Max Planck Institute
LUXEMBOURG
for Procedural Law

IC2BE Project

Cross-Border Debt Recovery in the EU

Application of the "second-generation" regulations in France and Luxembourg

Workshop Report[1]

MPI Luxembourg, 8th June 2018

[1] This report has been drafted by Prof. Dr. Marta Requejo Isidro summarizing the record's transcription of the Ic2BE national workshop, previously processed by Dr. Veerle Van Den Eeckhout and Mr. Carlos Santaló. The original document, of *circa* 60 pages, will only serve internal purposes and is not meant for the public. Should nevertheless the Commission have an interest in it the MPI Luxembourg will indeed be very pleased to provide it.

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I. The workshop in context

i. Background

On June 8, 2018, a seminar was held at the premises of the MPI Luxembourg in the framework of the IC2BE project, with the purposes of taking stock of practitioners' experiences on the European Enforcement Order, the Small Claim Procedures, the European Order for Payments and the European Account Preservation Order. The seminar was attended by academics, lawyers and practitioners from (mainly)[2] France and Luxembourg having a direct interest in the above-mentioned instruments. They were invited to share with the MPI team, composed of Prof. B. Hess, Prof. Marta Requejo Isidro, Dr. Veerle Van Den Eeckhout and Mr. Carlos Santaló Gorís, the difficulties they meet in application of the regulations and their opinions on how they could be improved. In the months to come, the MPI IC2BE team will process the information obtained thereby.

The seminar was open to the scientific collaborators of the MPI Luxembourg.

(*Note: The June workshop is the last of a series of national seminars held between April and June 2018 in the EU countries covered by the research project. It is foreseen to come back to the participating stakeholders next year, to present and to explain to them the project's outcomes and the corresponding policy proposals, if any*).

ii. Unfolding of the seminar

The seminar comprised four panels, each on one of the EU regulations. Besides, a specific presentation was devoted to the so-called *Redress 17* project, which is here reported under number VI, "Related projects". A slot of 1 h 30 min. was opened for questions and answers at the end of the workshop.

The seminar was joined by 40 attendants. Due to the fact that participants came from different countries, that Luxembourg practitioners are not necessarily fluent in French and vice versa regarding English for the French attendants, it was agreed that both languages could be used indistinctly. The interventions were recorded with the previous agreement of all present in the room to facilitate the reporting and information-processing tasks.

Prof. C. Kohler, the external evaluator of the IC2BE, took part in the seminar.

[2] An announcement at the MPI website opened the seminar to practionners of other origins provided they had experience with the regulations, in particular in cross-border cases connected to France or Luxembourg; this explains the presence of attendants from other countries as well.

For data protection reasons, only the names of the nominated speakers will be indicated in what follows.

II. European Enforcement Order Regulation ("EEO")

Chair: Dr. Veerle Van Den Eeckhout (*Senior research fellow, Max Planck Institute Luxembourg*)

Speakers: Prof. Nourissat from the University of Lyon; Mr. Cagniart, notary in France.

i. Prof. Cyril Nourissat (*Professor, Jean Moulin University, Lyon*)

Summary: Putting aside the EEO in the notarial practice, this European instrument cannot be described as successful in France, as evidenced by the extremely low number of cases brought so far before the Court of Cassation -only four-, and the limited interest of the contents of the decisions - EEOs cannot be contested in the MS of enforcement, but only where they have been issued.

The reason for the lack of success seems to be twofold: on the one hand, the parallel existence of the Brussels I bis regulation, an instrument practitioners are already familiar with, and where exequatur has been abolished as well. On the other hand, the clash of the pro-creditor philosophy underlying the EEO regulation, as expressed by recital 8, with the pro-debtor logic presiding French law, which (once again) is the one the practitioners are comfortable with.

The French Code on Procedural Law has been amended in order to adapt to the EEO, in particular regarding the issuance of the certificate and the enforcement of a foreign title. The relevant provisions are Art. 509-1 CPC (last amendment, May 6th, 2017, see décret n° 2017-892 du 6 mai 2017 portant diverses mesures de modernisation et de simplification de la procédure civile), replacing the words "greffier en chef" by "directeur du greffe" ; and Art. 509-3, which confers a competitive advantage to the French Notaries by bestowing them with the competence to issue EEOs based on authentic documents.

ii. Mr. Marc Cagniart (*Notary, SCP de Braquilanges, Lambert, Cagniart et Marchay, Paris*)

Summary: The EEO based on an authentic document is currently delivered by the French notaries according to Art. 509-3 Code of Civil Procedure. The assessment of the practice so far is a positive one. Three constellations have already been tested of an EEO issued upon the recognition of a debt by the debtor, namely loan contracts; lease agreements; factoring contracts. A fourth easily imaginable case would be the agreement to sale.

Two questions are still undecided in the French notarial practice of the EEO regulation: firstly, if several copies of the EEO for the same underlying debt can be delivered, or only one; secondly, whether an EEO might be issued in advance -i.e., in anticipation of the

debtor's failure to pay-, when the necessary foreign elements are already known at the moment of the signature of the contractual documents.

III. European Order for Payment Procedure Regulation ("EPO")

Chair: Dr. Veerle Van Den Eeckhout (*Senior research fellow, Max Planck Institute Luxembourg*)

Speakers: Dr. Agnieszka Frąckowiak-Adamska (*Assistant Professor, University of Wroclaw, Poland*); Mr. Max Mailliet (*Attorney-at-Law, Luxembourg*).

i. Dr. Agnieszka Frąckowiak-Adamska (*Assistant Professor, University of Wroclaw, Poland*)

Summary: According to statistics and judging from the number of preliminary references submitted to the CJEU, the EPO seems to be the most popular regulation among the second-generation regulations. The reason seems to lie with the simplicity of a procedure based on standard forms (seven, available on the website of e-Justice), set up for cross-border monetary claims uncontested by the defendant. No presence before the court is required, and no supporting documentation needs to be attached to the application - the description of the evidentiary means should be enough; the court should not evaluate the evidence. Enforcement in a different MS cannot be refused except in case of irreconcilability with any previous decision or order, or if the claimant has paid the debt. Moreover, national procedural law is only applicable on subsidiary basis, as according to Article 26: "All procedural issues, not deal with this regulation, shall be governed by national law". It should nevertheless be noted that in practice it is not always easy to delineate the limits between national law and the EU procedure.

Note of the drafter: The presentation followed with the explanation of the procedure as designed in the Regulation, and a summary of the CJEU case law. For the latter, please see the IC2BE data base - compilation by the MPI team.

ii. Mr. Max Mailliet (*Attorney-at-Law, Luxembourg*).

Summary: In Luxembourgish practice the EPO is mostly used for unpaid invoices, either related to consumers or in the context of insolvency; constellations are mainly B2B or B2C. It is not unusual to go to courts abroad, especially courts of the neighbouring countries (Belgium, France and Germany). The assessment of the instrument is mixed. The EPO provides for a judgement enforcement tool via standard forms, with a view to simplify the procedure. The actual helpfulness of the forms may nevertheless be contested: in his own experience, a lawyer always needs to go beyond the form to achieve his/her purpose. In addition, it takes lot of time to get used to the forms: they are not self-explanatory; understanding them and filling them in is burdensome, especially for the debtor. This point needs reform, as quick as possible, profiting from the modern means of communication and IT.

A second concern is the protection of the defendant. The service of the EPO in Luxembourg is made by registered letter with receipt. Should the registered letter end up in the mail box of another person, the debtor will nevertheless be deemed to have received it. If the 'avis de depot' gets lots the defendant will not know about the letter, because he will not have been to the post office. Next thing the debtor will know is the bailiff knocking at his door to enforce an order he was never aware of.

Regarding evidence, whereas it is true that EPO regulation does not require the attachment of evidence to the application, in practice judges seem to prefer having it: otherwise no control is possible on their side.

Opposition to the EPO is working quite well. The downside is that in Luxembourg it leads to a long, slow written civil proceeding, as foreseen in the Code de Procedure.

As far as Luxembourgish courts are concerned, they grant EPOs regularly, free of charge; there is little request for additional information. Some difficulties arose at the beginning due to the fact that the EPO was issued in the language in which it was requested, independently of the ME where it was to produce its effect. The issue seems to have fixed now, with the form of the injunction being printed in French and in other languages.

IV. European Small claims Procedure Regulation ("ESCP")

Chair: Dr. Veerle Van Den Eeckhout (*Senior research fellow, Max Planck Institute Luxembourg*)

Speakers: Dr. Alina Ontanu from the University of Rotterdam in the Netherlands. Julie Jasson, lawyer, European Consumers Centre

i. Dr. Alina Ontanu (Assistant Professor, Erasmus School of Law, The Netherlands)

Summary: French practice regarding the ESCP shows the use of the instrument is not as simple as it is supposed to be. Some of the difficulties come from the fact that parties willing to use the instrument are lay parties. Difficulties arise as well from the interaction between the ESCP procedural law and the national procedural law. In France a chapter was added to the procedural code to include the ESCP; the code of commerce and the code of judicial organisation were also amended. Additionally, a Guide was published, explaining some aspects of the implementation and the use of this procedure. However, guidelines are mostly targeting practitioners - potential lay users do not find much support in them. Identifying the competent jurisdiction may prove too complicated for someone without a legal training.

The ESCP does not seem to be popular in France (a caveat: data on the actual use of the regulation may not be accurate; the Ministry of Justice's data do not correspond to the statistics of the European Commission in the Deloitte report about the ESCP; moreover, commercial courts statistics are not available). Consequently, awareness as to the existence of the regulation does not automatically translate into familiarity with it. In turn, the limited acquaintance with the regulation explains the tendency of judges and practitioners to handle the ESCP as if it was the parallel national procedure, instead of a self-standing European,

uniform one. Sometimes, they even automatically apply the characteristics of the national procedure to the ESCP. These problems -lack of familiarity and experience- could nevertheless be addressed without major amendments: for instance, concentrating this type of claims in small courts. Actually, from the data gathered it can be concluded that in terms of timing to handle the procedure, French courts generally manage quite well and stay within the time frame the Commission wanted to achieve (6 month period); this may be due to the fact that ESCP cases are usually allocated to judges having a low workload.

All cases the speaker was able to get information about concerned consumers; claims were filed to get a judgement for purchases made online, which were either not delivered or defective. Cases show that the parties have not resorted to lawyers but relied on the ECC to complete the forms or to communicate with the court in a different language than their own. In this regard experience shows that more help and information is needed for the parties, but also for the practitioners (the e-Justice portal information is not always updated, available in all the official languages, or to the point). It has been noticed that forms are perceived as challenging in practice; even if from the experience of ICC France the ESCP forms are much easier than those of the EPO, lay users still have trouble to understand them. Courts also show some reluctance against forms: parties have sometimes been requested to fill in the form again because it should look exactly like the one in the Annex of the regulation. Requests have also been made to correct the standard forms because the information was not properly filled in by the party.

Costs are also problematic: a French consumer wanting to enforce the ESCP judgement in Germany was asked by the bailiff in the latter country to pay 300 e. for translation purposes while the value of the claim itself was below that sum.

ii. Ms. Julie Jasson (Lawyer, European Consumer Centre, Luxembourg).

Summary: The ECC supports consumers by providing information on the ESCP; in 2017, some 2.600 queries were processed in this regard. Judging from that experience it can be safely concluded that the ESCP remains much too complicated for the average consumer. Many complications are linked to the language - the translation of the free parts of the form into a foreign language-, the identification of the competent court, the (high) costs of the procedure, and its actual length.

The ECC does not usually get feedback from the consumers applying for support who later filed a claim in a foreign MS as to how the ESCP unfolded there. However, some cases have been reported, showing how the procedure is (mis) understood or (mis) applied: for instance, in Spain, to hold an audience is not the exception but the rule, in spite of the clear wording of the regulation. Furthermore, cases have been reported regarding the difficulties experienced at the enforcement stage.

In spite of all the problems, the ECC has a positive view of the ESCP and praises the increase of the amount ceiling to 5.000 euros. The ESCP has proven useful in that it encourages the counterparty of the consumer to reach an agreement and settle instead of going to court.

V. European Account Preservation Order Procedure Regulation ("EAPO")

Chair: Carlos Santaló Gorís (R*esearch fellow, Max Planck Institute Luxembourg*)

Speakers: Dr. Katharina Raffelsieper (*Lawyer, Law Firm Thewes & Reuter, Luxembourg*); Ms. Katrien Baetens (*Managing Associate, Dispute Resolution at Linklaters, Luxembourg*); Mr. Grégory Minne (*Lawyer, Arendt & Medernach, Luxembourg*) / Ms. Clara Mara-Marhuenda (*Lawyer, Arendt & Medernach, Luxembourg*)

i. Dr. Katharina Raffelsieper (*Lawyer, Law Firm Thewes & Reuter, Luxembourg*)

Summary: The EAPO regulation is a rather new instrument aimed to facilitate cross-border debt recovery for monetary claims. It is rather complex; it builds on the different national civil procedural laws and the enforcement systems. It was adopted in May 2014 and has been applicable since 10th January 2018. Denmark and the UK are not participating in this regulation.

The regulation has a symbolic value, as it is the first instrument which goes beyond the enforceability of a foreign title and actually tackles the enforcement as such. In terms of practical use it represents an advantage over the Brussels I Regulation and the Brussels I Recast, according to which the recognition of provisional measures in another member state is not possible if those measures where delivered ex parte, without the prior hearing of the debtor; therefore, creditors have to go to the courts of the Member States where they want to enforce their title. The EAPO intends to facilitate access to provisional measures and establishes a uniform procedure; it sets common rules regarding jurisdiction, but also for the enforcement of the order. Besides, one of the main advantages of the regulation is that it preserves the "surprise effect" -crucial for enforcement for it prevents the debtor's concealing of assets - in cross-border cases, meaning there is no prior notification of the measure to the debtor.

The regulation applies to monetary claims in civil and commercial matters in cross-border cases, with some exceptions similar to the exclusions in the Brussels I Regulation. It provides for a definition of cross-border cases; in this regard, it is important to know that the creditor must be domiciled in a MS.

The regulation aims to synchronize the jurisdiction on the merits and the jurisdiction on the EAPO. By default, the general rules on jurisdiction -Brussels I bis- apply. If the creditor has already obtained an enforceable title, jurisdiction lies where the judgement or the authentic title has been issued. There is one exception regarding consumers: jurisdiction follows the consumer's domicile.

The procedure to obtain the EAPO is supposed to be simple and accessible for creditors without a lawyer. Forms are available on the internet in all the official languages; they have to be filled in by the creditor. In addition, the regulation permits the use of new technologies, such as video conferences, and other electronic means if these are accepted under the law of the MS concerned.

The substantive conditions to obtain a preservation order are set out in article 7. As a general requirement the creditor must provide the court with sufficient evidence of the urgent need for the measure. Besides, if the creditor has not yet obtained an enforceable title he also has to prove that he is likely to succeed on the merits.

In the application form, the creditor has to provide the court with specific information, including information concerning the debtor's bank account. The regulation also provides for an instrument for the creditors to obtain that information.

If the creditor has not yet obtained an enforcement title, he is obliged to initiate proceedings on the merits within a timeframe, which is usually 30 days. Otherwise, the court will withdraw the order. The creditor must also provide a security for the amount seized. In addition, compensation may have to be paid to the debtor for any damages he may suffer resulting from the freezing of the account.

According to article 18, the court should generally decide on the application within 10 working days. Nevertheless, if the creditor has already obtained a title, the deadline is shorter - the court has to issue the order on the fifth working day. In case the court refuses the application of the order, the creditor can appeal the decision.

Note of the drafter: Enforcement of the EAPO was not addressed due to time constraints

ii. Ms. Katrien Baetens (*Managing Associate, Dispute Resolution at Linklaters, Luxembourg*)

Summary: So far there are very few cases on this regulation in Luxembourg. It is for the national states to see how they implement the regulation; in this regard it must be recalled that the regulation only handles the conservatory measures, but it does not take into account the actual enforcement. The EAPO can be used to block the accounts and the assets: but it does not foresee on how to take the money once it is blocked.

Luxembourg is now in the final stage regarding the approval of the legal mesures for implementing the EAPO.

Note of the drafter: the explanations regarding the proposed legal amendments to Luxembourgish law are not included in the report.

In comparison to the Luxemburgish *saisie-arrêt*, the EAPO presents both advantages and disadvantages:

It requires the use of forms; their design might not be problematic for big firms with a law department, but it is for the average consumers.

According to Luxembourgish procedure, an enforceable title can be immediately enforced by a bailiff: the debtor's account will be blocked in one day. In the case of the EAPO, if the creditor already has the enforceable title it takes 5 days; if not, it takes 10 days.

The EAPO is meant for security deposits; this may have a discouraging effect for an unexperienced creditor.

Once the order has been issued, it has to be served on the banks for them to actually freeze debtors' assets. In the case of the Luxemburgish *saisie-arrêt* the bank does not make any declaration so that, until the very end of the procedure, the creditor does not know whether

the bank served actually keeps assets on behalf of the debtor or not. Under the EAPO the banks are under an obligation to make a statement on the assets within 3 working days (8, under exceptional circumstances). Moreover, there is a possibility to request information on the accounts, which permits to know whether the debtor holds an account with the bank; this is very different from the Luxembourg procedure, where such kind of mechanism does not exist. The EAPO thus definitely has an advantage against the Luxembourg procedure for the creditor in this regard.

After service on the banks is accomplished, under Luxembourgish law, banks have 8 days to effectively attach the account, against 3 days under the EAPO.

The EAPO provides much more possibilities for the creditor and the debtor in terms of appeals and remedies. In the Luxembourg *saisie-arrêt*, there is no possibility of appeal against the refusal to issue the order- therefore a new request has to be filed adding more elements. Conversely, the EAPO allows an appeal.

Under Luxembourgish law the seizure can be lifted if the creditor and the debtor reach an agreement: the debtor is willing to pay and comes to an agreement; the creditor will inform the bank. Besides, the debtor can request the withdrawal of the *saisie-arrêt* from the same judge who ordered the *saisie-arrêt*; the judge will review again its own *saisie-arrêt* from the perspective of both sides -whereas in the first occasion this was an ex parte procedure. There is also a possibility for *cantonnement:* the debtor asks the judge to put aside money which could be used to pay the creditor, and to lift the seizure.

Under the EAPO there is a series of remedies available for the debtor, both in the member state where the EAPO has been issued and on the member states where the order is enforced. Possibilities are multifold; there is also the right to provide security in lieu of preservation.

iii. Mr. Grégory Minne (*Lawyer, Arendt & Medernach, Luxembourg*) / Ms. Clara Mara-Marhuenda (*Lawyer, Arendt & Medernach, Luxembourg*)

Summary: (*Note: the presentation focused on the EAPO from the perspective of the Banks)*

The EAPO regulation applies to cash held by banks. The attachment of shares or of monies held by a third party who is not a bank cannot be made with a EAPO. A bank is a financial institution that receives deposits from the public and loans credits to its customers; there are no discussions on the concept of bank itself; there are, though, regarding the definition of "branch". From the Luxembourgish point of view, for the purposes of an EAPO on accounts held by a Luxembourg branch of a foreign bank, the accounts are located in Luxembourg. French lawyers, on the contrary, consider that the accounts kept in the Luxembourgish branch of a French bank "belong" to the latter.

The banks receive part A of the EAPO, which contains information in relation to the court of origin, the court issuing the EAPO, information on the creditor, information on the debtor, the date of the order, of course information on the bank accounts to be seized, and on the amount that is to be preserved. In Luxembourg, the EAPO is served by the competent authority - the bailiff, *huissier de justice*. According to the regulation, the bank must implement this order immediately - however, there is no specific definition of "immediately" on the regulation.

The EAPO produces the same effects as its domestic equivalent order, the *saisie-arrêt.* However, the bank will implement EAPO as any domestic order, but only for the amount specified on the EAPO, whereas in the case of the *saisie-arrêt* it has to freeze the account as such, even if the credit balance is superior to the amount of the underlying claim.

The creditor must provide the IBAN number; if he does not have this information, the name and the address of the bank are sufficient. Indeed, if the bank is not able to identify the account it will not implement the EAPO. Nonetheless, under the EAPO the creditor is entitled to make a request for obtaining information on possible bank accounts of the debtor.

After implementing the EAPO, the bank must make a statement regarding the actual funds that have been frozen, using the standard form or the form of the regulation of 2016. The declaration must be issued within 3 working days from the presentation of the EAPO. In exceptional circumstances, the bank will issue the declaration within 8 working days. Banks complain about the delay being too short. Indeed, the timeframe is very short in comparison to the Luxembourg corresponding domestic order: in the context of the *saisie-arrêt* procedure, the bank has to issue a declaration only after the validation of the *saisie-arrêt* or the judgement of validation (a judgement on the merits which can take several years after the *saisie-arrêt*), unless the creditor already has an authentic title. Thus, the debtor does not know for several years whether monies have actually been frozen. On the contrary, in the EAPO regulation the creditor is immediately informed after the bank issues the declaration. If the bank fails to comply with this obligation it incurs liability governed by the law of the member state of enforcement.

It may happen that moneys are already pledged in favour of a third party, or of the bank. A first example: according to the bank's general terms and conditions there is a pledge for the whole assets in the accounts; if a client is in default - for instance, he fails to repay a loan- the bank has the right to freeze the cashes and get the money back. A second example: a third party lender grants a loan to the client of a Luxembourgish bank, with the benefit of a first-ranking pledge over the cash accounts in Luxembourg; this means the lender will prevail in front of everybody. In other words, the pledge will have priority over the seizure.

Two final remarks on the EAPO: this first one concerns the time limits for the banks to disclose, upon request by the information authority, whether the debtor holds an account with them (art.14.5, a); the regulation is silent in this respect. The second relates to the situation where the debtor and the creditor have settled. In the domestic context, it is sufficient for the creditor to send a letter to the bank asking for the attachment of the assets to be released. Under the EAPO the form (Annex 2) includes a specific field for the creditor to authorize the bank to release the funds upon request of the debtor; if the creditor does not fill it out, both parties must expressly ask for the revocation of the EAPO. It is therefore recommended to complete the field in case of a potential settlement with the debtor.

VI. Related Projects

Speaker: Ms. Alice Canet *(ArteJuris, France, avocate. REDRESS 17 project)*

The *Redress 17* project is a project funded by the EU Commision; the project leader is Verbraucherzentrale Brandenburg e.v.. The European Consumer Center and the Polish

Consumer Protection Agency are both partners. It focuses on the effectiveness of cross-border enforcement of decisions obtained under simplified procedures. The project was done in three stages: comparison of systems of enforcement; comparison of practices based on surveys; the last step - ongoing - is the identification of good practices (notably in France, Germany and Poland) to finally propose concrete improvements.

No experience has been reported on enforcement within the scope of the EAPO.

As for the EEO, the outcome of the research shows that it is relatively well-known among the professionals who were interviewed. It must be noted however that we interviewed thousands of lawyers and bailiffs, but only obtained 75 responses in France. Of these, only about half, for lawyers, and one-third, for bailiffs, admitted to using the EEO. All in all, very little experience, and this including Strasbourg.

Regarding the EPO, it seems to be the instrument most used among the practitioners interviewed. Despite this, there is still an important lack of awareness and understanding of the text (among all practitioners - lawyers, bailiffs and judges). Everyone is lost as far as this instrument is concerned. The articulation between the European procedure and French law is not clear. An example: the EPO requires the court to ensure that service takes place according to national law; according to national law, the plaintiff is responsible for the service. This articulation generates difficulties. The forms are complicated to use as well, and not clear.

On the ESCP, the personal experiences with it have been rather discouraging: the client - consumer- was unable to fill out the form: instead of naming the defendant in the corresponding field, he wrote the lawyer's name. In turn, the judge was unwilling not to hold an audience, as he would do under the parallel national procedure.

The project itself has gathered very little information regarding the ESCP, which is probably the consequence of the claimants not hiring a lawyer for litigation of so little value; vice versa, lawyers do not accept such cases - they are not worth the work. The forms are clearer, probably because this regulation was drafted after the other two.

The fact that the Brussels I bis regulation continues to apply to the same kind of disputes is an additional factor of complexity.

A general conclusion of the *Redress 17* project is that all professionals regret the lack of clarity of the texts (in particular how they relate to each other). The articulation between the regulations and the national law is also unclear. National rules differ, notably on the questions of interest rates and exchange rates; it is necessary to find out which rate of exchange applies and which date - whether the one when the contract was agreed; the date of the judgment; another date - is to be taken as departing point for the calculation. There is no sufficient or easily accessible information as to the interest of getting a European certificate, or regarding how to obtain it, thus legal advice is needed, with the corresponding expenses. The little experience of the professionals with the regulations leads to significant delays and misapplication of regulations. Training is of the essence, but as not all judges, lawyers and bailiffs can get it, a centralized jurisdiction may be a solution (like in Wedding, Germany), also for enforcement purposes. Another way out could be a harmonized European procedure

for enforcement, not replacing the national ones but being additional to them; it would also be advisable to have one single language for the purposes of cross-border enforcement in all Europe, which could be English (it has actually been adopted in several specific courts in Germany, Belgium and The Netherlands).

VII. Debate

Chair: Prof. Marta Requejo Isidro (*Senior Research Fellow, Max Planck Institute Luxembourg*).

(*Court bailiff*)

On the speed and immediacy of enforcement. The UIHJ has published the "Global code on enforcement", which sets minimum standards -such as speed and immediacy- all judicial officers must meet for a successful and fair enforcement. In this regard, the second generation regulations may be a problem. If an enforceable title such as the EPO is sent to an enforcing officer in another EU State, and there the title needs to be validated by a court before being enforced, a very strong breach in the efficiency of the speed of enforcement occurs.

On the security of service. Furthermore, one of the strong issues the UIHJ stands for it is the secure service of documents. Both the ESCP and the EPO have secondary and alternative ways on serving the order for the debtor to appear. Experience of quite a few practical complications with that already exists, and the ECJ has given a few decisions - see in particular the recent *Novo Banco* decision, case C-354/15.

On providing information and advice. Informing the debtor of his or her rights matters. It has been said a few times during the presentations that a debtor is not always aware of what is expected from him in these procedures. Besides the forms are not always clear. Therefore, the security that the bailiffs offer may prove to be something very necessary.

(*Bailiff*)

On the security of service. Service of documents by post or by email may be dangerous; there is no guarantee that the document will reach the correct addressee. An email sent via Gmail, Outlook or Yahoo may get transformed in the way (thus no guarantee exists as to the correctness of the contents). With the second generation regulations, an enforceable title is easily obtained thanks to the forms, but there is no certainty that the form is received by the correct person. The core question here is not whether service should be made by email or not, but to make sure the document ends up where it should. In this regard, initiatives such as the eCODEX project, or the « signification électronique » in Belgium, are worth looking up.

On diversity at the enforcement stage. The UIHJ has produced questionnaires on the regulations, with 300 questions each, aiming at a better understanding of them. In addition, the Union's website provides for sheets corresponding to the different countries, offering relevant data on the enforcement systems. Diversity is the main feature in this regard; even when the starting point is harmonized European texts, we end up with as many solutions and

as many enforcement regimes as there are MS. The UIHJ, with the Global Enforcement Code, is trying to achieve some uniformity by way of generalizing good practices.

On training and information. Training is of the essence, and so is raising awareness among the population. Practitioners must learn and evolve in order to be capable to apply the instruments in an efficient manner.

(*Bailiff*)

His own professional experience with the service regulation (Regulation 1393/2007) is that it works extremely well, and that judgements are as perfectly served on a debtor abroad as they are to a Luxembourg-domiciled debtor. It is at the enforcement stage that problems arise, mostly in relation to small and seemingly unimportant details. To start with, the enforcement of a EET or a EPO always poses difficulties regarding the calculation of the interests increasing the principal; the harmonization of the interest rates at the European level would be welcome. Costs raise issues as well, as practices among the MS differ: for instance, they are not always indicated in the European title. In this context a *décompte,* which is a document everybody understands, could be a good addition to the regulations' forms.

Another point which would profit from an answer at the EU level would be the "address" concept. Citizens are under a legal obligation to have an address for official purposes only in some MS; where they are not, the decision on where to serve becomes a source of additional complexity for a bailiff.

Some other examples of underperformance of the system would be the following:

- For the EAPO, form A - to be served on the bank-, and B - to be served on the debtor- are not independent documents in the website (the end of form A and the beginning of form B are on the same page), thus in order to print out only one of them the document has to be manipulated.

- According to Art. 28(5)(c) EAPO regulation, copies of all documents submitted by the creditor to the court in order to obtain the order must be served on the debtor. However, the bailiff cannot guarantee that he himself has received all and the same pieces previously presented to the judge by the creditor.

- Lawyers are not entitled to issue an EAPO, but it happens in practice.

- Banks do not abide to their obligation to provide information on the debtor's accounts in 3 days, but much later.

- An EEO cannot be obtained from a Luxembourgish judge against a debtor having assets abroad in case he, the debtor, is domiciled in Luxembourg.

- When enforcement has to take place abroad, it is never easy to determine who to address (thus the added value of the initiative "Find a bailiff").

- Each MS's practices on enforcement and the way the involved professionals act, differs.

(Judge)

The complexity of the EAPO suggests that a parallel approach for the small and medium enterprises and the consumers should be given up, and the focus should be put on business to business litigation. In these constellations, creditors are advised by medium or big size law firms, highly specialized, and amounts go near the millions. If the creditor presumes from the start that there is bank account in only one other Member State, it will make sense to simply try a national measure. The EAPO is useful for multi-national litigation scenarios. It is an interesting tool, especially the mechanism in Art. 14, on obtaining bank account information. Compare with Germany, which is relatively strict on data protection; there is no possibility to get account information. If you want to enforce under German Execution law, you must have this specific bank account.

If we look at the Regulation from a judge´s point of view, the problem lies in its complexity, in a domain (enforcement) where clear-cut rules are of the essence. One example would be the security. Art. 12 foresees two scenarios: In the first scenario, the title has already been obtained; in the second scenario, it has not. In the first situation the provision of security is left to the discretion of the court. In cases where the creditor has not yet obtained a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the provision of security should be the rule; the court may dispense with this requirement, or require the provision of security in a lower amount, only exceptionally if it considers that such security is inappropriate, superfluous or disproportionate in the circumstances of the case. But (putting aside the examples provided for in recital 18), what does "inappropriate in the circumstances of the case" mean? What must be taken into consideration by the judge: is it the validity of the claim; the claim's probabilities of success, or the fact that the damages likely to be generated are very high? If so: What is a "high damage"? Must the judge look into into the financial setting of the debtor? Should the fact that the defendant is wealthy and the claim relatively low matter in any way?

This is one point. A second one is the amount for the security. How much should it be? Do we have to analyze the law applicable according to art.13? This art.13 is relatively poorly drafted, because it is a mixture of a conflict of law rule and European standards that interfere with the applicable law. In multi-national litigation, there may be even a change of the applicable law if enforcement takes place in several countries.

Besides, the security can be challenged according to art. 33, it is not clear on which grounds - could it be challenged, for instance, arguing the title is void, or that the security is too low? In the face of the silence of the regulation, national law applies, which means a different solution may be reached depending on the MS. In this constellation coordination would be needed.

In a more general vein, one should be aware that the European procedures under examination are not daily business. If they were, reluctancy from the judges facing such complex mechanisms would be the rule. At the same time, if judges only get a EEO, a EPO, etc, one or twice per year, and have to start digging for information for this reason, they will be confronted with such an amount of dense legal literature that they would be unwilling to go into the details. In this context the German solution of a specialised, centralised judge in Berlin-Wedding for the EPO has been very much praised. However, at the end of the day it may be that it works rather because parties do not appear before the court. Otherwise, a single

court for a whole, big country, would not be a good solution in terms of accessibility, and will probably deter from going to court, at least for the small claims procedure.

(*Lawyer*)

(Reporting on a positive personal experience of his with the EPO forms, and claiming the outcome could never have been achieved under the Brussels I bis regulation)

(*Lawyer*)

(Reports on positive professional experiences regarding the small claims regulation, but claiming the ceiling should not be 5.000 euros. Insisting on the need for legal advice, even for small claims, and showing how difficult it is to find the approppiate one for lack of adequate information, even on the internet. Also comments on Denmark and particularly the UK - with the City of London being one of the world largest financial markets- not applying the EAPO as a loss. Asking on how Art. 14 of the EAPO, which is revolutionary from the German point of view, has been received in the MS. Praising the role of insurance for legal costs and wondering how it works in MS other than Germany)

(*Lawyer*)

(*On the importance of a sound articulation of the different professionals involved in the functioning of the regulations, namely lawyers with bailiffs and clerks. On the need of better training of the professionals).*

Prof. Christian Kohler, external evaluator

(*On whether, from the point of view of the French and Luxembourgish professionals, attending the seminar the EET, the EPO and the ESCP could be expendable and replaced by the Brussels I bis)***.**

(Answer: no. In particular)

(*Judge*)

The three regulations alluded to by prof. Kohler, and especially the EPO, are widely used in Luxembourg. In Luxembourg City almost 100 EPOs have been delivered so far this year alone. A similar assertion applies to the ESCP. The instruments are really needed in Luxembourg, maybe due to the cosmopolitan nature of the population and, above all, to the high number of commuters residing in France, Germany and Belgium, but working in Luxembourg.

On the other hand, the exceptional character of the audience - as it is the case for the ESCP- , might not be in the interest of justice in each single case. Whenever distance is a surmountable obstacle, a hearing remains the best way to help understanding the facts of a

case. Moreover, IT means like videoconferencing cannot be compared to a face-to-face situation.

(*Bailiff*)

The EPO is very popular in Belgium as well, with several hundreds of orders being delivered every year.

(Closing remarks and acknowledgments)