

How to Ensure an Effective System of Enforcement of Judicial Decisions

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Enforcement or Execution of a Judgment – General Remarks

- All countries have procedures intended to overcome the resistance of a party who fails to comply with the judgment of a court
- Rules for the enforcement of judgments in civil-law countries are in some respects similar to those in the United States or other common-law countries, although differences do exist between CL and continent and between countries in Europe too. In some countries rules are highly technical.
- Common starting points: executory title: mostly final judgment or other decision, other by law provided executory document- certified true copy of that judgment or document or registration in CL countries.

Two systems:

1. Garnishee order (writ of execution, rješenje o ovrsi) is an order/decision of the court
2. It can be issued by an enforcement agent distinct from the courts – whether an independent professional or a State enforcement agency.

Different Effects of Seizure

- English law: the debt must be due but not liquidated
- Other legal systems may allow seizure in a wider variety of circumstances
Germany: money claim of a debtor against third party may be seized even when it is not due, and indeed even when it is dependant on the debtor performing his part of the contract or when it is conditional on some external event

ZIZ - SLO

- This Act has its roots in Yugoslavian Enforcement Act (ZIP) and hasn't really changed its concept. To the extent that improvements have been introduced in recent years, they focused on two areas. The first has been to introduce restrictions respecting the entitlement of judgment debtors to exemptions from execution (real estate enforcement - no right to stay in the sold house) and further development of provisional measures. The other change was more controversial and involved the "privatization" of part of the execution process, moving the duties in relation to the seizure and sale of property from the court clerks office to private bailiffs. Necessary adaptations regarding executory titles from EU countries have also been introduced recently.

Some Details on Introduced Measures for higher Efficiency of Enforcement in Slovenia

- Private enforcement agents – bailiffs
- Legal remedies (opposition, complaint) doesn't postpone the prosecution of the enforcement,
- the lawsuit for enforcement inadmissibility is only admissible after final decree (writ of enforcement /garnishee order)
- The opposition of the debtor and the third person has to be substantiate - if not is to be rejected
- Affidavit, a written statement of a debtor about extent and location of his property can be required under threat of committing false testimony criminal act
- Rules to collect personal data - balance between the legitimate interests of creditors and the respect for individuals" privacy (Personal Data Security Act).

Further Some Details on Introduced Measures for higher Efficiency of Enforcement in Slovenia

- Multiple repeated seizure
- Seized cash may not be distributed until the enforcement decree becomes final – exemption the enforcement in business matters
- Nonmaterialized securities – special rules for enforcement
- Enforcement on the ground of authentic instrument – fusion of two procedures – one decree two parts:
 - 1. Payment order (condemnatory claim)
 - 2. Garneshee order (dozvola ovrhe)
- Provisional and protective measures, mortgage establishment as protective measure
- Register of mortgages for movables

How to improve the system to deliver effective enforcement now and to adapt it to future needs

There are a number of areas to be examined:

- To long and complicated court procedure
- On the other hand concerns have been expressed that the private bailiff system lacks accountability for the way in which executions are conducted

Needed:

- An adequate regulatory system and fairer fee structure for all enforcement agents.
- Changes in the procedures for execution against land/real estate – now too long, too expensive, many times inefficient

For discussion:

- Very controversial mechanism for discussion: seizure of a bank account or other debt to take place without the need to further court intervention, once a judgment on the merits has been obtained or any other executory title. Many legal systems allow this already.
- Special improvements are needed for enforcement of obligation to do or refrain from doing some act

Proposed Radikal Change of the ZIZ -Notarial Sale

- Notarial act creating a mortgage – executory title
- Notary shall enforce the mortgage by selling the property of the debtor
- Requirement of judicial oversight of the proceedings ?

Balanced Protection of Rights of Both Parties

Searching for efficient enforcement and for the protection of rights of the creditor must not ruin fair enforcement system

Necessary balance between rights of the creditor and debtor - safeguard those who are genuinely unable to repay their debt

Object of Enforcement - Exemptions

- All property that is not exempt by a specific statute, as well as income earned and debts owed by third persons, are subject to this enforcement process.
- In all countries there are detailed rules exempting certain types of property from seizure, but continental European rules are much less generous toward the debtor than corresponding rules in the United States.
- Exemptions generally are given for such necessities as wearing apparel, tools and implements used in earning a living, household furniture, and such personal items as wedding rings, family Bibles, and family photographs.
- The remedy of garnishing the earnings of the defendant, although generally permitted, is accompanied by certain safeguards to prevent oppression. Thus, only if the debtor fails to make payments voluntarily, can his wages be seized, only a limited percentage of the wages. In France, for instance, all wages exceeding a stated amount may be seized, whereas in New York no more than 10 percent of wages may ever be taken. If several judgments exist against a debtor, threatening to exceed his available assets, other procedures are available to ensure that these assets will be distributed fairly. To some extent, such procedures replace bankruptcy, which in some European countries is available only to businessmen and not to private debtors.

Transborders Enforcement

- Conflicts of laws
- State of origin of executory title
- State of enforcement

International agreements

European legal order

National conflicts of laws act

European Civil Procedure

turning points

- Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
- Maastricht Treaty in 1993,
- Amsterdam Treaty 1999 brought judicial cooperation in civil matters into the Community framework.
- Special meeting at Tampere in Finland in October 1999 - further development - ***European Council called for a further reduction in intermediate measures needed for enforcement of foreign judgments***
- Treaty of Nizza, a concerted action of the European Parliament and the Council became necessary in order to adopt the European Enforcement Order Regulation (see Articles 67 (5), 65, 251 of the EC-Treaty)

REGULATIONS – JUDICIAL COOPERATION IN CIVIL MATTERS – *European Civil Procedure*

- 1.Reg. **44/2001** Jurisdiction and recognition and Enforcement of Judgements in Civil and Commercial Matters (Brussels I Reg.) ***in force on 1 March 2002***
- 2.Reg. **2201/2003** of 27 November 2003, val. March 05 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, (Brussels IIa Reg.) repealing Reg.1347/2000.
- 3.Reg. 1346/2000 on Insolvency Proceedings
- 4.Reg. 1348/2000 on service in Member States of judicial and extrajudicial documents in civil or commercial matters
- 5.Reg. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters will improve, simplify and expedite cooperation between courts as regards evidence.
6. Reg. **743/2002** of 25 April 2002, establishing a general framework for Community activities to facilitate the implementation of judicial cooperation in civil matters.
7. Reg. 805/2004 creating European Enforcement Order for uncontested claims

Mutual recognition of judicial decisions – simplified access to enforcement

Reg.

- Brussels I and II
- European enforcement order

Automatic recognition without any special procedure being required - recognition implied in declaration of enforceability

Recognition separately only for declarative or constitutive judgments

incidenter proceeding –only objections defined in reg.

Judgment on recognition as the principal issue can be required by an interested party-
only objections defined in reg.

Enforcement of foreign judgment or other instrument - **necessary two steps :**

1.enforceability in state of origin,

2.enforeability declaration in the state of enforcement

Scope

Brussels I:

- civil and commercial matters excluding revenue, customs or administrative matters.

It does not apply to:

- the status or legal capacity of natural persons, matrimonial matters, wills or succession;
- bankruptcy;
- social security;
- arbitration.

Brussels Ila:

matrimonial matters and

matters of parental responsibility for children of both spouses

Judgment and other enforceable documents

- 1. »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 the determination of costs or expenses by an officer of the court.
- 2. authentic instrument and settlement— two cumulative conditions :
 - 1. Officially drafted or registered in a member state
 - 2. Enforceable by the law of the state in a member state without further necessary proceedings.

1. step: enforceability in the state of origin

- First condition for exequatur (enforcement declaration in the member state in which enforcement is sought) is the enforceability of the document in the state of origin
- Under Slovene law an enforcement title is a document foreseen as such by the law if two of further conditions are fulfilled
- 1. decision (judgment or other decisions)
- - res iudicata (pravomočnost) if it's not foreseen that the complaint doesn't postpone the enforcement
- -expiration of a term for voluntary performance of the claim (paricijski rok)
- 2. court or administrative settlement
- -is by concluding it res transacta
- -falling due of a claim
- 3. notary act settlement
- -accordance of a defendant with direct enforceability of a defined claim
- -falling due of a claim

Certificate of enforceability in the state of origin

- Article 54, 57.
- The court or competent authority of a Member State of origin shall issue, at the request of any interested party, a certificate of enforceability using the standard form
- in Annex V (for judgments and decisions) in Annex VI (for enforceable authentic instruments and settlements),

the enforceability of decisions is certified by the authority which issues the decision (court or administrative authority)

- the enforceability of an authentic instrument (in SLO notary act, ground debt letter - zemljiško pismo in Germany Anwaltsvergleich) is certified by the notary who issued the public document (in Germany the court).
- **The certificate will be issued if** the conditions under the law of state of origin have been fulfilled

Exequatur in the state of enforcement

- **Article 41**
- The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.
- **Ex parte proceedings** - no service of the request to the other party before delivery of the enforceability declaration, no right for hearing of the debtor.
- **No judicial official review** of obstacles for enforceability declaration. Grounds to reject the request can be first exposed in the legal remedy.
- **Contradictory proceedings** guaranteed with the right to legal remedy against the declaration. The Creditor has the right to a complaint against the rejection of his request.

Formalities for exequatur

- Original title or copy capable of proving authenticity
- Certificate of enforceability of the state of origin on the prescribed form

Simplification of both steps

- **Indication of courts** or other authorities competent for issuing the **exequatur** - enforceability declaration in the state of enforcement, for **legal remedies**
- **Unified forms** for certificate of enforceability in the state of origin and for declaration of enforceability in the state of enforcement
- Legal remedies limited only to ones indicated in the reg.

European Enforcement Order

Abolition of exequatur in the State of enforcement

The Aim

- Like Brussels I, the European Enforcement Order Regulation concerns the enforcement of decisions in civil and commercial matters
- without any possibility of opposing its recognition
- The certified foreign judgments will thus be equalized to national judgments
- The rules do not have to be transformed into the national law but apply directly

Characteristics

- The document has to be declared in the state of origin as EU enforcement title
- Competence for this declaration has to be defined by national legislation.
- The European Enforcement Order Regulation does not regulate the certification procedure in detail but only points out that the application for certification as a European Enforcement Order must be made to the court of origin (Article 6 (1)).
- No appeal against issuing of a certificate
- Rectification or withdrawal of a certificate: The European Enforcement Order shall be rectified, upon application to the court of origin, in cases of a material error that has led to a discrepancy between the judgment and the certificate (Article 10 (1) lit. a). **not even be denied under plea of gross violation of the ordre public of the Member State of enforcement**

Uncontested claims

the exequatur is no more required for certain type of decisions or other instruments:

uncontested claims decisions, issued without debtor's opposing neither to the ground or the amount of the claim

So called abbreviated procedures

two categories

- 1. The defendant actively participated in the proceedings and expressly recognized the claim;
- 2. The defendant has with his passivity shown, that he has no objections to the claim.
- judgment by confession, settlements, express agreement in an authentic instrument, default judgments

Rectification or withdrawal of a certificate

- The European Enforcement Order shall be rectified, upon application to the court of origin, in cases of a material error that has led to a discrepancy between the judgment and the certificate (Article 10 (1) lit. a).
- It shall be withdrawn (Article 10 (1) lit. b) where it was clearly wrongly granted (e.g. under violation of Article 2 regarding the scope of application of the European Enforcement Order Regulation; certification of a judgment on a claim, that is not uncontested in the sense of Article 3; violation of the provisions on jurisdiction in Article 6 (1); for default judgments, violation of the minimum standards regarding service and due information).