

Editors:  
C.H. van Rhee  
A. Uzelac

## Enforcement and Enforceability – Tradition and Reform



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C.H. van Rhee

A. Uzelac

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## LIST OF AUTHORS

**Vadim Abolonin**, LL.M.Eur., Lecturer at the Chair of Civil Procedure and Enforcement Law, Urals State Law Academy, Russia

**Neil Andrews**, University of Cambridge; Bencher of Middle Temple, London

**Bob Assink**, Law student (bachelor), Faculty of Law, University of Maastricht, The Netherlands

**Vladimir Babunski**, Judge at the Supreme Court of the Republic of Macedonia

**Nina Betetto**, Judge at the Supreme Court of the Republic Slovenia; Member of the Consultative Council of European Judges

**Mathieu Chardon**, Huissier de Justice in Versailles, France; First Secretary of the Union Internationale des Huissiers de Justice

**Marc Dekkers**, Law student (bachelor), Faculty of Law, University of Maastricht, The Netherlands

**Fokke Fernhout**, Associate Professor of Civil Procedure, Faculty of Law, University of Maastricht, The Netherlands

**Mirjam Freudenthal**, Honorary Associate Professor, Molengraaff Institute of Private Law, Faculty of Law, University of Utrecht, The Netherlands

**Burkhard Hess**, University of Heidelberg, Court of Appeal Karlsruhe, Germany

**Rob Jagtenberg**, Associate Professor of Law, University of Rotterdam, The Netherlands; Former General Reporter on the subject of Mediation, Council of Europe

**Jon T. Johnsen**, Professor at the Department of Public and International Law, University of Oslo, Norway; Member of the SATURN Centre for Judicial Time Management of the European Commission for the Efficiency of Justice (CEPEJ, Council of Europe)

**Antonie Jongbloed**, Professor of the Law of Enforcement and Seizure, Molengraaff Institute for Private Law, University of Utrecht, The Netherlands

**Xandra Kramer**, Associate Professor of Private International Law and Comparative Law, Erasmus University Rotterdam; Deputy judge at the District Court of Rotterdam, The Netherlands

**John Marston**, Marston Group, High Court Enforcement Officers and Certificated Bailiffs, United Kingdom; Former Chairman of the High Court Enforcement Officers' Association in England and Wales; Chairman of the Working Group on Execution of the CEPEJ (Council of Europe)

**Natasa Pajic**, Associated with the law firm Simpson Thacher & Bartlett LLP, Palo Alto, United States of America

**Niels Pepels**, Law student (bachelor), Faculty of Law, University of Maastricht, The Netherlands

**Branka Rešetar**, Associate Professor, Faculty of Law, University of Osijek, Croatia; Member of the International Society of Family Law

**C.H. (Remco) van Rhee**, Professor of European Legal History and Comparative Civil Procedure, Maastricht University, The Netherlands

**Annie de Roo**, Associate Professor of Law, University of Rotterdam, The Netherlands; Accredited Mediator; Former Key Expert in the CILC Project on Labour Dispute Mediation in Croatia

**Elisabetta Silvestri**, Associate Professor of Comparative Civil Procedure, Faculty of Law, University of Pavia, Italy

**Robert Turner** MA, LLD, FICM; Former Senior Master of the Supreme Court of England and Wales and The Queen's Remembrancer; Member of the Notarial Board of the Archbishop of Canterbury; Visiting Professor of Law of the University of Gloucestershire; President of the Institute of Credit Management and the President of the High Court Enforcement Officers Association

**Jos Uitdehaag**, Huissier de Justice, The Netherlands; Member of the Board of the Royal Dutch Chamber of Judicial Officers; First questor of the Union Internationale des Huissiers de Justice; Expert for Council of Europe and the European Union on the subject of enforcement; Senior legal expert, Balkan Enforcement Reform Project

**Alan Uzelac**, Professor of Civil Procedure, Faculty of Law, University of Zagreb, Croatia; Former Member of the CEPEJ Bureau; Member of the SATURN Centre for Judicial Time Management of the European Commission for the Efficiency of Justice (CEPEJ), Council of Europe

**Remme Verkerk**, Researcher in Civil Procedure, Faculty of Law, University of Maastricht, The Netherlands

**Vladimir Yarkov**, Head of the Chair of Civil Procedure and Enforcement Law, Urals State Law Academy, Russia

## ENFORCEMENT AND ENFORCEABILITY - AN INTRODUCTION

If the proof of the pudding is in the eating (as a popular wisdom says),<sup>1</sup> the ultimate test for civil justice is in the implementation of its final products – judicial decisions, court orders and other enforceable instruments (hereinafter ‘judgments’) that regulate civil rights and obligations. Tautological as it may sound, the key to the effectiveness of legal protection is in its reaching of the desired results. Therefore, it may be surprising that the enforcement of judgments was until about a decade ago a relatively neglected subject, both as a topic of systematic and comparative legal research, and as an area for harmonization at the regional and international level. This can only be explained – at least in part – by the fact that the prevailing psychology of the legal professionals engaged in litigation was always focused on adjudication, whereas its aftermath was considered to be a more or less private matter of the parties. Simply put, the national histories of the enforcement of judgments, the attitudes towards its purpose and legal nature, and the evolution of the organizational structures in the various jurisdictions was so different that enforcement was left aside as one of the most national, parochial legal fields.

This situation has changed to some extent in the first years of the third millennium, which may be attributed to the encounter with the massive inefficiencies in the mechanisms of legal protection in a number of European countries. These inefficiencies are in many instances connected to systematic inability to implement judicial decisions, or at least systematic inability to implement them in a reasonable time. For the European countries, this became a matter of international attention only after the European Court of Human Rights, while condemning several countries for human rights violations, found that proper enforcement was a constitutive part of the human right to a fair trial.<sup>2</sup> Whereas the cases of human rights violations caused by non-enforcement or delayed enforcement originally arrived at the Strasbourg court from ‘old’ democracies such as Greece and Italy, the accession of a number of countries from Eastern Europe and the former Soviet Union to the Council of Europe contributed to the consciousness

<sup>1</sup> Spontaneously quoted, though in a different context, by two contributors to this book.

<sup>2</sup> *Hornsby v. Greece*, 19 March 1997, *Reports of Judgments and Decisions* 1997-II.

that systemic problems with ensuring the effectiveness of civil judgments and other enforceable documents plague a significant part of the European continent, thereby raising questions about the common standards of human rights protection.<sup>3</sup>

The need to initiate work on harmonization of enforcement law and practices was also recognized within the European Union, a body that previously largely ignored academic initiatives encouraging the setting of international standards in the field of civil procedure (e.g. the results of the work of the Storme Commission for the approximation of civil procedure in Europe).<sup>4</sup> Accompanying this development, some comparative legal research and academic writing on enforcement practices and structures emerged in the first decade of this century. Yet, in this field, which is currently among the most dynamic in Europe, there is still a great need for more research and up-to-date information.

The goal of the present book is to contribute to the efforts devoted to the comparative study and research of enforcement law and practices. The book aims at providing a number of perspectives on the development in this area, mainly as regards European jurisdictions. The contributions are written by authors from legal academia and from the circle of professionals engaged in enforcement practice. Various aspects of the implementation of civil judgments, court orders and other enforceable documents are discussed. New trends are highlighted by pointing to the contrast between static, slowly changing traditional perspectives, and the dynamic trends of reform that may both be observed in some of the jurisdictions under discussion.

The contributions to this volume show that the notion of 'enforcement' is complex and multi-faceted. In the present book, the main focus is on enforcement in the area of private law (including commercial and family law). As a rule, issues relating to the execution of criminal sentences, fines, taxes and other public dues have not been taken into account. Nevertheless, some attention to criminal law could not be excluded where the hearing and enforcement of civil claims within the context of criminal litigation is discussed in the excellent comparative survey by Jon T. Johnsen on so-called 'combined proceedings' in Norway.

While focusing on the enforcement of civil rights and obligations, a broad field of issues relevant for the effective implementation of court decisions is discussed. A technical and narrow construction of the term 'enforcement' was avoided, and a broader notion of 'enforceability' was used as a guiding star in this book.

One example of the broad understanding of issues relevant for enforcement may be found in the notorious fact that the best and the most effective legal title is the one that does not need enforcement at all because of voluntary compliance of

<sup>3</sup> The Strasbourg enforcement cases are mentioned in many of the contributions to this book. A particularly exhaustive overview of the most recent ECtHR case law is given with respect to the countries of the Western Balkans, where non-enforcement of judicial decisions is among the main causes of human rights violations under the ECHR (see the contribution of Jos Uitdehaag in this volume; the author was personally involved in a number of jurisdictions from Southern and Eastern Europe as an expert for the reform of enforcement law and practice).

<sup>4</sup> Storme 1994.

the debtor. As pointedly stated in the contribution of Remme Verkerk, 'voluntary compliance ... is the cheapest, quickest and the most pleasant form of enforcement'. The same contribution discusses extensively what factors have an impact on a higher or lower level of willingness to comply voluntarily, emphasizing in particular the role of the perceived fairness of the procedure and the legitimacy of the legal authorities involved in the matter. This is of course the best manner to avoid the need for draconian measures such as the deprivation of liberty as a method of enforcement of civil rights and obligations. As regards the latter type of enforcement, a team of authors led by Fokke Fernhout has conducted historical and comparative research, both at the national and international level. In this volume, the authors draw the challenging conclusion that civil arrest, harsh as it may seem, is at times indispensable as a tool for the successful enforcement of some forms of civil obligations, at least where other enforcement measures fail.

While it is indisputable that parties who settle their cases are more likely to comply voluntarily, it is interesting to note that nevertheless the question whether and how mediated settlements should be made (compulsorily) enforceable is a hotly debated issue, both in Europe and beyond. One may ask whether the enforcement of a mediated settlement is necessary because only the threat of the forceful intervention of the State apparatus is able to eradicate the innate wish of some human beings to cheat their opponents. In their synthesized presentation of the developments within the Council of Europe and the European Union, two leading scholars in the field of mediation, Rob Jagtenberg and Annie de Roo, give a negative answer to this question. Their conclusion is that the current strong emphasis on finality and enforceability of mediated settlements is primarily due to a change of perspective as regards mediation that has little to do with actual compliance rates. While in the early days of Council of Europe recommendations on various forms of mediation the principal issue was to cater for the needs of the users (by fostering mediation as an informal, friendly method of dispute resolution supplementing formal court procedures), the current trends, expressed clearly in the EU Mediation Directive,<sup>5</sup> see mediation primarily as a means to reduce the excessive workload of courts. Such a change of perspective (from bottom-up to top-down) leads to a strong urge for the finality and enforceability of settlements. The same logic also inspired the recent emphasis on the extra-judicial homologation of mediated settlements, which results in a duplication (or even triplication) of the possible ways of certifying (or homologating) the enforceability of settlements reached in mediation. One may ask whether this should be viewed as a problem or as healthy competition, as is – slightly ironically – stated by De Roo and Jagtenberg.

The developments within the EU are also the central issue in two other papers featured in this book. In both of them, trends in enhancing the effectiveness of the mutual enforcement of judicial decisions in the EU are discussed. The most notable legal instruments in this field are the European Regulation on an Order for Payment

<sup>5</sup> Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, *Official Journal* 2008, L 136/3.

Procedure<sup>6</sup> and the European Enforcement Order.<sup>7</sup> The contribution by Xandra Kramer is somewhat optimistic. The author provides a profound comparative analysis of the trans-European implementation of the EU Order for Payment Procedure, which she describes as ‘an important step in the realisation of a more effective enforcement of judgments in the European Union’, even though she also discusses some (not insignificant) flaws. Another contribution, based on first-hand insights and a comprehensive knowledge of legislative customs and practices within the various legislative bodies of the European Union, supplies a clear explanation of such flaws and inconsistencies in EU legislation in the field of civil procedure, including enforcement-related regulations such as the European Enforcement Order. Describing the various tactics of the Member States to avoid implementing the Commission’s ‘utopian Tampere dreams of an ideal harmonisation of civil procedure’, Mirjam Freudenthal concludes euphemistically on the progress of harmonization of civil procedure in general and enforcement law in particular in the following manner: ‘The statement that substantial progress is being made and satisfactory results have been obtained in the area of judicial cooperation in civil matters, does not seem to completely reflect reality’. This conclusion is supported by Nina Bettetto on Slovenia, who shows that the current EU regulations in the field of civil procedure are occasionally implemented in the EU Member States in an inappropriate and sometimes deficient and misleading manner.

A parallel and more ambitious European attempt to harmonize various national enforcement practices may be witnessed within the Council of Europe. Several papers deal with this issue. A useful summary of the work of the Council of Europe (as well as of other organisations engaged in setting international standards for enforcement) is provided by Mathieu Chardon, who himself is personally involved in the study of enforcement standards within the Council of Europe (as is John Marston, another contributor to the present volume).<sup>8</sup> Nevertheless, these trans-national European attempts to harmonize enforcement practices may still be far from maturity, as appears from the European Commission’s assertion that the ‘lack of common standards regarding enforcement is the “Achilles heel” of the European Civil Judicial Area’.<sup>9</sup> This indicates that the *situs materiae* of enforcement still lies in the national enforcement structures. Therefore, the largest part of the present book is dedicated to the presentation of various national and regional developments in the field of enforcement law and enforcement practice.

<sup>6</sup> Regulation (EC) No. 1896/2006 creating a European Order for Payment Procedure, *Official Journal* 2006, L 399/1.

<sup>7</sup> Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, *Official Journal* 2004, L 300/6.

<sup>8</sup> Matthieu Chardon is currently an observer on behalf of the Union Internationale des Huissiers de Justice, and John Marston is the Chairman of the Working Group on Execution of the CEPEJ (GT-EXE), which operates within the context of the Council of Europe.

<sup>9</sup> Green paper on improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts, Brussels, 24.10.2006, COM(2006)618 final.



A comparison of different (national) enforcement structures in Europe is the main topic of study of an author who was himself active in drafting various acts and reports for the EU. Burkhard Hess distinguishes several key divergences relating to the organization of enforcement agencies in Europe. The author discusses the difference between centralized and decentralized systems, the difference between the status and role of the competent enforcement authorities (bailiffs, courts, mixed systems and administrative systems) and differences in the qualifications of the enforcement agents (ranging from highly qualified bailiffs with a university degree to non-qualified personnel with little or no training). Hess shows that enforcement structures and enforcement procedure are closely interrelated: particular enforcement structures encourage particular procedural models, and, *vice versa*, some ideas regarding the aim of enforcement procedures (e.g. pure debt-collection or also mediation) encourage particular enforcement structures.

The various enforcement structures and models are highlighted in this volume in a number of papers that provide accounts of the practice of civil enforcement in a representative selection of European jurisdictions. They focus on England & Wales, France, the Netherlands, Italy, Russia, Macedonia and Croatia, but sometimes also touch upon enforcement in a number of other jurisdictions.<sup>10</sup> While each contribution exhibits a different level of satisfaction with the existing state of affairs, all of them share the same atmosphere of change, indicating a new attitude towards enforcement and the possibility of further reforms (and, possibly, further problems) in the future.

A transition from tradition to modernity is perhaps most visible in England & Wales, as is shown in a contribution by one of the architects of the recent reforms in that jurisdiction, who was for over twenty years responsible for, amongst other things, supervising the enforcement of the judgments of the superior English courts. In addition to telling us the story of the transformation of the sixty Sheriff's Officers and Under Sheriffs into the new High Court Enforcement Officers in 2004, which occurred under his leadership, former Senior Master of the Supreme Court and Queen's Remembrancer Robert Turner – together with Neil Andrews – also co-authored the contribution on the system of the enforcement of civil judgments in England & Wales in this volume. In this contribution the authors discuss the newest reforms in that jurisdiction, effective from the end of 2009. In a third paper written from the English perspective (at least insofar as its author, John Marston, is the former head of the professional organization of English Sheriff's Officers, and currently owns one of the largest commercial enforcement companies in England), a quasi-utopian parable is sketched. Marston provocatively tries to sell the reader an extreme model of free market enforcement services, demonstrating in a humorous way how important some apparently extraneous elements of a commercial nature

<sup>10</sup> In the presentation of the national enforcement systems, the authors were free to choose the problems they considered to be topical for their own jurisdiction. This resulted in the presentation of a colourful variety of enforcement systems and practices.

(such as competition, fee composition, and the methods of bailiff remuneration) are to the enforcement culture.

Another contribution by Mathieu Chardon, based on his professional and personal experience as *huissier de justice* (court bailiff) in France, outlines the French system of enforcement. Even though Chardon's presentation of the French system is largely affirmative, he also describes a number of prospective changes that might be necessary in order to improve the efficiency of enforcement. Among them are those related to access to information on the debtor's assets, the conditions for admission to the profession, the introduction of compulsory continuing education for bailiffs, and a new code of ethics for judicial officers.

The *huissier de justice* and his success in providing enforcement services are at the heart of the contributions related to enforcement in the Netherlands. The contribution by Ton Jongbloed, who was a prominent member of a commission entrusted by the Dutch Government with the task of evaluating the major reforms introduced by the Dutch Court Bailiffs Act of 2001, summarizes the findings of the commission regarding the points on which the Act has and has not lived up to expectations. Praising the effects of self-regulation, stricter supervision and financial regulation of bailiffs' services, Jongbloed points to the risks connected to the 'super-commercialization' of Dutch bailiffs, who, in addition to their regular activities in the enforcement of court judgments, may offer a number of other debt-collection services on a commercial basis, thereby jeopardizing the image of the 'court bailiff with a human face'.

Studying the historic background of the Dutch bailiffs as a specific national version of the *huissier de justice* can enhance the understanding of the development of the Dutch reforms. This development is presented extensively and in detail in the second contribution on the Netherlands. The author states that 'within a period of a century, the *huissier de justice* has changed from a very modest, badly educated official into a well-trained professional' and presents some of the recent reforms as based on an 'unlimited trust in market forces' and as endangering the progress that has been made since the last century.

In contrast to the more or less affirmative presentations of the English, French and Dutch enforcement systems, the presentation of the Italian enforcement experiences is very critical. The author, Elisabetta Silvestri, clearly shows that over-regulation of enforcement services may diminish and ultimately completely annihilate the efficiency of enforcement. She states that the 'obsession for details [in Italy] ... makes one lose sight of the overall issue, and ... makes the law on enforcement the nightmare of law students, a minefield for lawyers, and a source of endless frustration for judgment holders'. In contrast, for example, to one of the contributions on England & Wales, which starts with the motto that 'evolution is always preferable to revolution', Elisabetta Silvestri concludes for Italy that there is 'ample evidence of an urgent need for comprehensive and radical reforms'.

The belief in the need for comprehensive reforms is equally shared by the papers devoted to enforcement law and practice in the post-Socialist countries. In virtually all of these countries, successful or less successful reforms have been made or are on their way. One common trend may be observed in these countries, i.e. the trend toward the privatization of enforcement services. Some of the transition countries have already dramatically changed their previous, mainly court-based

enforcement practices. An example is Macedonia, where according to Vladimir Babunski, a 'dramatic improvement of the efficiency of enforcement' occurred in the first three years after the introduction of the reforms.

The possible gains of increasing the efficiency of enforcement also motivate other transition countries that are currently seriously considering the privatization of enforcement services. In Russia, major reforms are expected within the next two or three years. In the present volume, they are presented and discussed by the head of the group of experts entrusted with the drafting of the future Enforcement Code of Russia, Vladimir Yarkov, and by Vadim Abolonin. Although the policy decision on embracing a private system of enforcement for Russia has still not been made, this option is clearly on the table.

A jurisdiction where there was considerable opposition to the introduction of private enforcement agents, but which has changed its stance in 2009, is Croatia. In that country reforms are justified both for internal reasons similar to those of Italy (complexity and inefficiency of the enforcement process) and for external reasons (frequent warnings in the process of accession to the EU about the lack of well-functioning mechanisms for the protection of the rights of the citizens). Although final reform decisions have apparently been made, and the legislative process is under way, the author of the contribution on Croatia is critical and warns against the pitfalls of privatization in a transitional context (e.g. the lack of proper preparation for the reforms, difficulties in the implementation and monitoring of them, accompanied by the ever-present danger of corruption). The author submits that his conclusions may also be relevant for jurisdictions in transition other than Croatia.

Rounding up the circle of different European approaches to enforcement, this book features a paper that touches upon specific features of the enforcement of obligations in the area of family law. The paper, written by Branka Rešetar, is based on the situation in Croatia. It provides a valuable insight into the special needs for the enforcement of contact orders concerning children. In this rather sensitive area of law, classical coercive measures (fines, imprisonment and physical removal of the child) are not always appropriate and effective, and other means of enforcement may be needed, such as judicial mediation in the enforcement process, and liability for damages in case of the non-observance of contact orders.

As a contrast to the situation in Europe, this book features a contribution by Natasa Pajic on the various methods of enforcement of judgments in the United States of America. Enforcement regulations in this country are complicated due to the complex relationships between the individual States and the federal Government. Mrs Pajic describes the US system as 'complex' and 'bifurcated', which may remind the reader of the situation as regards enforcement in present-day Europe.

The editors of this volume hope that the various contributions to the present book will foster a further awareness of the challenges to which the various national systems of enforcement in Europe are subject. They hope that the national experiences discussed in this book will demonstrate that there is not only one solution to a slow and inefficient enforcement practice, but that possible solutions to this problem are various and finally all are based on a careful balance between, amongst other things, the enforcement rules and practices, the quality and

reliability of the various professionals involved in enforcement, and the institutional and societal framework in which these professionals have to operate. As some of the contributions to this volume demonstrate, this awareness is not always present, and consequently this book is not only useful reading material for academics and professionals, but also for policy-makers, both at the national and at the European level.

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C.H. (Remco) van Rhee & Alan Uzelac  
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