INFORMED CHOICES IN CROSS-BORDER ENFORCEMENT

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The European State of the Art and Future Perspectives

Edited by
Jan von Hein
Thalia Kruger

INTERSENTIA
Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

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FOREWORD*

The cross-border enforcement of civil and commercial judgments was addressed in the Treaty of Rome creating the European Economic Community, decades before that subject-matter was brought within the regulatory powers of the European Union. Its Article 220 mandated Member States to enter into negotiations to ensure the simplification of formalities governing the reciprocal recognition and enforcement of judgments. This triggered a development that started with the Brussels Convention, an international convention between Member States outside the parameters of Community law but still subject to the jurisdiction of the European Court of Justice, and that was both intensified and accelerated after the Community acquired the competence to legislate in this area by virtue of the Treaty of Amsterdam. The uniform system for an exequatur procedure under the Brussels Convention was substantially streamlined by the Brussels I Regulation. Under its terms, the declaration of enforceability had to be issued upon the completion of certain formalities, without hearing the judgment debtor and without assessing refusal grounds which could only be examined upon appeal. But it was also quickly established that the journey should not end there. The Tampere Programme of 1999 called upon the Commission to further reduce the intermediate measures required to enable the recognition and enforcement of judgments. As a first step it was envisaged to completely abolish these intermediate procedures for titles in respect of small consumer or commercial claims and for certain judgments in the field of family litigation (e.g. on maintenance claims and visiting rights). This approach of a gradual abolition of exequatur became the *leitmotiv* for European legislative activities in the area of international procedural law until today. The European Enforcement Order for uncontested claims (EEO) was designated as the pilot project for the direct enforceability of a decision in other Member States without any need for a declaration of enforceability there. The underlying rationale was that due to the uncontested nature of the claims in question, no controversy should arise in relation to the cross-border enforcement of decisions. However, somewhat ironically, the inclusion of default judgments where the defendant had not entered an appearance in the proceedings meant that the EEO also became

* The author is an official of the European Commission and currently the Head of Unit in charge of civil justice policy in DG Justice. This contribution exclusively reflects his personal views.

applicable to situations that are rather sensitive in terms of having to ensure that the defendant was properly informed about these proceedings. This led to an elaborate set of requirements relating to the service of documents and the information of the defendant, which had to be met in order to allow the certification of a judgment as an EEO. As inherent in the concept of a pilot project, this approach – abolition of exequatur in return for similar procedural minimum standards – was maintained in principle for the next instruments to be adopted, the Regulations establishing a European Order for Payment procedure and a European Small Claims procedure. In contrast to the EEO, however, these later instruments did not only relate to cross-border enforcement but created genuine European procedures (if only in a somewhat more fragmented form for small claims) in order to obtain a decision that would then circulate freely throughout the EU. However, when the time came to do away with the need for a declaration of enforceability across the board in the review of the Brussels I Regulation, the legislator chose not to build on these pilot projects developed as a regulatory model, opting for a different approach instead. As a result, the Brussels I *bis* Regulation has abolished the exequatur procedure as such but has preserved the possibility for the judgment debtor to invoke the refusal on the basis of essentially unchanged grounds. Interestingly, we have seen a similar development in the area of family law where the bold abolition of exequatur in some limited areas of parental responsibility in the Brussels II *bis* Regulation has not been generalised in the recast Regulation adopted in 2019. Rather, that Regulation now provides for two different approaches of abolishing exequatur within one instrument.

This means that in an area that is not exactly the main focus of attention of most legal practitioners, and despite the fact that the express purpose of EU legislation was to simplify cross-border enforcement, we find ourselves in a rather complex regulatory environment where parties have a choice between the 'default' system of the Brussels I *bis* Regulation or an alternative regime. For the 'pioneering' instruments meant as a precursor of the general abolition of exequatur, this naturally raises the question of their continued added value. This applies in particular to the European Enforcement Order for uncontested claims as a pure cross-border enforcement tool. An evaluation exercise, essentially to assess the question whether (and possibly subject to which amendments) this instrument should be maintained, has been launched by the European Commission in 2020.

The questions that arise for the Regulations on the European Order for Payment and the European Small Claims Procedure (and on the more recent European Account Preservation Order) are of a slightly different nature. Here one constantly needs to assess whether the specific procedures created offer a sufficient benefit to the users – including the greatly facilitated cross-border

enforcement but also the procedure for the attainment of an enforceable decision in competition with the options available under national procedural law – in order to justify the investment in coming to grips with these instruments. This assessment needs to take into account the empirical evidence on the extent to which these instruments have been used in practice. It needs to encompass detailed information on problems that have arisen in applying those instruments in the context of the various national procedural systems of EU Member States. To be sure, this needs to include the aspect of whether the interpretation of the crucial provisions of these instruments by the Court of Justice increases or reduces their attractiveness for practitioners. One case in point here is the question of the extent to which the court has to examine the merits of a claim pursuant to Article 8 of the Regulation on the European Order for Payment procedure. The recent *Bondora* ruling by the Court of Justice (C-453/18) touches upon the need for an *ex officio* review of the unfairness of contractual terms for consumer contracts to comply with EU requirements in that respect, which may affect the speed and efficiency of the European Order for payment procedure (but also of national order for payment procedures).

It is the distinguishing feature of the IC²BE project to comprehensively tackle these issues across the board for cross-border enforcement of civil and commercial claims outside the area of family law. That will make the results of this project not only an academic achievement but a valuable tool for policymakers in deciding where to go next in the continuing quest to build a European system for the cross-border enforcement of judgments that works for the benefit of citizens. A fully consistent and coherent approach across all instruments is a laudable objective to aspire to but experience has shown that this may be difficult to come by in the short and medium term since there are also a number of policy reasons that explain the situation as it has evolved over the past two decades.

Dr Andreas Stein
Head of Unit at the European Commission
June 2020

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This book is the outcome of IC²BE, a two-year research project co-funded by the EU's Justice Programme (2014–2020). IC²BE refers to *Informed Choices in Cross-Border Enforcement*. The project, conducted between 2018 and 2019, thus analysed various available instruments for cross-border enforcement in the EU. The research mainly focused on the EU Regulations creating uniform procedures: the European Order for Payment (no 1896/2006), the European Small Claims Procedure (no 861/2007) and the European Account Preservation Order (no 655/2014). Although not a full, uniform procedure, the analysis also included the European Enforcement Order (no 805/2004), which can be seen as the first step to setting minimum standards for civil proceedings in the EU.

For this purpose, our research consortium was made up of seven teams from different Member States. The team from the University of Freiburg (Germany) coordinated the project. The other partners were the University of Antwerp (Belgium), Erasmus University of Rotterdam (the Netherlands), Complutense University of Madrid (Spain), the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, the University of Milan (Italy), and the University of Wrocław (Poland). Through their common efforts the teams collected case law and conducted interviews in Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Poland, and Spain. In addition, they included the judgments of the Court of Justice of the EU. Summaries and, for some cases, the full text of the judgments remain freely available on the project website www.ic2be.eu.

The project was conceived as a follow-up of EUPILLAR, which had been similarly co-funded by the EU under the Justice Programme and coordinated by the University of Aberdeen (UK). We wish to thank Professor Paul Beaumont (now University of Stirling, UK) and other members of the Aberdeen team for allowing us to build on that earlier experience.

The IC²BE research has pointed out many intricacies of the European Regulations. It has shown which of these instruments are successful, what the particular sticky points are and how practices can diverge in the Member States. The research team as well as invited academics and practitioners reflected during the various workshops and the final conference upon these intricacies, problems and successes. They formulated advice for the EU and national legislators. We wish to express our thanks to all of them.

Finally yet importantly, thanks are due to all members of the various project teams who helped to conduct this study, to establish the database and to prepare

our findings for publication. Most of their work is visible in the chapters of this book. Additionally, Professor Johan Meeusen contributed significantly to the research efforts in Antwerp and to the final conference. Moreover, heartfelt thanks are due to Professor Christian Kohler (University of Saarbrücken, Germany), who had to evaluate the project on behalf of the Commission and from whose insightful remarks we profited considerably. In regard of efficient administration, we wish to thank Christian Jäger, who, as head of the EU office at the University of Freiburg, supported our project with great enthusiasm. Special thanks go to Ann-Christin Maak-Scherpe and her wonderful team at Intersentia.

The research was concluded at the end of December 2019 and the law is updated until that point.

Jan von Hein, Freiburg
and
Thalia Kruger, Antwerp

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LIST OF CONTRIBUTORS

Elena D'Alessandro
Full Professor of European and Italian Civil Procedure at the University of Torino, Italy

Samia Benaissa Pedriza
Researcher at Complutense University of Madrid, Spain

Gilles Cuniberti
Professor of Comparative Law and Private International Law at the University of Luxembourg

Veerle Van Den Eeckhout
Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg

Jonathan Fitchen
Director of the Centre for Private International Law, School of Law, University of Aberdeen, United Kingdom

Agnieszka Frąckowiak-Adamska
Associate Professor of European and International Law at the University of Wrocław, Poland

Fernando Gascón Inchausti
Professor of Law at Complutense University of Madrid, Spain

Valeria Giugliano
Postdoctoral Research Fellow in International Civil Procedure at the University of Milan, Italy, during the IC^{2}BE project and currently at Fondazione Fratelli Confalonieri

Agnieszka Guzewicz
Assistant Professor in the Department of Civil Law and Private International Law at the University of Wrocław, Poland

Jan von Hein
Professor of German, Comparative and Private International Law and a Director of the Institute for Comparative and Private International Law, Department III, at the University of Freiburg, Germany

Burkhard Hess
Director at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg

Jos Hoevenaars
Postdoctoral Researcher at the Erasmus University in Rotterdam, the Netherlands

Stefan Huber
Professor of Private Law, Civil Procedural Law, Insolvency Law, and Private International Law at the University of Tübingen, Germany

Tilman Imm
Previously, Doctoral Candidate at the Institute for Comparative and Private International Law, Department III, at the University of Freiburg, Germany, during the IC^{2}BE project; currently, Law Clerk at the Higher Regional Court of Düsseldorf, Germany

Xandra Kramer
Professor of Private Law at the Erasmus University in Rotterdam and Professor of Private International Law at Utrecht University, the Netherlands

Thalia Kruger
Professor of Private International Law at the University of Antwerp, Belgium, and Honorary Research Associate at the University of Cape Town, Republic of South Africa

Agnieszka Lewestam-Rodziewicz
Research Assistant at the University of Wrocław, Poland

Gerald Mäsch
Director of the Institute for International Business Law (Dept. I) at the Westfälische Wilhelms-Universität Münster, as well as a retired Judge at the Higher Regional Court of Hamm, Germany

Gabriele Molinaro
Postdoctoral Research Fellow at the University of Milan until January 2019; currently Trainee Judge at the first instance court of Milan, Italy; from November 2020, Judge at the first instance court of Novara, Italy

Elena Alina Onțanu
Assistant Professor of Private International Law at the Erasmus University in Rotterdam, the Netherlands

Carmen Otero García-Castrillón
Professor of Private International Law at Complutense University of Madrid, Spain

Fieke van Overbeeke
Researcher at the University of Antwerp, Belgium, and Legal Counsel at 'International Legal Institute' (www.iji.nl) in The Hague, the Netherlands

Max Peiffer
Practising Lawyer at AssmannPeiffer attorneys in Munich, Germany

Lidia Sandrini
Associate Professor of International Law at the University of Milan, Italy

Carlos Santaló Goris
Research Fellow at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg

Bernhard Ulrici
Practising Lawyer at Ulrici Rechtsanwaltsgesellschaft mbH, Leipzig, and teaches private law, civil procedural law and labour law as a *Privatdozent* at the University of Leipzig, Germany

Francesca C. Villata
Full Professor of Private International Law at the University of Milan, Italy

Denise Wiedemann
Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany

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     - 2.1.2. Available amount of information on Regulations
   - 2.2. PROBLEMS RELATED TO THE PROCEEDINGS
     - 2.2.1. Language issues
     - 2.2.2. Speed of Proceedings
     - 2.2.3. Cost of Proceedings
     - 2.2.4. Service of documents
     - 2.2.5. Form sheets
     - 2.2.6. Use of modern information technology
   - 2.3. TECHNICAL QUESTIONS
     - 2.3.1. Scope of Regulations (National and Third-Country Constellations)
     - 2.3.2. Area of application (Types of claims, participating parties)
     - 2.3.3. Determination of jurisdiction
   - 2.4. PROTECTION ISSUES
     - 2.4.1. Consumer protection
     - 2.4.2. Protection of the defendant against fraudulent or abusive proceedings
     - 2.4.3. Lack of public policy

3. PRACTICE RELATING TO THE EUROPEAN REGULATIONS
   - 3.1. EUROPEAN ENFORCEMENT ORDER
     - 3.1.1. Problems related to the Proceedings
     - 3.1.2. Technical questions
     - 3.1.3. Practical need for the EEO alongside Brussels Ibis

* For the national reports, the contributors were provided with this template in order to have a generally similar structure to the various reports, while allowing for some deviations in case of national peculiarities.

3.2. EUROPEAN ORDER FOR PAYMENT
3.2.1. Problems related to the Proceedings
3.2.2. Technical questions
3.3. EUROPEAN SMALL CLAIMS PROCEDURE
3.3.1. Problems related to the Proceedings
3.3.2. Technical questions
3.4. EUROPEAN ACCOUNT PRESERVATION ORDER
3.4.1. Problems related to the Proceedings
3.4.2. Technical questions

4. ANALYSIS

5. CONCLUSION AND RECOMMENDATIONS