concerns the payment of the arbitrator fees).[95] Consequently, as long as the claim that the provisional measure intends to protect falls within the material scope of the Brussels I bis, the EAPOR could be used.[96]

On the other hand, the European legislature may opt in favour of acknowledging that the EAPO can be used in support of a claim brought before an arbitral court as long as the claim falls within the material scope of the EAPOR. However, this would need further clarification. From a jurisdictional perspective, it should be made clear that the domestic jurisdictional rules permitting courts to grant protective measures in support of arbitration proceedings can be used to grant EAPO. It should also be stated that a proceeding before an arbitral court would be considered a 'proceeding on the substance of the matter'. In this sense, the EAPOR should also state that an enforceable arbitral award could be considered a valid title to request an EAPO.[97]

---

[92] As was done for the Brussels I bis: Recital 12 Brussels I bis.

[93] This seemed to be the approach defended by the European Commission in the Proposal of the EAPO Regulation: 'Arbitration is equally excluded from the scope. Even though there might be a case for allowing parties to an arbitration to have recourse to the European procedure, the inclusion of arbitration would entail complex questions have not yet been addressed by EU law, e.g. under which circumstances arbitral awards can be put on an equal footing with judgments and it did not seem appropriate to address them for the first time in this instrument' (COM(2011) 445 final, p. 5).

[94] C-391/95, 17 November 1998, *Van Uden Maritime*, EU:C:1998:543, paras 29–30.

[95] Hubertus Schumacher, 'Art 2 EuKoPfVO' in Hubertus Schumacher, Barbara Köllensperger and Martin Trenker (eds) *Kommentar zur EU-Kontenpfändungsverordnung EuKoPfVO* (MANZ 2017), margin no. 67.

[96] Fernando Gascón Inchausti, 'Medidas provisionales y cautelares' in Blanco-Morales Limones et al (eds), *Comentario al Reglamento (UE) no 1215/2012 relativo a la competencia judicial, el reconocimiento y ejecución de resoluciones judiciales en material civil y mercantil* (Thomson Reuters Aranzadi), paras 32–33.

[97] Something that for some authors is already a valid title under the EAPO: Schumacher (n 26), margin no. 65. *Cuniberti* and *Migliorini* consider that a judgment declaring an enforceable arbitral award would be a valid title to request an EAPO: Gilles Cuniberti and Silvia Migliorini, *The European Account Preservation Order Regulation: A Commentary* (Cambridge 2018), p 71.

IV. Restraining the *periculum in mora* under the EAPOR

According to Article 7(1) EAPOR, any creditor who wants to obtain an EAPO has 'to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult'. The so-called *periculum in mora* requirement is the centrepiece of the conditions that creditors have to satisfy to obtain an EAPO. All creditors, regardless of whether they have or do not have an enforceable title, have to prove it. According to the national case law examined within the EFFORTS project, the *periculum in mora* appears as one of the major difficulties that creditors have experienced while dealing with the EAPOR.[98] Many of the EAPO applications analysed with the Project ended up with rejections precisely because the creditors were unable to satisfy the requirement of the *periculum in mora* even if they had an enforceable title. Many EAPO applications were also rejected because the creditors were unable to prove that the debtor was taking actions intended to frustrate the enforcement as the Preamble suggests.[99]

The problems that creditors experience with the *periculum in mora* open the door to reconsidering the scope and content of this prerequisite. In this respect, the EU legislature may consider to restrain the *periculum in mora* to creditors without an enforceable title, as was the case with the EAPO Commission Proposal.[100] Such solution would be more coherent with the double nature of the EAPOR: as an interim measure during the proceeding on the merits of the claim and as a protective measure at the enforcement stage.[101] The existence of the enforceable title should be sufficient

---

[98] Buzzoni and Santaló Goris (cit n 1), 72–73; Lobach and Reich (cit n 36); Uzelac, Bratković and Brozović, (cit n 22), 6. In the IC2BE Project (JUST-AG-2016-02, Grant Agreement No. 764217), issues concerning the EAPO's *periculum in mora* were detected in Germany, Luxembourg and Poland: Jan von Hein and Tilman Imm, 'Germany' in Jan von Hein and Thalia Kruger (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021), pp 240 - 241; Veerle Van Den Eeckhout and Carlos Santaló Goris, 'Luxembourg' in Jan von Hein and Thalia Kruger (eds), ivi, 295–296; Agnieszka Frąckowiak-Adamska, Agnieszka Guzewicz and Agnieszka Lewestam-Rodziewicz, 'Poland' in Jan von Hein and Thalia Kruger (eds), ivi, pp 358–359.

[99] Recital 14 EAPOR. The EAPO Regulation puts an emphasis on the 'subjective element' of the *periculum in mora*: Bettina Nunner-Krautgasser, 'Der geplante Rechtsakt zur europäischen Kontenpfändung' in Burkhard Hess (ed), *Die Anerkennung im Internationalen Zivilprozessrecht - Europäisches Vollstreckungsrecht* (Gieseking 2014), 125.

[100] Art 7(1)(b) COM(2011) 445 final.

[101] Ilaria Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation.*

to apply for an EAPO. Removing the *periculum in mora* for creditors with an enforceable title would also make the EAPO information mechanism more accessible.[102] In fact, courts cannot authorise a request for information unless creditors have satisfied the more general prerequisites to obtain an EAPO.[103]

Another option would be to modify the part of the Preamble that provides some guidance on the *periculum in mora*.[104] The Preamble should differentiate between creditors with and without enforceable titles.[105] It should state that creditors with an enforceable title only need to show that there is an enforceable title and that the debtor is not paying despite the fact that he/she was requested to do so. A failed first attempt to enforce the title in the Member State of origin would be also sufficient. For creditors without an enforceable title, the current threshold set in the Preamble to satisfy the *periculum in mora* requirement would remain applicable. This means these creditors would still have to prove that the debtor is taking actions intended to hinder the effective recovery of the claim.

V. Making the EAPO information mechanism more accessible

Currently, the EAPO information mechanism is limited to creditors with a title, though the title does not have to be enforceable.[106] Although case law shows moderate reliance on the information mechanism, it might be time to consider the possibility of extending its use to creditors without a title. This was initially foreseen in the EAPO Commission Proposal.[107] In 2021 France – originally the most reluctant Member State to allow creditors without an enforceable title to access the EAPO information

---

Changes and Challenges of the Renewed Procedural Scheme (Springer 2017), p 108; Guillermo Schumann Barragán, 'Article 20' in Elena D'Alessandro and Fernando Gascón Inchausti (eds), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), para 20.15.

[102] A problem observed for German courts: Lobach and Reich (cit n 36), p 6.

[103] Denise Wiedemann, 'Artikel 14 EU-KpfVO' in Thomas Rauscher (ed) *Europäisches Zivilprozess- und Kollisionsrecht* (5th ed Otto Schmidt 2022), para 14.

[104] Recital 14 EPOR.

[105] In favour of this approach, see also Burkhard Hess, 'The Effective Disclosure of the Debtor's Assets in Enforcement Proceedings' in Masahisa Deguchi (ed), *Effective Enforcement of Creditors' Rights* (Springer 2022).

[106] Art 14(1) EAPOR.

[107] Art 17 COM(2011) 445 final.

mechanism–[108] extended access to its national registry of bank accounts, the FICOBA,[109] to creditors who apply for a national attachment order (*saisie conservatoire*) without a title.[110] Perhaps, now consensus may be more easily reached among the Member States to extend the use of the information mechanism to all kinds of creditors.

Another possible reform would be allowing creditors to rely on the EAPOR just to obtain information about the debtors' bank accounts. Under the current version of the EAPOR, the request for information about the debtors' bank accounts can be made only in the context of an EAPO request. The information obtained about the debtors' bank accounts can be used only to complete an EAPO application.[111] The cases analysed in the EFFORTS project show that some creditors were more interested in discovering if debtors have bank accounts in the other Member States than attaching the funds of those bank accounts.[112] If the creditors could simply use the EAPO information mechanism without applying for the attachment order, interest in the EAPOR might increase. Creditors would be able to combine the EAPO information mechanism with a domestic attachment order. Moreover, the idea of a separate tool to search for the debtors' bank accounts would reactivate one of the proposals of the 2006 Green Paper on the debtors' assets transparency,[113] and namely the proposal that explored the possibility of creating a mechanism to exchange information about the debtors' assets between enforcement authorities.[114]

From a more practical perspective, the Commission Implementing Regulation containing all the EAPO standard forms should incorporate a standard form that court can use to request information about the debtors' bank accounts from the information authorities.[115] This form already exists: however, it exists in a somewhat unofficial

---

[108] Comments on Chapters I, II and III from the French delegation, 13260/11 JUSTCIV 205 CODEC 1280, 13140/12 ADD 13, p 14.

[109] 'Fichier des comptes bancaires'. On the FICOBA see: < https://www.service public.fr/particuliers/vosdroits/F2233>.

[110] Art L151.A. Tax Procedures Book (*Livre de procédures fiscales*).

[111] Wiedemann, (cit n 84), para 14.

[112] Lobach and Reich (cit n 36), 14.

[113] European Commission, *Green Paper - Effective enforcement of judgments in the European Union: the transparency of debtors' assets* (COM(2008) 0128 final).

[114] Ibid, 8–9.

[115] Commission Implementi ng Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, C/2016/6339, *OJ* L 283, 19.10.2016, pp 1–48.

manner. It was created in 2020 by the European Judicial Network and it is available in the e-Justice portal.[116] Nonetheless, its use, contrary to the other standard forms, is not obligatory.[117] A pre-established standard form, which indicates all the necessary information that courts have to provide to the information authorities, would prevent issues like those observed between Lithuanian courts and the German information authority.[118]

Cross-cutting initiatives

In many respects, the implementation and concrete application of the EFFORTS Regulations appears to suffer setbacks arising from the interface of the Regulations with national legislation. This creates uncertainties in legal practice, to the detriment of predictability and efficiency.

I. Increasing awareness and access to information: The role of the e-Justice portal

A significant obstacle concerning cross-border enforcement procedures is the lack of information about the national enforcement rules of another Member State. Not all instruments are used often or properly in practice and praticioners and stakeholders often lack familiarity with them. This holds true, in particular, with respect to the ESCP and EAPO Regulations, though in some Member States the same applies also with respect to the EEO and EPO Regulations.[119] Against this background, two actions may be undertaken to increase awareness and access to information.

On the one hand, the information available on the e-Justice portal[120] appears insufficient: at times, it is simply missing, or it is available only in the language of the Member States it refers to, which makes the information of limited help. General descriptions are often provided, instead of detailed information. While an English translation/version is made available for most Member States, in the remaining cases the information is still available only in the national language of the Member State concerned, to the detriment of effective accessibility.

---

[116] Although it cannot be fulfilled online as the other standard forms: <https://e-justice.europa.eu/378/EN/european_account_preservation_order_forms?clang=en>.

[117] As it is indicated in the e-Justice portal ('non-compulsory form'): <https://e-justice.europa.eu/378/EN/european_account_preservation_order_forms?clang=en>.

[118] Buzzoni and Santaló Goris (cit n 1), pp 74–75.

[119] See, in part., Kramer (cit n 6), in passim.

[120] <https://e-justice.europa.eu/home?action=home>.

It follows that improvement of the information posted via the e-Justice portal is of the essence. In this regard, the Commission may consider setting up a system whereby it provides such information itself, with the allocation of the necessary resources, and in compulsory cooperation with the Member States.

Awareness of the existence of the e-Justice portal, together with the wealth of information that should come with it, should also be properly promoted via the national sources (and notably websites) of reference in each Member State. Proper reference to such information should not be limited to practitioners and to the judiciary: to the contrary, it should be extended to citizens, who ought to be in the position of making informed decisions, in a timely manner, with respect to their legal relationships.

II. Communication as a core instrument towards the proper functioning of cross-border justice: e-CODEX and the European Judicial Network

Fostering and facilitating communication is also a means to conducive to the proper functioning of cross-border justice, in general, and the EFFORTS Regulations, in particular.

In this context, e-CODEX is a system established primarily to promote the digitalisation of cross-border judicial proceedings and to facilitate the communication between Member States' judicial authorities,[121] and it is set to deeply influence national procedures.[122] In particular, e-CODEX aims at interconnecting the justice systems of the EU Member States by providing technical interfaces between the national IT systems. It creates the premise for direct electronic (cross-border) filings, direct communication between judges and it is designed to facilitate the enforcement of judicial decisions throughout the European Union.

As the EU Commission emphasised in its Communication of December 2020, the establishment of the e-CODEX system as a technical standard should be a priority for the upcoming years.[123] Once established, the whole system of judicial cooperation in civil and commercial matters shall be reassessed from a perspective of interconnected national justice systems.

---

[121] See supra, n 59.

[122] On the pivotal role of e-CODEX, see esp. Burkhard Hess, 'Reforming the Brussels I[bis] Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu].

[123] Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 (COM(2020) 712 final), p 1.

Furthermore, the EU legislature may rely on the cooperation mechanism of the European Judicial Network (EJN) in Civil and Commercial Matters in a proactive manner to improve the implementation and promote the take-up of these instruments.[124] By bringing together national authorities responsible for assisting local courts, the EJN was set up to facilitate judicial and legal cooperation between Member States. Since its inception, the EJN (in civil and commercial matters) has been an important tool for providing support for the implementation of EU civil justice instruments in daily legal practice. Notably, the EJN (in civil and commercial matters) facilitates and supports relations between national judicial authorities through contact points in each Member State and is thereby a tool to facilitate cross-border cases.

III. Education and training

The operation of the Regulations may be improved also through non-legislative and implementation measures. In this framework, education and training are a core tool and should be pursued as a major means to achieve the objective of effectiveness of the Regulations and harmonisation in this area of the law. To foster legal certainty and predictability, efficient and active promotion of the Regulations should be keenly pursued, providing the general public and professionals with the related information.[125] Such trainings should also be welcomed as they create the opportunity to bring together stakeholders from different Member States, so as to create an environment where experiences can fruitfully be shared and clarifications sought.

---

[124] <https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do>. The EJN (in civil and commercial matters) was established by Council Decision 2001/470/EC of 28 May 2001 (subsequently amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009) and started operating on 1 December 2002. All Member States except Denmark participate in the EJN (in civil and commercial matters).

[125] In this vein see, e.g., Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure of 13.10.2015 (COM(2015) 495 final), p 12; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure of 19.11.2013 (COM(2013) 795 final), pp 8-9.

2. Challenging the (non) issuance of certificates

Marko Bratković*, Juraj Brozović**

First, I would like to thank Professor Francesca Villata and her team for having organised such an interesting conference. Juraj (I think I can speak for him as well) and we are happy to have the opportunity to present our research here today and that we are part of the EFFORTS project.

I. Introduction

Today, Juraj and I will talk about the challenging the issuance and non-issuance of the certificate within the framework of four out of five EFFORTS Regulations. I will talk on Brussels I bis Regulation and the European Enforcement Order Regulation, and Juraj will cover the European Payment Order Regulation, and European Small Claims Regulation. The European Account Preservation Order Regulation will not be included in our presentation. Carlos will talk about it later today. Our topic – challenging the issuance and non-issuance of the certificate – is closely related to today's first presentation by Marco Buzzoni. Marco is also a co-author of the Report on Practices in Comparative and Cross-Border Perspective that helped us a lot in preparing today's presentation.

II. Brussels I bis Regulation

We all know that the abolition of exequatur represents one of the most significant innovations brought by the Brussels I bis Regulation. It means that a judgment given in a Member State and enforceable in that State shall be enforced in another Member State without any declaration of enforceability being required. Therefore, it is sufficient, in order to enforce in one Member State a judgment given in another Member State, to produce a copy of that judgment and the certificate provided for in Article 53 of the Regulation. Actually, the Regulation provides for two forms, namely, the certificate concerning a judgment and the certificate concerning an authentic instrument or court

* Assistant professor at the University of Zagreb, Faculty of Law.

** Teaching assistant at the University of Zagreb, Faculty of Law.

settlement. Without the certificate, the judgment, court settlement nor authentic document are 'capable of circulating freely within the European judicial area'. It is important to emphasise that, after the issuance of the certificate in the Member State of origin, no further review is carried out by the court having jurisdiction in the Member State of enforcement.

It is interesting to note that the Brussels I Regulation remains silent on the procedure applicable to (a) the issuance of certificates and (b) the available remedies in case of an erroneous or wrongful decision by the certifying authority. The Regulation does not contain any provisions related to rectification or withdrawal of certificate. There is no provision on certificate of non-enforceability. As we will see shortly, it is different with the Regulation on European enforcement order, but let's stick now to the Brussels I regime. As rightly pointed out by Marco Buzzoni in the EFFORTS Report, national procedural law plays a very prominent role in the application of the Brussels I Regulation. I am not sure whether it is the best possible way to ensure an equal footing for all parties involved in the proceedings, especially when the party is not represented by a lawyer who is expert in law of the country in which the certificate is being issued, which is often the case. Is it really the right way to make cross-border enforcement less time-consuming and costly? I don't think so.

Generally speaking, in the Member States covered by the EFFORTS Project, national legislators have enacted very few provisions, if any, regarding the implementation of the Regulation Brussels I. Belgium, Croatia, and Italy have not enacted any specific provisions in their national law yet. Only France and Germany have set up more detailed *ad hoc* rules applicable to the issuance of the certificate.

So, what should a party do if the certifying authority makes a mistake in issuing the certificate? What if the information contained in the certificate is inconsistent with the underlying decision? What if the title has not been enforceable yet, but the certificate has been issued? What if the certifying authority refuses to issue the certificate and the creditor wants to challenge the denial of issuance of the certificate? The answers to all these questions are to be found in national law.

But, for example, the French Code of Civil Procedure does not include any explicit remedy for debtors who might want to challenge the issuance of the certificate. The only remedy provided for under French law concerns the denial of issuance of the certificate. It is provided that the refusal to issue the certificate may be challenged before the President of the Regional Court, which rules on the certification after hearing both the applicant and the requested authority. There is no possibility of appeal. French law does not specify how to apply for the rectification of material errors in the certificate.

In Germany, the refusal to issue the certificate needs to be reasoned. There is a special rule of the Code of Civil Procedure that decision on issuance or non-issuance of the certificate may be challenged through the same procedures as those available to challenge a court certificate of enforceability (*Vollstreckungsklausel*) under domestic

law. In the other Member States covered by the EFFORTS Project, the question of the remedies available against outgoing certificates and/or refusals of certification under Brussels I bis remains open because of the absence of any national implementing rules on these issues. Probably national rules on the correction and the interpretation of judgments could be applicable in all jurisdictions. At least in Croatia also national rules on certificate of enforceability could be used by analogy. However, there is no specific rule in that regard.

To sum up, challenging the issuance or the non-issuance of the certificate under Brussels I bis regime depends on national law. So we can only agree with Marco Buzzoni that the lack of sufficient guidance in the Regulation itself and the scarcity of national implementation rules can lead only to inconsistency in application of the Brussels I regime.

III. EEOR

More detailed rules in that regard contains the Regulation on European Enforcement Order. However, one must bear in mind that the scope of the Regulation on European Enforcement Order is much more limited than the scope of the Brussels I bis Regulation. A European Enforcement Order can only be obtained for uncontested claims, and it will only be granted if certain requirements are met. The European Enforcement Order is a certificate which constitutes a “European judicial passport” for judgements, court settlements, and authentic instruments which concern an uncontested claim.

But, is it possible to challenge the issuance or non-issuance of the certificate? Let’s deal first with the challenging the issuance of the European Enforcement Order. What can a debtor do if a European Enforcement Order is issued? In principle, no appeal is possible against the issuing of a European Enforcement Order certificate. However, some possibilities still exist. For the sake of brevity, I will not go into details of each of them. I will just give a general overview. I'll just stick to the European enforcement orders for judgements. The same rules apply *mutatis mutandis* to court settlements and authentic instruments.

In the Member State of origin, the debtor may apply to the court which decided on the merits of the claim requesting a rectification of the certificate if there is a discrepancy between the judgment and the European Enforcement Order certificate which is due to a material error. There is the standard form laid down in the Regulation. However, the procedure for such a rectification is governed by national law.

If the European Enforcement Order was granted in violation of the requirements laid down in the Regulation, the debtor may apply to the court which decided on the merits of the claim requesting that the European Enforcement Order certificate be withdrawn.

Again, there is the standard form laid down in the Regulation and the procedure for such a withdrawal is governed by national law.

If the judgment has ceased to be enforceable or its enforceability has been suspended or limited under the law of the Member State where the judgment was delivered, the debtor may apply to the court for a certificate indicating the lack or limitation of enforceability. There is also the standard form laid down in the Regulation.

Of course, the debtor may challenge the judgment on the merits in accordance with the national procedural law of the Member State where the judgment was issued. If the challenge is unsuccessful and the judgment on appeal is enforceable, the claimant may obtain a replacement certificate using the standard form. In exceptional circumstances related to minimum standards prescribed by the Regulation, the debtor may also lodge a special review against the judgment before the competent court of the Member State where the judgment was issued.

In the Member State of enforcement, which is out of the scope of this presentation, the debtor has in special circumstances has the possibility to apply (a) for a refusal of enforcement of the judgment or (b) for a stay or limitation of enforcement of the judgment. However, these possibilities can never lead to a review in the Member State of enforcement of the substance of the judgment or its certification as a European Enforcement Order.

And, what can a claimant do if the European Enforcement Order is refused or contains an error? Well, if there is a discrepancy between the judgment and the European Enforcement Order certificate which is due to a material error, the claimant may also apply for a rectification of the certificate.

If the European Enforcement Order is refused due to noncompliance with minimum standards, there are special rules for that in the Article 18 of the Regulation.

If the European Enforcement Order certificate is refused due to other reasons, the claimant has the option to appeal the refusal to grant a European Enforcement Order if such possibility exists under national law.

All in all, many possibilities for both the debtor and the creditor to challenge the issuance or non-issuance of the European Enforcement Order, which are mostly governed by the national law of the Member States. Even though six out of the seven Member States covered by the EFFORTS Project have enacted at least some implementing legislation in relation to the European Enforcement Order Regulation, the practical approaches and the extent to which national procedural law regulates the different issues addressed by this Regulation vary greatly from one country to another.

For example, in Belgium, both courts and scholars have expressed doubts as to the possibility of issuing European Enforcement Order due to the lack of any specific national implementing legislation. In France, the Code of Civil Procedure provides that the decision denying the certification of a judgment under the EEO Regulation cannot, contrary to what happens under the Brussels I bis Regulation, be subject to any

challenge. Except, maybe, an appeal for excess of power. The application for a rectification of an EEO can be characterized as a mere correction of a material error and can be made *ex parte*. By contrast, the application for withdrawal should therefore be treated as a request to revoke the certificate that had been granted *ex parte*, and the court should allow the party to submit her comments on the correct applicability of the EEO Regulation.

In Germany, for instance, while no time limitation applies to the application for rectification, the application for withdrawal must be filed within one or two months. In Italy courts have come to inconsistent solutions on whether, in the absence of any specific remedy in the Regulation, creditors should be allowed to renew their applications or rather be required to challenge the refusal before the Court of Appeal following the relevant rules of domestic civil procedure.

In Croatia, if the competent body dismisses the request for issuance of a certificate, the applicant has the right to appeal in accordance with the rules governing the appeal against the decision dismissing the motion for enforcement. Also, if the notary public finds that the conditions for issuing the certificate are not met, he or she shall forward the request for issuing a certificate with a relevant documentation to the municipal court.

All this show the importance of implementing explicit national rules to fill in the gaps in the Regulation. The existence of explicit implementing rules is widely regarded as a helpful tool to enhance predictability and consistency in the application of European law.

IV. Enforcement in the shadow of the (first) unified rules of civil procedure: EOPR and ESCPR

Challenging the (non)issuance of certificates under the EOPR and ESCPR may seem a bit off topic, as enforcement is not directly in the center of attention of these regulations. Of course, one could argue that the end goal of these two instruments is to facilitate the cross-border enforcement in the EU, however the fact remains that these two instruments offer something completely different than other EFFORTS regulations: the unified rules of procedure in cases of minor value, social significance, or complexity. They both strive to “simplify and speed up small-claims litigation” and to rectify “the imbalances with regard to the functioning of the procedural means afforded to creditors in different Member States” without affecting the existing ones. Their main purpose is not to result in a ”passport” securing *ex post facto* the enforceability of the domestic decisions already made under the domestic rules. Quite on the contrary, the direct enforceability of decisions rendered in such autonomous proceedings originates from the assumption that the courts have applied common European rules, which

guarantee the consideration of minimum standards of due process previously agreed upon by the Member States. Certification of enforceability of the court decisions is merely a final step in such unified proceedings. Challenging of the certificates thus only make sense if the minimal procedural standards were not respected.

In that regard, both regulations share the possibility of the debtor to request "review in exceptional cases" of the EOP (Art. 20 EOPR) or judgment rendered in the ESCP (Art. 18 ESCPR). Originally, the provisions were almost the same, but the recast of ESCPR of 2017 decided to resolve the difficulties noticed in case law, and to further elaborate on some of the legal standards used in the provision. There are still many similarities, though. Both provisions entrust the courts of origin with the task to carry out the review. The ineffective service, or *force majeure* and other exceptional circumstances outside of control of the debtor, both preventing them from adequately engaging in proceedings, are the general legal grounds which can be raised under both regimes. Both regulations expect a prompt reaction of the debtor. They set the scope of the review – possibly resulting either in upholding decision or in declaring the EOP/judgment null and void.

The differences reflect not only the time lapse between their entry in force and subsequent amendments, but also the specific nature of these instruments. Since small claims proceedings, despite being simplified in many ways, maintain the adversarial elements in the proceedings before the judgment is rendered, the service can be ineffective on two different occasions: during service of process (service of claim form) and during the summons for a hearing (providing the court decides to hold one). Regardless of the reasons for not entering the appearance, the debtor is expected to exhaust all available remedies. In other words, if they could have challenged the judgment before its finality (e. g. in appeal, when available), they are precluded from requesting a review. Furthermore, the prompt reaction of the debtor is more precisely defined in the ESCPR. The request must be filed within 30 days of the day when the defendant was effectively able to react, but not later than 30 days from the date of the first enforcement measure making the debtor's property at least partially non-disposable. Finally, ESCPR narrows the effect of the decision to declare the judgment being null and void. Such decision does not affect the creditor's previously obtained benefit of interruption of limitation period(s).

On the other hand, since the EOP proceedings are adversarial only after the decision has already been rendered and preferably delivered directly to the debtor who is expected to react by lodging an opposition (if they decide to do so), the ineffective service is relevant only if it was carried out indirectly, without a proof of receipt (Art. 14 EOPR), but in such manner which prevented the debtor to react in due time. In other words, the review is possible only if the service was successful, but ineffective. Additionally, there is a special ground for review, again reflecting the *ex-parte* issuance of the EOP: it can be declared null and void if it was clearly wrongly issued, taking into account the prerequisites laid down in the EOPR.

Both instruments contain a number of legal standards that are subject to the interpretation of the CJEU and national courts (e.g. “prompt reaction”, “clearly wrongly issued”, “the exceptional circumstances”, etc.). On the top of that, many issues, not specifically addressed by the regulations (e.g. competent courts, time limits, procedural steps, etc.) are left to the Member States to regulate them as they deem appropriate. The following part of my presentation will emphasize the most important findings of the national implementing rules and practices in seven Member States within the EFFORTS project regarding three common points of interest, with the aim of opening the discussion on what needs to be done *pro futuro*.

V. EOPR and ESCPR: Common points of interests

1) The division of jurisdiction

Functionally, the exceptional review could be described as an extraordinary remedy against the final and enforceable decision, which is available to (former) litigants in the Member State of origin. If the review is successful, the parties no longer dispose of the enforceable title and the litigation, either under the common European rules or under the domestic rules, has to start over. Technically speaking, there is no creditor and no debtor in terms of enforcement proceedings yet, as the decision – which has had the potential to be used as an outgoing enforceable title in another Member State – is challenged in the Member State of the origin. The challenge itself is not a challenge on the merits, but a procedural one, aiming at the effect of the decision. In a way, this means not only the court in the Member State of enforcement is prevented from reviewing the EOP/judgment in ESCP on the merits (Art. 22(3) EOPR; Art. 22(2) ESCPR), but also the court in the Member State of origin within review proceedings (at least not directly). In case of the EOP, reviewing it on the merits would also mean the debtor has another opportunity to lodge an opposition against the EOP, which was strictly rejected as an option by the CJEU in Thomas Cook Case (C-245/14).

The issue of the division of jurisdiction between two potential courts which could question the enforceability of the decisions was raised before some of the courts in the Member States which were part of this research. According to the French Court of Cassation, only the courts of origin can review the quality of service of the EOP, which was also confirmed by some appellate courts (Buzzoni, Report on French case law, pp. 62-64 and 69-72). However, slightly dissentingly, lower courts decided that this not affect the power of the court in the Member State of enforcement take into account any decision of the courts in the Member State of origin on regularity of service when it is

relevant to decide on the remedies which are without any doubt in its jurisdiction, e.g. in case of stay of enforcement (*ibid*., pp. 73-74).

This division of powers between the courts of two Member States, recognizing only to the courts of origin the power to carry out the review, is seen by *Buzzoni* and *Santaló Goris* (Report on practices in comparative and cross-border perspective, pp. 53-54) as a logical extension of the rule that the court in the Member State of the enforcement cannot review the EOP on the merits. Unfortunately, other national reports did not mention this issue, so it was difficult to put the opinion of the French Court of Cassation into international perspective.

2) Legal grounds for the review

Both under the EOPR and ESCPR regime, one of the reasons preventing the debtor to timely engage in proceedings are the so-called "exceptional circumstances". Their meaning is not further elaborated in the regulations, except for the EOPR whose recital no. 25 mentions these circumstances "could include a situation where the European order for payment was based on false information provided in the application form." This leaves a considerable margin of discretion for the national courts, and the CJEU has only partially managed to give guidance on the proper interpretation of that standard. In of the cases, for instance, the CJEU decided that these circumstances do not exist where it is the debtor's representative who had not lodged a timely opposition (Novotel-Zala case, C-324/12). Some further guidance is given in case law of the Member States within the EFFORTS project.

French courts expressly stated their opinion that the service without proof of receipt cannot be considered exceptional circumstance as such (Buzzoni, Report on French case law, p. 71). A more detailed description of what can be considered exceptional is provided by the Italian courts. In case of the EPO, it could be when an error of form, or serious procedural errors, such as fraud of the claimant on the defendant, use of forged documents, existence of a final judgment that ascertained the fraud, corruption of the judge, etc. (Villata et al., Report on Italian case law, p. 57.

Some guidance from the CJEU is provided also regarding the term "obviously wrongly issued" EOP. It has clearly stated that the review cannot be done *ex officio* automatically in case of wrong jurisdiction (Flight Refund case, C-94/14). However, as it is clearly shown in one case in Luxembourg, it can lead to a successful review when rules on exclusive jurisdiction in consumer contracts were not respected and the debtor points it out in its request (Van der Eeckhout, Report on Luxembourg case law, p. 19), which was also the conclusion in another case where the parties had previously agreed on the jurisdiction of certain courts (*ibid*., p. 19).

As mentioned earlier, the exceptional review is option only when the service of the EOP was successfully conducted without the proof of receipt (Art. 14 EOPR), but in a way which effectively prevented the debtor to lodge an opposition in due time. The question arose before the CJEU which type of redress is available in situations when the EOP has not been properly delivered or not delivered to the debtor at all. On two occasions, the CJEU has clearly stated that in such situation "the order does not become enforceable and the period in which the defendant may lodge a statement of opposition cannot start to run" (Caitlin Europe case, C-21/17) and that the debtor as "the defendant must have the opportunity to raise that irregularity, which, if it is duly established, will invalidate the declaration of enforceability" (eco cosmetics and Reiffeisen joint cases, C-119/13 and C-120/13).

As a reaction to the latter decision, two Member States within the EFFORTS project recognized a special remedy for the debtors which were not properly served with the EOP (Buzzoni and Santaló Goris, Report on practices in comparative and cross-border perspective, pp. 52-53) and in two of them such possibility is strongly argued by theory (see Buzzoni, Collection of French implementation rules, p. 44; Villata et al., Collection of Italian implementation rules, p. 44). While Luxembourg merely recognized the debtor's right to appeal, since it was not explicitly forbidden by the law (Van Den Eeckhout, Report on Luxembourg case law, pp. 20-21), Germany acted proactively by laying down special set of rules (Lobach and Reich, Report on German case law, pp. 11-12). The comprehensive § 1092a ZPO (Civil Procedure Act) introduced a request for 'suspension' which the debtor can lodge within 30 days from the moment they became (or should have become) aware the EOP has been issued. The standard of proof that has to be met by the debtor is lowered to the level of probability. The result of such special remedy, if successful, is either the annulment of the EOP (if the enforcement has not yet started) or declaring the enforcement inadmissible (if the enforcement has already been ordered).

When ESCPs are in question, ESCPR recast of 2017 resolved many of potential issues faced in the practice. If one also takes into account that not many ESCP are carried out within the EU, there is so no surprise that the national reports did not cover many decisions regarding the exceptional review of judgments rendered in the ESCP. One reported case in Luxembourg mentioned that sole fact that the documents were served in the language the debtor did not understand does not fulfil the conditions of Art. 18 ESCPR (Van den Eeckhout, Report on Luxembourg case law, p. 27). This seems to be in line with the decision of the CJEU in the case Caitlin Europe (C-21/17).

3) Procedure

In comparing the national solutions to the issue which courts or tribunals are competent courts to decide on the exceptional review, it would seem that in all Member States

entrusted the same courts (or tribunals), which rendered the decision whose enforceability is questioned, with that task. The peculiarity is only seen in those states which centralized the decision-making process. Such is the case with Germany who delegated all cases dealing with EOPs to one particular first-instance court *Amtsgericht Berlin-Wedding* (Lobach and Reich, Collection of German implementation rules, p. 12). It also used to be the case for Croatian *Trgovački sud u Zagrebu* until such general delegation was abolished in 2019 (Uzelac, Bratković and Brozović, Collection of Croatian implementation rules, p. 10). Germany has also partially delegated solving some of the ESCPs to particular courts in five federal states which were equipped enough to hold remote hearings (Lobach and Reich, *ibid*., p. 13).

What is considered a "prompt" reaction of the debtor when requesting the exceptional review is also a matter which could have been addressed by the national implementing rules. Unfortunately, none of the countries used that opportunity (at least not directly). However, the interpretation of Italian *Corte di cassazione* sheds some light on the possible approach the Member States can take. The reported case law considers the same deadlines to be applicable to exceptional review under Art. 20 EOPR as the deadlines for the review of a final national order for payment: 10 days from the first enforcement measure known to the debtor or, if there is no enforcement, 40 days from the moment when the debtor could have opposed the order (Villata et al., Report on Italian case law, p. 60).

The national implementation rules are clearer and more comprehensive on procedural aspects of the exceptional review. There is almost a common agreement on the mandatory hearing, as the most of the partners have specifically reported that the courts are supposed to hold a special hearing before deciding on the review (compare Lobach and Reich, Collection of German implementation rules, p. 15; Buzzoni, Collection of French implementation rules, pp. 42 and 84-85; Van der Eeckhout, Collection of Luxembourg implementation rules, pp. 38-39; and Uzelac, Bratković and Brozović, Croatia - Practice guide on the EOP, p. 5). Interestingly enough, Lithuania reported completely different approach, opting for written exchange of pleadings and a written decision (Simaitis et al., Collection of Lithuanian implementing rules, pp. 33 and 35). Some of the countries specifically regulate the standard of proof – lowering it to the level of probability (Lobach and Reich, Collection of German implementation rules, p. 11; Uzelac, Bratković and Brozović, Collection of Croatian implementation rules, p. 11). Additionally, Luxembourg laid down the special rules on mandatory representation in the review proceedings against the EOP (Van der Eeckhout, Collection of Luxembourg implementation rules, pp. 35-36).

4) On challenging the non-issuance of the certificate

As mentioned before, certification of enforceability of the court decisions is merely a final step in unified European proceedings. Deciding not the issue the certificate is

highly unlikely because the same court which conducted the proceedings is the one later certifying the enforceability of the decisions. Such challenging is especially unlikely in case of the judgments rendered in the ESCP which are enforceable regardless of any right to appeal (Art. 15 ESCPR).

The issue still may arise in case of the EOPs whose enforceability is declared too soon, taking into account “an appropriate period of time to allow a statement to arrive” and national understanding of “no delay” (Art. 20 EOPR). Unfortunately, the national reports did not offer a direct answer to the issue how to proceed if the certification enforceability is denied. One option would be the application by way of analogy of the rules on the non-issuance of the certificate under the EEOR, as was done in Germany in case of suspension and stay of enforcement rules in three different instruments (§§ 1084 and 1096 German ZPO) or to apply domestic rules on the contestation of the decision to issue a court certificate of enforceability (Lobach and Reich, Collection of German implementation rules, p. 11 and 15;).

VI. Conclusion

When challenging the issuance and non-issuance of certificates of enforceability under EFFORTS regulations is in question, each of the regulations introduced similar, yet different rules to address a completely comparable set of issues. This shows the biggest flaw of EU cross-border procedure and enforcement rules: they are unclear, uncomprehensive, and sometimes contradictory. This issue is amplified by the fact that individual action depends vastly on the national implementing rules which may supplement the rules on the EU level to certain degree if they follow a coherent approach (like Germany), but they usually fail to do so. On the EU level, it would seem that having one unique set of civil procedure rules, perhaps inspired by the ELI/UNIDROIT rules of transnational civil procedure, as well as one set of rules regarding the enforceability certification is a more effective way to create user-friendly rules. This would create less uncertainty, facilitate the use of cross-border instruments instead of relying on the national ones, and contribute to the successful cross-border collection of claims within the EU.

3. *The Effectiveness of the Regulations on Cross-Border Enforcement and National Implementing Rules*

Quincy C. Lobach*

I. Introduction

In this paper, I will deal with some general matters relating to national implementing rules. Over the course of the Project, the consortium has repeatedly found that national implementation rules and particularly the lack thereof can be of great importance when it comes to the effectiveness and the practical workability of the European Regulations on cross-border enforcement, i.e. the Brussels I bis, European Enforcement Order, European Payment Order, European Small Claims, and European Account Preservation Order Regulation (also: EFFORTS-Regulations).

I will commence with some general reflections on implementation rules. I will then provide a brief description of the status quo in the Member States involved in the Project. Subsequently, I will demonstrate that implementation laws can play an important role to elevate the attractiveness of the EFFORTS-Regulations, which have not been very popular in practice. Finally, I will turn to the way forward and address various best-practices relating to the use of implementing rules.

II. Notion of implementing rules

First of all, it is important to briefly define the notion of implementing rules. Implementing rules are essentially all measures and instruments of national law dealing with the application of the EFFORTS-Regulations in a particular Member States. They are, so to speak, the bridge between the European legal order and the national legal order.

From a purely formal perspective, such instruments can be statutes entailing legal provisions, but also governmental decrees, ministerial circulars and more informal instruments such as guidelines, practice directions and so forth. Implementing rules are, therefore, mainly characterized by their function to contribute to the interplay between European and national law.

---

* Research Fellow at the Institute for Comparative Law, Conflict of Laws and International Business Law of Heidelberg University. This paper entails a transcript (with only minor textual changes) of a presentation delivered at the EFFORTS Final Conference held at the Università degli Studi di Milano on 30 September 2022.

III. Importance of implementing rules

One of the first questions arising is obviously why regulations require implementation in the first place. It should be point out that regulations, pursuant to Art. 288 TFEU, have direct effect and, contrary to directives, generally do not have to implemented.

However, one of the main traits of the EFFORTS-Regulations is that they leave many matters to national law. On the one hand, they repeatedly explicitly state that a certain topic is governed by the laws of the Member States. On the other hand, the Regulations sometimes implicitly require implementing legislation. For example, when a Regulation states that a European Enforcement Order or a European Payment Order can be issued, the question arises which national authority is competent to issue such a document.

IV. Status quo in various Members States

I will now turn to the ways in which the Member States involved in the Project have filled the gaps left by the EFFORTS-Regulations. Already here, I would like to point out that great differences can be observed.

On the basis of the national reports, the Member States can essentially be divided into three groups.

On one end of the spectrum, there are Members States with essentially no or at least very limited implementing rules. For example, in Italy[126], only a communication by the Italian government exists and in Belgium[127], the Ministery of Justice has issued a circular. According to the national reporters, both these documents fail to create an adequate foundation for the application of the Regulations and are not particularly helpful in practice.[128] In general, it is largely left to academia to pave the way and ultimately up to judges to find workable solutions. The gaps are usually filled by resorting to national rules which are applied by analogy. In itself, the application of domestic rules by analogy is not a bad strategy. I will get back to this point later on.[129] What is problematic, however, is that the reporters observe a great degree of legal

[126] Cf. *Villata et al.*, Italian National Report, p. 4 and 78.

[127] Cf. *Van Der Borght et al.*, Belgian National Report, p. 1.

[128] Cf. *Villata et al.*, Italian National Report, p. 4; *Van Der Borght et al.*, Belgian National Report, p. 33 et seq.

[129] See Section VII. 2.

uncertainty as to which rules of national law are to be applied *mutatis mutandis*.[130] As a consequence, diverging court practices can be observed.[131]

On the other end of the spectrum, we find Member States with fairly elaborate implementing rules, such as Luxembourg[132] and Germany[133], and partially also France[134]. These Member States have opted for statutory implementing rules, which have predominantly been placed in the Code of Civil Procedure. While also in these Member States the legislator has not in every instance made choices acclaimed by the national reporters, they appear to be quite content with the functioning of the system as whole.

Somehow placed in the middle are Member States with quite generic implementation rules, such a Croatia[135] and to a lesser extent Lithuania[136]. While implementation laws were indeed put into place from a formal perspective, these according to the national reporters are occasionally inconsistent, hard to grasp and, in general, appear to not have to been well-drafted.[137]

By ways of an interim conclusion, it can be said that in the majority of Member States, an adequate legal landscape to cope with the EFFORTS-Regulations on a national level has not been created. The national reporters also perceive the status quo as unsatisfactory and, in some instances, explicitly state that the workability of the Regulations in practice is hindered by the lack of implementing rules.[138] In one Member State, practitioners even claim that some instrument are “sabotaged” by the courts.[139] This brings me to my next point.

---

[130] Cf. in particular *Villata et al.*, Italian National Report, p. 78.

[131] Cf. in particular *Van Der Borght et al.*, Belgian National Report, p. 33 et seq.

[132] Cf. *Van Den Eeckhout*, Luxembourg National Report, p. 4 et seq.

[133] Cf. *Lobach/Reich*, German National Report, p. 1 et seq.

[134] In France, the legislator has only enacted detailed provisions for some of the Regulations, while having refrained from doing so for other Regulations. Cf. *Buzzoni/Van Den Eeckhout*, French National Report, p. 5 et seq.

[135] Cf. *Uzelac/Bratkovic/Brozovic*, Croatian National Report, p. 1 et seq. and 25.

[136] Cf. *Simaitis/Vebraite/Markeviciute*, Lithuanian National Report, p. 1 et seq.

[137] Cf. in particular *Uzelac/Bratkovic/Brozovic*, Croatian National Report, p. 25.

[138] Cf. inter alia *Uzelac/Bratkovic/Brozovic*, Croatian National Report, p. 25; *Van Der Borght et al.*, Belgian National Report, p. 33 et seq.; *Villata et al.*, Italian National Report, *passim*.

[139] *Van Der Borght et al.*, Belgian National Report, p. 17.

V. Limited practical relevance of the EFFORTS-Regulations

5) General observation

As is well known, the Regulations of the so-called second generation have hitherto only achieved limited practical relevance. It is a fact that most EFFORTS-Regulations are not regularly applied. This can be derived not only from statistics and the national reports but is also evidenced by the very limited amount of case law by national courts and the CJEU alike. In some Member States, even the first case for some EFFORTS-Regulations is yet to be reported.[140]

6) Reasons

I do not want to go into the reasons for the scarce use in practice in great detail, which indeed appear to be manifold. But I will briefly mention just a few. First of all, the EFFORTS-Regulations are characterized by a high degree of complexity and technicality.

One of the main reasons for their lack of popularity, however, appears to be the fact that many legal operators are simply unaware of or not well acquainted with the EFFORTS-Regulations. We know from empirical research conducted in previous projects that there is lack of familiarity with European private international law amongst legal operators in general, even when it comes to some of the more prominent European regulations.[141] This most likely also extends to the EFFORTS-Regulations. Against that background, various national reporters have called for judicial training and raising awareness amongst practitioners and citizens.[142] These may indeed be part of the solution.

In addition, many competing national procedures exist, for example national payment order proceedings. Some of these have been in place for years and have proven to be very successful tools. Due to their frequent use in practice, they are generally accompanied by a substantial amount of case law, in which many open matters have

---

[140] Cf. inter alia *Uzelac/Bratkovic/Brozovic*, Croatian National Report, p. 25 for the European Account Preservation Order Regulation.

[141] Cf. inter alia *Lobach/Rapp*, An Empirical Study on European Family and Succession Law, http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2.

[142] Cf. inter alia *Simaitis/Vebraite/Markeviciute*, Lithuanian National Report, p. 14; *Van Der Borght et al.*, Belgian National Report, p. 35.

gradually been clarified. Under these circumstances, it is purely rational for lawyers to opt for national instruments providing more legal certainty to the benefit of their clients.

Unfortunately, precisely the opposite is arguably true for the EFFORTS-Regulations. As a result of their infrequent application, the lack of experience amongst lawyers and judges, and in the absence of clarifying case law, they are simply not as attractive to practitioners.

But even assuming that lawyers are indeed willing to conduct proceedings under one of the Regulations: If we then enter into the equation that they are confronted with inadequate implementing rules, lawyers may simply not even know where to begin.

VI. The way forward

Let me now turn to the way forward. Are implementing rules the miracle cure that solves all problems and catapults the EFFORTS-Regulation to immense popularity? Obviously not. In my opinion, to a certain degree we should face the fact that most of the EFFORTS-Regulations are, and most likely also in the future will continue to be, somewhat of a niche product, the Brussels I bis Regulations obviously being an exception.

Nonetheless, I think that the EFFORTS-Regulations have not reached the peak of their potential. In some situations, they do provide a valuable tool for the cross-border enforcement of claims.

Having said all that, adequate implementation laws can contribute greatly to precisely the legal certainty that is now missing. Implementing rules should, so to speak, be a map for legal operators to navigate through the national legal order when conducting the procedures laid down by the EFFORTS-Regulations.

VII. Suggestions and best-practices

I will now turn to some suggestions and best-practices which relate to two aspects, namely the distribution of competences and the application of national procedures by analogy.

1) Distribution of competences

General remarks

Some national reporters state that in practice, doubts continue to exist as to which entities are competent to perform certain tasks under the EFFORTS-Regulations.

Evidently, for the parties involved it is of great importance not to be left in the dark as to where to turn. This extends both to the initiation of proceedings as well as to the many remedies under the Regulations, such as appeal, opposition, withdrawal of certificates, stay or limitation of enforcement proceedings, and so forth.

The importance of a clear distribution of competences and the detectability of remedies is underlined by the fact that many of these matters may also affect fundamental procedural rights and principles, such as access to justice, fair trail, the right to an effective remedy, and the right to heard. Clear rules on jurisdiction and remedies are, therefore, a necessity to stimulate the use of the EFFORTS-Regulations.

Imtech Marine-judgment

Also the functional competence within a particular court can cause problems. One notable issue in this respect has been brought up by the CJEU in its *Imtech Marine*-judgment. In many Member States, the certification of a judgment under the European Enforcement Order Regulation is processed by clerks or registrars. In the *Imtech Marine*-case, however, the CJEU explicitly held that "the certification of a judgment as a European Enforcement Order can be carried out only by a judge".[143] Against that background, it appears highly questionable whether the practices of some other Member States are in conformity with European law.[144]

Concentration and specialisation

When it comes to best-practices, we should in my opinion also consider the increased use of concentration of local jurisdiction within the judiciary and possibly also the creations of specialised chambers within a particular court. At present, the majority of the Member States have not concentrated jurisdiction whatsoever. In many Member States, all national courts of a particular hierarchy are competent. In view of the complexity of the EFFORTS-Regulations, it is not surprising that for judges who only rarely get cases pertaining to the Regulations on their desk, it is quite time-consuming and challenging to get an overview of the regulatory framework.

In my opinion, concentration and specialisation may entail significant benefits. One of the main advantages is that a limited number of courts and judges routinely deal with

[143] CJEU, 17.12.2015 – C-300/14 (*Imtech Marine v Radio Hellenic*), note 50.

[144] E.g. Germany, where pursuant to an implementing rule, the certificate is issued by the judicial officer. Cf. *Lobach/Reich*, German National Report, p. 4 and 8. Initially, the situation was similar in Luxembourg. Cf. *Van Den Eeckhout*, Luxembourg National Report, p. 9. However, Luxembourg recently passed amending legislation. Issuing certificates is now explicitly referred to a judge. Cf. *Buzzoni*, Report on Practices in Comparative and Cross-Border Perspective, p. 8 Fn. 17.

the Regulations. This will foster learning effects and may, therefore, result in a greater degree of expertise and experience.

I should point out that some Member States have indeed at least considered concentration, for example France during the legislative process.[145] Germany is a notable exception where jurisdiction has indeed been concentrated. For example, a single local court in Berlin is competent for all German proceedings under the European Payment Order Regulation. The experiences have been quite positive.[146]

2) Application of national procedures by analogy

A second suggestion concerns the application of national procedures by analogy. For example, when a Regulation requires a certain remedy, many Member States, both with and without implementing rules, almost intuitively resort to the application of comparable national legal rules, rather than creating dedicated procedures for the EFFORTS-Regulations.

This is, generally speaking, a sensible strategy. One important advantage is that the application of domestic rules enables legal operators to, so to speak, return to their "comfort zone". They can rely on national procedures with which they are familiar.

While the application by analogy is therefore generally to be acclaimed, caution is sometimes required. It is important to refrain from simply stipulating that national rules are to be applied *en bloc*, without any closer considerations. Rather, it is important to assess and inspect whether domestic rules are indeed a good fit for the particular remedy required by the EFFORTS-Regulations. More in particular, problems can arise when national law entails standards deviating from those laid down by the Regulations.

A prominent example of a less strict rule in the national laws of almost all Member States relates to the means of service. Both Art. 13 of the European Enforcement Order Regulation and Art. 14 of the European Payment Order Regulation contain minimum requirements for the service of documents, while leaving the modes of service to the laws of the Member States. Both these Regulations ultimately apply only for uncontested claims. Therefore, from the perspective of the Regulations, it is essential to safeguard that the defendant has been made aware of the proceedings. Against that background, the minimum requirements of these Regulations are rather strict. An acknowledgement of receipt, either by the debtor or a competent service person, is required in any instance.

---

[145] Cf. inter alia *Buzzoni*, Report on Practices in Comparative and Cross-Border Perspective, p. 46 with further references.

[146] Cf. *Richardt*, in: Pfeiffer/Lobach, Effektive grenzüberschreitende Vollstreckung in der Europäischen Union (2022), p. 41 et seq.

However, the laws of the vast majority of the Member States also provide for less strict modes of service. When the address or whereabouts of the defendant are unknown, a document can generally also be served by public announcement, for example by a posting on the court's black board or online.[147]

These deviations can result in unpleasant surprises for the claimant later on in the proceedings, as the judgment will ultimately not be capable of certification because it fails to meet the minimum standards of the Regulations.

VIII. Closing remarks

I have almost come to the end of my presentation. I hope to have demonstrated once more the quintessential importance of national implementing rules as a tool to intertwine the European and national legal order. As such, implementing rules can greatly foster the effectiveness of the EFFORTS-Regulations in practice. I have accordingly mentioned some implementation strategies that in my opinion can be considered best-practices, i.e. the concentration of jurisdiction and the application of national rules by analogy. By nature, these suggestions relate to a broad array of topics, some of which will likely be addressed in greater detail elsewhere in this final study.

[147] Cf. inter alia *Lobach/Reich*, German National Report, p. 6; *Simaitis/Vebraite/Markeviciute*, Lithuanian National Report, p. 3 et seq.; *Uzelac/Bratkovic/Brozovic*, Croatian National Report, p. 6 et seq.; *Villata et al.*, Italian National Report, p. 27 et seq.

4. *Current challenges in the EU rules on cross-border enforcement of claims: Cross-border provisional measures*

Lidia Sandrini*

1) As the EU Commission pointed out more than two decades ago, “Provisional and protective measures are of vital importance in the context of recognition and enforcement of foreign judgments”[148]. Thus, while thinking about making more effective the enforcement of claims in civil and commercial matters within the EU, one cannot avoid considering how to deal with cross-border provisional measures.

Precisely because of such a connection between the interim protection of rights and their actual enforcement, cross-border provisional measures have been extensively investigated by scholars since the Brussels 1968 Convention[149] entered into force. Over the years, they have detected a number of flaws in the EU discipline, and suggested different, and often sounding, solutions for each one. Recently, for example, it may be mentioned Professor Burkhard Hess’s suggestion to address the issue of coordination between the exercise of competence under the grounds set out for the merits and under the special rule that is now provided by Art. 35 of the Brussels 1 *bis* Regulation[150] by taking example from Art. 15 of the Brussels 2 *ter* Regulation[151].

In the past, some of such suggestions have even been taken up by the Commission in its proposals[152]. In spite of that, a comparison between the Brussels Convention and the Brussel 1 *bis* Regulation reveals that very little has changed in this matter.

---

* Professor at the University of Milan.

[148] Commission communication to the Council and the European Parliament "Towards greater efficiency in obtaining and enforcing judgments in the European Union", COM(1997) 609 final, § 22.

[149] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, of 27 September 1968.

[150] 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 (recast).

[151] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

[152] In addition to the Proposal for a Council act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the

More specifically, on one hand the new definition of "judgment" in Article 2 (a) of Brussels 1 *bis* has opportunely clarified the picture as to the circulation of provisional measures, preventing the circulation of measures ordered by a court or tribunal which does not have jurisdiction as to the merits. On the other hand, the abolition of exequatur may give rise to some concerns as to a possible circumvention of such a new rule through an incorrect – or even abusive – use of the certification system, upon which the free circulation of decisions relies. However, this risk seems to be a natural, and perhaps unavoidable, consequence of the certification system peculiarities, which have been analysed by Marco Buzzoni dealing with the certification of judgments under the EFFORTS Regulations.

Exactly because so little has changed in the Brussels discipline of provisional measures, it comes without surprise that the most recent case-law – both at the EU and the national level[153] – does not reveal "current challenges" that are also "new challenges", or, in other words, new interpretative or applicative problems. At the same time, and for the same reason, most of the issues that have been repeatedly highlighted by scholars under Brussels 1 (or even under the Brussels Convention) are still there.

In light of that, and taking into account that the EFFORTS project aims, *inter alia*, at finding policy options for a future redrafting of the Brussels 1 *bis* Regulation, it is necessary to look at this matter from a slightly different perspective and, first of all, try answering a "preliminary question": If the shortcomings of the current set of rules, as well as the solutions, were already well known when Brussels 1 *bis* was drafted, why did the legislator choose not to address them?

This might be – in part, at least – the result of an eminently political problem, *i.e.* a lack of "mutual trust" among member States, together with their concern that judicial cooperation in this field may impair the exercise sovereign powers. Such a concern emerged, for example, with regard to the Commission's suggestion to empower the Member State whose courts have jurisdiction as to the substance of the matter to discharge, modify or adapt a provisional measure ordered by a court of another

---

Member States of the European Union, in COM(1997) 609 final (fn. 1 above), see, especially, the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final.

[153] See the EFFORTS Reports on National case-law < https://efforts.unimi.it/research-outputs/reports/ >.

Member State ex Art. 24 of the Convention[154] (now Art. 35 of the Regulation). Clearly, if this were the only explanation, it would be of little use to put forward again legal solutions, however good they may be.

However, among the possible explanations, there is one which may also be considered and that, by contrast, is properly a legal one. Perhaps the legislator reached the conclusion that some shortcomings that have been detected by the academia are not worthy of a legislative reform, by weighing, on one hand, their limited impact on the functioning of the European judicial area and, on the other hand, the risks connected to the initial legal uncertainty that follows to any modification of a legal act, together with the training costs for practitioners.

In order to assess whether such a conclusion may be correct, it is necessary to look back at the history of provisional measures in the Brussels system from the very beginning, and see how what are currently considered as the major shortcomings – such as the impossibility to preserve the surprise effect of cross-border provisional measures and the lack of a uniform definition of such measures within Brussels I *bis*, the fact that it allows forum and remedy shopping, and, as a consequence, a conflict between interim judgments – came to our attention and how the European Court of Justice and the others institutions reacted to them.

Such an exercise will lead to a distinction between "actual problems", *i.e.* interpretative or applicative difficulties that occur repeatedly in the day by day practice and have negative effects on the proper functioning of the system, and "academic problems", *i.e.* those discrepancies in the Brussels rules on provisional measures that may result disturbing from a systematic point of view, but that do not have major detrimental effects in the practice.

2) The starting point is, of course, the 1968 Convention, which was a truly innovative piece of law, taken as a whole, but did not say anything, explicitly at least, about the recognition and enforcement of provisional measures and, more in general, didn't spend many words on such measures. This left the door widely open to equally innovative interpretations by the European Court of Justice, which arrived shortly after its entry into force.

In the *De Cavel I* case, the Court stated:

---

[154] Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009) 175 final, § 6. See A. Dickinson, *Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?*, 2010 *Journal of private international law* 519, at 550 ff.

"In relation to the matters covered by the Convention, no legal basis is to be found therein for drawing a distinction between provisional and definitive measures" [155].

And then, in *Denilauler*, it added:

"Article 24 does not preclude provisional or protective measures ordered in the state of origin pursuant to adversary proceedings - even though by default - from being the subject of recognition and an authorization for enforcement on the conditions laid down in articles 25 to 49 of the convention. On the other hand the conditions imposed by title III of the Convention … are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party"[156].

In both cases the European Court of Justice was concerned with the enforcement in Germany of a French court order, which purported to affect assets situated in Germany, upon request of the German judicial authority. The French judicial authority was competent with the merits. Article 24 of the Convention (now Art. 35 of the Regulation), therefore, was mentioned in the reasoning as a part of the legal context, but was not the primary object of the questions before the ECJ.

Despite that, what the Court said, and what it didn't, were almost unanimously understood by scholars as implying that *measures of this kind, even if ordered under Article 24 of the Convention*, *were entitled to recognition and enforcement in other Contracting States*, provided that they were communicated to the party against whom they are directed before the enforcement.

Someone tried to object. For example, Sir Lawrence Collins, in one of his first comments to such rulings, wrote:

"This, it is suggested, would be a development which could not have been intended by the Convention and one which, when it arises for decision, should be resisted by the Court" [157].

But a pervasive enthusiasm for such an innovative approach, such an advanced expression of the principle of mutual recognition of judgments, quickly defeated any

---

[155] ECJ, Case 143/78, *De Cavel I*, §9.

[156] ECJ, Case 125/79, *Denilauler*, § 17.

[157] L. Collins, *Provisional Measures, the Conflict of Laws and the Brussels Convention*, 1981 Yearbook of European Law 249, at 265.

voice of dissent. Lord Collins himself put aside his initial criticism and, in a later writing, admitted:

"There can be little doubt, however, that by implication the decisions in De Cavel (No. 1) and Denilauler accept in principle that … an order made under Article 24 will be entitled to recognition and enforcement in other Contracting States" [158].

So, in 1980 we found ourselves with to problems: a) because of the "previous communication" requirement, the creditor cannot enforce any provisional measure preserving its "surprise effect". On the other hand, b) different interim decisions, taken in different States on the bases of domestic – not uniform – grounds of jurisdiction (*i.e.*, under Art. 24 of the Convention), may circulate, and the abuse of this possibility by the creditor may result vexatious to the debtor.

The first problem is still in place: the Commission's proposal in 2010 tried to address it within the recast of Brussels 1[159], but the legislator took a different path. It chose to leave the Brussels regime as it was, and tackled the problem by establishing a uniform procedure the account preservation orders[160]. Unfortunately, the EAPO Regulation has not proved to be enough. On one and, it deals only with a specific measure; on the other hand, its interplay with the domestic procedural rules is not at all easy, despite many Member States have adopted specific implementing rules. That may explain why, so far, it had a limited success.

Whichever the explanation may be, today, the creditor who doesn't rely on the EAPO Regulation and seek to secure her/his credit under the Brussel 1 *bis* Regulation has to proceed in different Member States in order to preserve the surprise effect of interim measures, whenever (as it often happens) the debtor has not enough assets within one single Member State. This means that within the Brussels I *bis* system, in cross-border

---

[158] L. Collins, *The Territorial Reach of Mareva Injunctions*, 1989 Law Quarterly Review 262, at 292.

[159] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, Article 2 "For the purposes of Chapter III, the term 'judgment' includes provisional, including protective measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter. *It also includes measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant* if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin" (emphasis added).

[160] 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.

situations the creditor's rights are not protected effectively as in purely domestic situations. Thus, for creditors, the EU internal market is not as safe as the domestic market.

Thus, looking at the current situation from perspective of the link between the "the proper functioning of the internal market" and "the judicial cooperation in civil matters having cross-border implications" established by Article 81 of the TFEU, one must conclude that the first problem that emerged in the Eighties still exists and is an "actual problem".

On the contrary, the second problem, the one connected to the circulation of measures a possible abuse of the special rule laid down in Art. 24, was due to a gap in the Convention that the legislator filled in Brussels 1 *bis*. Here the technical-legal difficulty was to find a way to draw a distinction among interim judgments granted under Art. 35 of the Regulation (Art. 24 of the Convention / Art. 31 of the Brussels 1 Regulation) and those granted by the judge who is competent on the merits, without allowing a revision of the jurisdiction of the court of the Member State of origin.

The solution came from an improvement of the certificate that has to be provided with the judgment at the enforcement stage[161], so that now in the member State where the enforcement is sought it is possible to verify whether a decision ordering a provisional measure is entitled to enforcement abroad or not simply by checking which boxes the judge of origin has tick on the form[162]. Thus, it may safely be said that the risk of an abuse of the special rule for provisional measures has now substantially reduced.

3) However, thanks to *Denilauler* it has also become apparent that the creditor may choose among different fora for provisional measures: all the Members States where assets are located and those having jurisdiction as to the substance of the claim. In other words, the system leaves room to forum shopping.

Of course, forum shopping is not limited to provisional measures. On the contrary, as to the merits it is widely allowed by the interplay between the general ground of jurisdiction and the special ones provided for in chapter 2 of the Regulation. But, with specific regard to provisional measures, it may result in a proliferation of interim decisions based on national grounds of jurisdiction, all of which, before Brussels 1 *bis*, were entitled to free circulation. Furthermore, another risk is associated with forum

[161] See 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 (recast), Annex I.

[162] See, e.g., Oberlandesgericht München, 09.11.2020, 7 W 1210/20, BeckRS 2020, 29974, summarized in EFFORTS - Report on German Case Law, p. 5 (fn. 6 above).

shopping, that of remedy shopping: creditors may take advantage of the differences among domestic legal systems as to the measures available and their effects, in order to obtain a result that would not be possible before the court (or the courts) having jurisdiction as to the merits.

That is why in the Nineties, right after *Danilauler*, forum shopping and remedy shopping became scholars' primary reason of concern with regard to provisional measures. Specifically, they enlightened how the combination of the two may result in a circumvention of the uniform rules on jurisdiction.

The Court of Justice tackled these concerns as it could do, given the wording of the relevant rules: first of all, by defining a "uniform notion" of provisional and protective measures for the use of Art. 24 of the Convention; second, by limiting the possibility to issue remedies under that rule, and the subsequent circulation of such remedies, through the "real connecting link" requirement.

As to the "uniform notion" of provisional measures, in the *Reichert* case it was ruled that provisional measures are

"measures which… are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter" [163].

And, specifically, with regard to interim payments – that are considered the most "dangerous" measures, as to the pre-emption of the decisions on the substance – in *Van Uden* added:

"interim payment of a contractual consideration does not constitute a provisional measure … unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim…"[164].

A close look at those definitions reveals that they do not add anything particularly useful in the perspective of limiting remedy shopping. In all member States provisional and protective measures aim primarily at safeguarding the claimed rights before or pending the main proceeding, or, sometimes, before the enforcement of the final judgment. With regard to anticipatory measures, such as the French *référé provision* and those adopted in the Dutch *kort geding* proceedings, domestic laws always allow – even if sometimes do not require – the institution of proceedings on the merits, so they

[163] ECJ, Case C-261/90, *Reichert*, §34.

[164] ECJ, Case C-391/95, *Van Uden*, §47.

are not final in nature, and the defendant is always given the possibility not to accept them as such.

The mere fact that some national judges had doubts about what "provisional and protective measures" meant within the Convention – and that the ECJ had to clarify those doubts – does not make it necessary to add a "uniform definition" for such measures, because in most cases the system will function quite well even sticking to the given solution, that "the measures available are those provided for by the law of the State of the court to which application is made".

This is still true, even after the *St. Paul Dairy* case[165]. In that occasion the Court of justice was not careful enough to draw a distinction between measures

"ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard", which "are not covered by the notion of 'provisional, including protective, measures'", and protective measures aimed at obtaining information or preserving evidence, which surely are. Because of this, there was a risk that national courts would be led to believe that all measures for the preservation of evidence were excluded from the scope of Art. 24 of the Convention[166]. But, aside from some initial hesitation, national judicial authorities showed to be able to apply Art. 24 correctly,[167], maybe even thanks to the clarification that we find now in recital 25 of the Brussels 1 *bis* Regulation, which proved to be sufficient for this purpose.

So, taking into account that any change in the text may bring about new doubts as to its correct interpretation, one may agree that there is no need for an addition as the one proposed by the Commission in 1997, according to which

"For the purposes of this Convention, provisional, including protective measures means urgent measures for the examination of a dispute, for the preservation of evidence or of property pending judgment or enforcement, or for the preservation or settlement of a

---

[165] ECJ, case C-104/03, § 25.

[166] See, e.g., Trib. Gorizia, 26 may 2009, in 2010 *Riv. dir. int. priv. proc.*138.

[167] Trib. Venezia, 28.02.2003, in 2004 *Riv. dir. int. priv. proc*. 272; Cour de cassation (FR), 4.5.2011 – 10-13712 (on which see P. F. Schlosser, *Aus Frankreich Neues zum transnationalen einstweiligen -Rechtsschutz in der EU*, in 2012 *IPRax* 88); Cour d'appel de Besançon (FR), 06.11.2013, No 13/01655, summarized in EFFORTS - Report on French Case Law, p. 59 (fn. 6 above); Court of Cassation (BG), Judgement 3rd May 2018, C 17.0387.N, summarized in EFFORTS - Report on Belgian Case Law, p. 3 (fn. 6 above).

situation of fact or of law for the purpose of safeguarding rights which the courts hearing the substantive issues are, or may be, asked to recognize." [168].

As to the "real connecting link" requirement, according to ECJ case-law it means that[169]

«…the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought»

and, with specific regard to interim payments, that

«…interim payment of a contractual consideration does not constitute a provisional measure … unless …the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made».

This requirement was supposed to tackle the concern of a "too free" circulation of provisional measure, but it brought about more uncertainty than clarity and, in light of that, the above mentioned new definition of "judgment" in Art. 2 of Brussels 1 *bis* is certainly appreciable, as it surely is much more effective to this purpose.

On the other hand, neither the "real connecting link" requirement nor the subsequent amendment to the Regulation address the forum shopping issue as a whole.

The creditor is therefore still entitled to ask for provisional measures to any court having jurisdiction as to the merits, as well as to the judicial authorities of any Member State in which she/he hopes the enforcement of the final decision can be fruitful. This may be necessary in order to preserve entirely the creditor's rights on an interim base. However, such a possibility may also be used as a part of a judicial strategy, aiming at making life difficult to the debtor and bending her/his will to resist. Nevertheless, it is doubtful that this happens frequently. As a matter of fact, forum shopping is very expensive and time consuming, so its abuse is not so frequent.

That is the reason why, as case-law shows, the most common reason for forum shopping is the rejection of the request for provisional or protective measure by the first court seised, and the attempt to find a different answer in another Member State. Such

---

[168] Proposal for a Council act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union, in COM(1997) 609 final (fn. 1 above), Art. 18.

[169] ECJ, case C-391/95, *Van Uden*, § 40, 47. The Court reiterated this requirement in case C-99/96, *Mietz*, § 42, 43.

situation may easily end with two conflicting decisions in our common judicial area, and that is of course problematic.

4) Thus, when the new century arrived, the academia focused on a different issue: the coordination among interim decisions, as a way, *inter alia*, to prevent a conflict between interim judgments. The Court of Justice had the opportunity to deal with this issue twice, with the *Italian Leather* case and, more recently, with the *Toto* case.

In the first one, the Court found that, in order to solve the problem of conflicting interim decisions at the enforcement stage, the only solution within the Brussel Convention was to let the domestic decision prevail, according to its Art. 27(3)[170], even if, as in the case brought to the attention of the Court, such decision had been rendered according to Art. 24 of the Convention, and the other by the court competent on the substance of the case.

At the time this judgment was rendered, many scholars criticized it, with good reasons. Among the others, that it would have been sensible to recognize primacy to the court dealing with the merits.

This is even more true today, as a trend in this direction has emerged in European legislation. This trend is evident in Brussels II *ter*, in the EAPO regulation and also in Brussels I *bis*, in its art. 2(a). Thus, it might be appropriate to reconsider (or, perhaps, to give the European Court of justice the opportunity to do so) the issue in the light of this last rule, according to which a decision based on Art. 35 of the Regulation (Art. 24 of the Convention) is not a "judgment" for the purposes of Chapter III. In fact, if this definition applies not only to the decision the enforcement of which is sought, but also to the domestic one, *i.e.* for the purposes of the entire Art. 45(1)(c) – as the reference to chapter III, as a whole, seems to imply – the primacy to an interim decision rendered by the court competent on the substance of the case vis-à-vis a domestic interim decision is ensured, simply because the second cannot be considered a “a judgment given between the same parties in the Member State addressed”.

In this way, merely sticking to a literal interpretation of the new text, and maybe strengthening the reasoning by giving consideration to the broader EU legal context, the problem of irreconcilable provisional and protective measures may be address *de lege lata*, without going through a normative reform.

In the *Toto* case[171], the Court of justice dealt with the exercise of jurisdiction under Art. 35 of Brussels 1 *bis*, and it ruled that a court of a Member State hearing an application

[170] ECJ, case C-80/00, *Italian Leather*, §.

[171] ECJ, Case C-581/20, § 61.

for provisional or protective measures under such a special rule is not required to decline jurisdiction where the court of another State member has already decided on an application having the same subject-matter and the same cause and brought between the same parties.

Again, the Court's interpretation was criticized. In particular, it has been pointed out that the explanation as to why the *lis pendens* rule would not be applicable does not sound convincing[172]. This is an old issue, which has been debated since the Brussels Convention entered into force. The Court adopted the most "traditional" approach, which, admittedly, is shared by a significant number of scholars, but is not necessarily the most correct.

Unfortunately, since in this case the ruling concerns the current set of rules, and not a slightly different previous one, the only way to escape from it is to modify the Regulation.

It is therefore necessary to examine whether the inapplicability of the *lis pendens* rule between two parallel interim proceedings, or the current lack of any alternative coordination mechanism, is a "real problem" or not, *i.e.* whether the rules should be amended.

The main argument in favour of introducing a coordination mechanism is based on the possibility that the situation could end in two irreconcilable judgments. However, this is the result to which *Italian Leather* leads, and, as it has been submitted above, since that ruling was rendered with reference to the Brussels Convention, a different interpretation is now possible under Brussels I *bis*, in light of the changes that the legislator has introduced.

If, on the contrary, one wanted to stick to Italian Leather (as the Advocate General did in the TOTO case opinion[173]), it is necessary to evaluate how often two irreconcilable interim judgments occur in order to assess the extent of the problem.

Looking at the case-law, it is difficult to argue that it is a recurring situation. Of course, that might depend on the fact that interim decisions are seldom published. This is the

---

[172] C. Santaló Goris, *C-581/20, TOTO : A missed opportunity to cast light on Article 35 of the Brussels I bis Regulation?*, in 2022 *Cuadernos de Derecho Transnacional* 915, at 921.

[173] In the opinion delivered on 9 September 2021 in case C-581/20, *TOTO*, § 53, AG A. Rantos submitted that "Since Article 27(3) of the Brussels Convention and the current Article 45(1)(c) of Regulation No 1215/2012 (43) are identical, it is possible to state that the same approach is required under the latter article.", without taking into consideration whether the new definition of "judgment" in Art. 2(a) of the Regulation could lead to a different interpretation.

explanation given in the Nineties by Lord Collins with regard to the exercise of interim powers by arbitrators[174], which has been often quoted, and extended, thereafter in order to support the view that inconsistencies in the Brussels rules on provisional measures must be fixed even if the case-law does not provide for hard evidence that they cause actual problems.

But, such an explanation doesn't sound convincing thirty years later, with regard to judicial decisions at least. This because now there are many research projects, as the EFFORTS one, that gather together academics and practitioners from different Member States, and aim (*inter alia*) at collecting case-law and classifying it in accessible databases. Thus, nowadays it is very unusual for any relevant judicial decision to go unnoticed. As a consequence, it is difficult to characterize the current lack of a coordination mechanism between two parallel interim proceedings as an actual problem, without the support of a conspicuous case-law.

5) In conclusion, among the major shortcomings that scholars have detected within the current version of the Brussels I Regulation, only one seems to pass the test and be eligible in the category of the "real problems", and this is the impossibility to ensure the surprise effect of cross-border provisional and protective measures. This problem emerges every time the debtor has assets in more than one Member State, but not enough in any of them – which is a quite common situation within the EU internal market in light of the free circulation regime – and is intentioned to conceal such assets in order to impede the enforcement of a future judgment, which is a very common situation worldwide. Because of this problem, within the Brussels I *bis* set of rules the protection of the creditor's rights is weaker precisely when it is most needed, and then the enforcement of the final judgment may result ineffective.

As seen above, the gravity of the problem has been already recognized and addressed by the legislator outside the Brussels I system, by the adoption of the EAPO Regulation. This Regulation is indubitably a useful instrument, particularly by virtue of the mechanism aiming at overcoming difficulties in obtaining information about the whereabouts of the debtor's bank accounts which it provides for. However, as to the circulation of measures aiming at securing the enforcement of later judgments, the limited number of cases in which the uniform procedure has been applied proofs that such a procedure is not perceived by creditors (and/or by the practitioners who assist them) as a solution to the problem.

[174] L. Collins, *Provisional and protective measures in international litigation*, 1992 *Collected Courses of the Hague Academy of International Law* (volume 234), at 70.

Fortunately, we do not need to engage in never-ending legal speculations in order to find a suitable solution. As the Commission proposed in 2010[175], it would be sufficient to change a few words to the definition of "judgment" currently provided for by article 2(a).

On the contrary, the issue is rather politically sensitive, so it is uncertain whether a future reform will actually lead to such a solution.

Thus, as fa as cross-border provisional and protective measures are concerned, in the perspective of a more effective enforcement of claims in civil and commercial matters within the EU, there is only one challenge that we should focus on, which is to convince the EU legislator (*i.e.*, the Council and the European Parliament, as both opposed the Commission's proposal on this point during the Brussels I recast procedure) that the time has come to address the problem of ensuring the surprise effect of cross-border provisional and protective measures within the Brussels I *bis* Regulation.

[175] See COM(2010) 778 final, Art. 2 (fn. 12 above).

The interaction between the EFFORTS Regulations and national enforcement procedures

1. *The refusal of enforcement in a comparative perspective: some critical issues (Part I)*

Michele Casi*

1. The recast of the Brussels Regulation has amended the *exequatur* procedure and introduced the principle that "*A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*" (Art. 39 Reg. (EU) No 1215/2012 [*hereinafter also just* "Regulation" *or* "BI bis"]). Notwithstanding the automatic recognition of the enforceability of a foreign judgment issued in the European judicial area, in the Brussels recast system (soon to be subject to re-recast) the debtor retains the right ([176]) to oppose the enforcement of a judgment based on the grounds for refusal listed in Art. 45 BI bis. In the 2001 version of the Regulation such grounds for

---

* *Postdoctoral researcher at the Department of International, Legal, Historical and Political Studies of the Università degli Studi di Milano.* *This paper is based on the presentation given at the Final Conference of the Project JUST-JCOO-AG-2019-881802 Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU EFFORTS, in Milan on 30 September 2022. The contents of the presentation and of this paper represent the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.*

[176] The right of the debtor to claim the refusal of enforcement, substituting the *exequatur* procedure, is of paramount importance considering the debtor's rights of defence: "The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability *should not jeopardise respect for the rights of the defence*", Recital (29) Reg. (EU) No 1215/2012. Among those who advocated for retaining the *exequatur* procedure, this has been well underlined by SCHLOSSER, *The Abolition of Exequatur Proceedings – Including Public Policy review?*, in *IPRax*, 2010, p. 101. Another rule concerned with the debtor's rights of defence (but, in this case, also the creditor's right to proceed with the enforcement of a binding judgment) is Art. 54(2) of the Regulation, which gives the debtor (and the creditor) the right to appeal, before a judicial authority, the "adaptation" of a foreign unknown measure or order: here, again, it is clear that the direct enforcement within the European judicial area does not mean that the party against whom enforcement is sought loses all special defence rights directly connected to the international (or rather *European*) character of the judgment being enforced.

refusal were not object of the *exequatur* procedure but only invoked by the party against whom enforcement was sought by appealing, under Art. 43 Reg. (EC) No 44/2001, the declaration of enforceability. No other claim for refusal for the grounds referred to in Arts. 34 and 35 Reg. (EC) No 44/2001 was available apart that such appeal and no other ground for refusal could be invoked at that stage ([177]). On the contrary, the recast Brussels Regulation foresees two different claims for refusal, in which the debtor may invoke the grounds for refusal under Art. 45 BI bis and other grounds: (a) the *claim for refusal of recognition*, "on the application of any interested party", to be made "in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4" (Art. 45 BI bis); and (b) the *claim for refusal of enforcement*, "on the application of the person against whom enforcement is sought", for the refusal of the enforcement either under the grounds referred to in Art. 45 or the grounds for refusal available under national law (Arts. 41(2) and 46 BI bis). The differentiation between these two claims is inferred from the provisions of the Regulation. Even if all the effects, non-enforceable or enforceable, are equally automatically recognized, the third Chapter ("Recognition and enforcement") of the Regulation, like the previous one, is still arranged in different sections and subsections depending on issues relating to the recognition or to the enforcement of the foreign incoming judgment. Amongst these rules, some of the rules concerning each claim for refusal (respectively, of recognition of the non-enforceable effects or of enforcement of the enforceable effects) are different depending on the type of claim. On a procedural level, the grounds for refusal of enforcement available under national law are applicable ("in so far as they are not incompatible with the grounds referred to in Article 45") in the same procedure for refusal of *enforcement*, while in the claim for refusal of *recognition* only the grounds for refusal provided for in the Regulation itself are allowed (arg. *ex* Recital (30)). Also, the refusal of *recognition* may be asked as an incidental question (that there are grounds to refuse recognition) in proceedings on a depending object, and the creditor may also claim that there are no grounds to refuse *recognition* (Art. 36(2) and (3) BI bis), while such right is not available for the claim to refuse *enforcement*. The party entitled to claim the refusal of recognition is "any interested party", while the refusal of enforcement may be claimed only by "the person against whom enforcement is sought".

Even if such distinction is appreciable, it is not clear whether the drafters of the recast Regulation intended to organize the debtor's defences so that it is to be *guaranteed* to the debtor, at a national level, the *option to file multiple claims for refusal* against an incoming foreign judgment. Rather, it seems that, in principle, such matter is not directly regulated by the European legislature, but it is left to the national legislators to lay down the rules for the procedure for refusal (Art. 47(2) BI bis), including the

[177] CJEU, 13 October 2011, In Case C-139/10, *Prism Investments BV v Jaap Anne van der Meer*.

possibility to file multiple claims for refusal, subsequent or pending at the same time ([178]).

National legislators have regulated the issue differently, sometimes explicitly making a distinction between different claims for refusal based on *the refusal of recognition or of the enforcement* ([179]), and between a claim filed *before or after the first act of the enforcement*; other times referring indistinctively to a '*claim for refusal of recognition or enforcement*'. Germany, France and Italy offer different legislative scenarios on this respect. The German legislator has dedicated an explicit implementing rule: competence for applications for refusal of recognition or enforcement (Arts. 45(4) and 47 (1) BI bis respectively) lies with the regional court (*Landgericht*) (§1115(1) ZPO) at the debtor's place of residence or, in the event that the debtor does not reside in Germany, at the place of enforcement (§1115(2) ZPO). The court's decision can be reviewed by means of the remedy of complaint subject to a time limit (*sofortige Beschwerde*) (§ 1115(5) in conjunction with § 567(1) No. 1 ZPO) ([180]). Other than the claim for refusal of recognition or enforcement under §1115 ZPO, the debtor could make the classical claim for opposition to enforcement under §767 ZPO in conjunction with §1117 ZPO, which would be the claim for invoking grounds for refusal of enforcement available under national law. It is not clear whether grounds for refusal provided for in national law could be invoked in the same procedure for refusal under §1115 ZPO ([181]). The French legislator has taken a different path: there are not dedicated implementing rules, but the issue is explicitly addressed in the declaration made by the French Government to the Commission pursuant to Art. 75(a) BI bis. Such

[178] Thereby included the issue of the extent of the *res judicata* on the claim for refusal: an issue that directly influences the possibility to file or not multiple subsequent claims for refusal. In other words, it is not clear whether, by giving the debtor more than one chance to fight refusal, first as a merely *interested party* and then as the *person against whom enforcement is sought*, the European legislator has set a general principle that the decision on the first claim for refusal does not cover the grounds that have not been explicitly invoked by the debtor, allowing a subsequent claim for refusal based on different grounds. Such question is not analysed in this paper.

[179] For instance, in Austria the competent court for the refusal of enforcement is the district court '*Bezirksgericht*', where the enforcement proceedings are pending. In the case of applications for a decision that there are no grounds for non-recognition (Article 36(2)), and in the case of applications for refusal of recognition (Article 45), the competent court is the district court in the area where the party bound by the judgment is registered or established.

[180] As outlined by national reporters in the EFFORTS Report on German Implementing Rules, and in the EFFORTS German Practice Guide, available on the EFFORTS Website (link).

[181] The issue has not been addressed by national reporters in the EFFORTS reports. In doctrine, see for instance THOPU/HOBTEGE, in PRÜTTING-GEHRLEIN (Hrsg.), *ZPO Kommentar*, 10. Auflage, Monaco, 2018, under Art. 46.

communication, recently updated ([182]), indicates that an application for refusal of enforcement can only be made in the context of a challenge to an enforcement measure and, as such, must be brought before the "*juge de l'exécution du tribunal judiciaire*"; on the other hand, the claim for refusal (as well as the claim for a decision that there are no grounds for refusal) must be brought before the "*tribunal judiciaire*". That the two claims for refusal (of recognition and of enforcement) are different under French law has been the object of a very recent decision of the judge of the enforcement of Paris, that held that "*Ces deux demandes* [for the refusal of recognition and for the refusal of enforcement], *qui ne sont présentées qu'à titre subsidiaire, doivent être distinguées.* (…) *En l'espèce, la demande de M. Y en refus de reconnaissance du jugement anglais excède les pouvoirs ordinaires du juge de l'exécution. Cependant, celle-ci peut être considérée comme valablement présentée à titre incident au sens de l'article 36, 3, du règlement.*" ([183]). It is not clear which are the procedural implications of such distinction; however, according to French doctrine, the claim for refusal of recognition filed before the first act of the enforcement regards only the grounds under Art. 45 BI bis, while grounds for refusal available under national law may be invoked only afterwards, during the enforcement proceedings.

In Italy there is a newly drafted implementing rule on the claims for refusal of recognition and/or enforcement and the claim for a decision that there are no grounds for refusal of recognition: such claims are decided with the *rito semplificato di cognizione* (summary ordinary proceedings) under Arts. 281-*decies* ff. of the *codice di procedura civile* ([184]). They must be brought before the competent *tribunale* ([185]), as

---

[182] On 4.8.2021; the actual text can be found on the e-Justice Portal dedicated page (last visited 3.10.2022). The preceding text read: *Names and contact details of the courts to which the applications are to be submitted pursuant to Articles 36(2), 45(4) and 47(1)* – "For applications for refusal of enforcement:

The court responsible for enforcement in the case of requests made following an enforcement measure ('*juge de l'exécution*'), with the exception of attachment of earnings,

The district court in the case of requests made in connection with attachment of earnings ('*Tribunal d'instance*').

For applications for a decision that there are no grounds for refusal of recognition under Article 36(2) and applications for refusal of recognition (Article 45), the regional court if this is the principal issue ('*Tribunal de grande instance*')".

[183] *Juge de l'exécution de Paris*, 1.7.2021, no. 21/80506.

[184] See Art. 30-*bis* co. 4 d.lgs. no. 150/2011.

[185] The law for the reform no. 201/2021 indicated that such claims should have been brought before the competent *corte d'appello*, and not the *tribunale*. Such rule of competence, attributing competence to the appellate court, was explained with the objective of favouring the most efficient and fastest possible procedure for the enforcement of a judgment subject to the principle of equality between domestic judgments and judgments given by the courts in other

autonomous claims or as an opposition to enforcement under Art. 615 co. 1 (opposition to the notice of execution "*precetto*") or co. 2 (opposition to enforcement in the strict sense) of the *codice di procedura civile*. Any interested party may ask the court to refuse the recognition of an incoming judgment based on the grounds under Art. 45 BI bis, and the creditor may ask the court to declare that there are no grounds to refuse recognition under Art. 45 BI bis, filing a complaint under Art. 281-*undecies* of the *codice di procedura civile*. These claims should be limited to the grounds for refusal provided for in the Regulation. In fact, to invoke other grounds for refusal of enforcement (namely, grounds for refusal available under national law), also together with uniform grounds, the person against whom enforcement is sought should file an opposition to enforcement under Art. 615 of the *codice di procedura civile*, which is a claim of opposition that is admissible from the moment the creditor serves on the debtor the notice of execution ("*precetto*") ([186]).

2. Amongst the different paths chosen by national legislators to implement the rule contained in Art. 47(2) BI bis, it can be noticed that in certain cases multiple claims for refusal of enforcement may be brought by the debtor against the same judgment, sometimes depending on the moment in which the claim is presented, other times depending on the fact that the debtor wishes to invoke only national/classical grounds

---

Member States, since the debtor would have lost one instance to fight the recognition or enforcement; see D'ALESSANDRO, *Le modifiche concernenti il procedimento per l'accertamento della riconoscibilità ed eseguibilità delle sentenze straniere in Italia*, in *Rivista di diritto internazionale*, 2022, p. 151.

[186] (a) As for the *initial moment* that determines the admissibility of an opposition to enforcement, under Italian law such opposition is normally admissible when the enforcement proceedings are pending, but the law anticipates such opposition, allowing it from the moment in which the notice of execution ("*precetto*") has been served (Art. 615 co. 1 of the *codice di procedura civile*), with a slightly different object. Such opposition would allow the debtor to invoke both the grounds for refusal provided for in the Regulation and the grounds for refusal available under national law. However, it is not clear if a claim for refusal *of enforcement*, with the same object (grounds for refusal provided for in the Regulation plus grounds for refusal available under national law) should be admissible even before the service of the notice of execution and after service of the judgment and the certificate under Art. 43(1) BI bis.

(b) As for the final *deadline* for the claim of opposition to enforcement, in brief, in case the creditor proceeds to enforce a pecuniary claim ("*espropriazione forzata*"), the opposition is precluded after the hearing for the forced selling of the attached goods or for the allocation of the sums, unless the opposition is based on grounds that occur after such hearing or unless the creditor proves to have failed the deadline for a reason which is not attributable to her (Art. 615 co. 2 of the *codice di procedura civile*). Such deadline, however, should not be applicable to the grounds provided for in the Regulation, but only to grounds available under national law: in fact, the grounds provided for in the Regulation could be invoked in a different claim for the refusal of recognition, which would be subject to the ordinary prescription periods.

for refusal of enforcement or uniform grounds for refusal under Art. 45 BI bis. In relation to enforceable judgments, the debtor may choose to file first a claim for refusal limited to the uniform grounds in order to prevent the subsequent enforcement by the creditor or to limit defences and costs to the extent possible, waiting for the actual enforcement to raise other potential grounds for refusal available under national law. This is possible, for example, in the Italian system ([187]). When such situation occurs, the question is how these claims should be coordinated, in order to ensure a balance between the right of the creditor to proceed with the enforcement in an efficient manner – or at least in the same manner as if the judgment was a national one – and the right of the debtor to oppose the enforcement with multiple means of refusal.

In a case decided by the Italian *Corte di Cassazione* ([188]), the Court was presented with the procedural matter regarding the rules of coordination of two claims for refusal pending against the same Dutch judgment, one for refusal of recognition under Art. 45 BI bis (based on the ground that recognition is manifestly contrary to public policy, under letter a)) and the other as an opposition to enforcement under Art. 615 of the *codice di procedura civile*. Pending the opposition to enforcement (second claim), the first claim for refusal of recognition was successful on first instance and appealed by the creditor. The judge of the opposition to the enforcement ordered the suspension of that opposition procedure (Arts. 295 and 337 of the *codice di procedura civile*), in order to wait for the decision on the appeal relating to the claim for refusal of recognition. The

[187] Formulates the same hypothesis also D'ALESSANDRO, *Le modifiche concernenti il procedimento per l'accertamento della riconoscibilità ed eseguibilità delle sentenze straniere in Italia*, in *Rivista di diritto internazionale*, no. 1, 2022, p. 154: "*Si pensi, ad esempio, al caso in cui l'esecutato lamenti la mancanza di un titolo esecutivo idoneo a sorreggere l'esecuzione per irriconoscibilità della sentenza di condanna proveniente da altro Stato membro e lamenti altresì l'avvenuto adempimento dell'obbligazione pecuniaria, cioè l'inesistenza del diritto del creditore a procedere ad esecuzione forzata per mancanza di un'obbligazione pecuniaria rimasta inadempiuta*". Or, for the event in which it is the creditor to file the first claim, for decision that there are no grounds for refusal of recognition, and the debtor – after the creditor also starts the enforcement proceedings – files an opposition to enforcement: "*Si supponga altresì che, in una situazione di tal fatta, il creditore eserciti l'azione esecutiva. Si immagini che il debitore proponga opposizione al precetto facendo valere l'irriconoscibilità della decisione straniera e, dunque, la mancanza di un titolo esecutivo unitamente ad altre doglianze tipiche del giudizio di opposizione al precetto ex art. 615 cod. proc. civ.: ad esempio, la mancanza di un titolo esecutivo spendibile nei suoi confronti in base alle regole sui limiti soggettivi di efficacia del titolo esecutivo di cui all'art. 477 cod. proc. civ. ovvero l'avvenuto adempimento dell'obbligazione pecuniaria che il creditore lamenta invece essere rimasta inadempiuta*.", p. 155.

[188] *Corte di Cassazione*, Sez. VI - 1, 04.05.2022, n. 14019, available on *Leggi d'Italia*.

debtor appealed the suspension order before the *Corte di Cassazione* ([189]). Therefore, the Court had to decide the procedural matter relating the rule applicable to the simultaneous claims of refusal, one of refusal of recognition and another as an opposition to enforcement. In the view of the debtor the proceedings should not have been suspended but terminated, since they have the same object and since the claim for refusal of recognition was successful at first. However, the Court takes another view on the case and declares that the proceedings on the opposition to enforcement were rightfully suspended by the judge since there is a strong relationship ([190]) between the claim for refusal and the claim for opposition, and that the claim of opposition should be stayed ([191]) until the claim for refusal of recognition is concluded with a final decision. As a reasoning behind such stay it could be mentioned the objective to avoid that the claim for opposition to enforcement is decided in a way that later results *inconsistent*

---

[189] According to Art. 42 of the *codice di procedura civile* the order to stay the proceedings under Art. 295 of the same code may be reviewed only by the *Corte di Cassazione* (and not by lower courts), by motion for a ruling on such matter under Art. 47 of the same code.

[190] Such relationship is described by Italian procedural law as *dependence* ("…another judge has to resolve a dispute upon whose decision the case depends", Art. 295 of the *codice di procedura civile*); however, the Court does not explicitly deal with the meaning of such relationship in the case at stake. For example, from the reasoning of the court it is not clear which grounds for refusal were raised by the debtor in its opposition to enforcement.

By declaring that there is a dependence relationship between the two claims, the Court implicitly excludes that the two claims have the same object. The issue is complex, however without more details on the specific object of the two claims in the case at stake it is difficult to formulate a proper view on this point. In another scenario, similar but with a crucial difference, D'ALESSANDRO, *Le modifiche concernenti il procedimento per l'accertamento della riconoscibilità ed eseguibilità delle sentenze straniere in Italia*, in *Rivista di diritto internazionale*, no. 1, 2022, p. 155-156 concludes that: "*Tra il giudizio di diniego del riconoscimento (…) e il giudizio di opposizione all'esecuzione ex art. 615 cod. proc. civ. sussisterebbe un rapporto di continenza* (…)". The difference between the case decided by the *Corte di Cassazione* and the example presented by the author is that in the latter the two claims had a partially identical object, while in the case before the *Corte di Cassazione* it seems that the claim for refusal was exclusively concerned with the uniform grounds for refusal of recognition, while the opposition to enforcement was exclusively concerned with national grounds for refusal of enforcement. Thus, they should rightfully be qualified under different rules (one as two dependent claims, and the other as two partially identical claims).

[191] "Should" and not "must" be stayed: in fact, the proceedings have been stayed under Art. 337 of the *codice di procedura civile*, which gives the judge the power to decide whether to stay the proceedings (differently from Art. 295, which is on a *mandatory* stay). In brief, according to Italian jurisprudence (*Corte di Cassazione*, Sez. Un., 19.06.2012, no. 10027 and, recently, *Corte di Cassazione*, Sez. Un., 29.07.2021, no. 21763, both available on *DeJure*), the difference lies in the fact that under Art. 337 there has already been a decision on the prejudicial claim, while under Art. 295 the two claims are pending at the same time before the court of first instance.

with the decision on the claim for refusal of recognition ([192]): in brief, it could be possible that the judge of the opposition to enforcement rejects the debtor's grounds for refusal and orders to proceed with enforcement… of a judgment that later is declared non-recognizable and, thus, non-enforceable.

3. Apart from specific national scenarios, it could be considered if such matter – the coordination of multiple pending claims for refusal – should be regulated at a European level or, lacking an explicit uniform rule, which are the rules and the principles that could guide national legislators or national courts in deciding similar cases. The coordination of multiple claims for refusal relates the fact that against an incoming judgment certified under Art. 53 BI bis multiple claims for refusal are allowed, in certain Member States, since the debtor has the option to claim the refusal of recognition raising the grounds available under the Regulation, and only those grounds, and later claim the refusal of the enforcement raising the grounds available under the national law of the Member State addressed ([193]). Seemingly, the Regulation does not *impose* to Member States to allow multiple claims for refusal, but it is allowed that Member States regulate the issue so that the debtor may file a claim for refusal of recognition invoking only the uniform grounds for refusal, followed by a subsequent (or vice versa) and contemporary pending different claim for refusal of enforcement invoking the grounds available under national law.

From this standpoint, it seems that a first coordination option would be to impose at a European level the *concentration of defences* in one claim for refusal of enforcement, in which the debtor should raise all the grounds for refusal (both common and national) against an incoming enforceable judgment. In this way, the uniform grounds for refusal (Art. 45 BI bis) would not correspond to a dedicated claim (for refusal of recognition), but there would be only one claim for refusal against incoming enforceable judgments, in which all grounds for refusal may be invoked. As such, the solution seems not the one chosen by the European legislator. Rather, the Regulation allows multiple claims

[192] This would hardly be the place to define the general functioning of the rule on suspension of civil proceedings in Italian civil procedural law. In a very general way, it can be said that the objective of Art. 295 of the *codice di procedura civile* is to tend to coherent decisions on related objects and to assure that resources are efficiently allocated, avoiding that multiple judges are conducting procedures on the same issues at the same time. See, among others, CONSOLO, *Spiegazioni di diritto processuale civile*, Vol. II, *Il processo di primo grado e le impugnazioni delle sentenze*, Giappichelli, 2017, p. 280.

[193] Depending on the solution to the matter relating to whether the *res judicata* of the decision on the first claim for refusal of recognition – concerning only uniform grounds for refusal – covers all the grounds for refusal or only those explicitly raised by the debtor (or by the creditor with an incidental question asking to declare that there are no grounds for refusal), this question of coordination may also relate to the different case in which the debtor files multiple claims for refusal of recognition or of enforcement, invoking *different uniform grounds*.

for refusal and leaves it to Member States, under Art. 47(2), to define how and when the debtor should raise the common or national grounds for refusal against an incoming judgment. Furthermore, even if the European legislator would impose the concentration of defences on the debtor, there would be the possibility that it is the *creditor* to file a claim for a decision that there are no grounds for refusal of recognition, and that such claim is to be coordinated with the opposition to enforcement filed by the debtor.

The solution for national legislators and national courts should be found in the rules and the principles laid down in the Regulation, within the rules generally applicable to claims for refusal of enforcement, such as the ones laid down in Arts. 46 ff. BI bis and, amongst others, the rule under Art. 44(1) BI bis, which states that "*in the event of an application for refusal of enforcement of a judgment*" the person against whom enforcement is sought may ask the court to "*suspend, either wholly or in part, the enforcement proceedings*". Such rule applies to enforcement proceedings *themselves*, and technically it does not cover the case of multiple claims of refusal: the only coordination it offers regards a claim for refusal under Arts. 46 ff. BI bis and related enforcement proceedings ([194]). Thus, as such, Art. 44(1) does not cover the matter under discussion, which regards a claim for refusal under Arts. 46 ff. BI bis and another claim for refusal of enforcement. Nevertheless, the rule on suspension could be favoured as a rule for coordinating multiple claims of refusal against the same judgment under the Brussels regime. If that is the case, the European legislature should also clarify which is the claim that takes precedence and which is the one that is stayed: precedence is always to be given to the claim for refusal based on common European grounds, since it fights the recognition of an incoming judgment (with the effect of denying its recognition, covering all the effects of the judgment), or to the first one filed, considering that both claims could result in the refusal of the enforcement (with preference for a fastest decision on the first claim)? The other option would be that such coordination should be left to each Member State, considering the insurmountable differences between the various procedures for refusal of an incoming judgment at a national level (Art. 47(2)). If that is the case, Member States should regulate this issue in light of the principles of the Brussels regime: it should be avoided, to the "fullest extent possible", any form of less efficient treatment of incoming judgments vis-à-vis national ones ([195]). In other words, the procedure for the refusal of

[194] As it has been clarified "Art 44(1) cannot be applied when only national grounds for refusal are invoked, though domestic law (applicable under Art 41(1)) may provide similar procedures.", DICKINSON-LEIN, *The Recognition and Enforcement of Member State Judgments*, Oxford, 2015, p. 431.

[195] "the principle of effectiveness requires that generally the domestic enforcement rules should not run counter to the spirit and principal objective of the Recast Regulation which aims to facilitate a free circulation of judgments to the fullest extent possible", DICKINSON-LEIN, *The Recognition and Enforcement of Member State Judgments*, Oxford, 2015, p. 418.

an incoming judgment and the coordination of multiple claims for refusal should be regulated, at a national level, so that the difference with national judgments (given that to refuse enforcement of national judgments the debtor has not the additional claim for the grounds under Art. 45 BI bis), does not result in a less frequent resorting to EU instruments for the circulation of judgments. An example would be to impose, at a national level, the *concentration of defences* against enforceable incoming judgments ([196]).

4. The Regulation provided for different types of grounds that the debtor may raise in order to claim the refusal of enforcement of an incoming judgment. For our purposes, they may be divided into three groups. First, there are the grounds for refusal provided directly in the Regulation, which have already been dealt with in the former paragraph, that are the grounds under Art. 45 plus other grounds resulting from the violation of uniform rules regarding the enforcement (such as the service of the judgment together with the certificate under Art. 43(1))([197]). Second, the Regulation considers also

---

[196] This is the option preferred by D'ALESSANDRO, *Le modifiche concernenti il procedimento per l'accertamento della riconoscibilità ed eseguibilità delle sentenze straniere in Italia*, in *Rivista di diritto internazionale*, no. 1, 2022, p. 154, concerning however only Italian implementing rules, and not the Regulation itself: "*Si potrebbe, cioè, immaginare che, quante volte il debitore abbia ricevuto la notifica del precetto, sia l'opposizione* ex *art. 615 cod. proc. civ. l'unica sede processuale in cui far valere le doglianze relative alla irriconoscibilità della decisione straniera di condanna proveniente da altro Stato membro*".

[197] As such, this group, of the grounds for refusal of enforcement provided for in the Regulation, is composed of two subsets: (*i*) the *grounds for refusal* of recognition and enforcement (Art. 45 BI bis) and (*ii*) uniform *conditions for the enforcement* (e.g., Art. 43 BI bis). It is debatable if (*iii*) *other* uniform grounds for refusal are applicable, for example if the judgment falls out of the scope of Art. 1 or out of the definition of "decision" under Art. 2.

The issue has been recently addressed by the CJEU, 7 April 2022, in Case C-568/20, *J v. H Limited*. In this judgment, the Court ruled on a request for a preliminary ruling concerning the concept of judgment under Arts. 2(a) and 39 BI bis. The request arose in civil proceedings for the enforcement in Austria of an English judgment, which in turn had been issued upon recognition of a non-EU judgment containing an order for payment. The request was related to the objection raised by the debtor that such English order did not fall within the scope of Art. 2(a) BI bis, as it was merely a "double exequatur" kind of judgment. The Court concluded that the concept of judgment included the one in the case at stake ("*It follows that that concept also includes an order for payment made by a court of a Member State on the basis of final judgments delivered in a third State*", §25; see also §39) and, in any case, for what interests here, that the issue relating to the scope of Art. 2(a) falls outside of the grounds that may be raised under Art. 45 in a claim for refusal of recognition and enforcement, and should not be included in the public order clause.

Interestingly, issues such as "whether the matter fell within the Regulation's scope of application, whether the judgment qualified as such" were deemed to fall under the competence

grounds relating to the law of the Member State of origin. Art. 39 states that "*A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*". This rule was intended to clarify the fundamental principle of the recast Brussels Regulation, being the abolition of the *exequatur* procedure, such that a judgment needs only be enforceable in the Member State of origin for it to be enforceable in all the other Member States. Moreover, such rule is read also from another perspective. In fact, a consequence of such principle is that if the judgment is not enforceable in the Member State of origin it shall not be considered 'enforceable' in the other Member States. In other words, the *enforceability* of a judgment in the Member State of origin functions both as a sufficient condition *and* as a needed requirement or "precondition" ([198]) for its enforceability in the remaining part of the European judicial area. As such, Art. 39 gives relevance to the law of the Member State of origin, insofar as it lays down certain conditions for the enforceability of a judgment: if not met, they would be grounds to claim the refusal of the enforcement, *in the Member State addressed*, but *based on the law of the Member State of origin* (for example, it would be the law of the Member State of origin to define the enforceable or merely declaratory character of a judgment, or to set the subjective limitations to its enforceability, or to define if and to which extent an enforceable judgment is intended to give the creditor the right to a monetary claim only or also other types of rights). Third, enforcement may be refused for the lack of the elements provided for in the national law *of the Member State addressed*. Art. 41(1) states that a judgment shall be enforced "*under the same conditions as a judgment given in the Member State addressed*": if such conditions are not met, the debtor may ask to refuse the enforcement, even if such conditions would not have been applied under the law of the Member State of origin, for the enforcement of the same judgment (for example, time limits and prescription periods, or certain procedural steps such as, in Italy, service of the notice of execution "*precetto*"). In addition, under the law of the Member State addressed other grounds for refusal of enforcement are allowed "in the same procedure" for refusal of enforcement (Recital (30)) ([199]) if they pass the incompatibility test with the

---

of the court of the *exequatur*, under the Brussels I Regulation, HOVAGUIMIAN, *The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns*, in *Journal of Private International Law*, available at the link https://doi.org/10.1080/17441048.2015.1068001, p. 219.

[198] In the words used by the CJEU, 28 April 2009, in Case C-420/07, *Apostolides v Orams*, §66.

[199] Such being the real core of Art. 41(2) BI bis: "Though Art 41(2) is formulated as an exception to the general application of national enforcement law, its importance lies in the explicit recognition that national grounds of refusal and suspension may be applied, alongside those laid down in the Regulation.", DICKINSON-LEIN, *The Recognition and Enforcement of Member State Judgments*, Oxford, 2015, p. 420.

grounds provided for in Art. 45 (Art. 41(2)) ([200]) and if they do not result in a review of the substance of the judgment (Art. 52). To sum up, the grounds for refusal against an incoming judgment under the Brussels regime, that the debtor may avail her/himself of, are: (*i*) the grounds for refusal provided for in the Regulation (including those under Art. 45 BI bis and the lack of the uniform conditions for the enforcement), (*ii*) the lack of the conditions for the enforceability of the judgment under the law of the Member State of origin, and (*iii*) the lack of the conditions for the enforcement, and the other grounds for refusal of enforcement, provided for in the law of the Member State addressed.

5. Apart from the first group of elements (n. (*i*)), which contains the uniform grounds for refusal, autonomously interpreted and equally applied across all Member States, the Regulation gives relevance to two different national laws: the national law of the Member State of origin and the national law of the Member State addressed. These two national laws are intended to govern different conditions applicable for the enforcement of a judgment, on one hand the conditions determining its enforceability and on the other hand the conditions for its enforcement in the strict sense: therefore, it is necessary to determine whether a certain element or procedural condition "relates to the enforceability of the [judgment] issued by a court of a Member State other than the Member State in which enforcement is sought, or whether that provision comes within the scope of enforcement in the strict sense" ([201]). In fact, when it comes to national laws, there is a certain degree of uncertainty as to the allocation of an element or a condition for the enforcement within the category of the elements defining the "enforceability" of a judgment or the "conditions for the enforcement" in the strict sense. These two categories fall each within the scope of one of the national laws of the Member States involved (so that the elements for the *enforceability* are governed by the law of the *Member State of origin*, under Art. 39, and the *conditions for the enforcement in the strict sense* are governed by the law of the *Member State addressed*, under Art. 41). However, the Regulation does not give a definition in order to allocate an element within one or the other category, leaving it to national courts to define such matters. In other words: the notions of "enforceability" and "conditions for the enforcement in the strict sense" are uniform, but the Regulation does not give a definition, leaving it to national courts to define the scope of the law of the Member State of origin and of the Member State addressed on such regard. This involves the risk that national courts of the Member State addressed use their own national law to define whether a certain element relates to the enforceability of a judgment (with the application of the law of the Member State of origin) or to its enforcement in the strict sense.

---

[200] For example, providing for a broader means of review of the jurisdiction of the court of origin than the limited cases provided for in Art. 45(1)(e) and (2) BI bis.

[201] CJEU, in Case C-379/17, *Società Immobiliare Al Bosco*.

Generally, this rule is applied quite flawlessly: national courts have refused enforcement of titles that were not enforceable in the Member State of origin, or cases in which enforcement of titles has been refused on the ground that they did not meet the conditions for the enforcement under the law of the Member State addressed ([202]). However, certain cases are more problematic. For example, in the case decided by the *Landgericht München* ([203]) the enforcement of an Italian judgment for payment has been refused under a rule of German enforcement law which states that a title is only sufficiently definite and suitable for enforcement if it states the creditor's claim and specifies the content and scope of the obligation to perform ([204]); such case involved the issue of the interest awarded 'according to law' without indicating what the value of the interest is. As a matter of fact, cases like this ([205]) raise the question: the element of

---

[202] The EFFORTS Project has collected, via national reporters, some national decisions on this regard (all the deliverables of the Project are available on the website: https://efforts.unimi.it). (*a*) Refusal of enforcement for lack of enforceability in the Member State of origin: (*i*) *Oberlandesgericht Düsseldorf*, 19.02.2019, 3 Wx 174/18, BeckRS 2019, 6069, refused the enforcement of a Romanian judgment that was no longer enforceable in that State due to the passing of time; (*ii*) Italian *Corte di Cassazione*, 12.04.2017, n. 9350, refused enforcement of a German authentic instrument in light of a decision revoking it and depriving it of its enforceability. (*b*) Refusal of enforcement for violation of the conditions for the enforcement under the law of the Member State addressed: (*i*) *Bundesgerichtshof*, 13.12.2018, V ZB 175/15, BeckRS 2018, 37000, refused enforcement under the rule that time limits for the enforcement of preventive attachment orders can be upheld by the law of the Member State of enforcement; (*ii*) Italian *Corte di Cassazione*, 20.02.2018, n. 4025, refused enforcement also ruling (*inter alia*) that conditional obligations contained in a foreign judgment can only be enforced if the creditor demonstrates that the condition is satisfied, irrespective of whether the Member State of origin imposes the same burden of proof; (*iii*) French *Cour de cassation 2,* 2 December 2021, no. 20-14.092, refused enforcement under the rule that a judgment given in another Member State must meet, independently of its enforceability, the same criteria as those applied by domestic law to determine whether a decision given by a national court allows the creditor to pursue its enforcement against his debtor's assets, so that it must establish a liquidated and enforceable claim against the latter.

[203] *Landgericht München* II, 19.01.2010, 6 T 6032/09, BeckRS 2011, 12370.

[204] The case involved a judgment certified as EEO, and not a judgment circulating under the Brussels regime; however, it should serve as an example also for our purposes, on the issue of the alternative allocation of certain elements under one of the national laws involved.

[205] In another case, the French *Cour de cassation 2,* 2 December 2021, no. 20-14.092 decided to refuse the enforcement of an incoming judgment on the basis of the fact that the judgment was not enforceable towards the person against whom enforcement was sought, on the basis of French civil enforcement rules: "*Il résulte du dernier de ces textes qu'un jugement rendu dans un autre État membre doit répondre, indépendamment de son caractère exécutoire, aux mêmes critères que ceux appliqués, en droit interne, pour déterminer si une décision rendue par une juridiction nationale permet au créancier d'en poursuivre l'exécution forcée sur les biens de son débiteur, de sorte qu'il doit, conformément aux dispositions de l'article L. 111-2*

the 'sufficient definition of the judgment' or the matter of the element of the 'subjective limitations on the enforceability of a judgment' ([206]) are matters pertaining to the enforceability of a judgment, and as such governed by the law of the Member State of origin, or rather subject to the rules that govern its enforcement in the strict sense under the law of the Member State addressed? ([207]) The lack of a precise uniform definition results in the judgment needing to pass a two-step enforceability test, such that for it to be enforced it undergoes a double positive check on the same element (in the example, its sufficient 'certainty' as to the interests awarded). Consequently, an enforceable judgment is subject to a different treatment within the European judicial area. In fact, on one hand, it is treated differently in the Member State addressed than it is treated in the Member State of origin, apparently in violation of the rule under Art. 39, according to which if the judgment is enforceable in the Member State of origin its enforceability should not be questioned in the Member State addressed. On the other hand, it could also be treated differently amongst different Member States, provided that courts of another Member State, potentially addressed for the enforcement, using their own national law, consider the element under the scope of the law of the Member State of origin and – provided that under such law the judgment is enforceable – proceed with the enforcement (as it is the case, continuing the previous example, for Italian judgments with interests awarded according to law, which could be enforced, for example, in France, in the event that the debtor has there also other attachable goods) ([208]).

---

précité, constater, à l'encontre de ce dernier, une créance liquide et exigible". Even if, based on the facts of the case and its complexity, one would hardly advocate for a different conclusion, interestingly the element of the subjective limitations on the enforceability of the judgment has been evaluated based on the law of the Member State addressed and not of the law of the Member State of origin, as if such matter was governed by the law of the Member State addressed.

[206] See the case referred to in the previous footnote.

[207] In doctrine, it has been stated that the matter of the subjective limitations of the enforceability of a judgment should be governed by the law of the Member State of origin: D'ALESSANDRO, *Titolo esecutivo europeo e opposizione all'esecuzione*, in *Rivista trimestrale di diritto e procedura civile*, 2016, n. 2, p. 581.

[208] Different treatment across different Member States is not *per se* a scenario inconsistent with the rules and the principles of the Brussels regime. In fact, the application of the public order clause may result, for example, in the fact that the same judgment is enforced in one Member State and refused enforcement in another one. The choice of the European legislator despite the Commission's proposal seems clear; on this point see DICKINSON, *The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("Brussels I bis" Regulation)*, *Sydney Law School Legal Studies Research Paper No. 11/58*, open access at the link http://ssrn.com/abstract=1930712, 2011, pp. 8-10, bringing various examples relating, among others, to the enforcement of contracts concerning internet gaming or prostitution.

6. The Regulation does not directly define the notions of "enforceability" (Art. 39) and the "conditions" the enforcement (Art. 41) (or rather, it does not define which elements fall within one or the other category). This way it leaves to national courts of the Member State addressed to allocate each element in the appropriate group, consequently defining the applicable law and checking if, under such law, the judgment meets the element for its enforcement. Such is a direct consequence of the application of the rules and the principles contained in the Regulation analysed so far. One could even go as far as to ask if such is an *unwanted* or rather a *wanted* consequence of the application of multiple national laws: it could also be argued that the Regulation willingly leaves it to Member States to *double check* certain elements for the enforcement ([209]). However, this conclusion, when based only on the assessment of the *enforceability of the judgment*, and elements relating to it (and not other grounds such as, for example, reasons connected to the procedural public order of the Member State addressed), seems rather inconsistent with the rule contained in Art. 39 and, in general, with the objectives of the Brussels regime. When the judgment is enforceable in the Member State of origin it should be recognized as such in all the other Member States: to fully apply this principle, the Regulation should define when an element assessed for the enforceability of a judgment should not be put again under scrutiny for its enforcement. However, one must also consider, first, that the distinction between the elements of the enforceability and the conditions for the enforcement in the strict sense seems to be generally well-applied by national courts, i.e., the uncertain cases are a very limited number ([210]). Second, it would be difficult to give a definition of these two categories generally valid for all the practical cases that could present uncertain boundaries: i.e., should the legislator give a general definition or leave it to a case-by-case analysis? These elements indicate that a definition at a uniform level could appear *not the most balanced solution*, after all.

Furthermore, a solution to these problems, and to the event that courts apply the undesired two-step enforceability test, may already lie in the rules and principles contained in the Regulation. One general principle that could be applied by national courts to decide unclear and uncertain cases could be derived from Art. 54 (*adaptation of unknown measures or orders*). The rule on adaptation provides that a measure or order, despite being unknown by the law of the Member State addressed, shall

---

However, in the event that such different treatment is based on the asserted *lack of the conditions for the enforceability* of the judgment, being such conditions *imposed by the law of the Member State addressed*, it would violate the rule contained in Art. 39 BI bis, under which the issues relating to the enforceability of a judgment are placed under the scope of the law of the Member State of origin, and not of the law of the Member State addressed.

[209] See the previous footnote no. 208.

[210] See the case-law mentioned in the previous paragraph and in the footnote no. 202.

nevertheless be recognised and enforced by way of adaptation to a measure, existent under the law of the State addressed, that meets the criteria of equivalence of effects and similarity of interests and objectives; the parties have the power to challenge the adaptation before a judicial authority (Art. 54(2)). The rule on adaptation introduces not only a procedure for the adaptation of unknown measures or orders, but also a principle ([211]): Member States should not, to the extent possible, refuse the recognition and the enforcement of incoming judgments, even if such judgments contain measures or orders unknown to the law of the Member State addressed. According to such principle, it could be stated that the cases of refused enforcement of incoming judgments should be limited, in the words of Art. 54, "to the extent possible": if the judgment passed the enforceability test in the Member State of origin, it should be enforced in the Member State addressed. In other words, the conditions for the enforcement under the law of the Member State addressed should not, in order to follow the principle of the automatic recognition and enforceability within the European judicial area, include elements that were already considered (and positively assessed) for the enforceability of the judgment under the law of the Member State of origin.

In principle, such rule should avoid that Member States, addressed for the enforcement, refuse to enforce an incoming judgment as *non-enforceable*, however labelling it as *not meeting the conditions for the enforcement in the strict sense*. In addition, the reasoning may also be brought forward and cover a related issue, that is recently object of various debates and even a ruling of the CJEU ([212]) (or rather, a missed opportunity) ([213]): the nature and the extent of the binding (or non-binding)

---

[211] PFEIFFER, *The abolition of* exequatur, in FERRARI-RAGNO (a cura di), *Cross-border litigation in Europe: the Brussels I recast regulation as a* panacea*?*, Wolters Kluwer, 2015, p. 192.

In addition to this, it should be concluded that Art. 54 BI bis denies the possibility of including in the guarantee of public policy a purported principle of typicality of the enforcement forms of local procedural law of the Member State addressed, SALERNO, *Il "sistema Bruxelles I" verso un regime "monista" di libera circolazione delle decisioni*, in *Cuadernos de derecho transnacional*, 2015, no. 7/2, p. 5 ff.

[212] CJEU, 7 April 2022, in Case C-568/20, *J v. H Limited*.

[213] The third question, concerning the binding or non-binding value of the information provided by the court of origin in the certificate ("*Are the provisions of Regulation No 1215/2012, in particular Articles 1, 2(a), 39, 42(1)(b), 46 and 53, to be interpreted as meaning that, in proceedings concerning an application for refusal of enforcement, the court of the Member State addressed is compelled to assume, on the basis solely of the information provided by the court of origin in the certificate issued pursuant to Article 53 of [that regulation], that a judgment that falls within the scope of the regulation and is to be enforced exists?*") has been set aside by the Court.

The issue has been addressed, however, in the opinion of the AG Pikamäe – even if only partially. In fact, the AG affirmed that "*the European legislature provided for the coexistence of*

effect of the information provided by the court of origin in the Art. 53-certificate. In fact, points 4.4 and 4.6 of the certificate specifically deal with some of the elements that could potentially tempt courts addressed with the enforcement to apply the two-step enforceability test. This would not be the appropriate place to analyse such complex matter ([214]), but only to emphasize that a number of issues relating to a double enforceability test would be set aside (*i*) by a re-drafting of the information to be provided under points 4.4 and 4.6 by the court of origin, so that (*ii*) the court addressed would more easily apply the principle that an element of the enforceability of a judgment positively assessed by the court of origin should not be object of a further scrutiny, as a condition for the enforcement, in the Member State addressed, even if under the procedural law of the Member State addressed such element is qualified (not as a condition for the enforceability but) as a condition for the enforcement in the strict sense.

---

two types of grounds for refusal of enforcement, namely those referred to generically in Article 41(2) of that regulation as 'the grounds for refusal … of enforcement under the law of the Member State addressed', on the one hand, and those specifically listed in Article 45 of that regulation, which should be read in conjunction with Article 46 of that regulation, on the other hand". Based on such binary description of the grounds for refusal, the AG concluded that "*to comply with the exhaustive nature of the grounds listed in Article 45 of Regulation No 1215/2012 and the compatibility requirement mentioned above, a ground for refusing enforcement under Article 41(2) of that regulation should not be intended to call into question the acceptability of the enforcement order itself but could result in a possible limitation of its effects and thus a restriction on its enforcement. In that context, it cannot be accepted that, in assessing a ground for refusal of enforcement referred to in Article 41(2) of Regulation No 1215/2012, the court addressed may review the regularity of the certificate and thus the applicability of that regulation to the action resulting in the judgment, which could lead that court to deprive the judgment concerned of its enforceability*".

One would be tempted to qualify this as another missed opportunity. In fact, the AG does not directly deal with the nature and the extent of the binding effect of the certificate, but rather with the admissibility of certain grounds for refusal within the "*two types of grounds for refusal of enforcement*" provided for in the Regulation. However, following such reasoning, and assuming that a certain ground *is* admissible within those provided for in the Regulation (for example, in the words of the AG, "*the existence of the title itself due to the effects of a limitation period or to its enforceability*"), one could ask to which extent is the court addressed bound to the information contained in the certificate issued by the court of origin, if such element (like the existence of the title due to its enforceability) was already affirmed in the certificate in a positive way.

[214] Thoroughly addressed, during the EFFORTS Final Conference, by Marco Buzzoni (Research Fellow, MPI Luxembourg), in his presentation on "*The certification of judgments under the EFFORTS Regulations*".

2. *The refusal of enforcement in a comparative perspective: Some critical issues (Part II)*

Marco Farina*

1. The first issue I'd like to discuss is the following: is it possible for the debtor to bring an action for refusal of recognition when the decision has already been enforced in the Member State of enforcement?

2. Let's imagine that scenario: a decision rendered in France in violation of the rule of exclusive jurisdiction laid down in article 26 BI-bis and therein became *res judicata* is successfully enforced in Italy without the debtor opposing it for the ground provided for in article 45(e)(i) BI-bis.

3. The question that we want to try to give an answer is whether the debtor can – at this late stage – bring an action for refusal of recognition in order to overturns the results of the enforcement carried out against him and obtain a decision which grants his claim for unjust enrichment.

4. In Italy the Supreme Court is of the opinion that, once the enforcement has been duly and successfully carried out, no action for unjust enrichment is admissible insofar it is based on facts and circumstances which could have been raised in the enforcement proceeding. The lack of an opposition by the debtor in the enforcement proceedings for reasons therein admissible and available precludes him from recovering what has been received by the creditor as a result of the enforcement procedure.

5. I do not believe that that principle could be applied in order to answer the question we've just asked ourselves. The reason why I believe that that principle should not be applied is because it precludes the debtor from relying on reasons that might affect the substantial relationship and not the decision itself. So, for example, if the payment already made by the debtor has not been raised as an objection in the enforcement proceeding, then – according to the Supreme Court – the debtor is prevented from raising that reason in a subsequent litigation aimed at obtaining the restitution of what has been recovered by the creditor with the enforcement. Accordingly, the principle we

* Adjunct Professor at Luiss University of Rome and at University of Rome "La Sapienza".

are discussing seems not to preclude the debtor from using means that directly affect the decision by way of an appeal for which the term has not been elapsed.

6. Because the regulation does not provide any term within which the debtor must make an application for refusal of recognition, I believe that it is a strong reason for asserting that the principle set forth by the Italian Supreme court does not preclude such application even if the decision has already been successfully enforced.

7. We may add that such a preclusion cannot be derived neither from the principle – on which scholars and case law agree – according to which the debtor cannon bring an action for unjust enrichment after the enforcement has already been successfully completed claiming the lack of an enforceable title. The existence of an enforceable title is a foundative element of the procedural right to proceed with the enforcement, so once the enforcement has been carried out that procedural right may be considered consummated and the debtor cannot rely on that procedural reason to assert his or her claim of unjust enrichment. Neither that principle is applicable to the issue in question, in my opinion. The application for refusal of recognition, if granted, does not create a situation of mere lack of an enforceable title; quite the contrary, once the application is granted, in the member state there is no longer anything that regulates the substantial relationship between the parties; so it must be said that the refusal for recognition involves something more that a mere procedural complaint related to the lack an enforceable title.

8. The question is, then, whether a preclusion, as a result of the enforcement proceedings being carried out without the debtor has opposed it (being able and allowed to do so), exists according to the rules and principles of BI-bis. The answer might be in the positive. For this reason: in the context of Regulation 44/2001, the non-opposition to the *exequatur* decree certainly precluded the debtor from asserting in the ongoing enforcement proceeding (and thus *a fortiori* once it had been concluded) grounds for refusal of recognition which, in fact, would have been raised within the time limit for opposing the decree of *exequatur* given *inaudita altera parte*. In the transition from BI to BI-bis one might therefore consider that the enforcement proceeding initiated by the creditor works as *provocation ad opponendum* ando so requires the debtor to raise the grounds for refusal of recognition (and of enforcement) in the context of enforcement (by way of opposition to enforcement) with a preclusion of any possible subsequent action in the form of an application for refusal of recognition.

9. If an application for refusal of recognition is admissible even if the debtor had not opposed the enforcement and the latter has been successfully carried out, I believe that such an action can be brought together with a claim for unjust enrichment despite

to what has been decided by the ECJ in the HRVATSKE ŠUME case. According to that decision, as you are well aware of, an action for unjust enrichment brought in reliance of payment unduly made in enforcement proceedings does not fall within the rule of exclusive jurisdiction of article 24(5) of BI-bis and must be brought before the court of the member state where the defendant is domiciled.

10. The action for unjust enrichment which the debtor can bring once the application for refusal of recognition has been granted lies on the fact that in the member state in question there is non longer anything that justify the payment made by the debtor and it is strictly connected and correlated to the prejudicial declaration that the decision already enforced must not be recognized. So the jurisdiction of the court of the member state where the refusal of recognition is sought and where the undue payment was made can be established. And this is also true because, in my opinion, the decision both on the refusal of enforcement and on the claim for unjust enrichment cannot circulate in other member States due to its limited territorial effect.

11. Very concisely I'd like to address a second issue. It refers to the adaptation set out in article 54 BI-bis as recently applied by an Italian court. The Court of Appeal of Naples has upheld the appeal lodged by a creditor who was seeking to enforce in Italy an English worldwide freezing injunction by its entry in the land register as it was equivalent to the Italian conservative measure known as *sequestro conservativo*. As matter of fact, initially the registrar granted the creditor only a conditional entry, expressing doubts as to whether the WFO could be considered equivalent to the Italian conservative measure known as *sequestro conservativo* due to the different nature of the WFO in respect of the Italian *sequestro conservativo*: the first operates *in personam*, while the second operates *in rem*. In the opinion of the registrar, granting the entry into the Italian land registry of the WFO as if it was an Italian *sequestro conservativo* would have meant giving the WFO effects greater that the one it has in the member state of origin.

12. The appeal brought by the creditor succeeded as the Court of Appeal found that, according to English law, it is not completely true that the WFO operates exclusively *in personam* considering that the party who has obtained such order may request the registrar to entry a restriction in the Land registry in order to prevent the debtor from disposing of the estate registered without the consent of the creditor. As a consequence of that finding, the Court held that the WFO and the Italian *sequestro conservativo* have equivalent effects and pursue similar aims and interests, so the first must be recognized and enforced in Italy in the same way as the *sequestro conservativo* is enforced, that is to say by its entry in the land registry.

13. The decision is interesting because, apart from others considerations, the French *Court de Cassation* held, for example, that a freezing injunction rendered by a Cypriot court and a *saisie conservatoire* have different nature and purposes as the first, unlike the latter, does not render the assets concerned legally unavailable, so that the recognition in France of a freezing injunction does non prevent the creditor from obtaining a national conservative measure in order to protect and guarantee his claim.

14. In any case, the decision raises the question as to whether the adaptation means that all the national rules applicable to the national measure and/or order to which the foreign order has been adapted shall apply. The *Al Bosco* case might be relevant here as, according to it, national rules which provides for time limit within which an attachment order must be enforced shall be applied to an order adopted in another member state.

3. *The suspension of the enforcement proceedings under the EFFORTS Regulations*

Rimantas Simaitis*

Milda Markevičiūtė*

In order to determine the main features and problematic issues analysis is limited to four EFFORTS regulations and their implementation in four countries.

Regulations that have similar rules will be covered:

- Regulation No 861/2007 (as amended by Regulation No 2015/2421) establishing a European Small Claims Procedure (hereinafter - "ESCP");

- Regulation No 1896/2006 (as amended by Regulation No 2015/2421) creating a European order for payment (hereinafter - "EOP");

- Regulation (EC) No 805/2004 (as amended by Regulation No 1103/2008) creating a European Enforcement Order for uncontested claims (hereinafter - "EEO"); and

- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter - "Brussels I recast").

National application patterns were determined by review of laws and practice of Lithuania, Italy, France and Germany.

EFFORTS Regulations' rules

All four regulations that are analysed here provide that a competent court or tribunal or competent authority in a Member State of enforcement has certain discretionary power to limit enforcement in situations where review of enforceable title is possible.

Art. 23 of ESCP provide that where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18 of ESCP, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;

---

* Associate Professor at Vilnius University.

* Researcher at Vilnius University.

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances stay, either wholly or in part, the enforcement proceedings.

The same remedies are available to the competent court or authority in the Member State of enforcement may, upon application by the debtor, under Art. 23 of EEO where the debtor has challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19 of EEO, or applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10 of EEO.

Art. 23 of EOP stipulates that where the defendant has applied for a review in accordance with Article 20 of EOP, the competent court in the Member State of enforcement may, upon application by the defendant, apply similar three alternative remedies of (a) limiting the enforcement proceedings to protective measures, (b) making enforcement conditional on the provision of such security as it shall determine or (c) under exceptional circumstances stay, either wholly or in part, the enforcement proceedings.

Art. 44 of Brussels I recast grants analogous powers to the court in the Member State addressed on the application of the person against whom enforcement is sought in the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3 of this regulation. The enforcement shall be suspended by the competent authority in the Member State addressed, on the application of the person against whom enforcement is sought, if the enforceability of the judgment is suspended in the Member State of origin.

As we see, all the regulations provide in essence for the same set of alternative remedies limiting enforcement in cases of pending review of the enforcement title. However, the regulations do not specify criteria to be followed by the court or the competent authority. This is left to national practices and discretion of judges.

National application

Analysis of national application of the analysed suspension rules does not allow to deduct any unified pattern of functioning of the specified measures. Rules and practices to deal with analogous situations normally are applied mutatis mutandis to suspension under EFFORTS regulations.

Lithuania

Lithuanian Law on the Implementation of the European Union and International Legal Acts Regulating Civil Proceedings do not specify the rules related to the suspension of

the enforcement proceedings of either of the regulations in question. Therefore, rules of domestic civil procedure apply.

In case the enforcement is being handled by the bailiff, the bailiff or the district court is to analyse the application regarding stay (suspending) of enforcement (ESCP, Brussels I recast, EOP, EEO). In case the case is being handled in the Court of Appeals, the same court handles application regarding suspension of enforcement.

Application may be lodged as application to the court in order to apply interim measures, or as a separate application to the bailiff.

Italy

There is a lack of precise information on the procedure and the actual remedies available to the debtor when the EEO or EOP is brought up for enforcement. Therefore parties shall be aware of high level of uncertainty both in terms of procedure and remedies that might be applied in practice. Theoretically, under domestic civil procedure, the debtor could petition the court and the judge of the enforcements is to decide after hearing of the parties.

Remedies under ESCP are handled by ordinary courts (Tribunale) acting as enforcement judge.

Under Brussels I recast the appellate court is to decide upon the application of the party if there are serious and compelling grounds (e.g. possible insolvency of the debtor). If the application to stay the proceedings is submitted due to pending motion for the revision of the judgment is to be decided by the same court that hears the motion.

Alternatively, deposit of security may be imposed if there are serious and irrecoverable danger to the debtor.

In summary, the procedure and the conditions to grant such measure vary depending on the court competent to receive the plea or the motion.

If the motion of the party to stay the enforceability is inadmissible or manifestly unfounded, the court may issue a penalty order from 250.00 to 10,000.00 Euros. Such order may be later waived with the judgment that rules on the appeals.

A hearing regarding the motion is to be held, however, in exceptional cases, an immediate suspension may be applied.

France

Remedies specified in Art. 23 of EEO are determined by an enforcement judge. Limited jurisprudence provide for such examples of the grounds for stay: challenging the constitutionality of the underlying judgment in the state of origin; annulment of the

procedural acts leading to the issuance of the EEO in the court of origin. Applications for a stay are generally refused if the challenged against the EEO have been rejected in the state of origin.

Under EOP it is enforcement judge to decide regarding stay (suspending) of enforcement. The procedure is adversarial, but the powers of the enforcement judge are limited: (i) enforcement judge has limited discretion, however, it can be ordered to release of unnecessary of abusive measure and order the creditor to reimburse damages caused by such abuse; (ii) deposit of security may be imposed; (iii) enforcement judge has the power to grant a discretionary delay to the person against whom the enforcement is sought (it cannot exceed 2 years and does not prevent creditor from seeking conservatory measures).

Under ESCP the court with which an objection is lodged can withdraw any provisional enforcement order it has granted with the effect of staying enforcement. Only if the judgment was issued in France, the jurisdiction to withdraw the provisional enforcement of a default judgment lies with the court that issued the judgment. The enforcing judge may defer enforcement by granting a period of grace to the debtor.

Remedies of Brussels I recast are applied in the following manner. If there are serious ground for annulment or reversal of the decision and if the enforcement is likely to cause manifestly excessive consequences, enforceability be suspended by the First President of the Court of Appeal (if an appeal has been filed) or by the court that issued the judgment (in case of opposition). The procedure is adversarial and follows the rules applicable to summary proceedings.

Germany

Applications for stay of enforcement under EEO, EOP and ESCP may be lodged to the local court. It is either local court at the place of enforcement or debtor‘s place of residence or any local court where assets of the debtor are situated if the debtor does not have a residence in Germany. If more than one court may be competent, then it is up for the debtor to choose. The funcional competence lies with the judge. The decision is to be made after a hearing. It is not appealable.

Under Brussels I recast the application may be lodged to the Regional Court (in the district the debtor is domiciled or in the district enforcement takes place if the debtor is not domiciled in Germany) that has exclusive jurisdiction.

Art. 44 (2) Brussels I recast suspension is effectuated by mutatis mutandis application of the domestic rules on termination or limitation of the enforcement proceedings and on the repeal of already effected enforcement measures.

Conclusions

Implementation of EFFORTS rules on suspension of enforceable titles at national level can be characterised by such features:

- Supplementary application of national rules. This already creates 27 Member States‘ different modalities of varying criteria and practices;
- EFFORTTS rules are not always clearly linked to national implementation rules;
- Individual judges are empowered by wide discretion.

This results in lack of uniformity, clarity and certainty applying rather simple rules regarding suspension of enforcement. Differences of practices of Member States raise serious issues of equality of users.

Further harmonization of rules and practices on suspension can be seen as a solution to the problem of obscurity in the analysed field. Specification of criteria to select between various remedies and specification of conditions and particularities of their application might ensure higher level of certainty and equality.

4. *Digitalization of cross-border enforcement procedures*

Marco Giacalone*

"Efficient cross-border judicial cooperation requires secure, reliable and time-efficient communication between courts and competent authorities. Moreover, this cooperation should be carried out in a way that does not create a disproportionate administrative burden and is resilient to force majeure circumstances. These considerations are equally important for individuals and legal entities, as getting effective access to justice in a reasonable time is a crucial aspect of the right to a fair trial, as enshrined in Article 47 of the EU Charter of Fundamental Rights of the European Union (the Charter)".

The ones that I just read are part of the introductory Recitals of the EU Commission's Proposal[215] for the Regulation on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters of 1 December 2021. At the EU level, the proposal of 1 December 2021 is the encompassing proposal of the Commission on the digitalization of judicial cooperation.

During my speech, I will sketch the developments of digitalization as well as the challenges of Efforts Regulations and briefly discuss the key elements of this new proposal.

I. The developments of digitalization

As seen in the Questionnaire on the Digitalization made in our last deliverable (D.3.16), judicial work processes are still largely paper-based, and the use of distance communication and technology (such as videoconferencing) is an exception. The reasons are various:

1) the complex matching of technology and legal needs and protection of rights

2) the costs of implementing and maintaining an IT system

---

* Postdoctoral Researcher at the Private and Economic Law Department (PREC), Co-Director of the Research Group on Digitalisation and Access to Justice (DIKE) and member of the Research Group on Law, Science, Technology and Society (LSTS) of the Vrije Universiteit Brussel (VUB).

[215] Proposal for a Regulation of the European Parliament and of the Council on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM (2021)759 final.

3) the resistance within the judiciary to adopt new working modes.

The level of the digitization of the justice system is anachronistic with a view to technological advancement and the role various forms of digital communication has played in daily life for many years.

Around the globe, the Covid-19 pandemic has had the only positive aspect of accelerating efforts for further digitize internal workflows within the judiciary, to increase digital communication with parties and to introduce and to expand video conferencing for the purpose of hearings. Courts were temporarily closed and judges, lawyers, bailiffs and clerks were obliged to work from home. Some Member States reacted by implementing an "emergency legislation" to facilitate distance means of communications and remote hearings. But some measures were only put in place temporarily and there is no doubt that in post pandemic times the work on a more systematical and sustainable implementation of technology will continue.

II. The challenges of Efforts Regulations

The differences in the level of digitalization of justice between the Member States are considerable. While a number of Member States were advanced in digitizing justice, others are lagging behind.

At the EU level, advancing digital judicial cooperation between Member States has been complicated due to these different levels of digitalization.

From the outset, a decentralized approach has been taken, and to a large degree, EU digitalization has been based on voluntariness. Member States were not obliged to digitalize. It was considered a choice, in order to make it optional, not mandatory for them. This in part follows from the principles of proportionality and subsidiarity, set out in Articles 81 (2) and 82 (2) TFEU. The use of different systems in the Member States also raised questions of interoperability. Domestic IT solutions are often not designed for cross-border exchanges of data. While interoperability is often defined at different levels, the definition provided by the Digital Criminal Justice Study is adopted for this study: "the ability of computer systems or software to exchange and make use of information". In other words, interoperability refers to two or more systems that agree on how they will communicate and how the received messages will be interpreted. Technical interoperability requires the adoption of technical protocols and specifications.

While some progress on interoperability has been made at national level, in some cases national IT solutions for judicial authorities have been developed in an uncoordinated manner, leading to different and fragmented IT systems across the Member States.

The lack of interoperability between existing national systems can have negative consequences, also in terms of security, such as:

1) Low or no trust in terms of authentication and signature;
2) Lack of semantic interoperability between forms and data elaborated in one system by another system;
3) No guarantee for the authenticity and integrity of the documents;
4) Mutual misunderstanding of the execution of procedures because of diverging rules and traditions between the countries;
5) Incoming requests need to be manually entered into the national case management system. This process not only takes time, but also involves a high risk of human error, which could have serious consequences for the treatment of the request.

Now, let's focus on the digitalization of EFFORTS Regulations.

The Regulations on the European Order for Payment Procedure (EOP) and the European Small Claims Procedure (ESCP) merely enable the use of distance communication for submitting an application or a response to a claim (see e.g. Article 4 ESCP Regulation). It depends on the Member State where the application is submitted, or the claim has to be lodged whether this can be done electronically.

In the Regulation on the European Small Claims Procedure, as amended effective of 2017 (Regulation 2015/2421), the use of technology and for distance hearings (videoconferencing, teleconferencing) is incorporated as a default (Article 8 ESCP). However, it is still up to the Member States whether they actually use this.

The European Order for Payment Procedure can be handled fully electronically (Article 8 EOP Regulation), but only a few Member States have incorporated this.

An important step in the further regulation of digital communication between Member States is the recast of the Service and Evidence Regulations. These were adopted in 2020 and are applicable from 1 July 2022. These take the digital communication a step further by obliging the competent authorities of the Member States to communicate with each other - for example regarding the exchange of standard forms - using a decentralized IT system.

These should be connected through an interoperable system, such as e-Codex. The latter has firmly established itself after more than a decade, and also features prominently in the proposals that are on the table now. In December 2020, the Commission adopted a proposal on the e-Codex system. In December 2021, the Council and the European Parliament reached a provisional agreement on the proposed Regulation and I can assure from reliable sources that the final text will be published within the year (December 2022).

III. Key elements of the new Proposal

Along with the proposal on the e-Codex system, the Commission put forward its Communication on the digitalisation of justice in the EU in December 2020 (JOIN/2020/18 final). This was also included in the Commission work plan for 2021 as a 'digital judicial, cooperation' package (COM/2020/690 final).

In this Communication the Commission proposed a toolbox approach, which should include a set of measures to bring forward the digitalization of justice at both the EU level and the national level. While previous legislative activities focused on individual instruments or specific areas, the Communication takes a broad approach in addressing the modernization of the legislative framework for EU cross-border procedures in civil and commercial law. A key element mentioned in the Communication is the 'digital by default' principle, which 'should be understood as a way to improve the efficiency and resilience of communication, reduce costs and administrative burden, by making the digital channel of communication the preferred one to be used'.

The Commission stresses the need to ensure safeguards, acknowledging the need to avoid social exclusion.

In 2021, an extensive impact assessment was made for the further digitalisation of both civil and criminal justice. A public consultation was launched along with a consultation of a series of stakeholders. A study to support the impact assessment was prepared by a contracted party and involving experts; this entailed an extensive mapping of the existing instruments and the options for further regulation.

Following this, the Commission published its proposal (COM(2021) for a Regulation on the digitalisation of judicial cooperation and access to justice on 1 December 2021.

The proposed Regulation is based on Article 81(2) and 82(2) TFEU, providing the basis for facilitating judicial cooperation in civil matters and the cooperation between judicial or other competent authorities in criminal proceedings and in the enforcement of decisions. Important for civil justice in particular is that the scope of the proposal is limited to cross-border cases. However, as discussed above, EU policy in this area at the same time aims to upgrade digitalization at the national level. For reasons of subsidiarity and proportionality the choice for Article 81(2) for civil justice is most obvious, and will also benefit the instruments based on this provision, including for instance the European harmonised procedures. However, as the Service and Evidence Regulations have just been amended and provide for their own specific rules, these instruments are as such not part of the currently proposed Regulation.

As I already explained in the beginning, in its Explanatory Memorandum the Commission sets out that “efficient- cross-border Judicial cooperation requires secure, reliable and time-efficient communication between courts and competent authorities”.

At the same time this should not impose disproportionate administrative burdens and it should be resilient. As on previous occasions, the Commission stresses the need to secure effective access to justice, which should be swift, cost-efficient, and transparent. The existing set of instruments in civil justice do not sufficiently provide for secure and reliable digital communication channels or recognition of electronic documents, signatures and seals. The Commission also refers to the Covid-19 pandemic as a force majeure event that may severely affect the functioning of justice systems in the EU. While solutions were developed in an ad hoc manner in many Member States, these did not always comply with security standards.

The proposal aims at improving access to justice and the 'efficiency and resilience of the communication flows inherent to the cooperation between judicial and other competent authorities in EU cross-border cases'.

A common EU approach is necessary as leaving Member States to develop their own national IT solutions leads

to fragmentation and the risk of incompatibility, according to the Commission. What is interesting to note is that the Commission seems to limp somewhat between the need for judicial cooperation in cross-border cases, and the necessity to improve digitalization of justice at the national level.

The Commission lists five alms of the proposed Regulation - evolving around enabling and facilitating electronic means of communication, video conferencing, and the acceptance of documents and electronic signatures. More precisely this entail:

(1) Ensuring the availability and use of electronic means of communication in cross-border cases between Member States' judicial and other competent authorities, including the relevant Judicial Home Affairs agencies and EU bodies, where such communication is provided for in EU legal instruments on judicial cooperation.

(2) Enabling the use of electronic means of communication in cross-border cases between individuals and legal entities, and courts and competent authorities, except in cases covered by the Service of documents regulations.

(3) Facilitating the participation of parties to cross-border civil and criminal proceedings in oral hearings through videoconference or other distance communication technology, for purposes other than the taking of evidence in civil and commercial cases.

(4) Ensuring that documents are not refused or denied legal effect solely on the grounds of their electronic form (without interfering with the courts' powers to decide on their validity, admissibility, and probative value as evidence under national law).

(5) Ensuring the validity and acceptance of electronic signatures and seals in the context of electronic communication in cross-border judicial cooperation and access to justice.

A key provision of the proposal regards written communication and the exchange of forms between courts and competent authorities for the purpose of the instruments listed (Article 3).

It prescribes that this shall be carried out through a secure and reliable decentralized IT system. This should be understood in connection with the proposed Regulation for the e-Codex system, which is considered

the main tool to date. Only when such electronic communication is not possible or not appropriate in a specific case, other means of communication may be used.

Further provisions, however, also enable national IT portals, where available, and do still seem to make some of the requirements subject to availability (Articles 5 and 6).

Two provisions are dedicated to hearings through videoconferencing or other distance communication technology in civil and commercial matters (Article 7) and criminal matters (Article 8).

It prescribes that such hearings shall be allowed by competent authorities, but still makes its use subject to the availability of such technology. An important guarantee for parties and for accused persons is that the use of videoconferencing is subject to their consent.

Further provisions of the proposed Regulation deal with the adoption of implementing acts for the decentralized IT system (Article 12), make the Commission responsible for the implementation software (Article 13), and provide that the Member States shall bear the costs of the installation, operation and maintenance of the decentralized IT system as well as adjusting their national IT system to make them operable. This cost aspect will undoubtedly also lead to discussions in the negotiation on the proposal. The final provisions concern the protection of information and assistance, monitoring and evaluation, information to be provided by the Commission and amendments to specific instruments, transition and entry into force (Articles 15-25). The amendments of other instruments for example in the European Order for Payment Regulation, the Small Claims Regulation, the Account Preservation Order, and the Regulation on Freezing Orders and Confiscation - are intended to align these instruments with the provisions on, among others, electronic communication, and the acceptance of electronic documents of the proposed Regulation.

A final aspect that is not included in the proposal itself but mentioned in the Explanatory Memorandum is the training of justice professionals on E law, specifically on the use of digitals tools. It is indeed crucial for the success of any digitalization that the professionals must improve their use of these tools (not only judges and lawyers, but also court clerks, judicial officers and other competent authorities.

5. *The European Account Preservation Order and national implementing rules*

Carlos Santaló Goris*

A. Introduction

On 18 January 2017, the EAPO Regulation entered into force,[216] introducing the very first cross-border civil provisional measure at the EU level. Even if the EAPO Regulation was directly applicable since the date it entered into force, most Member States opted for adopting specific domestic implementing acts for the EAPO. In general, this national legislation was introduced with the intention to facilitate the incorporation and application of the EAPO procedure within the domestic civil procedural system. However, sometimes these implementing measures go beyond the mere incorporation and reinterpret some of the provisions of the EAPO differently than the text of the EAPO Regulation suggests. Such liberal reinterpretation not only risks hindering the EAPO's *effet utile* but also puts at stake the uniform and coherent application of this instrument across the EU.

B. A need to adopt national legislative measures to "implement" the EAPO regulation?

The EAPO was introduced through an EU Regulation. This means that this procedure was directly applicable from the very first moment it entered into force.[217] It also implied that, unlike EU Directives, it did not require any domestic legislation transposing the EAPO procedure into national legal systems of the Member States. However, across the text of the EAPO Regulation there are numerous articles containing references to the Member States' national laws.[218] Besides those direct references to national law,

---

* Research fellow at the Max Planck Institute Luxembourg.

[216] 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, p. 59–92.

[217] Art. 288 Treaty on the Functioning of the European Union.

[218] E. D'Alessandro, "Article 46: Relationship with national procedural law" in E. D'Alessandro and F. Gascón Inchausti (eds.), *The European Account Preservation Order - A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), para. 46.01.

Article 46 states that "all procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place".[219]

Therefore, even if Member States are not formally obliged to adopt implementing legislation, the large reliance of the EAPO procedure on national law makes such legislation convenient, if not necessary.[220] As a matter of legal certainty, the implementing legislation is an opportunity to introduce specific solutions for these procedural aspects of the EAPO procedure left to the national law of the Member States.[221] Otherwise, courts would have to find *ad hoc* solutions within their respective domestic civil procedural orders to fill those gaps. An example on how courts establish such kind of *ad hoc* solutions can be found in a judgment rendered by the District Court of Rotterdam. This court found that since there is not a standard form for the decision rejecting an EAPO application, the form of such decision would be established according to Dutch law.[222]

Even if no implementing legislation is required, following Article 50 Member States were obliged to provide certain information concerning the application of the EAPO Regulation in their respective legal system to the Commission before 18 July 2016.[223]

---

[219] This provision is "an expression of the principle of procedural autonomy": K. Hilbig-Lugani, "Artikle 46 EuKoPfVO" in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung* (C.H. Beck 2022), margin no. 1.

[220] The need for special legislation to accommodate the EAPO was acknowledged by several national legislators of several Member States. For instance, the Finnish legislator stated that the 'regulation must also not be rewritten or otherwise incorporated into national law. However, the application of the Regulation may require additional national provisions': Government's proposal to Parliament for a law on a European Account Preservation Order, HE 109/2016 vp (*Hallituksen esitys eduskunnalle laiksi eurooppalaisesta tilivarojen turvaamismääräysmenettelystä, HE 109/2016 vp*), p. 49.

[221] J. Hoevenaars and X. Kramer, "Improving Access to Information in European Civil Justice" in J. von Hein and T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement* (Intersentia 2021), 509.

[222] Rechtbank Rotterdam, 23.05.2018, C/10/541226 / KG RK 17-1823, ECLI:NL:RBROT:2018:6658.

[223] Art. 50 (1) EAPO Regulation: "By 18 July 2016, the Member States shall communicate the following information to the Commission: (a) the courts designated as competent to issue a Preservation Order (Article 6(4)); (b) the authority designated as competent to obtain account information (Article 14); (c) the methods of obtaining account information available under their national law (Article 14(5)); (d) the courts with which an appeal is to be lodged (Article 21); (e) the authority or authorities designated as competent to receive, transmit and serve the Preservation Order and other documents under this Regulation (point (14) of Article 4); (f) the

This implicitly required Member States to convey a minimum evaluation on how the EAPO would be applied within their domestic civil procedural systems.[224]

In the practice, all Member States except Portugal have adopted domestic legislative measures concerning the EAPO Regulation. Nevertheless, less than a third of these Member States had already approved such legislation by January 2017, the moment the EAPO Regulation entered into force. In other Member States, it took longer. For instance, Romania introduced the legislation concerning the EAPO only in 2020.[225]

From a technical perspective, the most common solution followed by Member States was the introduction of new provisions in pre-existing domestic legislation, mostly to national civil procedure or enforcement codes. The German act on the EAPO added an entire new Chapter to the Book on enforcement of the German Code of Civil Procedure.[226] Spain introduced a new final provision to its Code of Civil Procedure,[227]

---

authority competent to enforce the Preservation Order in accordance with Chapter 3; (g) the extent to which joint and nominee accounts can be preserved under their national law (Article 30); (h) the rules applicable to amounts exempt from seizure under national law (Article 31); (i) whether, under their national law, banks are entitled to charge fees for the implementation of equivalent national orders or for providing account information and, if so, which party is liable, provisionally and finally, to pay those fees (Article 43); (j) the scale of fees or other set of rules setting out the applicable fees charged by any authority or other body involved in the processing or enforcement of the Preservation Order (Article 44); (k) whether any ranking is conferred on equivalent national orders under national law (Article 32); (l) the courts or, where applicable, the enforcement authority, competent to grant a remedy (Article 33(1), Article 34(1) or (2)); (m) the courts with which an appeal is to be lodged, the period of time, if prescribed, within which such an appeal must be lodged under national law and the event marking the start of that period (Article 37); (n) an indication of court fees (Article 42); and (o) the languages accepted for translations of the documents (Article 49(2))".

[224] For instance, in Finland, before introducing any implementing act of the EAPO Regulation, its legislator examined first 'how the procedural provisions laid down in the (EAPO) Regulation fit into the Finnish legal environment' and in that manner assessing "the need for additional provisions in the Finnish domestic legal system": Government's proposal to Parliament for a law on a European Account Preservation Order, HE 109/2016 vp (*Hallituksen esitys eduskunnalle laiksi eurooppalaisesta tilivarojen turvaamismääräysmenettelystä, HE 109/2016 vp*), (unofficial translation).

[225] Emergency Ordinance no. 119 of December 21, 2006 (*Ordonanță de urgență nr. 119 din 21 decembrie 2006*).

[226] Sections 946 to 959, Chapter 11, Book 9 German Code of Civil Procedure (*Zivilprozessordnung*).

[227] Final Disposition 27 Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*).

while Austria included new sections in its Code of Civil Enforcement.[228] Lithuania enlarged its special act on EU civil procedural law with new articles on the EAPO Regulation.[229] Nonetheless, there were also those Member States which approved separate acts without making any changes to other national acts legislation. This was the case of Finland;[230] the Netherlands;[231] or Sweden.[232]

I. The content of the EAPO national legislation

Contentwise, the EAPO domestic implementing measures vary substantially from one Member State to another. Some Member States have adopted rather extensive implementing measures, reproducing almost entirely the structure of EAPO procedure in their national law, while others followed more discreet reforms, addressing only very select aspects of the EAPO procedure.

1. Article 50: the content-backbone of the EAPO domestic legislation

Despite the divergences existing concerning the content of the EAPO domestic implementing acts, in broad terms, a certain common background can be identified in all of them. Most of the EAPO domestic acts primarily focus on appointing the competent courts and authorities involved in the EAPO procedure and selecting the method used to gather information about debtors' bank accounts. This might not be accidental, since such content largely coincides with the information that Member States were required to provide to the Commission on the basis of Article 50 of the EAPO Regulation by 18 July 2016 at the latest.[233]

---

[228] Sections 422 to 424 Austrian Code of Enforcement (*Exekutionsordnung*).

[229] Law of the Republic of Lithuania on the Implementation of European Union and International Legal Acts Regulating Civil Procedure (*Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas*).

[230] Act 17/2017 on the European Account Preservation Procedure (*Laki 17/2017 eurooppalaisesta tilivarojen turvaamismääräysmenettelystä*). This first act subsequently amended in 2019 by the Act 781/2019, amending the Act on the European Account Preservation Procedure (*Laki 781/2019 eurooppalaisesta tilivarojen turvaamismääräysmenettelystä annetun lain muuttamisesta*).

[231] Implementing Act of the Regulation European Preservation Order on Bank Accounts (*Uitvoeringswet verordening Europees bevel tot conservatoir beslag op bankrekeningen*).

[232] Law (2016: 757) on attachment of bank funds within the EU (*Lag (2016:757) om kvarstad på bankmedel inom EU*).

[233] Art. 50(1) EAPO Regulation.

a. Courts and authorities involved in the application of the EPO Regulation

Concerning the courts and authorities involved in the application of the EAPO Regulation, the most relevant solutions are those cases in which Member States appointed central courts and authorities.[234] For instance, in Finland and the Czech Republic, there is just one single central court that handles all the EAPO applications. The Finnish legislator decided to appoint the District Court of Helsinki (*Helsingin käräjäoikeus*) as the EAPO central court.[235] It did so because it considered that "the concentration of jurisdiction in a single district court would better serve the accumulation of expertise needed to conduct the procedure than in a decentralized system".[236] A similar objective might have inspired the Czech legislator when it was decided to appoint the Prague 1 District Court (*Obvodní soud pro Prahu 1*) as the EAPO central court.[237] In Slovakia, only a partial centralization was achieved. Only when the debtor's domicile is not in Slovakia is the District Court of Banská Bystrica (*Okresný súd Banská Bystrica*) competent to issue the EAPO.[238]

b. Methods to search for the debtors' bank accounts

Other recurrent provisions that can be found in the national acts on the EAPO Regulation are those concerning the method to search for debtors' bank accounts.[239]

---

[234] The creation of central courts has been welcomed by the Court of Justice of the European Union ("CJEU"). In the CJEU stated that "a centralisation of jurisdiction before a single specialised court may be justified in the interests of the sound administration of justice" (C-30/20, 15 July 2021, *Volvo*, ECLI:EU:C:2021:604, para. 36). In this sense also: Joined Cases C-400/13 and C-408/13, 18 December 2014, *Sanders*, ECLI:EU:C:2014:2461, para. 44.

[235] Section 3(1) Act 17/2017 on the European Account Preservation Procedure (*Laki 17/2017 eurooppalaisesta tilivarojen turvaamismääräysmenettelystä*).

[236] Government's proposal 109/2016 to Parliament for a law on a European Account Preservation Order (*Hallituksen esitys 109/2016 eduskunnalle laiksi eurooppalaisesta tilivarojen turvaamismääräysmenettelystä*), 33.

[237] Section 37(13) Czech Act 6/2002 on Courts and Judges (*Zákon č. 6/2002 o soudech a soudcích*).

[238] Section 2(3)(a) Act 54/2017 on the European Account Suspension Order and on the amendment of the Act of the Slovak National Council no. 71/1992 Coll. on court fees and the fee for an extract from the criminal record, as amended (*Zákon 54/2017 o európskom príkaze na zablokovanie účtov a o doplnení zákona Slovenskej národnej rady č. 71/1992 Zb. o súdnych poplatkoch a poplatku za výpis z registra trestov v znení neskorších predpisov*).

[239] Art. 14(5) EAPO Regulation.

Member States are required to adopt at least one method to search for debtors' bank accounts. In this regard, the EAPO Regulation provides a non-exhaustive list of three methods that can be employed for that purpose. One of the methods consists of asking for such information from all banks operating in the Member States where the accounts are suspected to exist.[240] Through the second method the information authority would obtain the information about debtors' bank accounts from "public authorities or administrations in registers or otherwise".[241] A debtor can be also be obliged by a Member State court to disclose with which bank or banks in its territory he holds one or more accounts.[242] In order to prevent debtors hindering the effectiveness of the EAPO, the request to disclose the information is accompanied "by an *in personam* order by the court prohibiting the withdrawal or transfer by him of funds held in his account or accounts up to the amount to be preserved by the Preservation Order".

The three methods in Article 14 are just examples and Member States are free to opt for any other as long as it is "effective and efficient" and not "disproportionately costly or time-consuming".[243]

In practice, all Member States have relied on at least on one of the three listed methods.[244] The chosen method by Member States generally corresponds to a mechanism to search for debtors' assets which already existed in their national civil procedural systems. For instance, the French legislator opted to retrieve the information from the FICOBA (*Fichier des comptes bancaires*),[245] a national registry containing information about all bank accounts held in the country.[246] The FICOBA was

---

[240] Art. 14(5)(a) EAPO Regulation.

[241] Art. 14(5)(b) EAPO Regulation.

[242] Art. 14(5)(c) EAPO Regulation.

[243] Art. 14(5)(d) EAPO Regulation. Member States can also choose more than one method: D. Wiedemann, "Artikel 14 EU-KpfVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (Otto Schmidt 2022), margin no. 12. For instance in Spain, its information authority can ask the banks for the information but also ask public administrations which might have access to such information too: Final Disposition 27(5) Spanish Code of Civil Procedure (*Ley de Enjuiciamiento Civil*).

[244] C. Santaló Goris, "The implementation at the national level of the bank account information mechanism under the EAPO Regulation: a comparative analysis" (2020), Cuadernos de derecho transnacional 387, 403.

[245] Art. L. 151 A of the French Tax Procedures Book (*Livre des procédures fiscales*).

[246] On the FICOBA, see: <https://www.service-public.fr/particuliers/vosdroits/F2233> accessed on 15 November 2022.

already used to search for debtors' bank accounts in domestic civil enforcement.[247] The same happened in Germany. The German tax authority (*Bundeszentralamt für Steuern*) provides the information about debtors' bank accounts to the German EAPO information authority (*Bundesamt für Justiz*).[248] During the German civil enforcement procedure, the German tax authority can be also required to provide such information.[249] Conversely, in Luxembourg, where its national information authorities sends a request to disclose the information to all the banks operating in Luxembourgish territory,[250] such method lacked of precedent in the Luxembourgish civil procedural system.[251]

2. Other relevant aspects of the EAPO procedure covered by the national acts on the EAPO

Some national implementing acts cover other aspects of the EAPO procedure besides identifying the competent courts involved in applying the EAPO or the method to search for information about debtors' bank accounts. Notably, in Germany, a specific provision "complementing" a creditor's liability for the damages caused by the EAPO under the Article 13 of the EAPO Regulation was introduced in the German Code of Civil Procedure.[252] Article 13 establishes a fault-based liability regime, though Member States can "maintain or introduce in their national law other grounds or types of liability".[253] The German legislator decided to raise the fault-based liability into a strict liability regime for those cases when the EAPO is proven "to have been unfounded from the start".[254] Similarly, the Greek, Latvian and Slovakian acts on the EAPO also

[247] Art. L. 151 A of the French Tax Procedures Book (*Livre des procédures fiscales*).

[248] Section 948(3) German Code of Civil Procedure (*Zivilprozessordnung*).

[249] Section 802(l) German Code of Civil Procedure (*Zivilprozessordnung*).

[250] Art. 2(6) Amended law of 23 December 1998 creating a commission for the supervision of the financial sector (*Loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier*).

[251] C. Santaló Goris and V. Van Den Eeckhout, "Luxembourg" in J. von Hein and T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021), 296 – 297.

[252] Section 958 German Code of Civil Procedure (*Zivilprozessordnung*).

[253] Art. 13(3) EAPO Regulation.

[254] During the *travaux préparatoires* of the EAPO Regulation, the German delegation defended the introduction of a strict liability regime: Comments on Chapters I, II and III from the German delegation, 13260/11 JUSTCIV 205 CODEC 1280, 13140/12 ADD 6, p. 7.

included specific provisions concerning the creditors' liability regime.[255] It is also worth mentioning the Luxembourgish implementing legislation introduced a specific procedure that permits EAPOs to be converted into garnishment orders.[256] In plain words, it set up a specific procedure to transfer any debtor's bank account funds attached by an EAPO into the creditor's bank accounts once the creditor has obtained an enforceable title.[257]

II. Frictions between the national implementing legislation and the text of the EAPO Regulation?

Whereas national legislation on the EAPO can facilitate the application of the EAPO Regulation at the national level, it also entails the risk of distorting the original sense of the provisions of the EAPO application. Such misinterpretations can undermine the *effet utile* of the EAPO Regulation and accrue its fragmented application across the European landscape. Slovakia, Finland and Sweden provide examples of cases in which national legislators exceeded what they should have done regarding the national implementation of the EAPO.

1. Slovakia and the amount of the Article 12 security

The provision of a security is one of the prerequisites that creditors can be required to satisfy in order to obtain an EAPO.[258] The security aims to prevent creditors from

---

[255] **Greece**: Art. 738(A)(6) Greek Code of Civil Procedure (*Κώδικα Πολιτικής Δικονομίας*). **Latvia**: Article 644(29) Latvian Code of Civil Procedure (*Civilprocesa likums*). **Slovakia**: Section 11(2) Act no. 54/2017 on the European Account Preservation Order (*Zákon č. 54/2017 o európskom príkaze na zablokovanie účtov*).

[256] Art. 718(1) New Luxembourgish Code of Civil Procedure (*Nouveau Code de procédure civile*).

[257] Paradoxically, during early academic discussion about the creation of a European civil preservation order, some French scholars argued that such instrument should not only permit the attachment of the funds, but also garnishing those funds in favour of the creditor: E. Jeuland, "Les garanties de la saisie europeenne de creances bancaires" in J. Isnard and J. Normand (eds), *L'aménagement du droit de l'exécution dans l'espace communautaire : bientôt les premiers instruments* (Editions Juridiques et techniques 2003), 400 - 401. Similarly, *Hess* defended creating a "European Garnishment Order for Bank Accounts" that would have permitted, as its name suggests, garnishing the funds from debtors' bank accounts: B. Hess, *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures* (2004), 149.

[258] Art. 12 EAPO Regulation.

abusing the EAPO procedure and to cover the potential damages that the EAPO might cause to the debtor.[259]

The Slovakian act on the EAPO states that the amount of the security has to be at least one-third the amount of the claim.[260] What does the EAPO Regulation say in this respect? Article 12 refers to two criteria to calculate such security amount and which correspond to the objectives of the security.[261] On the one hand, the security has to be of "an amount sufficient to prevent abuse of the procedure".[262] This factor is rather programmatic and judges might find it of little help to calculate the security amount.[263] On the other hand, "the amount has to ensure compensation for any damage suffered by the debtor as a result of the Preservation Order". Here courts will find a real possibility to calculate though it entails certain complexity. The court would have to determine first, through the conflict of laws rule in Article 13, the law applicable to the creditor's potential liability.[264] Subsequently, based on the applicable law of the liability regime, the court would have to calculate the amount of potential damages.

Perhaps aware of the difficulties that courts would encounter applying Article 12's criteria to calculate the amount of the security, the European legislator decided to introduce in the Preamble a more realistic subsidiary rule.[265] Recital 18 states that courts can "consider the amount in which the Order is to be issued as a guideline for

---

[259] K. Hilbig-Lugani, "Artikle 12 EuKoPfVO" in W. Krüger and T. Rauscher (eds.), *Münchener Kommentar zur Zivilprozessordnung, Band 3* (Otto Schmidt 2022), margin no. 1.

[260] Section 3(1) Act 54/2017 on the European Account Preservation Order and on the amendment of the Act of the Slovak National Council no. 71/1992 Coll. on court fees and the fee for an extract from the criminal record, as amended (*Zákon 54/2017 o európskom príkaze na zablokovanie účtov a o doplnení zákona Slovenskej národnej rady č. 71/1992 Zb. o súdnych poplatkoch a poplatku za výpis z registra trestov v znení neskorších predpisov*).

[261] D. Wiedemann, "Artikel 12 EU-KPfVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht, 5. Aufl* (Otto Schmidt 2022), para. 10.

[262] Art. 12(1) EAPO Regulation.

[263] C. Senés Motilla, *La orden europea de retención de cuentas: aplicación en derecho español del Reglamento (UE) Núm. 655/2014, de 15 de mayo de 2014* (Aranzadi 2015), 79.

[264] B. Hess and K. Raffelsieper, "Die Europäische Kontenpfändungsverordnung: Eine überfällige Reform zur Effektuierung grenzüberschreitender Vollstreckung im Europäischen Justizraum" (2015) 35 IPRax 1.

[265] P. Peiteado Mariscal, "Article 12: Security to be provided to the creditor" in E. D'Alessandro and F. Gascón Inchausti (eds.), *The European Account Preservation Order - A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), para. 12.08. For instance, practice shows Luxembourgish courts have struggled to calculate the amount of the security: Santaló Goris and Van Den Eeckhout (n 36), 296.

determining the amount of the security" when there is not "sufficient evidence" to calculate the amount that could serve to cover the potential damages that the EAPO could cause to the debtor. It should be noted that the Preamble is non-binding.[266]

When the Slovakian legislator decided that the amount of security has to be at least one-third of the amount of the claim, it made the Preamble's rule to calculate the amount of the security no longer subsidiary. The Slovakian act on the EAPO requires Slovakian courts to always observe the amount of the claim to establish the amount of the security, regardless of "the absence of specific evidence as to the amount of the potential damage". Moreover, the one-third minimum amount of the claim can be higher than the amount resulting from calculating the security based on the potential damages that the EAPO might cause to the debtor.

Even if the solution reached by the Slovakian legislator contravenes the spirit of Article 12, it is understandable as a matter of pragmatism. Calculating the amount of the security on the basis of the potential damages that the EAPO might cause can result in too complex an exercise for the courts.[267] Courts' practice shows the amount of the security is generally calculated based on a percentage of the amount of the claim. However, such percentage varies from one Member State to another.[268] For instance, in Spain, the First Instance Court No 8 of Palma de Mallorca required around 5% of the amount of the claim as a security deposit to grant the EAPO.[269] In the Netherlands, the District Court of Rotterdam asked for a security of 30% of the amount of the claim,[270] while for the Austrian High Regional Court of Innsbruck it was 25% of such amount.[271] In Germany, several scholars defend the position that the amount of security should be

---

[266] The European Court of Justice has reiterated on several occasions that the Preamble is not binding. See, among others: C-215/88, 13 July 1989, *Casa Fleischhandel*, ECLI:EU:C:1989:331, para. 31; C-162/97, 19 November 1998, *Nilsson*, ECLI:EU:C:1998:554, para. 54.

[267] Art. 10 EAPO Regulation.

[268] Some scholars already expected that it would eventually occur: M. Mann-Kommenda, "Artikle 12 EuKoPfVO" in A. Geroldinger and M. Neumayr (eds.), *IZVR. Praxiskommentar Internationales Zivilverfahrensrech*t (LexisNexis 2021), margin no. 13; Peiteado Mariscal (n 50), para. 12.09.

[269] Juzgado Primera Instancia No 8 de Palma de Mallorca, 16.03.2018, Auto No 67/2018 (unpublished).

[270] Rechtbank Rotterdam, 11.27.2018, C/10/558112/KG RK 18-1174, ECLI:NL:RBROT:2018:9770.

[271] Oberlandesgericht Innsbruck, 07.05.2019, 10 R 25/19f, ECLI:AT:OLG0819:2019:01000R00025.19F.0507.000.

110% of the amount of the claim: the total amount of the claim plus 10% to cover interest and procedural costs.[272]

The Slovakian legislator put into law a solution to calculate the amount of the security that, even if it departs from Article 12, appears to be the widespread system used by domestic courts. Rather than blaming the Slovakian legislator, this example should serve to reflect on the possibility of introducing a more practical set of rules to calculate the amount of the security in an EAPO proceeding, such as establishing either the minimum or maximum percentage of the amount of the claim that courts can request for the security.

2. Finland and the appeal against the decision on the Article 12 security

The Finnish act on the EAPO establishes that a creditor cannot appeal separately the court's decision requiring the creditor to provide the Article 12 security.[273] The question arises whether the Finnish legislator was entitled to reject the possibility of appealing the decision on the security. The answer would depend on the manner in which the EAPO Regulation is interpreted, more concretely Article 21 of the EAPO Regulation. The EAPO Regulation does not expressly acknowledge that creditors can appeal a decision on the security. Still, Article 21 establishes an appeal against any decision of the court rejecting, wholly or in part, the EAPO application. Although this provision does not mention the decision on the security, some authors defend that, in order to achieve a more uniform application of the EAPO, Article 21's appeal should be available to contest the decision on the security.[274]

Conversely, other authors find that the EAPO Regulation does not address creditors' right to contest the decision on the security. Thus, based on Article 46, it becomes a

---

[272] B. Hess, "Art. 12 EuKtPVO" in P. Schlosser and B. Hess (eds.), *EU-Zivilprozessrecht* (C. H. Beck 2021), margin no. 3; Hilbig-Lugani (n 44), margin no. 7. Differently: Mann-Kommenda (n 53), margin no. 14.

[273] Section 3(1) Act 17/2017 on the European Account Preservation Procedure (*Laki 17/2017 eurooppalaisesta tilivarojen turvaamismääräysmenettelystä*).

[274] Peiteado Mariscal (n 50), para. 12.21. Other authors who share this opinion: C. F. Nordmeier and J. Schichmann, "Der Europäische Beschluss zur vorläufigen Kontenpfändung" (2017) RIW 407, 412; M. Trenker, "Art. 12 EuKoPfVO" in H. Schumacher, B. Köllensperger and M. Trenker (eds), *Kommentar zur EU-Kontenpfändungsverordnung EuKoPfVO* (2017), margin no. 19; Wiedemann (n 46), para. 21.

question that depends on the national law of the Member States.[275] This approach would also be supported by a systematic interpretation of the EAPO Regulation. Whereas creditors are not expressly recognized the possibility of contesting the decision on the security, debtors are.[276] Article 33 establishes that "upon application by the debtor to the competent court of the Member State of origin, the decision concerning the security pursuant to Article 12 shall be reviewed".[277] Therefore, the fact that the EAPO Regulation expressly acknowledges that debtors can contest the decision on the security, but it does not do the same for creditors, can be understood as if the European legislator left this question intentionally unaddressed, and thus to the discretion of national law.

Whereas an interpretation of the Article 21 appeal which encompasses decisions on the security would assure a more uniform application of the EAPO Regulation across the EU, it is difficult to fit such interpretation within the text of that provision. Indeed, Article 21 refers to "any decision", but only decisions rejecting "wholly or in part" the EAPO application. Perhaps, eventually, a national court will ask the CJEU whether an Article 21 appeal can be used to contest the decision on the security, and the CJEU may reply yes.[278] Nonetheless, considering that during the first five years of the EAPO Regulation being in force there were only two preliminary references before the CJEU on the EAPO,[279] the chances for that to occur are rather low. It would be desirable that in the event of a recast of the EAPO Regulation, the European legislator would decide to reform the Article 21 appeal to expressly acknowledge that it can be used against decisions on the security. That would put an end to the current academic discussions

---

[275] Hilbig-Lugani (n 44), margin no. 10. In this sense also: F. Mohr, *Die vorläufige Kontenpfändung. EuKoPfVO* (LexisNexis 2014), margin no. 200; M. L. Villamarín López, "La responsabilidad del acreedor en el Reglamento 655/2014, sobre la Orden Europea de retención de cuentas" (2020) 12 Cuadernos de Derecho Transnacional 1470, 1474.

[276] Villamarín López (n 60), 1474.

[277] Art. 33(2) EAPO Regulation

[278] However, for the European Payment Order Regulation (Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1–32), the CJEU interpreted the review mechanism against an enforceable European Payment Order in a restrictive manner: C-119/13, 4 September 2014, *eco cosmetics,* ECLI:EU:C:2014:2144, para. 44; C-21/17, 6 September 2018, *Catlin Europe*, ECLI:EU:C:2018:675, para. 54.

[279] One of those two preliminary references was the judgment C-555/18, 7 November 2019, *K.H.K.*, ECLI:EU:C:2019:937. The other preliminary reference was pending before the CJEU by the time this paper was published: C-291/21, *Starkinvest SRL*. However, on 20 October 2022, the AG issued the Opinion of this second case: Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819.

and assure that any creditor, regardless of the Member State where the EAPO is requested, would have the right to appeal the decision on the security.

3. Sweden and Article 38's security au lieu of preservation

Once the EAPO has been enforced, debtors can request to replace the funds attached by the EAPO with an alternative security. They can apply for this alternative security before the courts of the Member State where the EAPO was issued;[280] or before the courts or enforcement authorities of the Member State where the EAPO was enforced.[281]

According to the Swedish act on the EAPO Regulation, the creditor shall be given the opportunity to comment on the alternative security proposed by the debtor before this is accepted by the court.[282] What does the EAPO Regulation say in this respect? Article 38 only states that the "the provision of the security in lieu of preservation shall be brought to the notice of the creditor in accordance with national law".[283] Here, *Mohr* understands that the creditor has to be informed only after the alternative security has been established.[284] *Senés Motilla* reached a similar conclusion following a different reasoning.[285] She considers that since the title of Article 38 states the "right to provide a security", a debtor is entitled to provide the security regardless of the creditor's opinion.[286]

Against those authors who maintain that the procedure to provide an Article 38 alternative security has to be conducted *inaudita altera parte*, *Cuniberti* and *Migliorini*

[280] Art. 38(1)(a) EAPO Regulation.

[281] Art. 38(1)(b) EAPO Regulation.

[282] Section 12 Law (2016:757) on attachment of bank funds within the EU (*Lag (2016:757) om kvarstad på bankmedel inom EU*). Similarly, in Latvia, the implementing legislation of the EAPO Regulation states that both parties are given the opportunity to comment on the security before the court accepts the alternative security: Art. 644(36)(3) Latvian Code of Civil Procedure (*Civilprocesa likums*).

[283] Art. 38(2) EAPO Regulation.

[284] Mohr (n 60), margin no. 443. In this sense also: M. Mann-Kommenda, "Artikle 38 EuKoPfVO" in A. Geroldinger and M. Neumayr (eds), *IZVR. Praxiskommentar Internationales Zivilverfahrensrech*t (LexisNexis 2021), margin no. 7.

[285] Senés Motilla (n 48), 253.

[286] Senés Motilla (n 48), 253. However, the Preamble talks instead about "the right to apply for the release of the preserved funds if he provides appropriate alternative security": Recital 35 EAPO Regulation.

consider that this is instead a question to be solved by the national law of the Member States.[287] These two authors acknowledge that Article 38's wording suggests that the creditor should be heard before the security is accepted. Nonetheless, they find it "hard to see what would justify such violation of the debtors' right to be heard and, in particular, to argue whether the assurance does indeed offer the same guarantee to be paid than the preservation of the funds".[288]

From a systematic interpretation of the EAPO Regulation, it could be also concluded that national law determines whether the debtor can be heard before the security is accepted. Article 38 does not clearly state that the procedure to accept the alternative security has to be conducted *inaudita altera parte*. However, in other parts of the EAPO procedure, it is expressly indicated so. For instance, regarding the appeal procedure of a decision rejecting the EAPO application totally or partially, Article 21 states that such "appeal shall be dealt with in ex parte proceedings as provided for in Article 11".[289]

Therefore, under this second interpretation, the Swedish legislator would be entitled to decide that the creditor can be heard before the court accepts an Article 38 alternative security.

The existence of different interpretations of Article 38's procedure to provide the alternative security reflects the need to rewrite this provision in a clearer fashion. In Sweden, its legislator understood that the debtors' hearing during the procedure to replace the funds attached by the EAPO Regulation was a matter for national law. However, other national legislators might have reached the same conclusion as *Mohr* or *Senés Motilla*, finding that the text of Article 38 imposes that such procedure has to be conducted *inaudita altera parte*. Against the current version of Article 38, which favours a fragmented application across the EU, the European legislator should consider a uniform solution, either by expressly stating that the procedure is conducted with the prior hearing of the creditor or without it. At least this would put creditors applying for an EAPO in different Member States on equal feet.

C. Concluding remarks

The EAPO national implementing acts help practitioners and courts to navigate the EAPO procedure through their domestic civil procedural systems, a task that might not

---

[287] G. Cuniberti and S. Migliorini, *The European Account Preservation Order Regulation: A Commentary* (Cambridge University Press 2018), 306 – 307.

[288] Cuniberti and Migliorini (n 72), 306 – 307.

[289] Art. 21 EAPO Regulation.

be easy considering the number of references. The more references to national law, the more necessary domestic legislative acts are, and the higher the chances of distorting the content of the EAPO Regulation. Nonetheless, in those identified cases in which national legislators went beyond the original sense of some provisions of the EAPO Regulation, this was mainly the result of the ambiguous manner in which they were drafted. It would be desirable that the EU legislator took note of the above-examined Finnish, Slovakian and Swedish examples of strained implementation of the EAPO. In this manner, during a hypothetical recast of the EAPO Regulation,[290] those procedural aspects could be addressed in a more precise manner in the EAPO's text, something which would also help to achieve a more uniform application of this instrument.

[290] Article 53 of the EAPO Regulation foresees that the Commission has to monitor the application of the EAPO during its first five years into force and on that basis elaborate a report. The report should serve to assess whether the EAPO Regulation has to be amended or not: Art. 53(1) EAPO Regulation.

6. *European small claims procedure, ex aequo et bono judgement and the content of the claim. The Italian perspective*

Martino Zulberti*

1. Introduction.

Reg. (EC) no. 861/07, which regulates the European Small Claims Procedure, does not provide anything on the making-decision standard in the light of which the claim is to be decided, namely if the judgement has to be given according the law or ex aequo et bono.

When a proceedings under Reg. (EC) no. 861/07 takes place in Italy, the question is whether Article 113 of the code of Italian civil procedure is applicable. The first paragraph of Article 113 of the Italian code of civil procedure provides that the judge decides the case according to the law, unless the parties have given him the power to decide ex aequo et bono and the second paragraph of the same article provides that the justice of the peace decides ex aequo et bono (so-called necessary ex aequo et bono judgement), in compliance with the principles guiding the matter, disputes of a value of less than € 1,100, except for those arising from contracts concluded by forms, as set out in Article 1342 of the civil code.

The relevance of the problem can be grasped if one considers that the disputes falling within the scope of the Regulation are mainly within the jurisdiction of the justice of the peace and that the threshold for the necessary ex aequo et bono judgments - currently € 1,100 - will be raised to € 2,500, being of € 5,000 the threshold for the applicability of the Regulation.

The purpose of this contribution is therefore to consider, on the one hand, what is the applicable standard of judgment in a case governed by Reg. (EC) no. 861/07 when the proceedings takes place in Italy, and, on the other, if the conclusion were that necessary ex aequo et bono judgement is also applicable in relation to the European Small Claims Proceedings, what the corollaries are in terms of the content of the claim commencing the proceedings.

2. Ex aequo et bono judgements and European Small Claims Procedure.

* Assistant Professor at the University of Milan.

The question whether Article 113, paragraph 2, of the Italian code of civil procedure is relevant in the context of the European Small Claims Procedure has to be resolved in the light of Article 19 of Reg. (EC) no. 861/07, which provides that, subject to the provisions of the Regulation itself, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted. It is generally accepted the procedural nature of Article 113, paragraph 2, of the Italian code of civil procedure and consequently it can be affirmed its applicability in the context of the European Small Claims Procedure. Therefore, disputes of a value of less than € 1,100 will be decided ex aequo et bono, unless the claim is based on forms, in the latter case having to be decided according to the law.

Indeed, it might be asked whether the ex aequo et bono judgment is applicable also when the value of the claim exceeds the limit provided for by Article 113, paragraph 2, of the Italian code of civil procedure. The question arises because Article 10 of Reg. (EC) no. 861/07 excludes the need to be represented by a lawyer in these proceedings and, according to a thesis, there would be a link between the unnecessity to be represented by a lawyer and ex aequo et bono proceedings. In effect, it has been sustained that the recourse to a lawyer would be justified in the context of proceedings to be decided according to the law and not also in ex aequo et bono proceedings before the justice of the peace. These last ones are characterized by simplicity and the limit of € 1,100 for the decision according such standards corresponds to that within which the party, before the justice of the peace, may take legal action without the need to be represented by a lawyer.

There are several arguments for dissenting.

Firstly, any link between the unnecessity to be represented by a lawyer and ex aequo et bono decision-making standard should be denied. The latter is by no means so simple by definition as to make the assistance of a lawyer not useful: on the contrary, ex aequo et bono proceedings are even more complex than those at law, as the judge - according to the preferable approach - is first required to qualify the facts according to law and can use equitable powers only to affect the consequences provided for by the law. Therefore, the parties have to defend themselves not only at law, but also in relation to equitable considerations that could be taken into account by the judge for the decision.

Secondly, the exclusion of the obligation to provide a technical defence set forth by Article 82 of the Italian code of civil procedure for proceedings before the justice of the peace with a value of less than € 1,100 is valid notwithstanding the criterion of judgment. Even if its value is below that threshold, the claim is to be decided according to the law when it originates from contracts concluded by forms.

Thirdly, the exclusion of the obligation to be represented by a lawyer applies in relation to proceedings before both the justice of the peace and the tribunal when the small claim falls within its jurisdiction. Before the latter the necessary ex aequo et bono decision would not be possible, as Article 113, paragraph 2, of the Italian code of civil

procedure refers - at least at first instance - only to proceedings before the justice of the peace.

3. The content of the claim.

Article 4 Reg. (EC) no. 861/07 provides that the claimant shall commence the European Small Claims Procedure by filling in the standard claim Form A. The question that arises is whether the claim introducing a proceedings to be decided at law have the same content as a claim commencing an ex aequo et bono one. On this regard, it has been stated that when «the dispute is to be decided ex aequo et bono, the indication of specific rules of law is both impossible and unnecessary», since the justice of the peace would not apply any rules of substantive law.

This might seem even more in line with the content that the claim should have in the context of European Small Claim Procedure. Indeed, it has been observed that Article 12 Reg. (EC) no. 861/07, in the part where it states that «The court or tribunal shall not require the parties to make any legal assessment of the claim» would exclude the obligation for the plaintiff to legally qualify the claim. According to an opinion, such rule would be different to the one laid down by Article 164, paragraph, 4 of the Italian code of civil procedure, which requires the plaintiff to indicate not only the facts but also «the elements of law constituting the grounds of the claim», whereas the European Regulation would be in line with Article 318 of the Italian code of civil procedure, which would not require a legal assessment of the facts alleged by the plaintiff.

These differences at the basis of a debate on which the subject matter of the proceedings under Reg. (EC) no. 861/2007 is, echoing theories (now mostly abandoned) which identify the subject matter of the proceedings with the facts alleged. However, the debate on the subject-matter of the proceedings and on the correlative objective limits of res judicata does not affect the profile here examined, which rather concerns the possibility of legally qualifying the claim of an ex aequo et bono judgment. On this regard I think that the fact that it is not necessary to legally qualify the claim does not exclude that the plaintiff may provide a qualification, even if as a hypothesis not binding on the court.

Such hypothesis of qualification may also be formulated with the request for the commencement of an ex aequo et bono judgment before the justice of the peace. The solution derives from the notion of such a judgement, in relation to which the judge is required to qualify the case ex jure, the equitable powers affecting the determination of the legal consequences. In this perspective, therefore, it is up to the parties to indicate those facts that may justify the use of equitable powers by the court to depart from the legal consequences provided for by the applicable rule of law.

The request initiating proceedings could be the only act for the plaintiff to allege such facts. The procedure under Reg. (EC) no. 861/07 tends to be written and does not

provide for the necessary allocation of time limits for further written submissions. Therefore, facts (or other considerations) which are irrelevant ex jure, but which may be relevant as equitable considerations, should be alleged by the plaintiff in the claim, namely in the form A, at paragraph 8.1, where it is requested to state «the details of the claim».

Future perspectives for the re-drafting of EU rules on cross-border enforcement of claims

1. *Re-Recasting Brussels I-bis*

Burkhard Hess*

I. Reforming the Recast: State of Affairs and Ongoing Challenges

According to article 79 of Regulation 1215/2012,[291] the EU Commission should have had delivered a report and proposed potential improvements by 21 January 2022. However, the process only started in spring 2022; the Civil Justice Unit must follow the overarching regulatory approach of the EU Commission (Better Regulation Guidelines 2021). Accordingly, the Belgian firm Milieu Consulting SRL has been commissioned to elaborate the study. The consulting firm circulated a short questionnaire among 27 national reporters, a couple of interviews took place.[292] The report on the application of the Regulation is expected for the end of the year. Already today, we can be sure that the quality of the preparatory report will not correspond to the assessments made in the former recasts. However, the actual situation is not as bad as it might appear at first sight, as much empirical research on the Brussels I^{bis} Regulation is already available.

The current application of the Brussels I^{bis} Regulation in the EU Member States has been monitored in several academic research projects during the last years. In 2018, the MPI Luxembourg Report on the Free Movement of Judgments was published. This project included the practice of 17 EU Member States.[293] Several projects were run in

---

* Director of Max Planck Institute Luxembourg for Procedural Law.

[291] 'By 11 January 2022 the Commission shall present a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of this Regulation. That report shall include an evaluation of the possible need for a further extension of the rules on jurisdiction to defendants not domiciled in a Member State, taking into account the operation of this Regulation and possible developments at international level. Where appropriate, the report shall be accompanied by a proposal for amendment of this Regulation.'

[292] Each national reporter was requested to make 3 interviews; 10 additional interviews were made with so-called stakeholders.

[293] *Hess/Ortolani* (ed.), Impediments of National Procedural Law to the Free Movement of Judgments, Luxembourg Report on European Procedural Law, Volume I (Beck, Hart 2019), passim.

the framework of the EU Justice Programs: In 2021, *Jan v. Hein* and *Thalia Krueger* published the results of the IC²BE-project (informed choices in coss-border enforcement).[294] This spring, the Asser Institute finished the JUDGTRUST project (results are expected to be published in the upcoming weeks).[295] The University of Maribor run a comparative project on enforcement titles.[296] Finally, Efforts addresses the interfaces between national procedures and European instruments. Most of these projects combine empirical and doctrinal research and focus on the practical application of the EU instruments. As a result, empirical research has become largely available. However, the different projects appear fragmented and the databases they created are not interconnected.[297]

The second important development that directly addresses the recast of the Recast comes from Academia. The MPI Luxembourg, the University of Leuven under the auspices of the EAPIL, are currently organizing an Academic Position Paper on the Recast of the Recast to influence the upcoming reform process. In the beginning of 2022, a group of 27 colleagues from all EU Member States elaborated short answers to a questionnaire based on a paper I published in summer of last year.[298] On 9 September 2022, 50 experts attended a focussed conference on the ongoing reforms of the Brussels I[bis] Regulation in Luxembourg. More than 100 experts participated online. I would like to summarize the main findings of this conference in the following five points:

II. Five Main Issues to be addressed

(1) As the Brussels I Regulation operates the main (but not the only) reference instrument of European procedural law,[299] there is a need to review basic definitions,

---

[294] *V. Hein/Krueger* (ed.), Informed Choices in Cross-Border Enforcement (Intersentia 2021).

[295] https://www.asser.nl/judgtrust/judgtrust/, responsible researcher: Prof. Dr. Vesna Lazic.

[296] https://www.pf.um.si/en/acj/projects/pr09-eu-en4s/, responsible researcher: Prof. Dr. Vesna Rijavec.

[297] This issue was addressed in the Luxembourg seminar with stakeholders from Luxembourg, France and the EU Commission in the IC²BE project in 2018.

[298] *Hess*, Reforming the Brussels Ibis Regulation: Perspectives and Prospects, MPILux Working Paper 4/2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3895006

[299] *Hess*, Europäisches Zivilprozessrecht (2nd ed. de Gruyter 2021), paras 4.62 ff.

such as the concept of judgment, the delineation with settlements, the concept of court.[300]

(2) It is necessary to look at the wider context – the relationship to third states (including the UK) has become a priority. Here, the accession of the Union to the 2019 Hague Judgments Convention does not solve the issue. As many states will not accede the Convention in the close future, there is a need to implement an autonomous regime on the recognition of judgments from third states.[301]

(3) Reflecting about the impacts (benefits) of digitalization within the context of Brussels I Regulation;[302]

(4) Looking at the role and position of the Brussels I Regulation in the context of Union law. The main issue is the delineation of the Regulation from parallel instruments addressing collective redress,[303] data protection,[304] cartel damages, flight rights[305] and SLAPP;[306]

---

[300] There is a need to correct the case law of the CJEU qualifying the collection of public debts as a civil and commercial matter, CJEU, 9 March 2017, case C-551/15, *Pula Parking*, EU:C:2017:193; 7 May 2020, joined cases C-267/19 and C-323/19, *Parking*, EU:C:2020:351; 25 March 2021, case C-307/19, *Obala i lučice*, EU:C:2021:236; pending: case C-30/21, *Nemzeti Útdíjfizetési Szolgáltató*.

[301] Recent case law of the CJEU has given up the principle *exequatur sur exequatur ne vaut* and introduced a (dangerous) second track for the recognition of third-state judgments in the European Judicial Area, CJEU, 7 April 2022, case C-568/20, *H Limited*, EU:C:2022:264, annotated by *Hess*, IPRax 2022, 349.

[302] *Hess*, Cooperación judicial digital en el espacio de libertad, seguridad y justicia, in: Gascón Inchausti (ed.), xxx.

[303] *Hess*, Europäisches Zivilprozessrecht (fn. 299), paras 11.78 ff.

[304] Law firms are increasingly using platforms to collect actions for damages under article 82 GDPR, *Paal/Kritzer*, Die Geltendmachung von DSGVO-Ansprüchen als Geschäftsmodell, NJW 2022, 2433 ff.

[305] CJEU, 7 March 2018, joined cases C-274/16, C-447/16 and C-448/16, *flightright*, EU:C:2018:160; CJEU, 26 March 2020, case C-215/18, *Primera Air Scandinavia*, EU:C:2020:235.

[306] Proposal of the EU Commission of 27 April 2022, COM(2022) 177 final, *Hess*, Der Richtlinien-Vorschlag der EU-Kommission zur Bekämpfung von SLAPPs, COM(2022) 177 final – Mögliche Konsequenzen für das österreichische Prozessrecht, ecolex 2022, 704 ff; *Kohler*, Private International Law aspects of the EU Commission's proposal on SLAPPs, communication at the GEDIP, 9 September 2022 (on file with the author).

(5) Reviewing the case law of the CJEU[307] in order to determine several outcomes that the EU lawmaker should reconsider and correct.[308] Recent empirical research of the Court's case law will help to detect the most critical provisions of the Regulation.[309]

III. The Role of the Efforts Project in the Upcoming Reform Debate

Efforts is not directly connected to the ongoing reform, but takes up important aspects of it:

1. Looking at the Coherence between the EU Instruments

The first one addresses horizontal coherence. Here, the Brussels I[bis] Regulation operates as a reference instrument without expressly stating it. There are express references, as with regard to the jurisdictional regime of the Payment Order Regulation[310] or with regard to the recognition and enforcement regime of the Insolvency Regulation.[311]

---

[307] When recasting the Regulation, the EU lawmaker regularly reviews (and corrects) the case law of the CJEU, *Hess*, Seminal Judgments (les grands arrêts) in the Case Law of the Court of Justice, in: Hess/Lenarts (ed.), The 50th Anniversary of the European Law of Civil Procedure (Nomos 2020), p. 12, 43 ff.

[308] Recent judgments to be reviewed are (inter alia): CJEU, 6 October 2021, case C-581/20, *Toto*, EU:C:2021:808 (article 35); CJEU, 30 September 2021, case C-296/20, *Commerzbank*, EU:C:2021:784 (article 17); CJEU, 7 April 2022, case C-568/20, *H Limited*, EU:C:2022:264, *Hess*, Exequatur sur exequatur (ne) vaut?, IPRax 2022, 349; CJEU, 20 June 2022, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association v. Kingdom of Spain*, EU:C:2022:488 (annotated by *Hess* in CMLR 2022).

[309] *Mantovani*, Private International Law before the ECJ: A Look into Empirical Data, posted at EAPIL blog, 29 September 2022, https://eapil.org/2022/09/19/eu-private-international-law-before-the-ecj-a-look-into-empirical-data/.

[310] Article 6 Reg. 1896/2006, OJ 2006 L 399.

[311] Article 32 Reg. 848/2015, OJ 2015 L 141, 1 ff.

However, the interfaces between the sectorial instruments of European procedural law are more complicated. Especially the different instruments of the 2nd generation provide different and detailed regimes without any valuable justification.[312]

As these instruments are not frequently used, the lack of uniformity impedes their smooth functioning in practice. Simplification is needed: National payment orders should not be used for cross-border debt collection; there is a European procedure that operates well.[313] One might also reconsider abolishing the EEO Regulation:[314] Do we really need two parallel regimes for the cross-border enforcement of (uncontested) claims? Finally, a better harmonization among the different instruments is needed, too. We just learned about the different regimes regarding the suspension of enforceable titles and requested enforcement in different EU Member States under the Brussels Ibis Regulation, the Small Claims and the EEO Regulations. Uniform time limits facilitate the application of the parallel instruments in practice.[315]

2. Looking at the Interfaces between the EU Instruments and National Procedural Laws

Efforts focuses on the application of the instruments in the different EU Member States. As a recast directly refers to the 27 enforcement regimes of the EU Member States, the interfaces between Union and national procedural laws have become more important. One conclusion of the project is that EU regulations work better when national implementing legislation is available. However, the EU lawmaker must review the interfaces with national law, too, in order to consider whether a (certain) harmonization at EU level would facilitate the operation of the Regulation in the national procedural systems. Thus, the Re-Recast should address and align remedies in the national procedures regarding the certificate and the remedies regarding the grounds of refusal (articles 46 ff Brussels Ibis Regulation).[316]

---

[312] *Richard*, The 2017 Proposal of the European Parliament on Common Minimum Standards of Civil Procedure, in: Gascón Inchausti/Hess (ed.), The Future of the European Law of Civil Procedure - Coordination or Harmonization? (Intersentia 2020), p. 265 ff.

[313] All the more since the CJEU clarified the standard of proof in the joined cases dated 19 December 2019, C-453/18 and C-494/18, *Bondora*, EU:C:2019:1118.

[314] Already proposed by the EU Commission in 2011. Cf. *Hess*, Europäisches Zivilprozessrecht (fn. 299), paras 10.40 ff.

[315] *Themeli*, The frontiers of digital justice in Europe, in: Kramer et al (ed.), Frontiers in Civil Justice (Elgar 2022), p. 102 ff.

[316] Cf. the contribution of *M. Buzzoni* in this volume.

3. Taking up the Benefits and Chances of Digitalization

European procedural law is going through a phase of great challenges and changes: The digitalization transforms national procedures; it also transforms the judicial cooperation in civil and commercial matters.[317] However, there are also great opportunities to be seized: The implementation of e-codex will enable and facilitate direct communication between justices.[318] This will be extremely helpful in cases where different courts are dealing with the same or related claims and need to coordinate parallel proceedings. Another important tool is the e-justice portal.[319] At present, its main purpose is to provide information to EU citizens seeking access to justice. In future, it might also facilitate access to justice by providing forms and even entry doors to the competent courts in the different EU Member States.[320] It is imperative that the information provided on the e-justice portal is up-to-date and available in different languages of the EU Member States. Finally, the standardization of forms will facilitate communication and access to justice. Here, one important impediment to European judicial cooperation could be overcome: language gaps. Sophisticated software, often self-learning tools, may automatically translate information given by parties and lawyers to the different systems. Direct and open access to court files could eventually transform cross-border cooperation in a way that parties and lawyers will communicate across borders in virtual hearings without being forced to travel to other jurisdictions. The recast of the Brussels I^{bis} Regulation should be formulated in such a way that future developments in IT technology are already taken into account in order to facilitate technological change.

---

[317] *Hess*, Digital Judicial Cooperation in the Area of Freedom, Security and Justice, in: xxx.

[318] Reg. (EU) 2022/850 of 30 May 2022, OJ 2022 L 150/1 ff.

[319] https://e-justice.europa.eu/.

[320] *Hess*, Europäisches Zivilprozessrecht (fn. 299), paras 1.42 ff.

2. *Policy Options for the Re-Drafting of the EFFORTS Regulations*

Cristina M. Mariottini*

I. Introduction

Throughout this morning's presentations, we were offered a compelling and detailed overview of the concrete application of the EFFORTS Regulations[321] in hindsight. This afternoon, we are approaching the same Regulations with a foresight perspective, in an effort to support the EU legislature and policymakers in their activity by offering future prospects, scenarios and outcomes.

As illustrated in the preceding panels, the interplay of these EU instruments with national rules signifies a major weakness of the current system, making it difficult for the judiciary and practitioners, and even more for consumers and businesses, to be cognizant of the mere existence and practical functioning of the available procedures and mechanisms in the different Member States.[322] Against this background, this

---

* Senior research fellow at Max Planck Institute Luxembourg for Procedural Law.

[321] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, 'BI bis Regulation'): see esp. Burkhard HESS, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu]; 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 (hereinafter, 'EEO Regulation'); Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the 'EPO Regulation'); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the 'ESCP Regulation'); and 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 (hereinafter, the 'EAPO Regulation'). The EEO, EPO, ESCP, and EAPO Regulations are often also collectively referred to as the 'second generation instruments' in the context of the EU judicial cooperation in civil and commercial matters. The research outputs of the EFFORTS project are available at <https://efforts.unimi.it/research-outputs/>. All the links cited in the present Report were last accessed 24 October 2022.

[322] This was also evidenced in a 2002 Study conducted by Prof. Dr. Dres. h.c. Burkhard HESS on improving efficiency of enforcement of judicial decisions within the European Union upon request of the EU Commission: see 'Study No JAI/A3/2002/02 on Making More Efficient the Enforcement of Judicial Decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures'. Illustrating that little harmonization occurred thereafter, see Fernando GASCÓN INCHAUSTI and

panel's objective is to formulate policy guidelines that the EU legislature and policymakers may wish to take into consideration with a view to removing the obstacles that still affect the cross-border enforcement of judicial and extrajudicial titles in civil and commercial matters within the EU, and thus hinder the free movements of persons, capitals, goods, services, and judgments in the Area of Freedom, Security and Justice.

Notably, with my presentation I have the pleasure to complement *Professor Dr. Dres. h.c. Burkhard Hess*'s presentation on the recasting of the BI bis Regulation. In doing so, I will specifically address the policy options for the re-drafting of the other EFFORTS Regulations, and namely the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order, respectively, whilst also making reference to the BI bis Regulation where appropriate.

II. EU Judicial Cooperation in Civil and Commercial Matters in Foresight: Core Policy Options

1) Streamlining and coordinating

a) A general outlook

In his presentation, *Professor Hess* highlighted, inter alia, the need to ensure horizontal coherence among the EFFORTS Regulations, such coherence often being challenged by the fact that the so-called 'second generation instruments'[323] provide different and detailed regimes without any valuable rationale:[324] such lack of uniformity results in a limited use of these instruments in practice, undermining the very objective for which they were established.

It follows that simplification by means of a streamlined approach is desirable. As *Professor Hess* emphasised, on the one hand national payment orders should not be used for cross-border debt collection, since there is a European procedure that

---

Marta REQUEJO ISIDRO, 'A Classic Cross-Border Case: The Usual Situation in the First Instance', in *Impediments of National Procedural Law to the Free Movement of Judgments*. *Luxembourg Report on European Procedural Law* vol. I, B. Hess and P. Ortolani (eds), (Beck/Hart/Nomos 2019) p 68 ff.

[323] See supra, fn 1.

[324] Burkhard HESS, 'Re-Recasting Brussels I-bis', in this *Final Study*, esp. para. III.1 and authorities cited therein.

functions properly;[325] on the other hand, for the same purpose, the abolition of the EEO Regulation could also be taken into consideration since retaining two parallel regimes for the cross-border enforcement of (uncontested) claims may prove redundant.[326]

Against this backdrop, as pointed out earlier by *Dr. Quincy Lobach*, the procedural framework of these Regulations could benefit from additional simplification by means of the centralization with one court of numerous matters of cross-border judicial cooperation, as is the case with Germany.[327]

b) The EPO and ESCP Regulations

As concerns, in particular, the EPO and ESCP Regulations, two sets of issues arise vis-à-vis coordination (and lack thereof). On the one hand, strengthening the complementarity between the EPO and ESCP Regulations and the other EFFORTS Regulations by focusing on their specific features is a key objective. At their core, the procedures laid out with the EPO and ESCP Regulations were designed to offer rapid, mostly written procedures that would lower procedural and linguistic barriers to the recovery of debts by relying on standard forms and documentary evidence. As such, the EPO and ESCP procedures are especially suited to be conducted through e-mail and other appropriate distance communication technology, such as videoconferencing (in cases where a hearing would be required). Although Regulation No 2015/2421 has already encouraged some digitisation under the ESCP Regulation, the time has come for the European legislature to act more decisively in this direction and make the use of digital means of communication compulsory under both the EPO and ESCP Regulations.

On the other hand, a significant overlap between these uniform procedures and their domestic counterparts is apparent from the Project deliverables. As underscored in several National Reports, creditors may find it preferable to rely on national law and then seek the certification of the resulting title under the BI bis or EEO Regulations rather than testing the relatively less known procedures laid out in the EPO and ESCP Regulations.[328] Conversely, the research conducted within the EFFORTS Project has

---

[325] Ibid. Cf CJEU, joined cases, C-453/18 and C-494/18, *Bondora*, EU:C:2019:1118.

[326] This option was already proposed in the Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM(2010) 748, Art. 92. Cf also Burkhard HESS, *Europäisches Zivilprozessrecht* (De Gruyter 2nd ed. 2021), at fn **299**, paras 10.40 ff.

[327] See Quincy LOBACH, 'The Effectiveness of the Regulations on Cross-Border Enforcement and National Implementing Rules', in this *Final Study*.

[328] See in particular Alan UZELAC, Marko BRATKOVIĆ and Juraj BROZOVIĆ, 'Collection of Croatian implementing rules' EFFORTS Collection of national implementing rules, pp 1–3,

also shown that the absence of a readily accessible alternative at the national level may significantly boost the use of uniform European procedures in the Member States addressed.[329] In this respect, ensuring proper coordination and promotion concerning these Regulations appears of the essence with a view to the achievement of their underlying objectives.

2) Supplementing

a) The BI bis and EEO Regulations

With specific reference to the BI bis and EEO Regulations, the analysis of national rules and practices conducted in the framework of the EFFORTS project has cast light on three main areas where the interaction between European and national law would benefit from improvement, notably by supplementing the current provisions and procedural framework so as to ensure their full operability.

These areas concern, in particular: the designation of the competent authorities and the applicable procedure regarding the certification of domestic titles with a view to their enforcement in another Member State; the remedies available in the event of an erroneous or improper decision by the certifying authority; and the rules governing the challenges against enforcement in the Member State addressed.[330] As illustrated, in particular, in the *Report on Practices in Comparative and Cross-Border Perspectives*,[331] inconsistent positions across the seven Member States tackled with

---

<https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Croatian-implementing-rules.pdf> (critical assessments under EPO and ESCP); Marco BUZZONI and Veerle VAN DEN EECKHOUT, 'Collection of French Implementing Rules' EFFORTS Collection of national implementing rules, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf>, p 46 (critical assessment EPO); Simantas SIMAITIS, Vigita VEBRAITE and Milda MARKEVICIUTE, 'Collection of Lithuanian Implementing Rules' EFFORTS Collection of national implementing rules, < https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/D2.7-Collection-of-Lithuanian-implementing-rules.pdf> p 10 (critical assessment ESCP).

[329] Veerle VAN DEN EECKHOUT, 'Collection of Luxembourg Implementation Rules' EFFORTS Collection of national implementing rules, p 7, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.8-Collection-of-Luxembourg-implementing-rules.pdf>, pp 29–30.

[330] See Marco BUZZONI, Cristina M. MARIOTTINI and Michele CASI, 'Report on EU Policy Guidelines', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/09/Report-on-EU-Policy-Guidlines_FINAL.pdf>, esp. sections II.A, II.B, and II.C.

[331] See Marco BUZZONI, 'Report on Practices in Comparative and Cross-Border Perspective', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/07/Report-on-Practices-in-Comparative-and-Cross-Border-Perspective-1.pdf>, esp. sections II and III.

the EFFORTS project arise in these areas due to inadequate or insufficient guidance in the Regulations themselves and the scarcity of national implementation rules.

i. Designation of the competent certification authorities and applicable procedure

As concerns the identification of the authority responsible for the certification of judgments covered by the EEO and BI bis Regulations the circulation of titles within the EU would greatly benefit from an explicit extension of the CJEU's holding in Case C-300/14[332] to certificates issued under the BI bis Regulation, and namely under Article 53 thereof. Notably, in accordance with such ruling the certification of domestic titles as an EEO requires 'a judicial examination' of all the requirements laid down in the Regulation and, therefore, it can be carried out only by a judge.[333] The extension of this approach to the BI bis Regulation is desirable since it would foster consistency among different instruments and would avoid the multiplication of certification proceedings at the national level.

Furthermore, taking into account the principle of procedural economy and the fact that the judge who is called upon to issue the underlying decision is often best situated to assess whether the latter fulfils the certification requirements set out in the relevant Regulation, parties should be explicitly allowed to apply for certification at the outset of the proceedings and submit their request to the same judge who renders the decision on the merits. This solution has the advantage of striking a reasonable balance between the need to ensure compliance with the requirements set out in the Regulations and the importance of not replacing the exequatur proceedings in the Member State of enforcement with mirroring procedures in the Member State of origin.

ii. Remedies available in the event of an erroneous or improper decision by the certifying authority

As concerns the absence of clear guidance on the viable challenges against the certificate for enforcement pursuant to the BI bis and the EEO Regulations, these Regulations could be amended to reduce the significant inconsistencies that currently affect them. Specifically, the European legislature should work towards reducing and systematising the remedies available with respect to EEO certificates, on the one hand, and introducing a unique, simple remedy against certification decisions issued under the BI bis Regulation, on the other hand. Ultimately, these remedies should be sufficiently aligned so as to permit national legislatures to enact a unique set of implementing rules applicable to both Regulations. This approach would facilitate the work of national courts and practitioners, reduce the risk of regulatory arbitrage, and foster consistency and predictability at the European and national levels.

---

[332] CJEU, case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, EU:C:2015:825, para. 46.

[333] Ibid., holding.

iii. Rules governing the challenges against enforcement of incoming titles in the Member State addressed

Finally, clarity with regard to the relationship between claims for refusal of recognition and of enforcement under the BI bis Regulation would be beneficial, especially as to how the two refusals could be coordinated. To the extent that the answer to this question appears to be predicated on the time of the commencement of enforcement proceedings, there may be merit in defining this aspect via a harmonized solution at the European level.

b) The EAPO Regulation

At Article 53(1)(a)-(b), the EAPO Regulation alludes to two potential changes that may be considered in the event of a recast. The first involves whether the EAPO Regulation should permit the attachment of 'financial instruments' and not only of funds in the debtors' bank accounts. The second puts forth the possibility that the 'amounts credited to the debtor's account after the implementation of the Preservation Order could be made subject to preservation under the Order'. Nonetheless, other changes may prove desirable on the grounds of the comparative analysis of the EAPO national case law.[334]

i. More flexibility in jurisdiction for creditors with an enforceable title

Once creditors have obtained an enforceable judgment, court settlement or authentic instrument, the jurisdiction to grant an EAPO lies with the courts of the Member State where the judgment was rendered, or court settlement approved,[335] or the authentic instrument drawn up.[336] However, increasing flexibility over jurisdiction in this case may be desirable. In particular, the EU legislature and policymakers may resume the solution, initially put forth in the EAPO Commission Proposal, of a double-track jurisdictional system.[337] By giving creditors the opportunity to request an EAPO in the Member State of enforcement, the EAPO would respond better to the 'urgent need' that accompanies this proceeding.[338]

---

[334] See Carlos SANTALÓ GORIS, 'Report on Practices in Comparative and Cross-Border Perspective', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/07/Report-on-Practices-in-Comparative-and-Cross-Border-Perspective-1.pdf>, section VI.A.1, pp 59–62.

[335] Art. 6(3) EAPO Regulation.

[336] Art. 6(4) EAPO Regulation.

[337] This would also bring the EAPO Regulation closer to the BI bis Regulation and notably Article 40 thereof, in accordance to which claimants can apply for protective measures in the Member State of enforcement when they have obtained an enforceable title in the Member State of origin. In this vein, see Carlos SANTALÓ GORIS, 'Report on EU Policy Guidelines', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/09/Report-on-EU-Policy-Guidlines_FINAL.pdf>, esp. fn 80.

[338] Art. 7(1) EAPO Regulation.

ii. Elucidating the boundaries of the arbitration exclusion

While arbitration is a matters excluded from the scope of the EAPO Regulation, the boundaries of this exclusion remain blurred.[339] Overall, the EU legislature may wish to acknowledge that the EAPO Regulation can be used in support of a claim brought before an arbitral court provided the claim falls within the material scope of the Regulation. In particular, the domestic jurisdictional rules permitting courts to grant protective measures in support of arbitration proceedings should be made available to grant an EAPO.[340]

iii. The periculum in mora *requirement*

The existence of a *periculum in mora* is a core precondition that creditors have to satisfy in order to obtain an EAPO. Per the accomplished account offered by *Mr. Carlos Santaló Goris* earlier this morning, according to the national case law examined within the EFFORTS Project the *periculum in mora* appears as one of the major difficulties that creditors experience while applying for an EAPO.[341] In this respect, the EU legislature may consider limiting such requirement to creditors without an enforceable title, as was the case with the EAPO Commission Proposal.[342] Removing the *periculum in mora* for creditors with an enforceable title would also make the EAPO information mechanism more accessible. Another option would be to modify the part of the Preamble that provides some guidance on the *periculum in mora* and differentiate between creditors with and without enforceable titles. [343]

3) Boosting

In conjunction with streamlining and supplementing, the EU legislature and policymakers may consider boosting the existing instruments. In fact, a significant obstacle concerning cross-border enforcement procedures arises from the lack of information about the national enforcement rules of another Member State: not all

---

[339] Art. 2(2)(e) EAPO Regulation. See Carlos SANTALÓ GORIS, 'Report on EU Policy Guidelines', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/09/Report-on-EU-Policy-Guidlines_FINAL.pdf>, esp. section IV.A.2.

[340] Ibid.

[341] See Carlos SANTALÓ GORIS, 'Report on EU Policy Guidelines', <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/09/Report-on-EU-Policy-Guidlines_FINAL.pdf>, esp. section IV.B.

[342] Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, (COM(2011) 0445).

[343] Recital 14 EAPO Regulation. In favour of this approach, see also Burkhard HESS, 'The Effective Disclosure of the Debtor's Assets in Enforcement Proceedings' in M. Deguchi (ed), *Effective Enforcement of Creditors' Rights* (Springer 2022).

instruments are used often or properly in practice, and practitioners and stakeholders frequently lack familiarity with them. This holds true, in particular, with respect to the ESCP and EAPO Regulations, though in some Member States the same applies also with respect to the EEO and EPO Regulations.[344]

Against this background, increase in promotion and digitalization are crucial to the success of cross-border judicial cooperation, overall, and the EFFORTS Regulations, in particular. In fact, despite the underlying considerable and meritorious ambitions that come with the EFFORTS Regulations, the research conducted within the context of the EFFORTS project has shown that the actual use of, in particular, the EPO and ESCP Regulation remains somewhat limited to date. In particular, most judges, legal practitioners and economic operators remain largely unfamiliar with the rules governing these procedures. Against this backdrop, the European legislature could consider boosting these instruments by ensuring an appropriate promotion.

In this framework, improvement of the information posted via the e-Justice portal is of the essence.[345] The information available on the e-Justice portal appears insufficient: at times, it is simply missing, or it is available only in the language of the Member States it refers to, which makes the information of limited help, or – again – general descriptions are provided, instead of detailed information. Consequently, the European Commission may consider setting up a system whereby it provides such information itself, with the allocation of the necessary resources, and in compulsory cooperation with the Member States. Awareness of the existence of the e-Justice portal, together with the wealth of information that should come with it, should also be properly promoted via the national sources (and notably websites) of reference in each Member State.

Fostering and facilitating communication is also a means to conducive to the proper functioning of cross-border justice, in general, and the EFFORTS Regulations, in particular. In this context, e-CODEX is expected to play a primary role. Notably, e-CODEX is a system established primarily to promote the digitalisation of cross-border judicial proceedings and to facilitate the communication between Member States' judicial authorities,[346] and it is set to deeply influence national procedures.[347] In

---

[344] Marco BUZZONI, 'Report on Practices in Comparative and Cross-Border Perspective' <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/07/Report-on-Practices-in-Comparative-and-Cross-Border-Perspective-1.pdf>, sections IV and V, respectively.

[345] <https://e-justice.europa.eu/home?action=home>. General descriptions are often provided, instead of detailed information. While an English translation/version is made available for most Member States, in the remaining cases the information is still available only in the national language of the Member State concerned, to the detriment of effective accessibility.

[346] <https://www.e-codex.eu/>. See Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726. The e-CODEX system was originally launched under the Multiannual e-Justice Action Plan 2009-2013; it was

particular, it aims at interconnecting the justice systems of the EU Member States by providing technical interfaces between the national IT systems. It creates the premise for direct electronic (cross-border) filings, direct communication between judges and it is designed to facilitate the enforcement of judicial decisions throughout the European Union. As the EU Commission emphasised in its Communication of December 2020, the establishment of the e-CODEX system as a technical standard should be a priority for the upcoming years.[348]

Furthermore, the EU legislature may rely on the cooperation mechanism of the European Judicial Network (EJN) in Civil and Commercial Matters in a proactive manner to improve the implementation and promote the take-up of these instruments.[349] By bringing together national authorities responsible for assisting local courts, the EJN was set up to facilitate judicial and legal cooperation between Member States. Since its inception, the EJN (in civil and commercial matters) has been an important tool for providing support for the implementation of EU civil justice instruments in daily legal practice. Notably, the EJN (in civil and commercial matters) facilitates and supports relations between national judicial authorities through contact points in each Member State and is thereby a tool to facilitate cross-border cases.

Finally, the operation of the Regulations may be improved also through non-legislative and implementation measures. In this framework, education and training are a core tool and should be pursued as a major means to achieve the objective of effectiveness of the Regulations and harmonisation in this area of the law.[350]

---

developed in the framework of e-Justice Communication via On-line Data Exchange between 2010 and 2016 by 21 Member States with the participation of other third countries/territories and organisations. To date, the system is managed by a consortium of Member States and other organisations, financed by an EU grant.

[347] On the pivotal role of e-CODEX, see esp. Burkhard HESS, 'Reforming the Brussels I^{bis} Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu].

[348] Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 (COM(2020) 712 final), p 1.

[349] <https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do>. The EJN (in civil and commercial matters) was established by Council Decision 2001/470/EC of 28 May 2001 (subsequently amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009) and started operating on 1 December 2002. All Member States except Denmark participate in the EJN (in civil and commercial matters).

While the improvement of communication via promotion and digitalization is a cross-cutting and overarching measure that would reasonably prove effective vis-à-vis all the instruments in the area of cross-border judicial cooperation, overall, it would certainly contribute to the operability and success of, in particular, the EFFORTS Regulations. Accordingly, any such efforts should be met with approval and further pursued.

3. *The notion of authentic instruments and court settlements across the EFFORTS Regulations. What about ADR mechanisms?*

Alan Uzelac*

I. Introductory part of the speech

Being the last speaker in this conference is a big honour and responsibility. After so many excellent and exhaustive presentations almost all is already said and done, and this creates an opportunity. We may be freer and talk openly. At the end, we are also allowed to dream a bit, to zoom out, and to speak *lege ferenda.*

I was given the title of my speech by the organizers, and I liked it a lot. I found it thrilling and provoking. Also, in general, I think it has been a thrilling conference, in particular because it was one of the rare conferences which collected comprehensive information about national law related to implementation of EU instruments.

If I may dare to say, we usually speak too much about EU law, and too little about national law. The latter is important as in the end it determines how EU law is going to be understood, applied, and implemented. This conference indeed showed us how much EU law is dependent on national implementation rules and practices.

But, maybe we need to make a further step forward, and speak more about the fundamental notions of national procedural law. They are the background of our understanding of law, and they also determine our application of EU law. It is nowhere more visible than in respect to the issue of enforceability. Which enforceable instruments would need to be directly enforceable under EU law is basically dependent on national law.

Taking seriously the doctrine of mutual trust and the single area of justice, in principle every national enforceable instrument should be enforceable under EU law as well, in a cross-border context just as in the country of origin. But this is not so, and maybe it is good to be so. I will explain why in the course of my presentation, which I conceived as an interface for discussion of EU law matters from the perspective of comparative civil procedure.

My principal submission to you is that we should not only encourage improvement of EU law (specifically: of the EFFORTs regulations) but also to encourage comparative study of national enforceable instruments, with a view to not only clarify the conditions for cross-border enforcement and improve (and/or expand) their enforcement in other MSs, but also to harmonize our understanding of, and approach to, enforceable titles,

* Professor at the University of Zagreb, Faculty of Law.

their content and the best practices in the approach to some debatable issues. One of them is e.g. how to provide the most effective approach to enforceability of various forms of agreements and settlements.

I will address my topic in two parts: first, I will deal with the enforceable instruments which are more common and conventional, i.e the enforceable instruments which belong to the so-called "formal" or state justice system. In this context, I will address in particular the notion of authentic instruments, where we have the most divergences. Second, I will deal with the instruments arising out of so-called "informal" justice, and that are the instruments which arise out of different ADR mechanisms. As we all know, under EU law, the least is done exactly in this aspect, as arbitration and ADR are generally outside of the scope of Brussels Ibis and other EFFORTS regulations. We will briefly explore what are the issues and whether there should be changes in this context, i.e. whether the regulation of enforceable titles under EFFORTS Regulations needs to be amended, or whether there are further preconditions for such an undertaking.

II. Enforceable instruments in the world of „formal" justice

1) General survey

Let us start with a survey of enforceable instruments in the context of state, or "formal" justice. There are 3 such instruments (talking from the perspective of comparative civil procedure). The first two are more or less understood in a very similar fashion in the various EU national legal orders. The third category is the most fluid ones, as various legal systems have most differences, and the very notion of „authentic instruments" is difficult to translate and understand in an unique way.

These three instruments are the following:

Table 1

Court decisions	Court settlements	Authentic instruments
Judgments - Final, contradictory - Default judgments - Partial, Interim *Other decisions* - Decrees, orders, writs…	*In- and out-of-court settlements* - Made within litigation or other proceedings - Certified in a special dedicated court proceeding	Notarial deeds - acts, certificates - authentication of signatures and/or content Other authentic instruments - (quasi)administrative - (quasi)judicial

Court decisions display a higher degree of similarity across EU countries. There are differences, but the categories in most legal systems are similar. Every state recognizes final judgments made on the merits after hearing both parties. Categories of partial, interim, and default judgments may have more divergencies across the systems, but this is not creating a lot of difficulties in the context of enforcement.

However, regarding judgments there are issues that would need to be clarified in the future, both in respect of existent differences and in the context of technological development. Today we have already heard that in different countries there are different understandings regarding what makes a sufficiently specified dispositive part of the judgments; Germans are here naturally more demanding than the other European nations.

But there are some more important issues which would need to be solved in the context of digitalization. If we are really serious about automatic recognition and enforcement of judgments, we need to harmonize the content of judgments (or at least the content of their operative part). Harmonization must be provided in a way which could be interoperable and, both in national and cross-border context, enable proper automatic, machine enforcement (e.g. by an algorithmic test of consistency and automatic enforcement actions, e.g. electronic order to transfer funds from one account to the another). But this could be a content of another conference.

Moving to court settlements, the conclusion is similar at with the judgments. Court settlements are also a familiar feature in EU national systems. There are some formal differences. Positions also differ regarding settlements that can either arise out of other judicial proceedings (e.g. litigation), and those that are the product of a special

dedicated court proceeding, specifically designed to provide the form of court settlements to settlements which originated outside of the the court.

But all those differences fade in comparison with the diversity which exists with respect to authentic instruments. Due to such diversity, this category is practically a negative one, as it encompasses all enforceable instruments within the realm of „formal" or state justice, except court decisions and court settlements.

Most often, when speaking of authentic instruments in the EU we refer to various notarial deeds - acts issued by public notaries. But there are also other authentic instruments issued by various public authorities which may have either quasi-administrative or quasi-judicial nature.

I was seeking to find an adequate definition in recent scholarship, and this is the one which I found: an authentic instrument is "a public document by which an agent of the state formally and authoritatively records declarations made by the parties so as to constitute conclusive evidence of legal obligations, eventually allowing immediate access to enforcement without first needing to secure a court judgments" (see J. Fitchen, JPIL 7/1:2015).

So far, we were talking in the categories of comparative civil procedure. Now, how is this reflected in the EFFORTS regulations?

2) Enforceable instruments under EFFORTS Regulations

Definitions of enforceable instruments under Brussels Ibis is contained in Art. 2. Under Art. 2(a) to (d), we can find definitions which are generally in line with the outlined scheme. Differences are minor. Out of all court decisions, the Regulation is focused on „judgments" – but it also states that labels do not matters, i.e. that any decision, whether it is called a decree, order, decision or writ of execution, qualifies for enforcement.

The provisional and protective measures issued in the form of a judgment are also enforceable under condition that they are issued by the court or tribunal of a MS. The only exception is motivated by due process considerations, and excludes enforcement of ex parte provisional measures, at least until they are served upon the defendant.

Court settlements are also briefly defined, as settlements *concluded* before a court, or *approved* by a court.

3) Various problematic issues related to 'authentic instruments'

The definition of the authentic instruments is contained in Art. 2(c). Authentic instruments are in Brussels Ibis Regulation defined rather broadly, with the reference to the national law of the MS. Essential is that such instruments are "formally drawn up or registered as authentic instrument in the MS of the origin". The substantive conditions are also low, namely the "authenticity needs to related both to the signature and the content of the instrument", but it is not stated whose signature should it be, and what the content should be. It is only clear that, unlike judgments and court settlements, authentic instruments are not issued by a court or tribunal, but by a public authority or „other authority" (whatever that might be). The nature of the proceeding out of which the authentic instruments originate is also not specified. Reading the provision of Art. 2(c) literally, it would even not exclude the possibility that the authentic instrument originates from a proceeding in which rights and obligations of the parties are determined without an actual consent. While authentication of signature(s) is needed, the link between enforceability and the identity of signatory is not specified, so on the face the Brussels Ibis would permit enforcement of a document issued by a non-court authority, if it is recognized as an authentic instrument under local law in a MS, even if this document disposes of disputed rights in contentious proceedings.

Nevertheless, what we also see in the definitions from Art 2 are some elements of due process, or minimum requirements regarding the nature of the process, but not in respect to authentic instruments. In respect to the enforcement of provisional measures issued by courts, enforcement of *ex parte* provisional measures is prohibited before the measure is served on the defendant. However, a similar exception does not exist in respect to authentic instruments, so it is not clear whether such instruments need to contain an express declaration of will by the debtor to be enforced, or whether also some forms of default instruments which are interpreted as tacit approval of creditors' claims may be enforceable.

In this respect, the Brussels Ibis is different to the EEO Regulation which provides a more precise determination on the conditions of enforceability of authentic instruments. Art. 3 EEOR reads:

A claim shall be regarded as uncontested if:

(a) the debtor has *expressly agreed* to it by *admission* or by means of a *settlement* which has been approved by a *court* or concluded before a *court* in the course of proceedings; or

(b) the *debtor has never objected to it*, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the *course of the court proceedings*; or

(c) the debtor has *not appeared or been represented at a court hearing* regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) the debtor has *expressly agreed to it in an authentic instrument*.

In the EEOR, whose focus is more precisely put on uncontested claims, the conditions of due process are clearer and more precise: it suffices to note that *all sorts of default decisions* (decisions based on presumed consent which is inferred from passivity – failure to object or appear) can be *enforceable only if they arise out of court proceedings*. On the other hand, the authentic instruments, which can be issued by other *public authorites*, need to be based on the *express agreement of the debtor with the creditors' claim*.

But, while EEOR makes it sure that decisions based on tacit consent cannot be certified as enforceable under EU law if they are disguised in the form of authentic instruments, it may be debatable under the Brussels Ibis.

4) *Enforceability of quasi-adjudicative acts issued by public notaries: Pula Parking and Zulfikarpašić cases*

In the first two decisions which in which the EU issued preliminary rulings against Croatia dealt exactly with the cross-border enforcement of specific acts issued by public notaries which are enforceable under Croatian law, but are based on the presumed consent of passive debtors who fail to object the claim. The cases Pula Parking and Zulfikarpašić (C-551/15 and C-484/15) had to decide whether so-called "enforcement writs issued on the basis of authentic documents" are enforceable under EU law, either under EEOR (Zulfikarpašić) or under Brussels Ibis (Pula Parking).

In both cases, the answer of the Court was negative. In Zulfikarpašić, it was simpler to decide, as the Art 3(d) EEOR clearly required the *express* consent of the debtor – and this consent was obviously not present. However, the approach in Pula Parking was not so straightforward and obvious.

Although a notarial writ of enforcement is under Croatian law issued on the basis of "authentic documents", at the outset it needs to be recognized that the notion of "authentic documents" hasn't anything in common with the notion of "authentic instruments" under EU law. In Croatian law, "authentic documents" include "*an invoice … an extract from accounting records, a legalised private document or any document considered to be an official document under specific rules"* (Art. 31 of the Enforcement Act). In should *obiter dicta* be noted that Croatian version of the EFFORTS regulations uses for 'authentic instruments' the notion *vjerodostojna isprava* which is identical to the national term for 'authentic documents', which makes the conceptual confusion quite likely.

Therefore, it is fortunate that the CJEU did not confuse the notarial enforcement writs based on "authentic documents" with the "authentic instruments", and has not applied

Art. 2(c) of Brussels Ibis, but has rather subsumed the enforcement writs under Art. 2(a), further inquiring whether Croatian notaries can issue enforceable 'judgments'. The answer basically depended on the whether the notaries, when acting in enforcement proceedings on the basis of 'authentic documents', can be deemed to be 'courts' within the meaning of the Brussels Ibis Regulation.

The CJEU applied here its case law on fundamental differences between judicial and notarial functions (e.g. Commission v. Austria, C-53/08; ERSTE Bank Hungary, C-32/14 and Commission v. Hungary, C-392/15, see. p. 47 in Pula Parking), finally concluding that 'judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*' (p. 54). As these conditions were not met in respect to Croatian notaries, the answer to the question was that they cannot fall within the concept of 'court' under EU law, making consequently notarial enforcement writs unenforceable under Brussels Ibis as well.

In the end, the result of these two Croatian cases is not surprising. The Croatian procedure for the issuance of notarial enforcement writs based on 'authentic documents' is basically a local invention based on local circumstances, arising out of undeveloped rule of law tradition and motivated by the transitional tendencies to privatize proceedings which traditionally belong to the ambit of state justice. It is confusing an ambiguous, not only because of the notion of 'authentic documents' which is a hardly translatable local invention, but also because of its hybrid nature. Enforcement writs issued by notaries are effectively payment orders, merged with enforcement orders, and therefore closer to judicial proceedings (proceedings for the issuance of enforcement titles) than to enforcement proceedings in which the titles are being forcibly implemented. The first are linked to 'determination of (contested) rights and obligations' which need an independent and impartial adjudicator (a 'court' or 'tribunal') and contradictory proceedings; the latter (execution of enforcement titles) may be outsourced to various public and private bodies – including public notaries.

Thus, it is good that not every national enforceable title may get enforced under EU law. A view from Luxembourg may push local policy makers and local legal communities in Member States towards rethinking their 'weird animals' and reforming the law in a way that is compatible with the common understanding of due process and differentiation of functions among judicial and non-judicial bodies in the national legal landscape.

5) *In anticipation of future issues with EU enforceability:* **zadužnice** *(executory debentures)*

Just another *obiter dicta* related to another 'weird animal'. Another original Croatian instrument which is locally enforceable, but whose enforceability under EU law is not yet addressed by the CJEU, may be an interesting future object of examination under EFFORTS Regulations. This local invention, called ***zadužnica*** (executory debenture) is also at the crossroads between authentic instruments and judicial decisions, and provides an unprecedented level of options for the enforcement on whatever assets and means of the debtor. While locally enforceable, it is considered to be both equivalent to final and binding judicial decision and to be a transferrable security with unlimited expiration date and even the options for arbitrary determination of the owed value. Originating from the Enforcement Act, and initially defined as a means for securing fulfilment of debtor's obligations, it has gradually become so abstract that it can be enforced without reference (or even existence) of any underlying obligation, making objections based on due process considerations (e.g. the need for transparency and the right to be heard) virtually impossible. Yet, the definition of 'authentic instruments' under Brussels Ibis might be understood in the way that allows its certification as European enforceable title, and according to available information a few of such notarial executory debentures were already certified under EU law. Clarifying its status under EFFORTS regulations would be very helpful due to the broad local use of executory debentures; it would be even more needed, knowing that they might be used as a potential and (excessively?) strong instrument for the availability of bank account preservation orders under Art. 5(b) EAPO.

6) *Final thoughts and suggestions regarding enforceable instruments issued by public justice bodies*

My suggestions regarding the enforceable instruments of public justice are twofold. In the context of further development of EFFORTS Regulations, I would suggest further examination of the notion of 'authentic instruments' and clarification of their substantive differences in respect to judicial decisions ('judgments') issued by the court. It is also desirable to rethink and, to the level possible, harmonize, the concept of procedural safeguards even for the instruments issued on the voluntary basis, in particular when such instruments are issued by consumers. For the national law, in particular Croatian law, my suggestion is to amend local legislation, essentially by killing local weird animals unless there are overwhelming reasons for their maintenance. This is in any case much better for mutual understanding and European unity than the policies which seek to find a way to smuggle a local instrument under EU enforceable titles or maintain the duality of local and European regimes. The first policy was successful in respect of Hungary, which managed to smuggle their 'notaries' as 'courts' in Brussels Ibis Regulation, Art. 3(a), in the context of issuance of notarial payment orders – and this was neither helpful for understanding of division of functions between courts and

notaries, nor helpful for development of rule of law in Hungary (as we witness it now in the events which are unfolding in Hungarian justice).

III. Enforceable instruments in the world of „informal" justice

7) General survey

Alternative ways of obtaining resolution to legal problems have been on the rise in the past several decades. EFFORTS regulations, based on the perceptions which originated in 1990, were still focused on the enforceable instruments that originate within the system of state justice. Today, however, an important role in the system of civil enforcement belongs also to the instruments which have originated outside of the "formal" environment of state justice.

The enforceable instruments in the world of "informal" justice may also be classified in three broad categories, presented in the following table:

Table 2

Arbitral awards	Mediated settlements	CADR decisions
Awards on merits - partial - final *Awards on costs* *Consent awards* *Interim awards*	*Settlements concluded before an ADR body* - independent? - certified? - conditionally or unconditionally enforced?	*Decisions of consumer ADR bodies* - general, sectorial - mandatory? final? - public? private? Ombudsperson Other bodies - administrative? - *sui generis?*

The oldest and the best regulated enforceable instruments in the world of private justice are the arbitral awards. The arbitral awards are nowadays not only well-defined by national law of virtually all countries in the world, but they are also the most harmonized enforceable instruments. This is largely due to the influence of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards which covers, with a very few, mostly insignificant exceptions, all member states of the United Nations. The New York Convention is currently ratified in 170 countries and may be considered to be among the most successful multilateral instruments ever made within the UN system.

The application of the New York Convention is at present being monitored and assisted by the UNCITRAL, the UN Commission for the International Trade Law. Upon a solid basis of the NYC, UNCITRAL has produced a number of influential soft law instruments which include the UNCITRAL Model Law on International Commercial Arbitration that has been the basis of formulation of arbitral legislation in 85 states, in a total of 118 jurisdictions. The UNCITRAL Model Law on ICA has also developed the notion of arbitral awards and provided rules on their recognition and enforcement compatible with the NYC.

In addition, the UNCITRAL also collects a broad database of cases on enforcement and recognition of arbitral law, so-called CLOUT (Case Law on UNCITRAL Texts, see https://uncitral.un.org/en/case_law). Thus, it can be said that, at the global level, the enforcement of arbitral awards is well-defined, relatively unified in understanding of the process and main requirements, and well-monitored and developed by a reputable global institution. Some problems regarding the enforcement of arbitral awards indeed exist, but they are manageable and covered by various institutions.

In respect to the other two categories, the situation is certainly different. Alternatives to litigation have been taking multiple forms and differ from country to country. The very trend which stimulates mediation and other forms of consensual dispute settlement in the private sector is relatively recent, and therefore it has not reached the same level of *de facto* harmonization as was the case with arbitration.

Admittedly, the UNCITRAL has also been active in the field of international commercial conciliation/mediation, but the results are far from the success of its work in the field of arbitration. Regarding the enforceability of mediated settlements, the UNCITRAL adopted two texts in 2018 and 2019, one being the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018) (amending the Model Law on International Commercial Conciliation, 2002), the other being the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention on Mediation”). Both instruments provide that the settlement agreements concluded as a result of mediation need to be binding and enforceable, and set the requirements for reliance on such settlement agreements and grounds for

refusing to (see Art. 18-19 UML and Art 4-5 of the Singapore Convention). In the past years, the adoption of the Singapore Convention (and the UML) has not been impressive. The Singapore Convention has been ratified by 10 countries: Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore and Turkey. No EU countries are among them.

The situation is even more unsettled with the other categories of enforceable instruments. In spite of attempts at creation of a uniform European approach to consumer ADR, the CADR Directive has not brought much harmonization in the treatment of consumer ADR procedures. The outcome of consumer ADR is only in some Member States binding and enforceable. The enforcement of decisions of consumer dispute resolution bodies is also not uniformly regulated. The CADR Directive only provides under transparency rules the need to provide "clear and easily understandable information" on, *inter alia,* "the enforceability of the ADR decision, if relevant" (Art. 7(1)(o)). But, such information is in reality not systematically available, and – if at all – cross-border enforcement of ADR decisions may only be sought under Brussels Ibis if the decision qualifies as a "court judgment". Still, the consumer ADR decisions are the only decisions which are at least noted by EU instruments; with respect to all other national enforceable documents arising out of ADR and similar procedure, research only needs to start.

8) Enforceability of ADR instruments under EU law: why not (or why at all?)

After a brief survey of the situation regarding various types of enforceable instruments which exist in the world of "informal" justice, we may ask what – if any – would be the desirable actions of the Commission when deliberating eventual review of the EFFORTS regulations. What about ADR mechanisms? Should the scope of the EFFORTS regulations be expanded by inclusion of further categories of enforceable instruments or redefining the existent ones so that they include also some forms of enforceable instruments under EU law.

The answer to this question depends, in my opinion, on the success of the reforms related to the application and common understanding of the EFFORTS regulations in relation to presently existent enforceable titles – judgments and settlements arising out of the system of state justice. The results of the EFFORTS project have shown that in the present moment we have more than sufficient number of problems with the existing regimes of enforcement under the recognized titles. The national implementation rules are generally poor and underdeveloped, practices are different, and the overall use of the EFFORTS regulations is spoiled by poorly drafted, mutually overlapping and generally user-unfriendly multitude of enforcement regimes.

Therefore, before any broadening of the scope of application of the existent EU enforcement instruments, they should themselves be thoroughly rethought and simplified, and their implementation should be improved and adapted to the need of the users. Only a fully functional and undoubtedly useful and reliable normative framework deserves to be expanded, otherwise any broadening of the scope would bring new uncertainties and the system may become even more dysfunctional than it is at the present time.

In addition, the world of the ADR is itself very dynamic and diverse. There is much more what needs to be known before the policy makers could be ready to take a stand. Systematic research and collection of data is needed in order to capture the current state of affairs in respect to the enforceability of ADR decisions and ADR settlements in the 27 EU Member States.

The exception might be arbitration, as arbitral awards are more or less uniformly treated in all jurisdictions. However, in this context, the fundamental question is why would EU desire to compete with an already very successful enforcement regime and duplicate instruments where there is essentially no need for that? The New York Convention is subscribed to by all EU Member States, and formation of a special, additional regime for the (mutual?) recognition and enforcement of arbitral awards issued in other Member States could create confusion rather than be helpful. There are many potential disadvantages of multiple, overlapping regimes in regard to enforcement of arbitral awards; if they are any potential benefits, remains to be seen. I don't see them.

An area where future work might be useful is the issue of enforceability of mediated settlements (settlement agreements resulting from mediation proceedings). But at the outset it must be clear that divergencies of national approaches in this area are great, and that it is unlikely that a solid uniform regime will be created in a foreseeable future. Why so? It is because different countries employ different, in principle equally plausible, but mutually exclusive strategies in supporting enforcement of the outcomes of ADR mechanisms.

There are generally three possible approaches to the enforceability of mediated settlements. The first approach is to grant the mediated settlements the status of enforceable instruments automatically, and attribute to them the same force as to judicial settlements. This approach looks apparently very pro-ADR but has its major problems. Mediators and judges are fundamentally different professionals. Judges are trained legal professionals vested with public authorities who can and should control the content of the settlement agreement from the perspective of its legal feasibility, compliance with public order and procedural and other formal requirements. This is regularly not the case with mediators. Eventually, the system of automatic enforceability of mediated settlements could work well in environments with closely controlled and legally trained inner circle of mediators, which prevents broad popular use and may also have other setbacks. If this is not the case, there is a considerable chance of abuse of system and incidents that may cast the shadow of doubt on the

system. To prevent it from happening, legislative models of automatic enforceability add additional levels of checks at the enforcement stage, which are effectively leading to hidden *exequatur* proceedings (see e.g. the multiple requirements for "reliance" on mediated settlements and grounds for refusal to "grant relief" in Arts. 4-5 of the Singapore Convention).

The second approach is the one with a uniform national system of certification of enforceability of mediated settlements. This process, also called homologation, is implemented in some European jurisdictions, e.g. in Belgium. It has major advantages, but also requires additional time and resources. In such a system, mediated settlements are not automatically enforceable, but can be submitted to a central authority which is established for a summary check of fundamental requirements of enforceability. If it is established that the settlement was indeed reached by the parties after an appropriate ADR process, that settlement agreement is sufficiently clear, operative and capable of being performed, and that it complies with public policy and deals with matters that could be submitted to mediation, it is being certified by enforceable by a judge specialized for such certification.

Finally, an often-adopted approach is the one which does not provide automatically any priority treatment to mediated settlements, but allows – if parties so desire – to convert the mediated settlements into enforceable instruments using various avenues which are also available for any other – also directly concluded – settlement agreement. The options which are at the disposal are various: approaching courts with a request to convert mediated settlement into judicial settlement; composing an enforceable instrument using notarial acts in the form of authentic instruments; or, concluding arbitration agreements with the only mandate of the arbitrator(s) to issue a consent award on the basis of the mediated agreement.

So far, there is no majority view (let alone consensus) about what avenue is the best one for the effective enforceability of mediated settlements. However, the second and third of the aforementioned approaches enable production of instruments which satisfy the existent requirements of cross-border enforceability under EFFORTS regulations. Therefore, there is no pressing need to immediately start any project which would separately cover cross-border enforceability of various results of ADR mechanisms.

9) *Concluding remarks on authentic instruments, court settlements and ADR mechanisms under EFFORTS regulations*

The principle of mutual trust has been the solid basis for the first stage of development of the EU instruments devoted to mutual recognition and enforcement of enforceable titles. In the second stage, it is high time to devote more attention to a comparative study of various enforceable titles under national law, and to the proceedings in which

these titles originated. Such study can help to improve European procedures, and also help to amend and improve national law. The approximation of civil procedural systems is, in the end, a better outcome than the blind trust and cross-border enforcement of instruments that may be problematic from the very beginning.

Evaluating various enforceable instruments under national law and the EFFORTS regulations, we have showed that:

- further work is needed in particular to clarify the nature and common procedural and substantive standards of “authentic instruments”;
- regulation of various forms of settlement, from court settlements to mediated settlements, needs to be further explored, along with the rules for their enforcement and their efficiency; and
- ADR mechanisms, which are undoubtedly an ever more important element of modern civil justice systems, at present need no major change of EU law provisions regarding their enforcement but deserve a thorough further research.

All this should be put in the context of creating a user-friendly framework which assists mutual recognition and enforcement of enforceable titles in the EU, but at the same time safeguards common procedural standards and stimulates improvements in the national procedural law and practice of the Member States.

4. *The enforcement of non-Member States' judgments: The role of the 2005 and 2019 Hague Conventions*

Christian Kohler *

I. Enforcement of judgments from non-Member States under Regulation Brussels Ia

Regulation Brussels Ia ("BR") provides, *inter alia*, the regime for the recognition and enforcement of judgments in civil and commercial matters in the EU Member States. According to Article 2(a) BR, for the purposes of the Regulation the term "judgment" means

"any judgment *given by a court or tribunal of a Member State*, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court".[351]

It follows from that definition that a judgment given by a court of a non-Member State does not fall under the regime of the Regulation and cannot be recognised and enforced according to its rules. In a case relating to the predecessor of the Regulation, the Brussels Convention of 1968, the CJEU held in 1994 that the Convention does not apply to proceedings, or to issues arising in proceedings, in Contracting States for the recognition and enforcement of judgments in civil and commercial matters given in non-contracting States.[352] In that case, the plaintiff, Owens Bank, had obtained a judgment of the High Court of St. Vincent and the Grenadines ordering the Italian defendants to repay a loan of 9 million SFR, and attempted to enforce the judgment in Italy and in England. It applied, inter alia, to an English court, pursuant to section 9 of the Administration of Justice Act 1920, for a declaration that the Saint Vincent judgment was enforceable in England. The defendants maintained, as they had done in the Italian proceedings, that the Bank had obtained the St. Vincent judgment by fraud. On the reference by the House of Lords, the CJEU, relying on the wording of the relevant provisions, made it clear that the procedures envisaged by Title III of the Convention concerning recognition and enforcement apply only in the case of decisions given by the courts of a Contracting State. The Court further held that Title II of the Convention lays down no rules determining the forum for proceedings for the recognition and enforcement of judgments given in non-contracting States.

---

* Professor at University of Saarbrücken.

[351] Emphasis added.

[352] CJEU, 20.1.1994 – C-129/92, Owens Bank Ltd ./. Bracco.

So it seemed clear that judgments from non-Member States cannot profit from the regime of free movement of judgments enshrined in the Brussels Regulation. This conclusion is, however, subject to a significant reservation following a recent judgment of the CJEU. In case C-568/20, the Court had to decide, on a reference by the Austrian Supreme Court, whether an order for payment made by a court of a Member State on the basis of final judgments delivered in a non-Member State constitutes a judgment and is enforceable in the other Member States under the BR if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable there.[353] In the main proceedings before the Austrian courts, H Limited, a bank, had applied for enforcement in Austria of an order for payment made by the High Court for England and Wales by which the Austrian defendant was ordered to pay the bank approximately EUR 9 million pursuant to two judgments delivered in May 2013 by the courts of the Kingdom of Jordan; for the order for payment the High Court had issued the certificate provided for under Article 53 BR.

The European Court (Third Chamber) held that the High Court order for payment constituted a judgment within the meaning of Article 2(a) BR and, since it had been declared to be enforceable in the UK, it was enforceable in the other Member States pursuant to Article 39 of that regulation, although the order gave effect to judgments delivered in a third State which were not, as such, enforceable in the Member States.[354] In an attempt to distinguish the case from its judgment in Owens Bank, the Court said that, given the absence of harmonisation at EU level, the courts of a Member State were free to adopt enforceable decisions on the basis of judgments from non-Member States, even though taking such judgments into consideration in other Member States is still subject to the requirement for exequatur according to the applicable national law. The Court added, however, that the fact that such a decision had to be recognised as a judgment did not deprive the party against whom enforcement is sought of the right to oppose enforcement of that judgment by relying on one of the grounds for refusal in accordance with Article 45 BR.

The judgment deserves a critical analysis, which, however, cannot be undertaken in detail within the present context; Burkhard Hess has presented the essential elements of the criticism in IPRax.[355] Here it suffices to say that the objections of the Austrian Supreme Court to the application of the BR, specified in the order for reference, go to the heart of the matter and have not been refuted by the CJEU: The referring court expressed the view that the principle of the exclusion of "double exequatur" also applies to orders made by a court of a Member State on the basis of an action seeking enforcement of a third country judgment, since the legal relationship underlying the

[353] Case C-568/20, J ./. H Limited.

[354] CJEU, 7.4.2022 – C-568/20, J ./. H Limited.

[355] Hess, Exequatur sur exequatur (ne) vaut? Der EuGH erweitert die Freizügigkeit von Drittstaatenurteilen nach Art. 39 ff. EuGVVO, *IPRax,* 2022, p. 349.

debt recognised by a final judgment is not subject to a review as to its substance. It should be added that the liberal recognition regime of the BR is based on the mutual trust of the Member States in the administration of justice of these states, which justifies the premise that eligible judgments are issued on the basis of adversarial proceedings in which the alleged claim is judged fairly and equitably by an independent court according to law and justice. Because this trust cannot easily be placed in courts of third states, other parameters are required for the recognition of judgments issued by them in order to decide whether they will be enforced, i.e. put into effect with state coercion.

In the case before the CJEU the order of the English court based on the Jordanian judgments did not therefore fall within the concept of a “judgment” within the meaning of Article 2(a) BR. The consequences of the opposite ruling of the Third Chamber of the European Court are far-reaching. The effectiveness of the enforcement of third-country judgments in the European judicial area has been enhanced significantly. The principle that third-country judgments can only be recognised in accordance with national law no longer applies absolutely. Insofar as such decisions can be incorporated, or “merged”, in a judgment under the national law of a Member State in adversarial proceedings, but without a review of the merits of the foreign judgment, the BR now applies to its recognition and enforcement. By this device, the applicability of the BR regime is created artificially. It is an clear overruling of the CJEU’s decision in Owens Bank and a misinterpretation of the term "judgment" in Art. 2(a) BR. It is of course true that with Brexit the "merger doctrine" of English law has lost its practical significance in the European judicial area. However, as has been pointed out, it remains that Member States are free to provide for similar procedures for third-country judgments in their national law in order to increase their attractiveness on the international law market.[356]

Despite this questionable development, the principle remains that the BR does not contain any rules for the recognition and enforcement of judgments from non-Member States. A change of this situation is apparently not planned; Art. 79 BR only mentions the extension of the rules of jurisdiction to defendants domiciled in non-Member States. The effects of third-country judgments in the Member States of the EU are thus still determined by national law, unless international agreements include specific rules. Such rules are currently contained in the "Parallel Convention" of Lugano of 30 October 2007 and the Hague Conventions of 2005 on choice of court agreements and of 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters.

II. Enforcement of judgments from non-Member States under the 2007 Lugano Convention

[356] Cf. Hess, fn. 5.

For a small group of non-Member States, recognition and enforcement of decisions given by their courts is ensured on the basis of the 2007 Lugano Convention (LC), which applies as an international convention of the Union for the EU-Member States as well as for the EFTA-States Iceland, Liechtenstein and Switzerland. As is well known, the Convention mirrors the regime of recognition and enforcement of judgments of the Brussels Regulation of 2001 (with very few changes), which means that the likewise liberal recognition regime of the LC is also based on the mutual trust of the Contracting Parties in the administration of justice of the states bound by the Convention. Although an exequatur is still required for the enforceability of judgments, the decision on enforceability is almost automatic, and grounds for refusing recognition and enforcement are only examined in a further stage of the proceedings at the request of the judgment debtor. The differences to the regime of the Brussels Regulation 2012 – which abolished the exequatur altogether, but provided for a separate procedure to examine the grounds for refusal of recognition and enforcement – are rather cosmetic. As a result, the effectiveness of the enforcement of judgments given in the three EFTA-States under the Lugano Convention is ensured in the same, or at least comparable, manner as the enforcement of judgments from the EU Member States. The three EFTA States are thus atypical examples for the enforcement of judgments from non-Member States.

III. Effective enforcement of judgments under the 2005 and 2019 Hague Conventions?

Apart from the regional specificities of the Lugano Convention, the map of international agreements on recognition and enforcement of judgments is dominated by the conventions concluded in the framework of the Hague Conference on Private International Law, of which the European Union has been a member since 2007. They are the only international agreements with potentially *universal* application and constitute, in the words of the Commission, "the appropriate framework for cooperation with third countries in the field of civil judicial cooperation".[357] Here, the conventions of 2005 on choice of court agreements and of 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters take first place. In the present context of it is not necessary to recall the content of the conventions as both have received sufficient, and even extraordinary, publicity.[358]

[357] Assessment on the application of the UK to accede to the 2007 Lugano Convention, COM(2021) 222, p. 3.

[358] Cf. the bibliography on https://conflictoflaws.net/2022/update-repository-hcch-2019-judgments-convention-2/

It should be mentioned that the importance of the Hague Conventions for the European Union has taken an additional dimension with Brexit, because the Lugano Convention no longer applies to the United Kingdom and the accession of this country to the Convention as an independent contracting party failed (for the time being) due to the opposition of the Commission. Thus, recognition and enforcement of UK judgments in the EU is now governed essentially by the national law of the Member States. The Hague Conventions take of course precedence, but so far only the Choice of Court Convention (and the 2007 Maintenance Convention) is in force for the UK, whereas the Judgments Convention has not yet been signed by this country.

However, it seems inappropriate to look at the 2005 and 2019 Conventions from the perspective of the *effectiveness* of enforcement, which is the main focus of the EFFORTS project. Such effectiveness is inextricably linked to the premises for the liberal recognition regime of Brussels and Lugano, which – as already mentioned – do not apply to third-country judgments. A quasi-automatic enforceability of judgments from the contracting states of the Hague Conventions along the lines of the LC is therefore ruled out. However, it can be asked whether these conventions at least allow for a *relative* effectiveness of enforcement. For this purpose, three parameters will be briefly examined for the 2005 and 2019 Conventions, i.e. the geographical scope, the substantive scope and the procedure leading to enforcement.

A. The 2005 Convention on choice of court agreements

1. Geographical scope

The Choice of Court Convention came into force on 1 October 2015. It now applies to the EU and its Member States, to Mexico, Denmark. Montenegro, Singapore, and, since 1 January 2021, also to the United Kingdom as an independent Contracting Party. Moreover, China, Israel, North Macedonia, Ukraine, and the United States have signed the Convention but not yet ratified it.

Although the number and economic weight of the third countries involved – with the exception of the United Kingdom – appear small at first glance, the status of the convention is not disconcerting. The ratification of a universal convention is not a routine matter; it is understandable that states look twice with whom they sit down at the table and enter into treaty obligations. Furthermore, it is rather encouraging that the 2005 Convention was signed by China and the USA. It is obvious that the participation of these states, or one of them, would dramatically increase the importance of the convention.

2. Substantive scope and refusal of recognition or enforcement

In the perspective of effectiveness of enforcement, a weak point of the 2005 Convention is its narrow substantive scope. As is well known, it is limited to *exclusive* choice of court agreements, and this limitation is also emphasised in the provisions on recognition and enforcement of judgments from other Contracting States. These provisions apply only to judgments „given by a court of a Contracting State designated in an *exclusive* choice of court agreement" (Art. 8(1)),[359] provided that the agreement has been concluded after the entry into force of the Convention for the State of the chosen court (Art. 16). It is true that according to Art. 22(1) a Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a *non-exclusive* choice of court agreement. However, to date none of the Contracting Parties of the Convention has made such a declaration. Thus, the restriction to exclusive choice of court agreements remains. In this context, the effectiveness of the Convention is further weakened by the fact that, with regard to the existence of such an agreement, there is a *review of the merits* of the judgment given by the court of origin (Art. 8(2)). According to Art. 9(a) and (b) recognition or enforcement of a judgment may be refused if the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid, or if a party lacked the capacity to conclude the agreement under the law of the requested State. However, the review of the merits is limited by the fact that the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default Art. 8(2).

Apart from the review of the choice of court agreement, the grounds on which recognition or enforcement can be refused follow the pattern of modern regimes in this area. Lack of notification of the document instituting the proceedings, fraud in connection with a matter of procedure, inconsistency with other judgments may lead to a refusal, as does the fact that recognition or enforcement is manifestly incompatible with the public policy of the State addressed. It is worth noting here that fundamental convictions of the requested state are particularly protected. So it forms a ground for refusal if the document instituting the proceedings was notified "in a manner that is incompatible with fundamental principles of the requested State concerning service of documents" (Art. 9(c)(ii)), and violations of public policy include situations "where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State" (Art. 9(e)).

3. Procedure leading to enforcement

[359] Emphasis added.

Effectiveness of enforcement depends crucially on the procedure leading to the actual putting into effect of the foreign judgment. In this respect the Convention also follows the pattern of recent practice of international convention and leaves it to the law of the requested State which formalities have to be fulfilled before enforcement can take place. It implies, without saying so explicitly, that the enforcement of the foreign judgment requires a decision of the competent authority of the requested State authorizing the enforcement, but gives no details of the prerequisites of that decision. Indeed, both the procedure for "recognition, declaration of enforceability or registration for enforcement" and the enforcement itself are governed by the law of the requested State (Art. 14). However, the drafters of the Convention have been conscious about the risks inherent in the slow treatment of applications for recognition and enforcement of foreign judgments: Art. 14 provides that the court addressed shall act "expeditiously", and the Hartley/Dogauchi Report on the Convention highlights, in respect of the documents to be produced, that "[e]xcessive formalism should ... be avoided".[360] This, however, could turn out to be a pious hope. Of practical importance could be the "Recommended Form" published by the Hague Conference, which, according to Art. 13(3), may accompany an application for recognition or enforcement. Its use is not obligatory, but it provides a helpful checklist for the documents and information that have to be produced for the support of the application.[361]

So far there is little information about the working of the Convention's rules on enforcement in practice. The website of the Hague Conference displays a judgment from the High Court of Singapore of 12 June 2018 which, after the filing of an *ex parte* Originating Summons, granted an Enforcement Application seeking the recognition and enforcement of a summary judgment made by the High Court of Justice of England and Wales.[362] According to the Singapore court, it was the first application under the Choice of Court Agreements Act 2017 and the new Order 111 of the Rules of Court, which gave effect in Singapore to the 2005 Convention. In an elaborate judgment of 15 pages, the Singapore court conducted a careful examination of the application under the provisions of the Act and the Order, citing the Hartley/Dogauchi Report and devoting time and effort also on unproblematic points. It should be mentioned that the Recommended Form of the Hague Conference had not been used, although it would have facilitated the proceedings. Anyhow, it has to be acknowledged that the court acted expeditiously as the application had been filed only 12 days before the judgment. The judgment will probably serve as a model for the decision of future applications for

[360] Para. 211 of the Report.

[361] See para. 213 of the Hartley/Dogauchi Report.

[362] *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd*, [2018] SGHCR 8.

recognition and enforcement and may thus contribute to an effective enforcement under the Convention.

B. The 2019 Judgments Convention

1. Geographical scope

On 29 August 2022, the European Union deposited its instrument of accession to the Judgments Convention, becoming the first Contracting Party to the Convention. Shortly after, on the same day, Ukraine deposited its instrument of ratification. With the EU's accession and Ukraine's ratification, the Judgments Convention now has two Contracting Parties, which triggers its entry into force on 1 September 2023.[363] The EU's accession will bind all EU Member States with the exception of Denmark. Moreover, the Convention has been signed but so far not ratified by Costa Rica, Israel, the Russian Federation, the United States, and Uruguay.

What has been said in respect of the status of the Choice of Court Convention applies, *mutatis mutandis*, also to the 2019 Judgments Convention. The forthcoming entry into force for the EU and the signature of the Convention by the United States may be taken as encouraging prospects.[364] Should China likewise sign the Convention, as happened with the Choice of Court Convention, the Judgments Convention would have the potential of a heavyweight in international recognition and enforcement practice. Obviously, the accession of the United Kingdom would be highly desirable in order to establish some legal certainty after Brexit.

---

[363] See Art. 28(1): "This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24." The "second State" is Ukraine.

Art. 29(2) provides: "A Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention."

[364] „[I]n the light of the trade between the EU and the US, the signature of the Convention by the latter appears remarkable and could pave the way, if followed by ratification, to a transatlantic trade in which businesses no longer have to rely solely on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958." (Explanatory Statement of the European Parliament legislative resolution of 23 June 2022 on the draft Council decision concerning the accession of the EU to the Judgments Convention (13494/2021 – C9-0465/2021 – 2021/0208(NLE)).

2. Substantive scope and refusal of recognition or enforcement

Much has been written on the substantive scope of the Judgments Convention and the numerous exceptions detailed in the 17 subparagraphs of Art. 2(1), and there is no need to repeat the criticism which has been addressed to it in this context. Indeed, negotiating a potentially universal convention invariably means that in sensitive matters there is no way but to agree on the basis of a low, sometimes the lowest, common denominator. The Convention has no rules on "direct" adjudicatory jurisdiction, it is a *convention simple*; requirements as to the jurisdiction of the court of origin (*compétence indirecte*) are detailed in a series of provisions ("jurisdictional filters") in Art. 5. As far as the guiding principles of recognition and enforcement and the grounds for refusal are concerned, the Judgments Convention follows to a large extent the Choice of Court Convention. A review of the merits of the foreign judgment is excluded; there "may only be such consideration as is necessary for the application of this Convention" (Art. 4(2)). Refusal of recognition or enforcement may be grounded in lack of notification of the document instituting the proceedings, fraud in connection with a matter of procedure, inconsistency with other judgments may lead to a refusal, and the fact that recognition or enforcement is manifestly incompatible with the public policy of the State addressed. Fundamental principles of the law of the requested state are protected in the same way as in the 2005 Convention (Art. 7(1)(a)(ii) and (c)).

Two novel grounds for refusal deserve mentioning: first, a specific ground protects choice of court agreements: according to Art. 7(1)(d) recognition or enforcement may be refused if the proceedings in the court of origin were "contrary to an agreement ... under which the dispute in question was to be determines in a court of a State other than the State of origin". With regard to the existence and the validity of such an agreement the requested court will have to "consider" the merits of the foreign judgment. Indeed, the validity and effectiveness of the agreement is governed by the law of the requested State, including its private international law rules.[365] The second ground for refusal to be mentioned in the present context protects the administration of justice of the requested State: Art. 7(2) says that recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, provided that (a) this court was seised before the court of origin, and (b) there is a close connection between the dispute and the requested State.[366]

---

[365] See the Garcimartin/Saumier Report on the Judgments Convention, para. 269.

[366] According to the Garcimartin/Saumier Report, para. 275, this condition is to prevent strategic or opportunistic behaviour. However, the Convention does not determine which bases of jurisdiction meet the "close connection" condition. Any of the filters in Art. 5 satisfies the condition, but there may be others that do so as well.

3. Procedure leading to enforcement

As the Judgments Convention is not yet in force, no information on its working in practice is available, and the observer is left with the provisions of the Convention and the Explanatory Report. With regard to the procedure leading to the actual enforcement of the foreign judgment, the 2019 Convention follows the pattern of the Choice of Court Convention. It is left to the law of the requested State what formalities have to be fulfilled before enforcement can take place. According to Art. 13, both the procedure for "recognition, declaration of enforceability or registration for enforcement" and the enforcement itself are governed by the law of the requested State. Copying Art. 14 of the 2005 Convention, Art. 13(1) of the Judgments Convention says that the court addressed "shall act expeditiously", and Art. 12(3) provides (as does Art. 13(3) of the 2005 Convention) that the application for recognition or enforcement may be accompanied by a document "in the form recommended and published by the Hague Conference on Private International Law".

It should be emphasized that, unlike the Choice of Court Convention, the Judgments Convention "does not prevent the recognition or enforcement of judgments under national law" (Art. 15). If a judgment cannot be recognized under the Convention, a party may still seek recognition and enforcement under national law. Thus, the Convention sets a minimum standard for mutual recognition, but States may go further. According to the Garcimartin/Saumier Report, the law of the requested State determines whether a party may resort to national law as a whole or may combine provisions from both systems.[367] Clearly, the *favor recognitionis* behind that approach may enhance the effectiveness of the enforcement of third-country judgments.

IV. Do the Hague Conventions provide the appropriate framework for the enforcement of judgments from non-Member States in the EU?

The preceding overview of the two Hague Conventions is cursory and incomplete, but it does allow for a brief characterisation: Both conventions have a potentially universal but currently very limited geographical scope, and it is uncertain when and to what extent that scope will be extended to new Contracting States; the substantive scope of application of both conventions is narrow (2005) or riddled with exceptions (2019) and by no means covers all civil and commercial matters; the grounds for refusing recognition or enforcement require a (limited) *révision au fond* in several cases, and, finally, before the actual enforcement of the foreign judgment can be put into effect, an

[367] Para. 326 of the Report.

exequatur procedure relating to, or the registration of, the foreign judgment is needed, in the context of which grounds for refusal of recognition or enforcement are examined.

Whether these conventions are really "the appropriate framework for cooperation with third countries"[368] is open to doubt. The crucial weakness of this policy is that it follows the motto "one size fits all" and wants to use the same regime of recognition and enforcement for all third countries. However, it is plainly inappropriate to apply the same rules to post-Brexit relations with the United Kingdom and to, say, Paraguay, Vietnam or South Africa. The design of judicial cooperation in civil matters depends essentially on the nature and depth of the relations with the third countries concerned. The standard for an “appropriate framework” for the external policy of the EU with third countries is set by Art. 47 of the Charter of Fundamental Rights and Art. 6 of the European Convention of Human Rights. The right to an effective remedy and to a fair trial in civil matters must be the yardstick not only for the Union’s own rules governing jurisdiction and recognition and enforcement of judgments but also for international agreements with third countries in this field. The closer the economic and social relations with a third state, the higher the requirements for legal certainty and predictability of the framework conditions for adequate legal protection of market participants and citizens. This may include the requirement to agree to uniform rules for the "direct" jurisdiction of courts, not just "jurisdictional filters" for the purposes of recognition as provided for in the Judgments Convention.

One has to think also of the EU's associations with third countries with which "deep and comprehensive" Free Trade Agreements have been concluded. Within the framework of these agreements, judicial cooperation in civil matters has so far been blatantly neglected. What is the reason for this? Since the EU has acquired an internal competence for civil judicial cooperation in the Treaty of Amsterdam this field has been viewed mainly as an appendage of the economic policies of the Union and the free movement of persons,[369] not as a policy in its own right. This is visible also, and in particular, in the external relations of the Union where the main emphasis is, again, on the economy, whereas no adequate framework has ever been conceived for the legal protection of individuals and businesses in that context. The latest generation of these agreements, which were concluded with Georgia, Moldova and Ukraine within the framework of the neighbourhood policy, has at least taken note of the importance of judicial cooperation, although here too reference is made primarily to the Hague Conventions.[370] An obligation to negotiate the recognition and enforcement of judgments, as contained in Art. 220 of the EEC Treaty, is not provided for.

---

[368] See supra fn. 7.

[369] See the reference to the “functioning of the internal market” in Art. 81(2) TFEU.

[370] Cf. J. Basedow, EU Law of Civil Procedure and Third Countries: The Case of the European Neighbourhood Policy, in A. Trunk/N. Hatzimihail, *EU Civil Procedure Law and Third Count*ries (2021), p. 7; as an example see the Association Agreement with Georgia, Art. 21(1):

Anyhow, one does not have to look too far to find an example of an agreement that reasonably corresponds to the requirements of adequate legal protection: the Lugano Convention of 2007, concluded with the neighbouring Western European states of Iceland, Norway and Switzerland, has created a regime of cooperation and mutual recognition that takes sufficient account of the needs of businesses and citizens. The Commission's assertion that the Lugano Convention presupposes participation in the internal market does not correspond to the facts: while Iceland and Norway belong to the EEA, which extends market freedoms to these states, Switzerland does not belong to the EEA; rather, as is well known, it has bilateral relations with the EU based on free trade agreements.

This does not necessarily mean that neighbouring states or other states closely linked to the EU should accede to the Lugano Convention without further ado. Whether accession can be considered for a third state must be examined on a case-by-case basis, nor should it be overlooked that such accession requires the consent of all existing contracting parties. If it turns out that an accession is not suitable or does not obtain the necessary consent, there are alternative solutions. For example, a multilateral agreement could be considered that takes over the main features of the Lugano Convention, but contains adaptations to special features that are typical for associated states; but the conclusion of a bilateral agreement may also be a suitable solution under certain circumstances.

No mention has been made so far of the point whether the EU should unilaterally create its own rules for the recognition and enforcement of third-country judgments. The fact that such rules are still missing is admittedly an abnormal blank space. On the other hand, unilateral rules are no substitute for international obligations concerning the recognition and enforcement of judgments. Unilateral rules that do not impose a condition of reciprocity always contain an advance performance of which one does not know whether it will be honoured. On the other hand, however, unilateral rules that impose a restrictive regime of recognition and enforcement may provide an incentive for third countries to agree to a more liberal bilateral or multilateral agreement.

But all this is reaching into the future. For the context of “effective” enforcement of third state judgments at issue today, it has emerged that the 2005 and 2019 Hague Conventions have little role to play. They may fit for third states with which there are no close economic or social ties. However, as soon as it comes to third states with which the EU has close relations along the lines of free trade or association treaties involving

---

“The parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the Conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children.”

citizens and companies of the participating states, more sophisticated solutions are required, as the example of the Lugano Convention shows.