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REMEDIES AGAINST ENFORCEMENT OF FOREIGN JUDGMENTS

SUMMARY: 1. General observations. – 2. Remedies in enforcement procedure. – 3. Opposition in enforcement. – 4. Remedies concerning recognition and enforcement of non-EU judgments. – 5. Remedies concerning recognition and enforcement of EU decisions. – 6. Final remarks.

1. General observations.

The following analysis is based on reports from Austria, Belgium, Croatia, Estonia, France, Germany, Greece, Italy, Lithuania, Portugal, Slovenia, Sweden, the Czech Republic, the Netherlands, and the U.K., as they were delivered until 20 September 2017 (hence, in still provisional drafts). It is important to state at the outset that for the purposes of this chapter, the concept of remedy includes: *a*) challenges against national judicial decisions; *b*) challenges to recognition and enforcement of foreign decisions; *c*) challenges to enforcement proceedings.

The distinction between ordinary and extraordinary remedies has been repeatedly dealt with in the reports, albeit it concerns, for the purposes of this chapter, only a part of the first kind of challenges: namely, challenges to judicial decisions amenable to *res iudicata* effects. By contrast, rules that allow a party to cure an involuntary default, often qualified as extraordinary remedies in various legal cultures, are not treated here as such, in order to prevent confusion: in fact, such rules may allow a party to plead both ordinary and extraordinary remedies, or any kind of otherwise precluded motion; hence, they are deemed here as means to gain access to a remedy, and not remedies.

In this perspective, it is worth mentioning from the start that *res iudicata* effects generally stem from judicial decisions given after a full-fledged trial was at least made available to each of the involved parties. It is also useful to clarify that *res iudicata* effects not only do not necessarily coincide with enforceability, or mere preclusion of re-examination of facts, but also with

mere limitation of grounds for a challenge: even if only specific violations of the law may still be pleaded against a decision, a legal system may choose to deny that there is *res iudicata*, and qualify the available remedy as an ordinary one.

The distinctive feature of *res iudicata* effects, in fact, consists in a preclusion for the losing party from pleading that a new law retroactively changed the rules governing the conflict resolved by a judicial decision: from the point of view of a substantive theory of *res iudicata*, because from that moment on that decision becomes a self-standing source of the law of the case (so that changes of the substantive law applied, even if they are retroactive for every other interested party, are irrelevant for the parties bound by *res iudicata*); from the point of view of a procedural theory of *res iudicata*, because immunity of judicial adjudication from the effects of new retroactive law is an essential feature of the balance of powers in a democratic system; different legal systems may freely select for that purpose different stages of the litigation.

In Italy, according to the traditional view, every challenge against such decisions whose grounds may be detected from its reading must be filed within a deadline running from its issue, and qualifies therefore as an ordinary remedy precluding formation of *res iudicata*, while challenges whose grounds can be detected only elsewhere (such as fraud) must be filed within a deadline running from their discovery, and qualify therefore as extraordinary remedies, not precluding formation of *res iudicata*, and a similar approach has been reported for Sweden, and the Netherlands. However, in Italy this systematic analysis was undermined by law no. 353 of 26 November 1990, introducing Art. 391-*bis* of the Code to provide that a very rare ordinary remedy, that became available against the judgments of the Court of Cassation after a judgment of the Constitutional Court[1], does not preclude *res iudicata*.

Slovenia, however, reportedly attaches the distinction between ordinary and extraordinary remedies to the stay of enforceability granted by appeal to a higher court, denying that any different kind of remedy could be deemed ordinary. From the Czech Republic is also apparently reported the idea that ordinary remedies must allow full review of the decision, and a similar approach is reported from Belgium and France.

With respect to the U.K., the distinction is explicitly interpreted, for

[1] No. 17 of 30 January 1986.

the purposes of Regulation 1215/2012, by its art. 51, § 2, of, providing that every appeal to a higher court is deemed an ordinary remedy, but the autonomous notion of *res iudicata* pursuant to such Regulation is not binding for the Member States outside the field of recognition or enforcement of EU decisions. Other reports did not give any account of the issue amenable for comparative analysis.

Overcoming such lack of uniformity between Member States, however, might prove an exceedingly ambitious target from the political point of view for the European Commission, because different choices might be driven by different degrees of confidence in the various echelons of the judiciary.

2. Remedies in enforcement procedure.

Challenges to enforcement proceedings, for the purposes of this section, comprise complaints introducing a proceeding on the merits that interferes with the enforcement proceedings.

1 Description of available remedies

In Italian law, challenges to enforcement proceedings can be divided in three groups: *a*) complaints alleging that the creditor has no right to proceed with the enforcement; *b*) complaints alleging that the enforcement proceedings should develop in a different way; *c*) complaints by a third party holding a right on the seized asset prevailing over the seizure.

Complaints concerning distribution of the revenue of the forced sale of seized assets, or complaints by garnished third parties, are also available, but they are disposed of by the enforcement judge with summary decisions subject to further challenge (subject to the rule governing challenges alleging that enforcement proceedings should develop in a different way).

A similar approach is reported for the other Member States involved in the project.

2 Procedural rules

Rules establishing which court would hear a challenge to enforcement proceedings vary a lot in the Member States involved in the project. However, the procedural dynamics has common features: the authority entrusted with enforcement proceedings can always provide a stay whenever the complaint deals with issues that can be decided by that authority; the merits of the complaint may be deferred to a different court whenever it deals with issues concerning the existence of the right whose enforcement is sought.

In Italy, complaints concerning the right to proceed must be filed in the court in charge of the proceeding after seizure (or the corresponding step in specific enforcement proceedings). However, such complaints may also be filed before seizure, because service of the *precetto* suffices to grant the debtor standing to challenge the attempted enforcement, but in this case the court in charge of the enforcement proceedings has not yet been determined: hence, the challenge must be filed in the Court of the place where the *precetto* (a warning by the creditor that judicial enforcement will take place if obligation is not complied within 10 days) was served, unless the creditor choose in the same *precetto* a domicile in the city of a different court in whose territory enforcement may be performed (in this latter case the challenge must be filed in that court, but the burden of proof that enforcement may take place in that territory lies on the creditor); besides, the competent court for the decision on the merits of the case, after the enforcement court has decided on the motion to stay proceeding, is not necessarily a Tribunal, since ordinary rules on subject-matter jurisdiction apply (hence, it may be a Justice of the Peace if the value of the credit is less than 5.000 euros).

The same holds for complaints alleging that the enforcement proceeding should develop in a different way, but in this case only a Tribunal has subject-matter jurisdiction, even when the complaint is filed before the seizure, and there is no deferral to a different court for the merits of the case. Complaints by third parties are necessarily filed at the court in charge of the proceeding because they can be filed only after the beginning of enforcement, but then again, after the decision on the motion to stay, the merits goes to the court determined pursuant to ordinary rules.

Stay of the enforcement proceedings is usually asked within every kind of such challenges: hence Italian law provides for these motions a mandatory fast-track for a provisional order by a single judge, subject to further challenge (*reclamo*) to a panel of three within the same Court (without the participation of the first one), and in any case (that is, regardless of the outcome) setting a deadline for a motion for an ordinary proceeding on the same claim; if the deadline is missed, the case is discontinued, while otherwise a full judgment amenable to *res iudicata* effects, and subject to appeal, is issued (appeal to the Court of Appeal is granted, after law no. 69 of 18 June 2009, for complaints alleging that the creditor has no right to proceed, and for complaints by third parties, with the judgment of the Court of Appeal subject to further third instance appeal to the Court of Cassation; otherwise only appeal directly to the Court of Cassation is granted).

Joinder in all these challenge proceedings of the debtor, the creditor, and, according to some case law, the intervening creditors[2], is necessary.

Reports form the Member States involved in the project describe several differences in the details of the regulation of such proceedings. Albeit complete analysis of such details would be too cumbersome to be useful for comparative study, the following list suffices to give a fair presentation of their actual dimensions:

- U.K. law is reported to provide for greater flexibility and redundancies in the power to grant a stay, and foresee an automatic stay when a third party complaint is filed; moreover, appeal to the Supreme Court is reportedly granted even against decisions concerning requests of stay;
- Slovenian law is reported to provide that complaints alleging that the right whose enforcement is sought does not exist can be decided on the merits by the enforcement court;
- in the Netherlands challenges to enforcement proceedings are reported to be indifferently available both within the enforcement court and within the court competent pursuant to ordinary rules;
- Estonian, Greek, and Portuguese law reportedly provide that all challenges are decided by the enforcement court;
- Greek law also reportedly limits the power of the enforcement court to grant a stay, and access to the Supreme Court for appeals against judgments over challenges to enforcement proceedings;
- Swedish law is reported to provide that stay of enforcement proceedings is mandatory when the challenge is supported by evidence.

All these variations seem to lie within the boundaries of Member States' residual sovereignty in the realm of enforcement proceedings granted in principle by art. 47, § 2, of Regulation 1215/2012. Further harmonization would help development of a common market, but would require further relinquishments of sovereignty.

3 Challenges within the enforcement proceedings

Many grounds for a challenge may be found directly by the enforce-

[2] See, e.g., the judgment of the Italian Court of Cassation no. 7264 of 1 June 2000; joinder of the garnished party, by contrast, is required only in exceptional circumstances, see, e.g., the judgment of the Italian Court of Cassation no. 24637 of 19 November 2014.

ment judge, if they appear on the record of the case, or if the debtor highlights them, and justify, even *ex officio*, a declaration of discontinuance of the proceeding. The creditor may challenge this declaration alleging that proceeding should develop in a different way, meaning that there should not be discontinuance.

Obviously if the enforcement judge overlooks, or ignores, or deny, the ground for challenge, or if it is not possible to see it from the record, it is up to the debtor (or to the other interested party) to timely and fairly file the complaint.

On this respect, no significant differences between Member States were reported, with the exception of Greek law, reportedly providing no kind of *ex officio* court control over the enforcement proceedings (Swedish enforcement proceedings are carried out through an administrative agency under the principle of party disposition, but the agency's power to find defects *ex officio* is reportedly not ruled out). This latter deviation, however, also seems to lie within the realm of Member States' residual sovereignty in regulating enforcement proceedings.

3. Opposition in enforcement.

For the purposes of this section, in order to ensure coherence in the queries, "opposition in enforcement" refers to challenges to enforcement of judicial decisions alleging that the creditor has no right to proceed.

1 Oppositions based on new facts or procedural violations

Relevant facts occurred after formation of the title are in a general way plainly grounds for an "opposition in enforcement".

Complaints concerning the way enforcement is performed are rather grounds for an "opposition against a decision of the enforcement court", albeit there may be some overlapping: in fact, sometimes it may be also possible to plead, that a creditor has no right to proceed in the way adopted in the concrete proceeding, albeit there is a right to proceed in a different way (e.g., when the creditor tries enforcement of specific performance with a non-judicial title, or attachment of non-attachable assets).

This overlapping may be troubling in the practice because deadlines for the two kinds of challenges may differ, and different kinds of appeals may be granted against the judgment (e.g. in Italy, as already seen above): satellite litigation on the point often arises.

When special rules allowing enforcement without a court hearing apply, both kinds of challenges are anyway available to the debtor.

On these aspect, no significant differences were reported for the Member States involved in the project: both kinds of challenges are always available to the debtor.

2 Grounds for opposition

No "opposition in enforcement" may be allowed by way of a mere "notice pleading": plaintiff must state cause of action. However, burdens of specificity obviously fit the "reactive" nature of the opposition, since the remedy aims substantially at a negative declaration (a declaration of non-existence of the right to proceed): hence, a defendant's specific denial of facts giving rise to the right whose enforcement is sought, or allegation of other facts precluding enforcement, is necessary only inasmuch the right was identified by the creditor, and such identification may often need description of facts giving rise to it.

The most important general principle governing the issue, however, is that when the enforcement title is a judicial decision amenable to *res iudicata* effects, no ground that can support an appeal against that decision may support an "opposition in enforcement": no redundancy of remedies is allowed. Obviously, grounds precluded by *res iudicata* itself are *a fortiori* inadmissible.

It is worth noting that according to the most recent Italian case law, a burden to firstly challenge the judgment used as enforceable title may lie also upon the third party claiming a right on the seized asset prevailing over the seizure: in fact, grounds to challenge the judicial decision with a third party opposition must be pleaded there (and stay of enforcement can be granted on such grounds only by that court), while they cannot support directly a challenge to the enforcement proceeding by the same third party in the enforcement court (and that court cannot grant a stay upon such grounds), even if the complaining party never participated to the proceeding leading to the formation of the enforceable title; an enforcement court would directly hear an opposition by a third party only if it is based on different grounds[3].

Exclusion of such redundancies is also reported for the other Member States involved in the project, regardless from the degree of specificity re-

[3] See the judgment of the Court of Cassation no. 1238 of 23 January 2015.

quired for the complaint (albeit report from the Netherlands seems to state that a debtor may plead gross mistakes of the enforced judgment at the court in charge of enforcement proceeding). Hence, a modest lack of uniformity between Member States with respect to requirements of specificity of complaints for opposition in enforcement when a non-judicial enforceable title is involved does not seem to infringe significantly with the purposes of European rules governing recognition and enforcement of foreign judgments.

3 Source of grounds for opposition

In no Member State involved in the project rules governing grounds for "opposition in enforcement" are reportedly other than general clauses. A different solution, in fact, would obviously foster needless satellite litigation.

4. Remedies concerning recognition and enforcement of non-EU judgments.

Remedies against enforcement of foreign non-EU judgments also comprise challenges aimed at showing that recognition should be denied. However, since none of the Member States involved in the project reportedly allows enforcement of non-EU judgments without at least an *exequatur* (if not a new trial) exclusion of redundancies applies as already seen above: grounds to challenge recognition obviously support as well a denial of the *exequatur*, but after grant of *exequatur*, an "opposition in enforcement", filed within the enforcement proceeding promoted using the foreign judgment as a title, cannot be supported by any ground that could have been pleaded there.

1 Features of remedies

In Member States that provide for automatic recognition of foreign non-EU judgments their effects may be freely contested in and out of court: the other party has the burden to file an action to prevent that. In such cases, however, standing for a challenge in court of recognition may be difficult to prove: evidence that apparent effects of the judgment are prejudicial for the plaintiff would be required[4]. By contrast, when a new trial or an *exequa-*

[4] See, e.g., in Italy, the judgment of the Court of Appeal of Venezia of 11 June 1997, in *Giurisprudenza italiana*, 1998, 1158.

tur is required for recognition (a need for a new trail is reported for Sweden, the Netherlands, and in some cases for the U.K.; *exequatur* is reportedly required in Slovenia, Lithuania, and Portugal), it is up to the creditor to start proceeding.

Decisions on recognition, even if they are given within proceedings aimed at obtaining enforceability, can always be challenged with remedies available against a judgment (albeit sometimes for *exequatur* a fast-track is provided, curtailing the scope of remedies: in Italy, *exequatur* is granted by the Court of Appeal, and appeal against the decision is available only at the Court of Cassation; appeals are reportedly limited also in some instances in the Netherlands), and may acquire full *res iudicata* preclusive effects. A decision on recognition *incidenter tantum* (that is, only for the purpose of deciding a different case, and with no *res iudicata* effects binding in other proceedings), however, is sometimes explicitly allowed (Italy provides such a rule, albeit the lack of preclusive effects should not be overestimated in actual practice).

2 Grounds

Grounds for denial of recognition and enforcement of foreign non-EU judgments in the Member States involved in the project are pretty similar in substance. This convergence is determined mainly by the general clause of public order, and the growing consensus over the idea that such clause includes violation of fundamental procedural rules: hence, despite several variations in the wording of the rules concerning specific procedural violations, such as lack of jurisdiction, violation of the rights of the defense, or fraud, it is quite unlikely that a judgment whose recognition is refused in a Member State for this kind of procedural considerations would nevertheless be recognized and enforced in a different Member State.

The main difference concerns reciprocity: albeit no mention of it can be found in the reports from Italy, France, Belgium, Greece, Portugal, Lithuania, Estonia, and the U.K., this requirement reportedly applies in Austria, Sweden, Slovenia, Croatia, and the Czech Republic (and also, in principle, in Germany). Previous local *lis pendens* is also reportedly a ground for refusal in only some of the Member States involved in the project (Italy, Germany, Belgium, Portugal, Estonia, Slovenia, Croatia, and the Czech Republic) but not in others (Lithuania, Austria, Greece; in Sweden, the Netherlands, and the U.K., however, a requirement that the same action is not actually pending between the same parties might be implicit in the need to institute a new local suit for recognition).

Such variations, and also variations in the way foreign non-EU judgments are recognized, might hinder the purpose of granting an EU decision the same effects in the whole European judicial space, whenever a conflict between a EU and a non-EU judgment arises. However, these differences remain within the realm of the Member States' own sovereignty: hence, they may be deemed anyway compatible with the reciprocal trust between Member States in the field of recognition of foreign judgments.

A more comprehensive fulfillment of the task of granting a decision identical effects within the whole European judicial space, in fact, probably requires that a European federal judiciary provides it.

3 Differences with recognition and enforcement of EU decisions

The main differences are the following: *a*) non-EU foreign judgments are generally recognized only after *res iudicata* (albeit such requirement is not clearly reported in Germany), but in order to preclude their recognition is not even necessary a conflict with an local judgment, because, as already seen above, a previous local *lis pendens* may suffice in several of the Member States involved in the project; *b*) any violation of local principles on international jurisdiction might preclude recognition (albeit conformity to local jurisdictional rules is reportedly less rigorously required in Belgium, in France, and in the Czech Republic; by contrast, jurisdictional requirements of the foreign decision are reportedly even stricter than in local litigation in the U.K.; reference to lack of jurisdiction in the State of origin is also missing from reports dealing with Member States requiring new trial for the purposes of recognition, like Sweden and the Netherlands); *c*) violations of public order preclude recognition even if they are not manifest (with the exception of Belgium and Germany, reportedly requiring a manifest violation even when non-EU judgments are considered).

Other differences are of a more limited relevance: in fact, violation of essential rights of the defense would also determine a manifest conflict with public order, precluding also recognition of EU decisions, and conflict with a recognized judgment from a different State would also generally preclude recognition of non-EU judgments, because public order would be violated, according to some doctrinal analysis[5].

[5] For this interpretation, largely influenced by German doctrine, see, e.g., in Italy, E. D'Alessandro, *Il riconoscimento delle sentenze straniere*, Giappichelli, Torino 2007, esp. 308 ff.; however, it may be argued that if the preclusive effects of the first judgment could

5. Remedies concerning recognition and enforcement of EU decisions.

It is important to state at the outset that an analysis of remedies concerning enforcement of EU decisions pursuant to Regulation 1215/2012 requires to consider the overlap between challenges to recognition and enforcement of the decision, and challenges to enforcement proceedings based on it.

1 Remedies in the Member State of origin

Art. 51 of Regulation 1215/2012 expressly provides for a discretionary stay of enforcement when the decision is challenged with an ordinary remedy in the Member State of origin: the notion of ordinary remedy is autonomous, and relates to usual remedies against a judicial decision, insofar as they are available within a deadline starting from the delivery of the court ruling. Besides, pursuant to Art. 38, proceedings on the merits influenced by an EU decision may also be stayed whenever such decision is challenged in the Member State of origin, even if an extraordinary remedy is sought (as well as when a proceeding for a refusal or recognition or enforcement is pending in the Member State addressed).

Obviously, if the decision is annulled or repealed in the Member State of origin, its recognition and its enforceability in the Member State addressed also elapse as well at the same time, and any interested party may allege such event whenever it is necessary. If enforceability of the decision is stayed in the Member State of origin, enforcement in the Member State addressed is also subject to mandatory stay, at the request of the debtor, pursuant to Art. 44 of Regulation 1215/2012.

The main difficulties in this field come from the European Court of Justice case law forbidding the court of the State of destination to grant a stay on grounds that have or could have been pleaded in the State of origin, pursuant to the idea that otherwise the absolute prohibition to review the merits established by Art. 52 of Regulation 1215/2012 would be frustrated[6].

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be pleaded in the second proceeding, recognition should not be denied to the latter, according to the general principles governing such contrasts in Italian case law (see., e.g., the judgment of the Italian Court of Cassation no. 2082 of 26 February 1998); priority reportedly governs resolution of conflicts between non-EU decisions in France, Estonia, Slovenia, Belgium, and the Czech Republic.

[6] See the holding of the European Court of Justice in Case C-183/90, *B. J. van Dalfsen and others v B. van Loon and T. Berendsen* [1991] ECR I-04743, para. 32.

This interpretation is disputable from a technical point of view, because the power of the judge to grant a stay on grounds that were not and could not have been pleaded in the State of origin cannot be denied, since otherwise the enforceable title would be more effective in the State of destination than in the State of origin itself (since in none of the Member States pleading such grounds within the enforcement proceeding of a local title in order to obtain a stay is precluded by a general rule): hence, there was no need at all to provide for it in an explicit rule within Regulation 1215/2012; consequently, according to sound analysis, stay pursuant to Art. 51 should rely on the probability of success of the ordinary remedy, without violating Art. 52, because it allows not a review but a prediction of the outcome of the merits, and only to the limited end of staying enforcement, without implying a final refusal. However, none of the reports from the Member States involved in the projects mentions any case law disregarding the holding of the European Court of Justice on this point, and allowing stay upon mere evaluation of probabilities of success of an ordinary remedy[7].

Hence, a revision of Regulation 1215/2012 clarifying the issue would be useful, but not necessary for purposes of harmonization with respect to such Member States.

2 Procedural aspects of proceedings pursuant to Art. 47 of Regulation 1215/2012

Italy chose to give subject-matter jurisdiction for complaints pursuant to Art. 47 of Regulation 1215/2012 to ordinary Tribunals, without enacting any special provision for a speedy track. This option aims at allowing overlapping challenges to enforcement of the decision and challenges to enforcement proceedings: the debtor may plead together, in the same proceeding, both that there are grounds to refuse enforcement pursuant to Art. 45 of Regulation 1215/2012, and that the creditor has no right to proceed with the enforcement pursuant to national rules (provided, pursuant to Art. 41 of Regulation 1215/2012, that grounds to challenge enforcement pursuant to national law do not conflict with said Art. 45: e.g., local law for-

[7] Albeit doctrinal analysis may sometimes take for granted the sound interpretation of the rule, without even considering the odd reasoning of the *Van Dalfsen* case: see, e.g., P. Biavati, *L'esecutorietà delle decisioni nell'UE alla luce del reg. 1215/2012*, in *Il processo esecutivo*, eds. B. Capponi, B. Sassani, A. Storto, and R. Tiscini, Wolters Kluwer, Milanofiori Assago 2014, 194.

bidding enforcement of appealable judgments would obviously not apply; local law forbidding enforcement whenever the credit was already paid, by contrast, obviously would).

The solution was fostered by Consideration 30 of Regulation 1215/2012: the new system overcomes the practical problems generated by Regulation 44/2001 (that barred the debtor from pleading grounds to challenge enforcement within exequatur proceedings). Hence, rules already dealt with above concerning territorial jurisdiction for challenges to enforcement proceedings apply. Territorial jurisdiction of Art. 47 courts for declarations of recognition, pursuant to art. 36 of Regulation 1215/2012, by contrast, is governed by the general rules, since no enforcement proceeding is involved.

Besides Italy, only some of the Member States involved in the project, however, reportedly enacted legislation actually implementing the right of the debtor to plead grounds for refusal together with national grounds for opposition in enforcement within the enforcement proceedings: Austria, France, Greece, the Netherlands, and the U.K. (albeit the U.K. Government apparently did not submit relevant information to the European Commission). By contrast, this is still reportedly hindered in Sweden (since many grounds to challenge enforcement must be dealt with by the enforcement agency, while grounds based on Art. 45 go to court), and in Belgium (where Art. 45 claims are reportedly deemed out of the jurisdiction of the enforcement court), and in Slovenia is also reportedly under discussion a legislative proposal denying the enforcement court the power to judge Art. 45 challenges.

On this respect, however, further harmonization would concern the realm of the government of enforcement proceedings, and require further important relinquishments of sovereignty by the Member States, because it would interfere with local choices based on different degrees of confidence in the various echelons of the enforcement authority.

None of the Member States involved in the project, anyway, reportedly applies significantly special rules on jurisdiction for Art. 45 challenges filed before the start of enforcement proceedings, and actions pursuant to Art. 36.

3 Documents pursuant to Art. 47, § 3, of Regulation 1215/2012

None of the Member States involved in the project reportedly enacted provisions derogating to Art. 47, § 3, of Regulation 1215/2012, with the notable exception of the U.K., providing that an application for refusal should be supported by written evidence. This deviation, however, would

deserve, rather than a clarifying amendment to current rules, enforcement by a holding of the European Court of Justice, since requiring such evidence in order to obtain a judgment on the merits obviously runs against the current Regulation.

4 Service and representation

Service in proceedings pursuant to Art. 47 of Regulation 1215/2012 is unequivocally governed by the rules of the Member State addressed. None of the Member States involved in the project reportedly departs from this interpretation.

Italian procedural rules require every party, irrespective of nationality or domicile, to be represented by a lawyer located in Italy, pursuant to Art. 82 of the Code of Civil Procedure, as a prerequisite to active participation to such proceedings. None of the Member States involved in the project reported any provision requiring representation due to nationality or domicile of a party.

5 Challenges to recognition

Besides challenges to enforcement pursuant to Art. 47 of Regulation 1215/2012, challenges to recognition are allowed both *principaliter* and *incidenter* (within the meaning explained above), pursuant to Art. 36 of the same. When the challenge is the main claim of the action, rules provided by said Art. 47 apply, while when the challenge is filed to prevent the decision from influencing the disposition of a different claim, the procedural rules provided for the disposition of such claim prevail. No Member State involved in the project reportedly developed problems with this principles.

As already seen above some Member States require the debtor challenging enforcement both on Art. 45 and on national law grounds, to institute separate proceedings (Belgium, Sweden, and, according to a reform proposal, also Slovenia), despite the wording of Consideration 30 of Regulation 1215/2012.

6 Appeal to the Court of Cassation

As a general rule, in Italy third instance appeal (*rectius*, appeal to the Court of Cassation, that is not necessarily a "third" instance: in fact, whenever a Court of Appeal has subject-matter jurisdiction, e.g. for exequatur of non-EU foreign judgments, the decision is subject to appeal at the Court of Cassation, but such appeal is not a "second" appeal, nor a "third" instance, but rather the "only one" appeal available, and a "second" instance, but

nevertheless the same rules provided for "third instance"/"second appeal" apply) cannot find support in a request to re-examine the evidence (unless it concerns procedural events). However, an indirect check on the fact-finding is anyway allowed if the supporting opinion of the judgment is challenged.

Recent reforms aim at reducing supervision by the Court of Cassation of the supporting opinion of the appealed judgment, but do not eliminate it[8]. Hence the conclusion that no check of the fact-finding at all is allowed in the Italian Court of Cassation is grossly exaggerated, and quite misleading in the practice of law: in fact, a wise lawyer would never miss the opportunity to challenge the appealed decision's fact-finding whenever it is clearly erroneous (futile, by contrast, is such a challenge when the fact-finding may be erroneous, but is not clearly so). The only limitation to fact-finding in the Italian Court of Cassation that really nobody can overcome is that no oral evidence is allowed in the proceeding.

Hence, Art. 49 and Art. 50 of Regulation 1215/2010 were implemented in Italy providing both for an appeal with full review of the merits at the Court of Appeal, and a further appeal to the Court of Cassation on grounds of violation of law with limited review of the fact-finding.

Member States involved in the project generally accord the losing party the same opportunities to appeal granted by general rules: in this perspective, it is especially worth noting that in the U.K., coherently with the common law tradition, even in the first appeal review of fact-finding is limited. However, this does not seem to infringe the not very demanding provision of Art. 49, since at least the right to challenge the decision to a different judge is respected.

However, Austria reportedly exceptionally allows appeal at the Supreme Court against appellate judgments concerning recognition and enforcement of EU decisions even when the appellate judgment totally confirmed the first-instance one (while ordinarily such second appeal would be reportedly inadmissible). Slovenian law, by contrast, is reportedly still unclear with respect to the limits of review of facts within the appeal at the local Supreme Court against appellate judgments concerning recognition and enforcement of EU decisions.

The most troublesome cases are Sweden and Portugal, reportedly not

[8] The latest one was amendment of Art. 360 of the Code of Civil Procedure by law no. 134 of 7 August 2012: on its impact see, e.g., the essays collected in *La Cassazione civile*, eds. M. Acierno, P. Curzio, A. Giusti, Cacucci, Bari 2015, esp. 31 ff.

granting the losing party first appeal as of right against judgments on recognition and enforcement. This would run against Art. 49 so clearly that, rather than amendments to Regulation 1215/2012, enforcement of the current rule by a holding of the European Court of Justice seems necessary.

Other differences between the Member States involved in the project with respect to this issue, however, legitimately reflect different conceptions of the role of the Supreme Court within the judiciary: in fact, pursuant to art. 50, a second appeal is not mandatorily available. Further harmonization, hence, would require relinquishments of sovereignty in an especially sensitive field, and would be difficult to implement in an effective way.

7 Standing for refusal of recognition and enforcement

Standing for refusal of enforcement pursuant to Art. 47 of Regulation 1215/2012 is granted only to the party against whom enforcement is attempted. However, standing for refusal of recognition (that implies unenforceability) is granted by Artt. 36 and 45 of the same to any interested party.

None of the Member States involved in the project reportedly adopted different solutions, albeit in Austria some doctrinal analysis seems to cast doubts about standing of any interested party (however, since the wording of the relevant rules on this point is already very clear, such doubts would be rapidly swept away by the European Court of Justice), with the exception of Portugal, reportedly granting standing only to the party against whom enforcement is attempted: if this was actually true, a holding of the European Court of Justice reestablishing the correct interpretation would be necessary.

8 Provisional measures pursuant to Art. 44, § 1, of Regulation 1215/2012

Orders pursuant to Art. 44, § 1, of Regulation 1215/2012 are provisional measures, and according to rules governing enforcement procedures already dealt with above they are issued (or denied) by a single judge, whose ruling is subject to challenge to be decided by a panel of three of the same court (without the participation of the first judge).

The Slovenian report seems to support, relying upon English doctrinal sources, the conclusion that Consideration 31 forbids the courts of the State of destination from granting such measures whenever refusal of enforcement is asked on national law grounds. This interpretation, however, is not convincing from the technical point of view, not only because nothing in the wording of Consideration 31 allows it (since it only grants access to

measures), but also and foremost because such reading implies, contrary to general principles, that the enforceable title would be even more effective in the State of destination than in the State of origin (since in no Member State the debtor is precluded from obtaining a stay of enforcement of a local title on national law grounds, albeit sometimes, as already seen above, the authority entrusted with such power may be different from the court hearing applications for refusal of enforcement).

On the contrary, the power to grant stay of enforcement on national law grounds, insofar as they do not conflict with Art. 45 of Regulation 1215/2012 (within the meaning already explained above), is also governed by national law: hence, a debtor pleading that the credit has already been paid may well obtain a stay of enforcement, or other similar protective measures provided by local law, even when the enforceable title is a EU decision. Amendment of Regulation 1215/2012 for clarification, however, does not seem necessary, since actually no explicit rule and no case law are reportedly precluding a debtor challenging enforcement of a EU decision on such national law grounds from obtaining a stay.

9 Stay of enforcement pursuant to Art. 44, § 2, of Regulation 1215/2012

As already seen above, whenever enforceability of the decision is stayed in the Member State of origin, enforcement in the Member State addresses is also subject to mandatory stay, at the request of the debtor, pursuant to Art. 44, § 2, of Regulation 1215/2012. None of the Member States involved in then project reportedly developed problems with this rule.

6. Final remarks.

With respect to remedies concerning recognition and enforcement of foreign decisions, lack of uniformity between the Member States involved in the project mainly depend from choices pertaining the realm of their residual sovereignty in politically sensitive fields, reflecting various degrees of openness to foreign legal systems, or of confidence in the various echelons of the enforcement authority. This holds especially for differences in the way non-EU judgments are recognized, in the general principles governing allocation between different courts of challenges to enforcement, or degrees of specificity required for oppositions in enforcement.

Other reported lacks of uniformity depend from direct violations of Regulation 1215/2012 clear wording, and deserve a holding of the European Court of Justice reestablishing the hierarchy of the sources of law. This

holds especially for: the U.K. requirement that an applicant for refusal of recognition of a EU decision present written evidence in support; Swedish and Portuguese limits to appeal as of right of the losing party in proceedings concerning recognition or enforcement of EU decision; Austrian and Portuguese law apparently not clearly granting, to interested parties different from the party against whom enforcement is sought, standing to apply for refusal of enforcement as an implication of refusal of recognition.

A revision of Regulation 1215/2012 would be useful, albeit not necessary for purposes of harmonization, to solve the contrast between sound systematic analysis of Art. 51 on one side, and European Court of Justice case law, forbidding the court of the State of destination from granting a stay of enforcement upon an evaluation of the probabilities of success of the ordinary remedy filed against the decision whose enforcement is sought, on the other side.