

Towards mutual recognition

Enforcing judgments in other EU jurisdictions is now easier than ever. Rod Baker and Ivan Shiu explain how it is done and discuss likely future EU legislation in this area

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The EU institutions have been busy in recent months in moving forward a programme of measures to implement the long-standing principle of mutual recognition and enforcement of civil judgments across EU member states. The most recent Regulation, EC805/2004, came into force on 21 October 2005 and is the first step in a raft of proposed EU legislation designed to promote the freedom of movement of judgments in the European legal area.

Regulation 805/2004

Regulation EC805/2004 (the Regulation) created the European Enforcement Order (EEO) and a new framework which allows a judgment creditor to enforce a judgment obtained in one member state directly against the judgment debtor in another member state, without the need for separate recognition proceedings in the member state in which enforcement is sought and without any possibility of opposing its recognition. For convenience, we will refer, as the Regulation does, to these respective jurisdictions as 'the member state of origin' and 'the member state of enforcement'.

The principal reason for which European businesses and litigators alike consider the availability of the EEO certification procedure an improvement over the previous regime is obvious: there is no longer any need for a judgment creditor to incur the additional (and substantial) time and costs of obtaining a declaration of enforceability in order to enforce a judgment in a jurisdiction not their own.

Thus, a judgment entered in favour of, say, a Spanish claimant by the Spanish court and certified as an EEO by that court could be directly enforced over the border against a French debtor by the French court. The French court would be bound to enforce the EEO as if it were a

judgment entered by the French court. The French debtor would have no rights to appeal the merits of the Spanish judgment and only very limited rights to oppose recognition and enforcement of the judgment.

This represents a significant departure from the long-established *exequatur* principle by which, continuing the above example, a judgment entered by the Spanish court could not be enforced in France without a declaration of enforceability from the French court. Prior to the entry into force of the Regulation, the enforcement of judgments across member states was governed by Regulation EC44/2001 (Brussels I), which, although it sought to simplify the process of *exequatur*, still required a declaration of enforceability from the court of the member state of enforcement. Article 5 of the Regulation expressly states that *exequatur* is abolished.

Applicability of the Regulation

The Regulation applies to judgments entered on uncontested claims in civil or commercial matters by a court of a member state. The Regulation came into force on 21 October 2005 but applies to any such judgment entered after 20 January 2005. The Regulation applies in all member states (including the most recent admissions) except Denmark.

A claim is defined as a claim for payment of a specific sum that has fallen due or for which the date is indicated in the judgment or court settlement. Certain types of claim are specifically excluded. In particular, the Regulation does not apply to revenue, customs or administrative matters, state liability, bankruptcy and insolvency proceedings, divorce proceedings, or arbitration. Brussels I continues to apply to claims outside the scope of the Regulation.

'To enforce an EEO, the creditor normally only has to provide limited paperwork, and the enforcement authority will enforce the judgment in accordance with local enforcement procedures.'

The Regulation applies only to uncontested claims, which are defined restrictively in Article 3. The definition includes claims where there has been an admission or a settlement approved by the court during the proceedings.

The Commission and Council were particularly swayed by statistics showing that 50%-80% of claims in the lower civil courts of member states did not seek a judicial ruling on disputed issues of fact or law but were straightforward claims for non-payment of sums owing where there was no real legal dispute about liability, such as claims under unpaid invoices for the sale of goods or supply of services. There was a great burden on creditors, typically small- and medium-sized businesses, pursuing such claims in cross-border disputes on account of the *exequatur* requirement in Brussels I, by which a creditor would have to instruct local lawyers to issue and conduct recognition proceedings in the member state of enforcement. The state of the legislation favoured the debtor, who could ignore the claim in the foreign court and stall if and when enforcement proceedings came to be issued against them in their home court.

The EEO certification procedure

A judgment handed down by a court of a member state in respect of an uncontested claim is not automatically an EEO. The judgment creditor must make a separate application for certification, if they wish to do so. The Regulation is voluntary and it remains open to a creditor to proceed as before under Brussels I.

There are two sets of factors to be considered by the court in determining a creditor's application for certification of a judgment as an EEO. The general factors set out in Article 6 of the Regulation require that the judgment:

- (i) is enforceable in the member state of origin;
- (ii) does not conflict with the rules on insurance contracts and exclusive jurisdiction in Brussels I; and
- (iii) was given in the member state of the debtor's domicile where the debtor is (or was dealing as) a consumer.

The second set of factors are certain 'minimum standards' for uncontested claims procedures, the purpose of which is to ensure that the debtor had a

proper opportunity to defend the claim. These standards are identified in Chapter III of the Regulation and relate to such matters as service of process and the extent of information about the claim and about the procedure to defend the claim that must be given to the defendant. The court must be content that these standards were observed in the original court proceedings.

If the application is successful, the court will issue a certificate in the form prescribed in Annex I to the Regulation. The certificate can be made to apply to only parts of the judgment.

An enforceable costs award in the judgment for costs in the proceedings can also be certified unless the debtor has specifically objected to its obligation to bear such costs. This scenario is unlikely to arise in cases of uncontested proceedings in which the debtor has played no part, but could be relevant in cases where a debtor has admitted or agreed to settle a claim. If the debtor has

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admitted liability for costs but disputes the amount of costs claimed or awarded, the creditor's claim for costs may still be certified as an EEO.

Procedure for certification in England and Wales

The procedure for an application for certification of a judgment as an EEO in England & Wales is set out in a new sV of CPR Part 74 and Practice Direction 74b.

The application is made to a master (for judgments entered in the High Court) or district judge (for judgments entered in the county court). The application is on paper and made on either form N219 (in the case where a defendant has admitted or agreed to settle a claim) or form N219A (in cases where there is a default judgment or the defendant has not objected to the judgment). The application must be filed with the application fee, three copies of the EEO certificate in draft, and a copy of the judgment and any costs certificate.

Proof of service will be required in the case of a default judgment. The procedural requirements under the CPR, in

particular, as to service and provision of information to the defendant in the Response Pack and Notes for Defendants, meet the minimum standards identified in the Regulation. In the great majority of cases, an English default judgment will not fall foul of certification on these grounds.

Section V of CPR Part 74 also sets out the procedure for enforcement in England and Wales of an EEO certified by another member state, the procedure for an application to rectify, withdraw or limit the enforceability of an EEO, and the very limited circumstances in which an application for enforcement of an EEO may be refused, stayed or limited (reflecting the provisions of Articles 10 and 19 of the Regulation).

Enforcing the EEO

To enforce an EEO in the member state of enforcement, the creditor need only provide the competent enforcement authority (usually the court) of that

member state with a copy of the sealed judgment and EEO certificate and a translation of the certificate. The enforcement authority will then proceed to enforce the judgment as if it were a local judgment, in accordance with local enforcement procedures. The creditor is not required to give any security for this procedure.

There are very limited opportunities for the debtor to oppose or appeal against enforcement. These are as follows:

- (1) Article 21 of the Regulation permits the debtor to apply to the court in the member state of enforcement to block enforcement in the narrowest of circumstances. The debtor would have to show that (i) the EEO is irreconcilable with an earlier judgment entered by a court elsewhere between the same parties and involving the same cause of action, (ii) the earlier judgment is recognised by the court of the member state of enforcement, and (iii) the fact that there was such an earlier irreconcilable judgment was not, and could not have been, raised

by the debtor as an objection to the proceedings in the member state of origin.

- (2) Article 10 permits an application to the court of the member state of origin for rectification or withdrawal of the EEO on the grounds either that there is a material error giving rise to a discrepancy between the EEO and the judgment or that the EEO was 'clearly wrongly granted' having regard to the requirements in the Regulation. There is no right of recourse in either of these circumstances to the court of the member state of enforcement.

A judgment can quickly be certified as an EEO in the creditor's home court, at which point there is little the debtor can do to resist enforcement.

- (3) Article 19 provides that the debtor may apply to the court of the member state of origin for a review of the judgment (i) if service of process was not effected in sufficient time to enable it to arrange a defence, through no fault of its own, or (ii) where *force majeure* or extraordinary circumstances prevented it from defending the claim. In either case, Article 19 requires the debtor to apply promptly to the court for a review of the judgment.

In the event of an application to the court of the member state of origin under either Article 10 or 19, Article 23 provides that the court of the member state of enforcement can limit the enforcement to protective measures, require security, or stay the proceedings pending the outcome of the debtor's application to the court of the member state of origin.

Advantages and disadvantages

The EEO should enable creditors to obtain quick and efficient enforcement of judgments in other member states. A corollary of this is that it is no longer advisable for a defendant against whom a claim has been issued to sit on their hands: once judgment has been entered against them, that judgment can quickly be certified as an EEO and presented to the court in their own jurisdiction, at which point there is little that they can do

or say to resist enforcement. Indeed, commentators have expressed concern about the limited defences (discussed above) available to a defendant once a judgment against them is certified as an EEO. The advice to a defendant would appear to be that if they intend to defend the claim at all, they should do so in the original proceedings and not wait until the enforcement proceedings, by which time, in the majority of cases, it will be too late.

So much for the theory. In practice, defendants may find some room for manoeuvre in the Regulation's definition of when a claim is uncontested. It has been suggested that it is sufficient for a defendant to file, within the prescribed

time limit, a defence which does little more than deny or not admit the claim in order to take the defendant outside the definition of uncontested claim and hence the scope of the Regulation. The defendant need not continue to defend the proceedings once its defence is filed: it must be the case that, even if the claimant is successful in striking out the defendant's defence, this cannot turn back the clock and render the claim uncontested for the purposes of the definition under the Regulation. It may well be, then, that even token resistance by a wilful defaulter will defeat the

Regulation and leave the creditor with no option but to jump through the *exequatur* hoops of Brussels I that the Regulation seeks to eradicate. We will have to wait to see how the courts approach this issue.

The European Order for Payment

On 21 February 2006 the Council reached political agreement on a regulation to create a European Order for Payment procedure (EOP). The EOP procedure will be an alternative means of recovering unpaid and uncontested debts throughout member states without issuing civil proceedings (as are presently required for the EOP certification procedure). The EOP procedure goes a step further than the EOP framework in this respect: the procedure superimposes (without the need for wholesale amendments to legislation at member state level) uniform deadlines for the various stages in the proceedings so that creditors will no longer need to rely solely on existing procedures at member state level.

The EOP procedure (as stated in the Commission's proposal for a regulation dated 24 May 2004) is outlined in the box below. The new procedure will be optional and creditors will still be able to apply for an EEO or enforce under Brussels I.

There are other legislative proposals on the table, most notably a European small claims procedure. This continues the trend of simplification of cross-border litigation and enforcement of judgments, but it is especially significant as it looks beyond uncontested claims to encompass contested claims between parties. ■

The EOP procedure

- (1) The creditor fills in and submits to the court an application form giving the names and addresses of the parties involved, details of the amount claimed, the interest claimed, the cause of action and a brief summary of the evidence in support of the claim.
- (2) The court issues a 'payment notification' to the defendant, in which the defendant is advised that it has three weeks either to confirm that it will make payment of the amounts claimed or to lodge a 'statement of defence', in which it must indicate whether it contests the claim in whole or in part.
- (3) If the defendant lodges a statement of defence, the claim is not uncontested and the EOP procedure concludes and the claim proceeds by way of ordinary civil proceedings.
- (4) If the defendant fails to lodge a statement of defence within that period, the court serves the EOP on the defendant requiring payment of the sum claimed.
- (6) The EOP gives the defendant a second opportunity to defend by lodging a 'statement of opposition' within three weeks of service of the EOP on it.
- (7) Once again, if the defendant lodges a 'statement of opposition' within that period, the claim is transferred to ordinary civil proceedings; if it fails to do so, the EOP stands.