JOUR – J FOR JUDGMENTS

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Pierre Haincourt MCICM considers Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, and why it may be good news for enforcing judgments against European debtors.

AT the second FECMA Congress in Brussels on 20 and 21 May, which brought together over 100 European Credit Management specialists, Phillip King asked for a show of hands: only 15 percent of the delegates knew about the specific European cross-border legal debt recovery procedures that have been introduced in the last 10 years.

Further to the EU Regulation 1215 of 12 December 2012, a very easy date to remember, any judgment obtained after 10 January 2015 in an EU member state will automatically be enforceable in all member states, without any additional registration procedure being necessary. All you need to do is fill in a form. Really? Yes really.

This is the latest advance towards a harmonised European Justice Area so enforcement of judgments can be carried out efficiently, meaning faster and at a much reduced cost.

The so-called Brussels I Regulation (recast) is the latest tool available to enforce judgments obtained against European debtors.

So that's great, right? Well, yes, on paper, it is fantastic but how smoothly will the system run?

Nobody knows yet but if we look back over the past 10 years and see how the intermediate EU procedures have worked for creditors and what difficulties have been experienced, we may get a flavour of what is to come. We should hopefully spot a few of the traps to avoid and offer a handful of useful tips.

1. The European Small Claims Procedure (ESCP) Regulation (EC) No 861/2007, which came into force on 1 January 2009, has remained largely unused. Personally, I think the text of this Regulation is not helpful as it is neither systematic nor decisive. For example, it states, in the same breath, that this is a written procedure but that a court may still decide to hold a hearing or take evidence using video conferencing, and may even award costs in defended cases. Inevitably, translation costs are also involved. With costs having to be proportionate, needless to say creditors will be limited to Google translations here. The text of the Regulation goes on to say that once judgment is granted there is no possibility of opposing its recognition; but if you read on, you find out that there may be a right to appeal determined by the individual EU member state's legislation. How do costs remain proportional? More uncertainty. I am puzzled that the European Commission is currently doing a lot of work to make the procedure 'more widely used', or should they just say 'used'. The main aspect they seem to be looking at is threshold, which they propose to raise from 2000€. Currently the Commission is still debating with JURI (European Parliament Committee on Legal Affairs) if the ESCP threshold should be 5000€ or 10000€, and if payment of the Court fee should be means tested and capped at five percent or 10 percent of the claimed amount. The European Commission claims that it is estimated that the ESCP has reduced the cost of litigation for cross-border small claims by up to 40 percent and its duration from two years and five months to an average of five months.

Brussels' institutions must have an amazing model for calculating such complex estimates. It's a shame nobody seems to have figures to share on how many ESCPs have been issued since 2009. Thankfully, for B2B transactions, this procedure will, in my view, soon be redundant and may finally find its rightful place as a tool for consumers to use when, for example, the chainsaw they bought online from a Polish company does not work and they are unable to obtain a replacement or a refund.

2. The European Order for Payment (EOP) was introduced by Regulation EC 1896/2006. In force since 12 December 2008, it provides a way to obtain judgment faster and at reduced cost in European cross-border undisputed matters, and it has been used in many member states with various levels of success. My country of origin, France, calls it the 'European Payment Injunction'.

We don't have payment injunctions in England and Wales but many EU countries do. In general terms, a payment injunction is an alternative and simplified way to issue an undisputed claim in a court. The debtor has three options: paying, doing nothing, or ticking a box that says: 'I contest the claim' and providing, or not, details of the dispute. The debtor only has a short time to react. The court fee is often symbolic as the involvement from the court is minimal given that the procedure quickly comes to an end. Countries who offer an injunction procedure in their National Court System require that proceedings are served in person. If the debtor objects, the creditor can re-issue the claim in the 'normal' way.

Again, the advantages payment injunctions should bring are speed, simplicity and good value. A fair few EOPs have passed through my hands over the years and HCEOs in England and Wales have told me that they have successfully assisted French, German, Dutch and Polish creditors with the enforcement of the EOP obtained against their English debtors.

It seems to have been quieter the other way around and I have not seen or heard of very many EOP procedures being started by creditors in this country.

In my view, the European legislator has made the EOP an overcomplicated process by giving more options to the parties, compared to what a payment injunction should be. The default system, when the debtor contests, calls for the case to be transferred to the national court system, unless the creditor has completed an additional form which makes it work like a traditional payment injunction.

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Maybe this is why HM Courts did not think it necessary to levy a reduced court fee for an EOP procedure?

No wonder this is not an attractive proposition for English creditors or their lawyers.

Why use a separate procedure just for a handful of cases, why go through the trouble of getting to grips with new Court forms, giving the debtor 30 days instead of 14 from the date of service of the proceedings, paying the same hefty fee, and starting all over again if the debtor ticks 'I contest', when it is not even compulsory to do so? This is not good value for money.

3. The most useful tool for European creditors, in my view, has been the European Enforcement Order (EEO) that was introduced by Regulation EC 805/2004 and came into force on 21 October 2005. It has provided a quick and effective way to get judgments obtained in one EU jurisdiction, whilst being easily registered and enforced in another.

The EEO procedure can be used when a creditor has obtained a local judgment against a local debtor who moves to another EU member state. It can also be used when a creditor obtains a judgment in his own jurisdiction against a debtor based in another EU member state. This happens when the terms and conditions give jurisdiction to the creditor's local courts. The EEO needs to be requested from the court that has issued the judgment and providing that all conditions are met, the court will validate the EEO. The creditor can then proceed to register and enforce his judgment in any member state.

But beware: unless the initial court papers have been served on the debtor in person, you may run into difficulties. In England and Wales, where the default regime for serving court papers is first class post (how unsafe), the English court will certainly grant you the EEO, as you have met all the required conditions, but if, as you start your enforcement action in another EU member state, the debtor denies any knowledge of the judgment, enforcement action will be suspended on the grounds that the debtor has not had an opportunity to defend the proceedings.

Now, even when the creditor does everything right, such as serving the court papers on the debtor in person and enclosing a full translation in the language of the debtor, do not think that enforcement will be 'a walk in the park' or 'les doigts dans le nez' (the fingers in the nose) as we say in France. Many debtors still apply for enforcement to be suspended, even if there are no good reasons to do so. For some of them, it may be due to lack of knowledge of these procedures, or maybe they are misinformed, ill advised, or simply want to try it on? In any case, the courts always want to hear such objections. This results in a hearing where witness statements are exchanged and yes, the judge will probably decide that enforcement can resume but this will have set the creditor back a few thousand pounds, which will only be recovered if the debtor is able to pay.

Despite the visible successes the EOP and EEO procedures have brought with them it is clear that English creditors are at a disadvantage because of the way service is carried out in the jurisdiction of England and Wales. Unless there is certainty that the debtor has had an opportunity to defend, enforceability can be contested.

Since 10 January 2015, there is a new tool in the box, and what a tool this is. It is surprising that it made such little noise. On paper, the process of enforcing judgments is going to be just as easy, wherever in Europe the debtor is based.

My lawyer always tells me that it is better to give exclusive jurisdiction to the courts of England and Wales. I can see why this is. HM Court Service is an efficient service and things are definitely more comfortable at home, using a court service we know and understand well.

In my experience however, when two jurisdictions are involved, there are always options, and creditors need to make an informed decision about the best strategy, and the best strategy is the one which has the most chance of generating cash recoveries.

The starting point of this strategic approach has to be the terms and conditions. I need flexibility.

This way, given what I know about the state of the courts in Spain and Italy, I can sue my Spanish and Italian debtors in England and Wales. However, given the recent huge increase in court fees here coupled with the unpredictable cost of defended legal action, I would rather sue my Scandinavian, German, Austrian, and even Turkish debtors in their respective countries.

So maybe I will speak to my lawyer and ask him to write a clever jurisdiction clause that gives me options.

To make an informed decision, I also need to gather the information. I will never start a Court Action before I have gathered all the information about the debtor.

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THE ADVANTAGES PAYMENT INJUNCTIONS SHOULD BRING ARE SPEED, SIMPLICITY AND GOOD VALUE...

– PIERRE HAINCOURT

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