Razprave
Discussions

Advantages and Disadvantages of the Unification of Rules Simplifying Cross-border Debt Collection

1. Introduction

In the period when the Directorate-General Justice, Freedom and Security (since July 1, 2010 has become two directorates – Directorate-General for Justice and Directorate-General for Home Affairs) was only a »Task Force« and one single EU official – *Anne Marie Rouchaud* - was in charge of cooperation in civil and commercial matters, were always existing very high expectations in the process of building the European Area of Justice and developing legal instruments to facilitate the right of the individuals all over Europe through Private Law. Not even 15 years ago, we could find a declared Vasque Terrorist criminally convicted by the Spanish authorities buying in the Belgian grocery store; while marriage was easily and widely recognized in all jurisdictions, divorce, separation, and nullity of marriages caused great headaches both for the couple and the lawyers in all Member States, and being paid by a debtor abroad was a dream really celebrated when, if any time, happened. By the way, it never happened with minor claims.

Thus, advantages, regulations, certain legal tools, are now there, they exist and so they have to be accepted, recognized, executed and therefore the means to protect our rights seem to have been developed. Although they are not always known by local courts and lawyers, the European civil legal system has changed and improved lawyer's practice and citizen rights and actions. However, as the half full - half empty bottle for each eye looking at it, some may believe that much more should be done. In this sense, our position in this debate has to be clear to support the words that will follow. In the recent years, the European Union lacks of the political will of its Member States and the support of the people to move further and deeper, and the slowness of the integration process is affecting the expected Area of Freedom Security and Justice.

2. Legal framework of debt collection

In the current political and economic context, let us try to consider the legal framework of debt collection, its positive aspect and the disadvantages or issues to be improved.

When *Ms Reding* prepared for the new portfolio of European Justice Commissioner that for the first time was created in the European Commission, she looked into the subject that we are discussing in this contribution. She saw a figure that she found rather alarming: only around 37 % of cross-border debt can be recovered today. As a good mathematician and politician, she also took it the other way round since it means that in our internal market more than 60 % of cross-border debt is not recovered. If you are a businessman, how can you really contract on a cross-border basis if this is true? If you are a small or medium-sized company and you know that in over 60 % of cases where you have a title, a judgment, but your debtor is on the other side of the border you will not be able to enforce your claim? It has often been said that enforcement is the »Achilles heel« of the internal market. We are talking today about a very concrete issue for which we should clearly do something about healing this Achilles heel.

Professor *Carrillo Salcedo* has always distinguished between public international law and private international law. He considered that public international law is public and it is international, but it is not law; while private international law is private and it is law, but it is not international. Enforcing our rights abroad, even within the European Union, still remains us that our legal framework is based on the States' laws in which border, are much more than just frontiers. However, the unification of certain sets of laws is changing the rules of the game and we are lucky to be among the States included into these legal transformations.

In this context, globalization, intensified in the last years by the revolution of technology and information around the world, and particularly the European Union as an unique supranational legal system, requires legal tools which prove to be efficient, practical and useful, for the citizen, the business community and also the States and the international organizations to fight this »Achilles Heel«. And certainly, in the new era of international law, the European Union seems to be an extraordinary field of new initiatives. European efforts to internally harmonize laws among its Member States and within the limits of the Treaties, but also across nations worldwide through negotiation of bilateral and multilateral agreements are one of its distinctive features. Furthermore, the integration process has been possible thanks to the development of fundamental principles such as the direct effect and

supremacy of European Union law, together with a decision making process based on legitimated and balanced institutional system which represents the citizen, the States and the EU community as a whole. Considering that the European Union has itself the power to promulgate texts that have the force of law in all its member States without the need for any act of acceptance of incorporation into the domestic legal order, as a supranational organization, it cannot be compared to other classical international organizations. The impact of regulation, directives, decisions, and even recommendations and opinion, in our internal legal orders, has proved to be an effective process of harmonization and legal integration to all of us.

However, there exist general problems, faced by international legal harmonization, irrespective of the subject matter and the form of the instrument. In fact, a particular subject matter as debt collection, raise its own difficulties. The European Union faces the challenge of ensuring the European Area of Justice in which individuals and businesses are not prevented or discouraged from exercising their rights by the reality of the legal systems in the Member States.

The Judicial System is not working properly in certain countries, such as Spain. In Europe, In the Action Plan adopted in Warsaw (May 2005) within the framework of their 3rd Summit, the Heads of State and government of the Council of Europe's member states have expressed their support for and their wish to strengthen the process for evaluating judicial systems set up by the CEPEJ.[1] In 2008 CEPEJ published its reports enabling assessment of evolutions of the public services of justice for 800 million Europeans shows the remaining differences a lack of efficiency in our judicial systems. The well known obstacles to obtaining a judgment in another jurisdiction still continue and even are increased in such a cross-border context. To hire two or several lawyers, translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, evidence, witnesses, among many others, will discourage us from introducing actions in such cases.

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[1] The European Commission for the Efficiency of Justice (CEPEJ) is entrusted by the Committee of Ministers of the Council of Europe with proposing concrete solutions, suitable for use by Council of Europe member states for promoting the effective implementation of existing Council of Europe instruments relating to the organisation of justice (normative »after sale service«), ensuring that public policies concerning the courts take account of the needs of users of the justice system and helping to reduce congestion in the European Court of Human Rights by offering states effective solutions prior to application to the Court and preventing violations of Article 6 of the European Convention on Human Rights. The CEPEJ is today a unique body for all European States, made up of qualified experts from the 47 Council of Europe member states, to assess the efficiency of judicial systems and propose practical tools and measures for working towards an increasingly efficient service to the citizens.

3. Avoiding courts

Certain existing national insurance coverage for commercial transactions abroad or alternative dispute resolution systems are preferred by the business community that any kind of action in Court. Likewise, the cost, problems and delays to be expected when one of the parties is domiciled in a different Member State become a major obstacle to effective access to justice and discourage economic actors and citizens from extending their activities beyond our own country.

The main objective is to provide the best possible service to the citizen. Priority should be given to mechanisms that facilitate people's access to the courts, so that they can enforce their rights throughout the Union. Further, the European judicial area should serve to support economic activity in the single market, particularly in a period of crisis. Provisional and protective measures must be available to speed up procedures and ensure that legal decisions are enforced more effectively. Member States have, however, introduced simplified and accelerated procedures in which local rules are relaxed, mainly in cases where the value of the claim is below a certain threshold (»Small Claims« procedures), and where the claim is not disputed by the debtor (»Order for payment« procedures). These procedures vary, however, significantly from one Member State to another. In order to improve and facilitate access to justice, the European Union has set itself the aim of laying down common rules for simplified and accelerated litigation.

4. Program of measures

As the European Commission states, »The Program of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2000 provides for the adoption of measures in this respect in three stages. In the first stage, a European Enforcement Order for uncontested claims should be introduced, and the settlement of cross-border litigation on Small Claims should be simplified and speeded up. Following the Tampere conclusions and the mutual recognition program, the European Commission in December 2002 adopted a Green Paper on a European Order for Payment procedure and on measures to simplify and speed up small claims litigation. The Green Paper raised several questions in order to explore the content of possible Community instruments in these two fields«.

Recently, following two Green Papers, on the attachment of bank accounts[2] and on the transparency of the debtor's assets,[3] the European Commission intends now to elaborate a global strategy for making enforcement abroad as »easy« as in a domestic context. So, in the European Judicial Area, small and medium size enterprises and citizens are willing to have useful legal tools to be able to recover their debts. Particularly in the current situation of crisis and economic difficulties where access to capital and credit is limited, a rapid enforcement of claims is a need. That is the main reason to improve cross border debt collection. Thus, and in line with the objective of Article 67 Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 47–199), and in order to establish progressively an area of freedom, security and justice, the Commission has set out priorities in December 2009, known as the Stockholm Program.[4] In this sense, a creditor seeking to recover a monetary claim will try to do so by obtaining an attachment of his debtor's bank accounts as it us commonly done in its national legal system. But while debtors are today able to move their monies out of accounts known to their creditors into other accounts in the same or another Member State almost instantaneously, creditors are currently not able to block these monies with the same swiftness and effectiveness. And each country has a particular procedure which effect must vary widely regarding both its efficiency and efficacy regarding the recovery of monetary claims in other Member States. The situation is aggravated where a creditor wants to arrest funds lying to his debtor's credit in bank accounts situated in several Member States.

Therefore the problems of cross border debt recovery outlined above constitute an obstacle to the free circulation of monetary payment orders within the European Union and an impediment for the proper functioning of the Internal Market. Furthermore, the differences in the efficiency of debt-recovery within the European Union also risk to distort competition between businesses operating in Member States with efficient systems of enforcing monetary payment orders and those operating in Member States where this is not the case.

In this sense, it is important to consider The »Study on making more efficient the enforcement of judicial decisions within the European Union«, undertaken by Professor *Burckhard Hess* and a team of academics and published in December 2003. Once the Commission held a first meeting of

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[2] Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (COM (2006) 618 final).

[3] Green Paper on the effective enforcement of judgments in the European Union: the transparency of debtors' assets.

[4] Communication from the Commission to the European Parliament and the Council »An area of freedom, security and justice serving the citizen« (COM (2009) 262 final).

government experts which discussed possibilities to improve the attachment of bank accounts in Europe, the results and policy recommendations of the study were discussed and during the preparation of the Green Paper, a number of key stakeholders were consulted. Before proposing a legal harmonization in this field, and after the publication of the Green Paper in October 2006, the Commission received 60 contributions. And the participation of other institutions, such as the European Parliament and the European Economic and Social Committee, help us shape and limit the new piece of legislation.

Currently, it is limited to Article 5 of Directive 2000/35/EC on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35–38) which requires the Member States to ensure the availability of recovery procedures for uncontested claims so that an enforceable title can be obtained normally within 90 calendar days. Under the Directive, Member States are, however, not required to adopt a specific procedure or to amend their existing legal procedures in a specific way. It remains therefore to be seen if the transposition of Article 5 will entail significant changes in the procedural systems of the Member States.

It is relevant to refer to Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating the European order for payment procedure (OJ L 399, 30.12.2006, p. 1–32) which allows creditors to recover their uncontested civil and commercial claims before the courts of the Member States according to an uniform procedure that operates on the basis of standard forms. Due to the existence of a common procedure in all Member States, the need for creditors to familiarize themselves with foreign civil procedures is reduced to a minimum. In this new legal tool, applicable since 12 December 2008, the procedure does not require presence before the court and it can even be started and handled in a purely electronic way. The claimant only has to submit his application, after which the procedure will lead its own life. It does not require any further formalities or intervention on the part of the claimant. This ensures a swift and efficient handling of the claim, which should substantially reduce the length of traditional court proceedings.

In addition, and as supposedly the assistance of a lawyer is not required, the procedure will keep costs at a minimum. Language problems are minimized thanks to the availability of standard forms for the communication between the parties and the court that are available in all EU languages. Otherwise, since the judicial decision obtained as a result of this procedure circulates freely in the other Member States, the creditor will not have to undertake intermediate steps to enforce the decision abroad.

5. Small claims

With similar aims, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1–22) does for the first time provide citizens and businesses all over Europe with a speedy and affordable civil procedure which is uniform in all Member States and in all procedural steps from the commencement of the procedure to the final enforcement of the judgment. It is applicable in civil and commercial matters where the value of a claim does not exceed 2000 € since 1 January 2009. The procedure applies to pecuniary claims as well as to non-pecuniary claims. This Regulation introduces standard forms to be used by the parties and the court and establishes time limits for the parties and for the court in order to simplify and speed up litigation concerning small claims.

As the procedure is a written procedure, unless an oral hearing is considered necessary by the court, it is supposed to facilitate credit recovery in the European Union. In fact, the court may hold a hearing or take evidence through a video conference or other communications technology if the technical means are available. Again, the parties are not required to be represented by a lawyer or another legal professional. And the unsuccessful party shall bear the costs of the proceedings. However, the court shall not award costs to the successful party to the extent that they were unnecessarily incurred or disproportionate to the claim. At last but not least, the Regulation abolishes the intermediate measures to enable the recognition and enforcement of a judgment given in a European Small Claims Procedure. A judgment shall be recognized and enforced in another Member State automatically and without any possibility of opposing its recognition, unless the defendant was not served with the papers.

6. Process of harmonization

In the line above mentioned to reach a consensus before trying to harmonize complex topics such as debt recovery, the European Commission organized a public hearing on improving the enforcement of judgments and facilitating cross-border debt recovery on 1 June 2010, in Brussels. Over 84 participants representing ministries of justice, judicial authorities, law firms, bailiffs, academics, banks, businesses and citizens' groups, and thus all eminent experts in their field, coming from various countries and organizations, assisted the European Commission in the definition of this topic. As a result the hearing provided stakeholders with an opportunity to express their opinion on existing problems in these areas and the possible solutions to

those issues raised both by them and the European Institutions participating in the decision making process.

As it usually happens, the hearing was part of an on-going consultation process, followed the publication of two Commission Green Papers on the attachment of bank accounts and on the transparency of assets, issued in 2006 and 2008, and proved that more data was needed to really solve the problem of unpaid debt in the EU. The debate on the policy options had indicated a consensus in favor of a free-standing European bank attachment order although many details were still to be decided as to the conditions for and the effects of such order. Furthermore some consistency of the European procedure with existing national enforcement schemes is to be sought, since the area justice needs further development in this topic.

Certain pending issues came out from the above referred recent hearing since it has made a valuable and significant input to the research on cross-border debt recovery, especially in terms of the problem definition and clarifying the arguments for and against different policy options. It is now commonly accepted that problems of cross-border debt recovery may have adverse effects to the prosperity of the European Union. Harmonization is really a need, and therefore an advantage since they may be an obstacle to the free circulation of payment orders throughout the Union consequently they impede the proper functioning of the Single Market. As it was agreed, late payment and non-payment jeopardize the interest of our businesses and consumers alike.

7. The factors of cross-border recovery of debts

Regarding the level of difficulty of cross-border recovery the nature and amount of the unpaid debt has to be considered. So, among business, small and medium size enterprise and consumers are more exposed to payment default from their debtors as they have limited cash-flow and in the crisis they are particularly affected by this issue.

However, many differences remain depending on the country where enforcement is sought. In fact, the literature review on this issue underlines the considerable divergences between the national systems, with one source estimating that there are currently 16 different enforcement systems in the European Union. So, countries where effective domestic procedures for bank attachment and for disclosure of debtor's assets apply are likely to provide more guarantees to creditor's rights.

Hence, the scope and size of current shortcomings calls for a coordinated action at European Union level. As you are aware, different options are still being examined, subject to the on-going study and need of a consensus and execution measures to grant citizen rights. With the new foreseen legal measures, the aim is to enable a creditor to preserve, as security for the debt owed, money held to the credit of his debtor in one or several bank accounts within the territory of the European Union. The procedure should be available for all monetary claims arising from a commercial transaction.

8. Future legislative activities

Eventually a new insight for the Commission for devising a future legislative proposal is based on the following principles: »efficiency of the Attachment Order«, in view of keeping the »surprise effect«, it should be made *ex parte* (no hearing or notification to the debtor is required) and served on the branch of the bank holding the debtor's account as quickly as possible; »safeguarding the debtor's rights«, since the defendant's right to object to the order must be ensured as regards possible grounds for objection, and jurisdiction to hear objections to the same court as the one which issued the order. And in order to avoid abusive bank attachment, the court will have discretion to order creditor to provide security against damage to the debtor, if the order proves unjustifiable; »protection of personal data«, and thus, processing of banking data must comply with the provisions of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31–50) and Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1–22*)*; »cost-neutrality for banks«, which means that the enforcement of the order is likely to create certain costs for the bank, for instance for execution of the order and monitoring of the account. Accordingly, it may be possible charging specific fees for executing the order; or in countries where enforcement authorities, such as bailiffs, should be given an important role in serving the order, it would help reducing additional costs for the bank.

9. Conclusion

In order to conclude this discussion, we should attend practical examples on the advantages and consequences of legal harmonization on debt recovery.

We can imagine that a company having its seat in Slovenia delivers motor components to a car manufacturer in Spain. The manufacturer refuses to pay the bill, alleging that the delivered goods were defective. Consequently, the Slovenian company sues the manufacturer for payment in the courts of Spain, on the basis of a choice of court- clause figuring in its standard contract term which refers to the domicile of the defendant. However, considering that this is already costly, and having information of other providers that the Spanish manufacturer is in financial difficulties, the Slovenian company is concerned that the judgment, when eventually rendered after a few years of cost and fees of lawyers in Spain, will be worthless because the manufacturer will have become bankrupt or insolvent, if it is not the case at the time of introducing the claim. Thus, any company therefore would need to secure the payment of any debt owed by freezing the manufacturers account situated with a bank in any European country. Nowadays, any creditor could apply for an attachment order under national law but such an order would not be automatically recognized in other Member State, in particular if it was rendered without a hearing of the debtor in order to safeguard the »surprise effect« of the measure previously referred. The intention is to improve that situation with a European system for the attachment of bank accounts and to grant the creditor an effective provisional remedy operating across the entire European Union.

Oscar Wilde has a very well known phrase: »When I was young, I used to think that money was the most important thing in life. Now I am old, I know that it is«. Efficient prevention of irrecoverable debts - besides arrangement of advance payments or sufficient prepayments - is especially based on obtaining as much information as possible about the current economic situation and economic power of a contractual partner and arrangement of adequate securing as a previous demand to any business and when it is possible to obtain it.

Some important issues remain opened such as the question of the priority for creditors which is already complex enough in each jurisdiction to have them now »harmonized«; how are we going to deal with data protection and bank secrecy?; are national exemptions going to be allowed?; and what about the »timings« for each phase of the proceeding and length of the attachment order. The delay on the approval of this new measure is justified by the complexity of the subject matter.
While forthcoming proposals will be of interest to those who regularly seek to enforce judgments in the European Union, the sensitive nature of the issue is likely to mean that progress will be relatively slow. The Attachment Order seems to be a great step forward and a need, more than an advantage, in the field of European debt collection. At the moment, this type of action has to

be pursued through national courts in the two countries which can be very costly, complex and time time-consuming. A European bank attachment order would really simplify and speed up the process.

Jesús Bores Lazo *

* LLM, odvetnik in mednarodni svetovalec za Evropsko komisijo, Boleo Global, Avda, Ciudad de Ronda, 6-20 A, Sevilla 41004, Španija, e-pošta: jbores@boleoglobal.com
LLM, lawyer and international consultant for the European Commission, Boleo Global, Avda, Ciudad de Ronda, 6-20 A, Sevilla 41004, Spain, e-mail: jbores@boleoglobal.com