

REMOVAL OF EXEQUATUR IN ENGLAND AND WALES

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Summary:

The law relating to the enforcement of judgments in England and Wales is complex: a complexity deriving from the lack of any overall supervision of the procedure. Enforcement tasks are divided between solicitors, judges and other court officers, and independent enforcement agents, and are moreover allocated to two different court systems: the High Court and the County Court. For the creditor who is not experienced in English enforcement law, it may be difficult to know where to get good advice. In addition, information about debtors' assets is not easy to obtain. In the light of these considerations, the amendments to English law that have been introduced to implement the Brussels I Regulation (recast) – removing the previously centralised procedure for registration of foreign judgments and directing creditors to choose among these diffuse enforcement procedures – do not seem to be an unalloyed improvement in the system of cross-border enforcement.

Key words:

Cross-border enforcement, enforcement agents, access to information, choice of procedures, protective measures

1. The system for enforcement: what authority or authorities are competent in relation to enforcement in England and Wales?

The three basic types of system to be found in Europe are administrative (e.g. Sweden, Finland), independent liberal professional (e.g. France), and court-based (e.g. Germany, Spain, Italy).

These are not neat categories, however. Systems that are primarily court-based may employ independent or semi-independent agents to undertake tasks that involve activities outside the

court – such as visits to the premises of the debtor for service of documents or seizure of assets. The English system is just such a hybrid. Enforcement of judgments is in principle through the court and its officers, but many of the relevant officers of the court are independent professionals such as solicitors and High Court Enforcement Officers (HCEOs). Much of the practice of enforcement is undertaken by HCEOs who, in addition to their licensed activities as court officers, offer a range of services related to debt collection and so share some characteristics with the liberal professional enforcement agent (*'huissier de justice'*) found in a number of European jurisdictions.

The law on enforcement is complicated by the existence of two court systems: the High Court and the County Court. The High Court is one of the Senior Courts of England and Wales.¹ It deals at first instance with all high value and high importance cases.² Although its central office is in London, almost any High Court case can be commenced in a District Registry – which is usually to be found in the same building as the local County Court centre. In enforcement matters, the High Court has sole responsibility for enforcing judgments for more than £5000 (including interest).

The County Court is the successor to county courts that were established by statute in 1846, replacing the earlier heterogeneous and ineffective local court structures. It is now a single, centrally organised and administered court system, sitting in County Court centres. The County Court deals with civil cases where the amount in dispute is relatively small, as well as having various special competencies. It has the exclusive responsibility for enforcement of claims

¹ Together with the Court of Appeal and the Crown Court.

² It also has a supervisory jurisdiction over all subordinate courts and tribunals, with a few statutory exceptions.

arising under a regulated consumer credit agreement, and is also the only court in which an application for an attachment of earnings order (AEO) can be made.³

In minor civil and commercial disputes, the County Court is solely responsible for enforcing judgments for less than £600 (including interest). Judgments for amounts falling £600 and £5000 may be enforced in the High Court or the County Court. These thresholds are currently subject to review. HCEOs are arguing for competence in relation to the enforcement of debts of any size.

In principle the Civil Procedure Rules apply in both the High Court and the County Court – but specific provisions may be limited to one court or the other, as in the case of AEOs. In cross-border cases, applications are most likely to be made to the High Court because the amounts involved are likely to be above the High Court threshold. Applications to the High Court are also the default position in relation to applications for a refusal of recognition or enforcement, or for applications for relief against enforcement. Thus for example CPR rule 74.7A(1)(b) states that an application under article 45 or 46 of Brussels I (recast) must be made “to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court.”

In addition to deciding which court to approach, the onus is on the creditor to decide which method of enforcement to pursue from those available, as is commonly the case in court-centred enforcement systems. These methods include:

- i) execution against goods (seizure and sale of movable property)
- ii) charging orders (registration of a security right against immovable property)

³ There is a centralised procedure for attachment of earnings that operates from Northampton Business Centre (NBC). NBC has streamlined, secure computer systems used for various centralised procedures, and notably debt claims.

- iii) attachment of earnings
- iv) third party debt order (seizure of a debt – typically money standing to the judgment debtor's credit in a bank)

In high value cases the appointment of a receiver by way of equitable execution may be an enforcement option, and an application for insolvency, or the threat thereof, is also a common tool for dealing with commercial debtors and acquiring access to information.

The lack of an obvious point of entry to the system makes it immediately somewhat opaque for those seeking to access it from a different jurisdiction. Legal advice may be sought, but the majority of solicitors do very little enforcement work and so are likely to be inefficient and expensive. Finding appropriate legal advice is the first challenge!

2. Getting advice: the choice of solicitor and/or enforcement agent

For those without good prior information and advice, a disincentive to enforcement is the expense of enforcement proceedings. Since the system is not transparent a creditor may need, or want, to employ a lawyer to advise them. A number of debt recovery solicitors advertise fees of about £400 for any application for a method of enforcement. Court fees are in addition to this: for example, the fee for applying for a third party debt order or an attachment of earnings order is currently £100. While additional fees and charges may be paid out of any proceeds of enforcement, these initial fees may prove irrecoverable.

Applications that arise in relation to enforcement, such as an application by the judgment debtor for refusal of recognition or enforcement, will proceed under the standard application procedure in CPR 23. The standard fee for an application on notice is £255 - in addition to the fees of any legal representative. For work going beyond standard applications, solicitors will normally

charge an hourly rate – but some firms offer no win no fee enforcement of judgments, on the basis that they will retain a high proportion of any money collected.⁴

However, unless creditors are aware of details about the debtor that make a specific method of enforcement attractive, the default position is to apply for execution against goods via a writ or warrant of control: a writ in the High Court, a warrant in the County Court. And a specialised service provider – with varying levels of professionalism – has evolved to perform this function: the bailiff, or enforcement agent. Historically they have had a variety of origins and titles, and have been responsible for the enforcement of different types of judgments and other debts, but recent legislation, in the form of the Tribunals, Courts and Enforcement Act 2007, has led to greater standardisation and integration within the industry.⁵ In relation to the enforcement of civil judgments, two types of agents can be identified: High Court Enforcement Officers (HCEOs) and County Court bailiffs.⁶

The predecessors of HCEOs were sheriff's officers – a title with a long history, since sheriffs were bearers of judicial power in England before the Norman conquest in 1066. High Sheriff is now a largely titular and ceremonial role since the law and order functions of the sheriff have long been delegated to others. Until recently, civil enforcement functions in the form of the execution of High Court writs were delegated to an Under Sheriff, usually a solicitor, and performed in practice by sheriff's officers. Like the High Sheriff, their jurisdiction was limited to a single county. The Courts Act 2003 short-circuited this complex process of delegation by

⁴ E.g. Helpland Ltd (www.helpland.co.uk) offer this service on the basis that they retain 60% of any money collected.

⁵ Note that industry, rather than profession, is the term typically used.

⁶ A further type of bailiff involved mainly in the collection of public debts has become regulated under the title of certificated enforcement agents: see the Tribunals, Courts and Enforcement Act 2007, ss.63 and 64.

recreating sheriff's officers as HCEOs and giving them direct authority to enforce writs (in the context of seizure of goods).⁷ It also allowed HCEOs to be appointed to more than one district,⁸ so that many now in effect have nationwide jurisdiction. In practice, this has led to new businesses being established which group together several HCEOs who work together.⁹ New qualifications and training have been brought in to improve training and professionalism.

County Court bailiffs are employees of the court service and trained within that service. As well as service of documents, seizure of goods and evictions, they deal with the committal to prison of those in contempt of court and transport from prison to court. Views differ as to whether they are effective. HCEOs have campaigned vigorously for the power to enforce all County Court judgments, and encourage judgment creditors to transfer judgment debts over £600, and repossession orders,¹⁰ up to the High Court for enforcement.

A very large proportion of enforcement proceedings involve writs and warrants of control, rather than the wider range of enforcement measures which often prove most useful in other jurisdictions. The table below shows the comparative use of various methods of enforcement in the County Court in the period 2002-2011 by way of indication of this,¹¹ and more recent

⁷ Courts Act 2003, Sch.7(4).

⁸ Schedule 7(2).

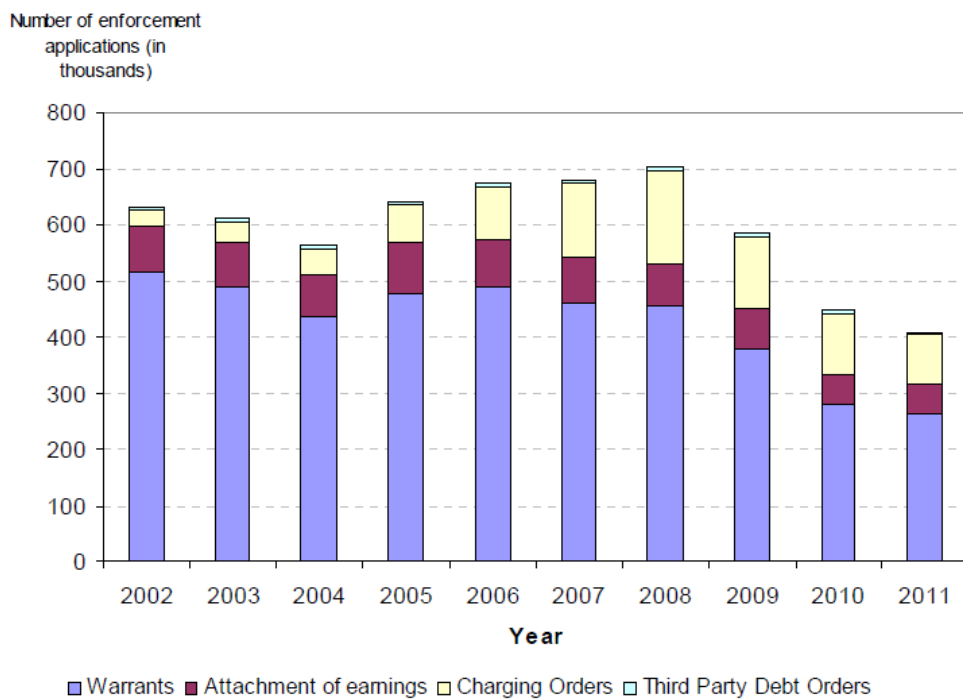
⁹ The nationwide jurisdiction that HCEOs now enjoy has led to the merger or takeover of firms of HCEOs and other parties involved in the debt collection process, so that an integrated service can be offered.

¹⁰ The majority of repossession claims have to be brought in the County Court under s.8 or s.21 of the Housing Act 1988 or the Rent Act 1977 (tenants), or CPR Part 55 (trespassers).

¹¹ Taken from the Ministry of Justice, *Judicial and Court Statistics 2011 – full report* (June 2012), available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf> accessed 4 June 2016.

statistics show warrants of control in the County Court continuing to be issued at nearly double the rate of other the other methods of enforcement added together. The contrast between methods of enforcement is much more marked in the High Court. In 2014, the latest date for which data is available, 41,267 writs of *feri facias* (now writs of control) were issued, but only 445 charging orders were granted, and 201 third party debt orders.¹² Attractions for the judgment creditor are the lower costs of initiating these proceedings directly with an HCEO, and the fact that it is this method of enforcement that is likely to lead quickly to direct contact with the judgment debtor and the pressure to achieve a payment arrangement.

Enforcement applications by type, 2002-2011



¹² In fact the numbers of charging orders and third party debt orders are quite high compared with previous years: see Ministry of Justice, *Civil justice statistics quarterly: January to March 2015 and the Appellate Courts 2014* (June 2015), Appellate Court Tables: 2014, available at

<<https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2015>>

accessed 4 June 2016.

3. Problems of access to information

Lack of information about the debtor's assets is an obstacle to enforcement in England and Wales. It is notable that the trend elsewhere in Europe is towards ensuring that enforcement agents have access to information about the debtor from e.g. tax, social security and/or local authority records. Banks may also be required to provide information. Granting access to information is perceived as problematic in the UK for a number of reasons. In part there is a cultural concern for privacy and resistance to authority. But more specifically, there is a considerable distrust of enforcement agents.

In some Member States enforcement is undertaken by an administrative agency who can access other administrative records. Alternatively access to information may be within the control of the enforcement court. In a number of EU Member States competence to enforce judgments has been granted to independent enforcement agents who claim, or aspire to, a high level of professional training and regulation. In these states it is felt that there are sufficient guarantees for the protection of the debtor, that access to information about debtor assets is justified. In England and Wales, however, despite several reviews, the law has proved resistant to change, and in particular there is a reluctance to identify enforcement agents as professionals and to give them significant powers.¹³ A combination of unclear legal rules and the privatisation of many enforcement operations without the proper training and regulation of the agents involved has historically led to abuses, which have been vigorously condemned by a strong debt advice

¹³ Similar resistance to change can be seen in other jurisdictions where enforcement is court supervised and limited functions are given to the enforcement agents responsible for service of documents and seizure of goods, such as Germany and Spain.

community. The adversarial relationship between these two sides of the industry has damaged the prospects for the emergence of a trusted profession. The most serious problems exist in relation to the collection of public debts by certificated enforcement agents, but all enforcement agents are affected by the resulting public perceptions.

Nevertheless, the new framework created by the Tribunals, Courts and Enforcement Act 2007, the Taking Control of Goods Regulations 2013¹⁴ and the Taking Control of Goods (Fees) Regulations 2014¹⁵ clarifies the rights and obligations of enforcement agents, simplifying the law and trying to make it fairer, while improving the incentives for enforcement agents to act correctly and charge the appropriate fees. Early indications are that this new framework is making a difference. The Ministry of Justice is currently in the process of review of its operation, and certainly there has been a reduction in the number of complaints. But whether this is the first stage on a journey to a professional status is doubtful. The view within the industry and outside is that high levels of education are not required for the work – but rather it is about personal skills, in terms of e.g. organisational, negotiating and conflict-resolution abilities and commercial sense. In discussions concerning a regulator for enforcement agents in the lead up to the 2007 Act, the expectation was that the Security Industry Authority – which deals with security guards and surveillance - would be given this responsibility. This has not happened, and so enforcement of regulation remains diffused between local authority complaints procedures, the Local Government Ombudsman and weak professional associations, with the removal of the agent's certificate by the County Court as an ultimate sanction.

Lawyers who specialise in debt collection may nevertheless maintain close links with particular enforcement agents, and the possibility of multidisciplinary practices licensed as Alternative

¹⁴ S.I. 2013/1894.

¹⁵ S.I. 2014/1

Business Structures has led to the creation of at least one such practice in the debt enforcement field,¹⁶ bringing together solicitors and HCEOs and allowing an integrated approach to enforcement that puts them in a comparable position to the French *buisier de justice* in terms of their range of competencies¹⁷ (but not their independence of the court).

The new regulations, and market adaptations, may in time change attitudes towards access to information from tax and other authorities for the purposes of enforcement, but this does not seem imminent.¹⁸ In the absence of such access to third party information, the current procedure for obtaining information is via an Order to Obtain Information. The debtor is required to attend court, bringing relevant financial documents, so that they can be questioned as to their assets. Applications in the High Court for debtors to attend for questioning have ranged between about 50 and 100 per annum over the last five years, but in the County Court, the annual number ranges from about 20-30,000 per annum – still a small number compared to applications for warrants. The procedure is seen as potentially helpful for the pressure that it places on the judgment debtor to provide the desired information, since the sanction for non-attendance is imprisonment for contempt of court, but the time involved and doubts as to whether the information given by the judgment debtor will be complete and accurate are disincentives to its use, particularly since the courts are reluctant to order imprisonment except in egregious cases.

¹⁶ Burlingtons, which is regulated by the Solicitors' Regulation Authority, the Financial Conduct Authority and the Ministry of Justice.

¹⁷ Seizure of goods, other methods of enforcement, pre-litigation debt collection, and also summary court procedures for debt collection cf. *injonction de payer*.

¹⁸ Part 4 of the Tribunals, Courts and Enforcement Act 2007 provides for the making of regulations to allow specified information to be obtained from Government Departments or other sources, but no implementing regulations have been adopted.

Like their domestic counterparts, therefore, a judgment creditor from another EU Member State must rely to a large extent on the information they have already gleaned about the judgment debtor from their business dealings with them. Information can nevertheless be obtained more readily in the commercial sector. For example, an HCEO can force entry to commercial premises without notice, and is therefore in a position to access financial records and glean further information.

At an initial stage, therefore, a judgment creditor has a number of hurdles to overcome in terms of obtaining good legal advice and assistance, choosing whether to seek High Court or County Court enforcement, and – in particular in non-commercial cases – making sure they are in possession of adequate information about the judgment debtor to avoid costly errors devising an enforcement strategy.

4. Against this background, how does the removal of exequatur work?

Under the Brussels I Regulation as originally formulated, an application for a declaration of enforceability is directed to the High Court in London. As a result of the procedure the foreign judgment is registered and thereafter treated as a judgment of the English Court. This channelling of applications through the High Court has the great merit of concentration of expertise.

Amendments to the CPR to implement Brussels I Regulation (recast) were effected in November 2014 by the Civil Procedure (Amendment No.7) Rules 2014.¹⁹ CPR 74, entitled Enforcement of Judgments in Different Jurisdictions, is the principal provision affected by these changes. The rules as amended omit any reference to registration of a judgment enforceable

¹⁹ SI 2014/2948

under Brussels I (recast), and previous reference to ‘registration’ are altered to read ‘enforcement’. Thus CPR rule 74.4A states that “a person seeking the enforcement of a judgment which is enforceable under the [Brussels I] Regulation [(recast)] must, except in a case falling within article 43(3) of the Regulation (protective measures), provide the documents required by article 42 of the Regulation”.

The effect of this seems to be that a judgment creditor should provide the documents required by article 42 of the Regulation on each occasion that an enforcement measure is sought.

The removal of any requirement of registration is particularly noteworthy when it remains the case that the enforcement of judgments from Scotland or Northern Ireland involves a process of registration,²⁰ but Franzina, Kramer and Fitchen take the view that it is necessitated by the removal of *exequatur*.

“Recital (8) of that Regulation [*European Enforcement Order*] records that in relation to this principle of equality, arrangements for the enforcement of judgments should continue to be governed by national law. It provides the example of the legal systems of the UK, where the judgment rendered in another Member State should follow the same rules as the registration of a judgment from another part of the UK. This example, however, appears misplaced, as the applicable UK legislation imposes additional requirements of certification and registration for judgments from other UK legal systems, which do not apply to judgments delivered in the UK legal system in which enforcement is sought. This is out of line with the principle of equality and, whatever interpretation of the

²⁰ Civil Jurisdiction and Judgments Act 1982, s.18 and Sch.6 and 7.

European Enforcement Order Regulation may be supportable by reference to its Recital (8), cannot be extended to the Recast Regulation.”²¹

But it is possible to challenge this view. In my opinion it does insufficient justice to the role of the court as the enforcement authority. Just as with a *huissier de justice*, or with an administrative authority such as the Swedish *kronofogdemyndighet* the judgment to be enforced needs to be submitted to the legal institution and recorded or registered in some way to facilitate effective processing by the enforcement authority. There needs to be a central point of reference to ensure that any measures adopted, or disputes or problems relating to enforcement can be filed in one place. In relation to judgments from other parts of the UK, Sch.6²² of the Civil Jurisdiction and Judgments Act 1982 states:

A certificate registered under this Schedule shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered.

²¹ In Ch. 13 “The Recognition and Enforcement of Member State Judgments” of Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford: Oxford University Press, 2015) xlv, 836 pages at 419., and see Civil Jurisdiction and Judgments Act 1982, s 18 and Sch 6–7 for the UK legislation governing registration of a judgment from another part of the UK.

²² Schedule 6 relates to money judgments. Schedule 7, which relates to non-money judgments, is in very similar terms.

Domestic judgments are recorded on the Register of Judgments, Orders and Fines maintained by Registry Trust Ltd,²³ which also maintains records for judgments in Scotland, Northern Ireland and other jurisdictions in the British Isles. In the light of the limited information available to creditors about debtors' assets, it seems inappropriate if the latter's liabilities arising as a result of the judgment of another Member State become less transparent following the amendment of the Brussels I Regulation.

There has also been an amendment to the law in relation to challenges to the recognition and enforcement of judgments under the Judgments Regulation. Part 23 of the CPR permits a great variety of procedural applications to be made, and is identified as the provision under which applications to refuse recognition or enforcement are to be made. The same provision is also to be used in the case of applications for suspension of proceedings under article 38 of the Regulation, and in the case of applications for an adaptation order pursuant to article 54 of the Regulation (or challenges to such an order). In so far as national grounds for refusal of enforcement are relevant to a judgment from another Member State,²⁴ these will also be raised in a Part 23 application. Franzina, Kramer and Fitchen note that:

Domestic enforcement rules relating to, for example, lapse of time, disproportionality of enforcement means, abuse of rights, prohibitions to seize certain (primary) goods, set-off, or other specific procedural or material (temporary) obstacles to enforcement may be invoked in relation to a judgment originating from another Member State—as they may in relation to a domestic judgment. If, on the other hand, such grounds would, for example, run counter to or overlap with Art 45(1)(b) on default of appearance and

²³ Under contract with the Ministry of Justice (<http://registry-trust.org.uk/>). Judgments from other parts of the UK should also be recorded with judgments from England and Wales after they have been registered with the High Court under Sched.6 or 7 to the Civil Jurisdiction and Judgments Act 1982.

²⁴ *Brussels I Regulation recast*, 420

defective service or with Art 45(1)(c) and (d) on irreconcilability with another judgment, or involve an assessment of the jurisdiction of the court of the Member State of origin other than on the basis set out in Art 45(1)(e) and (2), they are not permitted to be applied under the Regulation, even if available for an equivalent domestic judgment.

Part 23 applications can be made in the High Court or the County Court. According to CPR rule 74.7A, an application under article 45 or 46 of the Judgments Regulation that the court should refuse to recognise or enforce a judgment must be made “to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court.” The court may require the judgment creditor to disclose to the judgment debtor the court or courts in which any proceedings relating to enforcement of the judgment are pending in England and Wales (CPR rule 74.7A(5)).

5. The availability of provisional enforcement

Article 40 of the Brussels I Regulation (recast) states: “An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed”.

The role of protective measures in the enforcement process is one that may vary considerably from one Member State to another, and an appreciation of the differences in approach to enforcement between Member States may promote reflection on whether and how the law of the State addressed may need to be adapted to take account of these differences.

A judgment may become final as soon as it has been handed down. This is essentially the position in England and Wales. CPR 40.7(1) states that “[a] judgment or order takes effect from the day when it is given or made, or such later date as the court may specify” – although under CPR 40.11 a judgment debtor has 14 days within which to comply with a money judgment

before enforcement becomes due. There is no ‘ordinary appeal’ against the judgment of a County Court or the High Court. On the rare occasions when an appeal is lodged, or an application is made to set aside a default judgment, a stay of enforcement can be sought.²⁵ The way that enforcement of judgments is conceptualised in other European jurisdictions is different. Since appeals from a first instance judgment are much more common than in England and Wales, such judgments enjoy only ‘provisional’ enforceability. They do not become final until the time has elapsed for lodging an appeal, or, if an appeal is lodged, until the appeal has been decided. Nevertheless, the meaning of provisional enforcement, and the conditions under which it may be permitted, vary significantly between jurisdictions.²⁶

In some Member States, the practical situation result is not dissimilar to the position in England and Wales – provisional execution is the norm, and there is no need for the judgment creditor to provide security against the risk of the judgment being overturned on appeal.²⁷ In others, provisional execution may be dependent on the provision of security.²⁸ In yet others,²⁹ provisional enforcement of a judgment means only that protective measures can be adopted to

²⁵ CPR 40.8A and 83.7 set out the range of grounds on which a stay may be sought.

²⁶ Further variations between states exist in relation to the types of enforceable instruments (*titres exécutoires*) that exist – some recognise a much wider range than others – and the availability of summary procedures for debt collection in relation to which an application to set aside a payment order may be the appropriate remedy for the debtor.

²⁷ E.g. the Netherlands: see arts 233-235 Rv. Provisional execution is nearly always ordered and without security. Security may be required in the case of summary judgments seeking provisional payment [*kort geding*], where it is more likely that the original decision will be overturned).

²⁸ This is, for example, the situation in Germany. A judgment debtor can prevent execution of a judgment by providing security (e.g. §§ 711-12 ZPO)

²⁹ Including Austria and Slovenia.

secure the debtor's assets against future execution. Moreover, in the latter case, in principle it has to be plausibly demonstrated to the enforcement court that without such measures there is a risk that enforcement will be unsuccessful or significantly more difficult, although there are a number of exceptions to this principle.³⁰ If an appeal is lodged, in any of these cases, the law of the relevant Member State may allow a stay of enforcement or a rescission of the order for provisional enforcement.

As a result of these differences, lawyers and enforcement agents in other Member States may be more familiar than those in England with the idea that a particular measure – such as a seizure of goods, or of a bank account – may have a purely protective purposes in some contexts, while being a step in the process of execution of a judgment in others. This has consequences for the form of any application for such measures, and the institution to which they should be addressed. Rather than seeking a protective order from a court, it may be possible to approach an enforcement agent directly with a request for provisional measures. In France, for example, a *titre exécutoire* creates an automatic right to protective measures (*saisies conservatoires*), entitling the holder of the title to approach a *huissier de justice*, and the latter to undertake such measures without the intervention of a court. But judgments that are not yet enforceable, accepted bills of exchange, and an unpaid cheque or rental payment also provide grounds for a creditor to approach a *huissier de justice* directly. And, as a matter purely of French law, a judgment of a foreign court is a 'décision de justice' for the purposes of Article L511-2 of the Code des procédures civiles d'exécution, with the result that it provides grounds for a *huissier* to proceed to protective measures.³¹

³⁰ See for Austria those in §§ 371, 371a EO.

³¹ *Société Same Deutz-Farb*, Civ 2e 12 October 2006, no.04-29.062, *Bull.civ.* II no.270. See Gilles Cuniberti, Fanny Cornette, and Clotilde Normand, *Droit International De L'exécution : Recouvrement Des Créances Civiles*

This potential for enforcement measures to have a function which is both protective and also a preliminary to execution is less apparent in England and Wales. An application for a protective measure is more readily envisaged as a pre-judgment action, to obtain the grant of an asset freezing injunction, or a mandatory or prohibitory injunction relating to the potential infringement of a substantive right (CPR Part 20). The well-known asset-freezing orders issued by English courts (formerly Mareva injunctions) – which can be obtained pre-or post-judgment – are flexible and effective, but also expensive to obtain.

The existence of a two stage process for enforcement measures – one which freezes the assets in question, and a second that realises those assets – is as much a feature of English law as it is of the law in other European jurisdictions: goods are made subject to control by an enforcement agent before they are removed and sold; a bank account may be frozen as part of the procedure for a third party debt order before notice of the procedure is served on the judgment debtor (CPR Part 72.3); a charge may be granted over immovable property rights before notice is given to the debtor (CPR Part 73.3 and 4). An application for the appointment of a receiver can also be made without notice to the debtor (CPR Part 69.3). A question for the English courts to address is therefore whether these measures are ‘protective’ measures within article 40 of the Judgments Regulation (recast), which can be used by the judgment creditor where appropriate, or whether an interim measure within the meaning of CPR Part 20 must be sought. If the latter is the case, there is certainly a difference in treatment of judgments between England and Wales and other jurisdictions with a broader view of the operation of protective measures.

6. Conclusion

Et Commerciales (Collection Droit Des Affaires; Paris: L.G.D.J. Lextenso éditions, 2011) 392 p. at pp.306-

The provisions implementing the Brussels I Regulation (recast) into English law are few in number and leave significant issues unregulated. It is to be expected that further legislation will be introduced in due course to clarify some of the areas of uncertainty. Be that as it may, the new procedure leads to a much more diffuse approach to cross-border enforcement that will be less accessible to creditors who are not repeat players. When compared with the original Brussels I Regulation (recast) it does not appear to be an improvement in the procedures for enforcement.

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