Session 4: Constitution, Fundamental Rights and Law of Enforcement

4.2. The Conflicts between the Fundamental Rights of the Creditor and the Debtor

General Reporter

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GENERAL REPORT

THE CONFLICTS BETWEEN THE FUNDAMENTAL RIGHTS OF THE CREDITOR AND THE DEBTOR

I. INTRODUCTION AND GENERAL REMARKS

I am one of those people who always count their blessings, and speaking before you now, I would like to start by saying that I have been very fortunate in two respects for this colloquium on the sub-subject of Enforcement Proceedings and the Conflict between the Fundamental Rights of the Creditor and Debtor. Firstly, I have had the honour of being chosen by very distinguished colleagues to act as the general reporter. Secondly, in preparing this report, I have been assisted by a team of very distinguished colleagues from many parts of the world (from Latin America, through Europe to Asia and Oceania) who have different ideas arising in connection with the machinery of enforcement. I have always regarded enforcement as a key subject of procedure. Enforcement involves the machinery of society operating within the legal regime of the rule of Law and procedural fairness. Actions that undermine orders of the court or other enforceable titles have moral, social, economic, and even political connotations.

1.1. This report discusses the procedure by which judgments and other enforceable titles are enforced against the debtor for the benefit of individual and singular creditors and the conflicts between their fundamental rights. This process is

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1 This a collective work, firstly there are those who gave direct transcriptions as contributions to the general report (main text and footnotes), without whose assistance this report would not be possible. I have opted, while preferring to the national reports as direct "copy-paste" to summarize the main contents of each contribution. I would like to thank the nationales reporters and really co-authors of this general report: Prof. Eduardo OTEIZA (Argentina), Prof. William VAN CAENEGEM and Prof. Kim WEINERT (Australia), Prof. Dr. Luiz Guilherme MARINONI, Prof. Dr. Sérgio Cruz ARENHART and Gustavo OSNA (Brazil), Prof. Dr. Maite AGUIRREZÁBAL and Prof. Macarena VARGAS (CHILE), Prof. Yulin Fü and the Ph.D. Candidates Zhixun CAO and Jingru HAN (China), Prof. Jairo PARRA QUIJANO (COLOMBIA), Prof. Mg. Alan UZELAC (CROATIA), Prof. Neil ANDREWS and Robert TURNER (CAMBRIDGE), Prof. Emmanuel JEUJLAND (FRANCE), Pedro José F. BERNARDO (PHILIPPINES), Prof. Dr. Laura ERVO (FINNLAND), Prof. Dr. Christoph A. KERN (GERMANY), Prof. Dr. Nikolaj A. FISCHER (GERMANY), Prof. Dr. Miklós KENGYEL and Prof. Dr. Viktória HARSÁGI (HUNGARY), Prof. Remo CAPONI and Pietro ORTOLANI (ITALY), Prof. Minoru YOSHIGAKI and Prof. Takuya HATTÀ (JAPAN), Prof. Choong-Soo HAN (KOREA), Prof. Tom JONGBLOED and Remme VERKERK (The Netherlands), Prof. Dr. José LEBRE DE FREITAS (PORTUGAL), Prof. Dr. Joan PICÓ I JUNÓY (SPAIN), Prof. Santiago PEREIRA CAMPOS and Gabriel VALENTÍN (URUGUAY). Additionally, because the English is not my native language I would like to thank Sophie Shaw, an outstanding Cambridge Faculty of Law student for the review and correction of this manuscript. Also I am grateful to my student assistant Vicente Tapia. Of course, all the formal and content mistakes are mine.
distinct from insolvency procedures, which tend to a collective satisfaction for all creditors with a claim against the same debtor. Both procedures have common characteristics and features, and they are interconnected. In the most general terms, one of the basic goals of insolvency law is to provide a framework for dealing with the concurrence of interests and claims within a given system of ranking or priority. The manner in which the competing interests are balanced is not necessarily identical in all systems of insolvency law. Each insolvency statute is drafted in the manner most regarded, in a particular legal system, as the most suitable to effectively pursue the underlying policy and prevailing purpose of the insolvency law, be it the protection of the debtor or his creditors or the preservation of employment.

1.2. Enforcement proceedings entail coordination with, and cooperation of, a separate enforcement body. The public interest in legal certainty, transparency, and respect for fundamental rights assumes a major role in the enforcement process. Although the singular civil enforcement process encompasses relevant features of substantive private law and party autonomy, it should not be forgotten that enforcement signifies the main moment where procedural devices can be tested in relation to the material right (credit) that is to be protected and satisfied from one side. From the other side should be tested if the limitations to the property and person of debtor are reasonable.

The limitation of party autonomy in certain areas of enforcement (for example the possibility of creating and granting, without additional safeguards, an enforcement title different to a judgment), aims to protect the debtor against unjust enforcement proceedings against them. This does not prevent the parties from agreeing, as is permitted in declaratory proceedings, to an advance waiver of the use of certain defences or exceptions that remain within the framework of respect for autonomy and free disposal of the parties. In the enforcement context, there are also other limitations seen in the enforcement context on certain objects or the choice of the enforcement proceeding to be applied, as well as the exclusion of the possibility of creating or abolishing (or even annulling) the right of the parties to access the enforcement proceedings as creditor, debtor or interested third party. Enforcement proceedings should be a place for the rights of both parties and their interests to be balanced adequately.

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5 FISCHER, Nikolaj, German National Report.
7 STAMM, Jürgen, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, (Tübingen: Mohr, 2007), p. 16 et seq.
The enforcement proceeding consists of the whole substantive and procedural legal relations. In order to commence an enforcement proceeding, a legal enforceable title is required, which enforcement, in a narrow sense, means “the right to start enforcement proceedings, and in a broader sense, (referring) to the totality of substantive and procedural legal consequences originating from the legal relation, which affect the rights and obligations of the participants of the enforcement proceedings.”

One characteristic element of this totality is the application of sanctions, which may be directed against persons or property. Within these sanctions, the creditor shall, within the legal framework, have the privilege to specify the type of property of the judgment debtor from which to secure enforcement of his claim. In the course of judicial enforcement, executive force may be employed to force a party compelled for payment of money or for some other conduct to fulfil such obligation. ”The essence of judicial enforcement lies in the application of executive force. This takes place only in the event of the lack of voluntary performance; executive force is resorted to, in any case, secondarily, with a subsidiary character”. In the view of the Constitutional Court of Hungary, executive force it is a provision expressly serving the purpose of the protection of creditors and the general interests of the rule of law so that the bailiff does not need send a second, completely unnecessary warning to the debtor to perform voluntarily, but instead he or she appears at the debtor’s apartment and seizes the debtor’s personal assets to cover the debt.

1.3. To deal with the conflict between fundamental rights of creditor and debtor in the enforcement process, it is important first to explain the general and comparative foundations and the organic structure of the enforcement procedure. (i) The enforcement might be court-centred, bailiff-centred or mixed, and might be organised on a decentralised or centralised model. These aspects are highly relevant to the dynamics of the proceedings. (ii) Because of both the public law and procedural aspects of the law of enforcement, there are prerequisites to be satisfied by the creditor before he may commence enforcement proceedings in which he has a dominant position. He needs an enforceable title, and there are some further (more or less detailed) requirements.

Enforcement procedures integrate fundamental procedural rights. In general, the creditor has a right to performance. The right to justice includes, according to that judgment, the right of access to the courts, the right of trial and the right to enforce a judgment within a reasonable time. This law enforcement in France stated solemnly into national law in Article 1 of the Law of 9 July 1991 on enforcement procedures regarding the execution of all obligations, which means the obligations of judgments.

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10 In its decision the Regional Court of Appeal of Budapest pointed out: “executive force applied against the debtor on justified grounds – in the lack of voluntary performance – does not constitute an injury to personal rights and therefore it does not serve as a ground for the award of damages.” Quotation by KENYEL Miklós / HARSÁGI Viktória, Hungary National Report.
12 JEULAND, Emmanuel, France National Report.
13 Pursuant Article L111-1 of the code of civil enforcement procedures: “a creditor may, under the conditions provided by law, compel the defaulting debtor to perform his obligations towards her. Any creditor may pursue a precautionary measure to safeguard its rights”. Also Article L111-2 rules “The
The protection of these rights is distinct from the legislative, doctrinal, and especially functional and practical importance assigned to other rights or guarantees such as access to justice and the right to an effective remedy\textsuperscript{14}. Furthermore in Japan the right of access to the courts (Constitution of Japan § 32) is normally considered as including the right to a speedy and public trial by an impartial tribunal and the right to the execution procedure that realizes a right effectively and efficiently (the right to an effective execution)\textsuperscript{15}. The same assertion can be found in Uruguay at the procedural level, the Uruguayan legal system and the so-called "right to effective judicial protection." This right has been widely recognized in international standards has been ratified by Uruguay, and the arts. 8 and 25.1 of the Inter American Convention on Human Rights. In the current Constitution, this right can be considered inherent to the human personality or the republican form of government, and therefore tacitly collected by the constitutional system (art. 72)\textsuperscript{16}. The Constitution of Portugal guarantees everyone the right of access to a fair trial (Article 20). The procedural law recognizes the debtor the full right to contest the enforcement action to defend himself. Furthermore, it is guaranteed to the debtor, in the enforcement proceeding, monitoring of executive acts and the right to complain of illegal or abusive executive acts\textsuperscript{17}. Also art. 118 of the Spanish Constitution make it explicit that the State is under an obligation to enforce the final judicial decision and in art. 24 Par I enlarges the right of access justice and to the court\textsuperscript{18}. The European Court of Human Rights has declared that the fundamental right to effective enforcement forms part of Art. 6 ECHR in a very extensive list of leading cases\textsuperscript{19}, beginning with \textit{Horsnby vs. Greece} (1997), followed by \textit{Guincho vs. Portugal} (1984), \textit{Martins vs. Portugal} (1988), \textit{Burdov vs. Russia} (2002), \textit{Boden Vod Greek-Catholic Parish vs. Romania} (2013), \textit{Çaquir and Others vs. Turkey} (2013) and also in creditor with a writ of execution showing a liquid and payable debt can continue the enforcement of the debtor's assets in the conditions of each measurement execution".\textsuperscript{14}

\textsuperscript{14} JEU LAND, Emmanuel, France National Report.

\textsuperscript{15} Fort the procedural and enforcement Law in Japan please see the Civil Execution Act http://www.japaneselawtranslation.go.jp/law/detail/?ft=5&rc=01&dn=1&gen=3&ksy=54&hct=A&no=4&ex=85&ca=22&ia=03&ky=&page=1 the Code of Civil Procedure http://www.japaneselawtranslation.go.jp/law/detail/?ft=5&rc=01&dn=1&gen=4&ksy=8&hct=A&no=109&ex=70&ca=18&ia=03&ky=&page=1

\textsuperscript{16} PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report: “Civil Procedure Act provides that any person has the right to go to court to ask a specific legal problem or oppose the solution demanded and to exercise all proceedings concerning the defense of either procedural position, and the court required has a duty to provide for their requests (General Code process, hereafter CGP, art. 11.1). Moreover, in the ordinal 11.4, added by Law 19.090, of June 14, 2013, provides that "Every subject of law have access to a reasonable length process to resolve their claims and the right to judicial protection effective "(highlight added). Naturally, one of the main applications of this law is the protection in execution. As we will see, the civil procedural law, after the reform of 2013, made several changes to the enforcement proceeding that tend to effectuate this form of protection”

\textsuperscript{18} FREITAS, Jose Lebre de, Portugal National Report.

\textsuperscript{19} RUIZ-DE LA FUENTE, M., El derecho constitucional a la ejecución de las sentencias firmes, in Ejecución Civil: Problemas Actuales, Cachon Cadenas, M./Pico Junoy, J. (Ed.), (Barcelona: Atelier, 2008), pp. 21-36.

other cases not mentioned in this report. In one example, the ECHR ruled that the refusal to enforce a common fourteen years after a judgment ordering the destruction of a building depriving the applicant of the view and the light is contrary to law enforcement within a reasonable time. A State must facilitate a private person’s to access to a court. It must "assist the applicant in its efforts for the enforcement of judgments" and is condemned even though the delay took its origin in the lack of diligence of a bailiff. The execution must be complete, perfect and certainly not partial. The Inter American Court of Human Rights has also considered the existence of a right to effective enforcement. As an introductory proposal, it was referring to “the proceedings before the unjustified refusal to performance with a provision through which [the creditor] seeks to break the will of the debtor by reserving the exercise of force by the State (...". The lack of timely, reasonable and adequate satisfaction of a undoubted titled right (judicially-granted or conferred by virtue of a provision contained in ‘general enforceable titles’) not only violates the guarantee of effective legal protection, but is also contrary to access to justice, and the fair and equitable process that is due as of right. The constitutional issues involved in the enforcement are linked to each other through their public character, both because of the public concern and also given that the public may be affected by a state organism or authority. Furthermore, when enforcement arises in private claims, the constitutional limitations and constraints on any public power are applied to the enforcement. It must, however, be recognised that the enforcement body is involved in the proceedings not out of self-interest but rather because of the creditor’s rights. The enforcement proceedings should ensure the procedural fairness and equal treatment of the interested parties.

1.4. The main conflicts between the fundamental rights of the debtor and the creditor’s right of enforcement were initially discussed most deeply in the German bibliography, given that they, were mainly German Constitutional Court decisions that described the minimal standards to be recognised from the debtor’s perspective: human dignity, the protection of property, the inviolability of personal privacy, the inviolability of the home, personal freedom, the protection of the family, and personal data protection. Particular cases were connected with a core of questions. Examples include: should a forced sale with an auction price under 50% of the current market value not be tolerated in light of the debtor’s right to be fully heard? Should a bailiff (as a judicial assistant) be able to search a home without judicial authorization? Should certain penalties and coercive measures imposed on a debtor for not complying with an ‘abstain

21 JEULAND, Emmanuel, France National Report.
22 Five Pensioners case (2003) and the later cases Baena (2008) and Mejia (2011).
24 For a bibliography overview see ROSENBERG, Leo/GAUL, Hans Friedhelm/SCHILKEN, Eberhard/BECKER-EBERHARD, Ekkehard, Zwangsvollstreckungsrecht, 12 ed. (Munich: Beck, 2010), § 3.
25 The German Constitutional Court decisions with the individual opinion of justice Böhmer are the main starting point ( BVerfG 27 Sept. 1978 , in BVerfGE 49, 220).
from doing’ judgment be tolerated? Should the personal situation of a debtor who is depressed and in suicide risk be considered, according to the social State principle? Should proportionality be considered on a case-by-case basis, according to constitutional standards, in the sense of weighing the harm to the debtor against the benefit to the creditor? Should it be determined by the criteria of a Constitutional Court, or by a detailed enforcement law regulation and the application of proportionality on a case by case, according to the legislator’s use of the provision? The subject is part of the connexion between Constitutional and Procedural Law. The modern constitutional theory recognizes positive and negative constitutional rights and stipulates a really wider judicial review on the law’s constitutionality around the main issue: describe the scope and limitations of constitutional rights. The limitations of constitutional rights are sometimes ruled in general in the constitution but certainly in the sub-constitutional law (statutes or common law). The enforcement proceedings impose limitations to fundamental rights and could be questions if the limitation are according to the constitution and this control is centred on the proportionality. We could test the constitutionality of the entire enforcement proceeding in the framework of the rule of law, but also could be tested each enforcement act. In order to answer the question about the conflict between the fundamental rights of creditor and debtor, the main problem is the limitation of the fundamental rights.

See the German decisions of the Federal Constitutional Court BVergGE 1, 97 ; 105 ; 36, 73 , 84 ; 65, 182 , 193 ; 22, 180 , 204 ; 59, 231 , 263.

See SCHWAB, K-H/GOTTWALD, P., Verfassung und Zivilprozess, in Rechtsschutz und verfassungsmässige Ordnung Habscheid (Ed.), (Bielefeld: Gieseking, 1983), p. 1 e seq.; Cf. with the enforcement proceeding and the fundamental rights FISCHER, Nikolaj , Vollstreckungszugriff als Grundrechtseingriff, (Frankfurt am Main: Vittorio Klostermann, 2006), passim; KLAMARIS, Zum Stand des griechischen Zwangsvollstreckungsrechts, ZZP 121 (208), at 475; for a discussion about the problem with different constitutional adjudication systems and the control of enforcement proceeding see NAKAMURA, Hideo, Grundrechtsverletzungen bei der Zwangsvollstreckung in Japan, Grundrechtsverletzungen bei der Zwangsvollstreckung (Athen: Dike International, 1996), p. 491 et seq.


1.5. It is perhaps this difficulty of plurality and the heterogeneity of adjudication that would permit a double procedural-material review and new litigation at the enforcement stage. In some legal systems, the diffuse, nebulous and sometimes contradictory results of declaratory proceedings could negatively affect the celerity and organization of the enforcement proceedings. This may explain why in some legal systems it is strange and rare to find a theorized treatment of the Civil Enforcement Procedural Law as systematized field. This was observed and highlighted in 1986 by the German professor STÜRNER in relation to the research and academic work on civil enforcement in Germany that time. The same observation had been noted thirty years before in a classic work on Enforcement Law in the Spanish tradition by CARRERAS. These findings remain true today, and the publications and research on the subject vary greatly in quality, quantity and relevance between the different Families of Law. Is the law of civil enforcement, with the very broad exception of certain legal Systems, an exotic and under-explored field? If the answer - as I suppose - is yes, would the dimension of creditor-debtor fundamental rights provide a new and attractive focus to revitalize the interest and relevance of the subject? A basic work with entire comparative contributions on this subject is a collective book containing essays in honour of Prof. GAUL, published in 1996 with more than 700 pages under the editorship of the Greek Prof. Kostas BEYS. This book provides a comprehensive study on the violation of fundamental rights and enforcement proceedings.

1.6. My contribution is divided into four chapters: (i) in the first (II) I discuss the general constitutional question of the enforcement procedure within the framework of fairness and due process of law from the perspective of the enforcement structure, organization and general principles of the enforcement proceeding (procedural, private and public law); (ii) in the second chapter (III) I consider case-by-case treatment of the debtor-creditor fundamental rights conflicts in enforcement procedures and enforceable measures; (iii) in the third chapter (IV) I consider conclusions on the main open questions, and general possible answers based on the combination of a fundamental rights view and the proper regulation of Enforcement Law.

II. CONSTITUTIONALITY OF THE ENFORCEMENT PROCEDURE IN THE FRAMEWORK OF FAIR AND DUE PROCESS OF LAW

33 See CARRERAS, Jorge, El embargo de bienes (Barcelona: Bosch, 1957) p. 6: “If there is one area in which more sharply intersect the substantive and procedural law this is undoubtedly the enforcement proceeding. The research was carried out unilaterally and has developed a doctrine that uses concepts and categories of private law hardly accumulated at institutions of public law” (free translation); in p. 5 “In Spain ... the implementation has not yet been studied in depth desirable and necessary” (free translation)
34 Under the edition of Prof. BEYS, Kostas on the base of an international Symposium in Greece titled “Grundrechtsverletzungen bei der Zwangsvollstreckung” (Athen: Dike International, 1996).
2.1. It might be said that civil procedure could achieve its goal only with a judgment which recognises a substantive right, but such a statement would be incorrect. An encounter between the process and the material right should materialise, and this encounter culminates in the concrete factual refund of the substantive legal order violated: the effective satisfaction of the right claimed, recognised and declared. Perhaps the general principles of civil procedure are so general that they are also applicable to the enforcement stage. Or perhaps it may be possible to find some special principles applicable to the enforcement. These may have certain similarities with the so-called "formative principles of the civil proceeding" applicable to the declaratory proceeding, but with some autonomous features that could be applied in this special field of enforcement.

There are two main areas of enforcement which have developed independently, although they have a close connection. These are the enforcement of debt, where the court awards a money judgement and the enforcement of orders or decrees, which are non-monetary in character. These enforcement processes have entirely different, although equally important, social contexts, and they must be recognised in order to understand the role of procedural law in relation to enforcement. It may be said that the enforcement of money and non-money's judgments occurs when the judicial process has come to an end and something akin to a mere administrative collection proceeding begins, and very often this is exactly what happens.

Civil enforcement is comprised of a plurality of discontinuous procedural acts without a uniform nature, which is in contrast to declaratory proceedings and their homogeneity: in the implementation of a judgment, there is a decision of the court, "an enforceability declaration" which this renders enforcement activities permissible and gives legal support to the executive activities of the State so long as they are carried out within the framework of legality and according to a constitutionally-based fair and due process. The coercive activities might primarily affect the debtor’s assets, and secondarily affect the debtor personally in, for example restricting their freedom. Additionally, a third possibility is that third party interests may be affected by enforcement proceedings. Third parties may, therefore, seek to be incorporated into the proceedings, to have their rights adjudicated in the declaratory and ancillary

proceedings. This will arise, for example, where the third party alleges an independent, exclusive right to the assets disputed by the original creditor-debtor parties.

2.2. If we could need to test the proportionality of the enforcement proceeding in general we could do it. The proportionality test of the limitation of fundamental rights need to mention the four sub-components\(^{40}\): (i) should have a proper purpose; (ii) the measures undertaken to such a limitation should be rationally connected to the fulfilment of that purpose; (iii) the measures undertaken should be necessary in that there are no other alternative measures similarly for the purpose with lesser harm; (iv) should be a balance (proportionality \textit{strictu sensu}) between the importance of achieving the purpose and the social importance of preventing the limitation of fundamental rights. This chapter deals with the general constitutional foundation of enforcement proceedings. The proper purpose is the fundamental rights of one party (creditor) to claim the enforcement and use of the whole executive devices to satisfy his right. The organic and procedural structure of an enforcement proceeding has to be rational and adequate to that purpose. Finally the main problem could be arisen in the test of the balancing of interests and to prevent unnecessary limitation of fundamental rights (to be analyse in the next chapter) May be this introduction with a examination with constitutional theory of the enforcement could be unnecessary, could be obvious. But understanding this background is a prerequisite to dealing with the particular, case-by-case instances of conflicts between the fundamental rights of the creditor and debtor\(^{41}\). It also provides a general framework in which to find answers to complex problems arising within the singular civil execution process. First, it must be remembered that enforcement is a complex relationship with at least three centres of interest: the creditor, the debtor and the enforcement organism\(^{42}\). Secondly, I will set out the principles, and then develop a couple of principles that are common to declaratory proceedings\(^{43}\). Finally, I will consider the special principles of enforcement, which have been influenced both by Public and Private law.

1. The fundamental right to enforce a claim

2.3. Civil enforcement has increased in importance not only within the European Union (as a result of the need for the free (and secure) movement of goods and the

\begin{footnotes}
\footnotetext[43]{See for a general and complete contribution on the “principles of Civil Proceeding” PEYRANO, Jorge, El proceso civil. Principios y fundamentos, \textit{ (Buenos Aires: Astrea 1978), passim ( esp. 1-28).}
\end{footnotes}
enforceable protection of credit) but also in Latin America, Asia and Oceania, as academics in these regions became increasingly aware of its legal significance and socio-cultural-economic dimensions. Constitutional imperatives and human rights both at the regional and national level impose on States the obligation to provide the right of access to justice, to claim, to defend oneself against another, to provide evidence and to participate in all stages that may influence the judicial decision. These obligations have assumed increasing relevance at the later stage of enforcing the judgment handed down. Legal systems are based on the idea that all subjective rights can be enforced unless otherwise provided for in the law, with these exceptions being of limited importance, and therefore legal systems must contain a detailed set of rules which define the creditor’s rights and strike a balance between effective enforcement and protection of the debtor. When the court decides that enforcement of a judgment or order is to take place, there are legal remedies available to creditors to enforce a debt, and, although the related procedures are frequently time-consuming and potentially costly, and there is no guarantee that the creditor will actually receive all of the funds owed them.

The creditor of money judgments can initiate enforcement according to various processes: seizure of the debtor’s goods, attachment of earnings orders, garnishing proceedings (‘third party debt orders’), or by charging orders against real property. There are also special procedures relating to the recovery of movable and real estate property. Non-money debts can also be enforced. In such cases, non-compliance with an order or an injunction can be sanctioned by a range of coercive measures. In some systems, these may have a punitive nature, for example the English contempt of court proceedings (‘committal proceedings’). The guarantee of the fundamental right to an effective judicial remedy, provided by Article 6 ECHR, is not limited in its scope to the declaratory phase, but is also applicable to the successful completion of any eventual enforcement proceedings. Most other subjective rights also enjoy the protection of fundamental rights enshrined by the Constitution and Human Rights Conventions. The Article 6 guarantee does recognise that in some cases, these fundamental guarantees must be limited where conflict arises with the fundamental rights of others. It is a constitutional right that claims supported by relevant substantive law should be effectively enforced. The enforcement is applied to claims arising from a private as well as a

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45 See PIÇÓ JUNY, Joan, Las garantías constitucionales del proceso, (Barcelona: Bosch, 1997), pp. 76-80.
47 See a decision of the German Federal Supreme Court BGH, JZ 2005, 525, 526.
48 Based on art. 101(1) 2nd sentence, 103(1) GG; see, e.g., Federal Supreme Court (Bundesgerichtshof, BGH), JZ 2005, 525, 526 (quoted by KERN, Germany National Report).
There is a connection between the fundamental right to judicial protection and the right of property (from the creditor side). I shall clarify this point by reference to the following statement grounded in German Law:

“Any “subjective right” can be pursued with the help of the courts and the state officials who are competent for compulsory enforcement. This is true regardless of whether the debtor is a private person or “the State”, i.e., the Federations, a State or a subdivision of the Federations, like a federal authority, or a subdivision of a State, like a State authority or a municipality; this is also applicable to the centralized and Unitarian State organization. There are some special rules concerning the enforcement of claims against the State; however, enforcement against the State only occurs very rarely, as the State normally abides by final judgments of the courts.”

According to the German Law the creditor has a fundamental right to protection by the judiciary (Justizgewährungsanspruch). The legal scholars remark that most subjective rights are also backed by individual constitutional guarantees. All “substantive rights” which have an economic value are protected by the fundamental right to property guaranteed by art. 14 of the Federal Constitution (Grundgesetz, GG). Art. 14 GG protects the right to property in a large sense, including all claims against debtors based on substantive (private or public) law. The only small exception to the enforceability of all “substantive rights” are a few “natural obligations”. By an

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50 See KERN, Germany National Report. The translation from German into English of legal provisions are taken from the official website www.gesetze-im-internet.de, item “translations”.
52 “Defined mostly in the Civil Code (Bürgerliches Gesetzbuch, BGB), i.e., obligations that cannot be enforced but if nevertheless fulfilled, the performance cannot be claimed back under the rules of unjust enrichment. Such obligations which cannot be enforced are, among others, obligations for which the statutes of limitations have run out (§ 214(1) BGB), obligations of the client of a marriage broker (§ 656 BGB), and debts from games or bets (§ 762 BGB) that are not based on an authorized lottery (§ 763 BGB)”. Conf. SCHULZE, Götz, Die Naturalobligation, (Tübingen: Mohr Siebeck 2008) (Supporting Argument of KERN, GERMAN National Report); see also KERN, Christoph, Typizität als Strukturprinzip des Privatrechts, (Tübingen: Mohr Siebeck 2013), p. 377. “Until 2002, § 764 BGB stipulated that obligations from contracts for difference concerning goods or securities also had to be considered natural obligations. However, from 1989 on, there was an exception to this provision in the Securities Exchange Act (Börsengesetz) if the debtor was either a merchant or had been informed on the risks of this kind of
act of 2002, the provision was finally abolished in order to allow a larger array of financial derivatives."

The German Constitution Art. 14 GG protects property in a wider sense. It is not only applicable to protecting all claims or assets which have a pecuniary value against expropriation and other forms of disturbance by the State, but is also interpreted to require the State to provide for effective means of protecting these claims.

2. The structure and cultures of the enforcement: complex relationship and its principles

2.4. The so-called principles of singular civil enforcement are useful to explain and support both the structure and the dynamics of enforcement proceedings. The principles allow for a better explanation and comprehension lege lata as lege ferenda of the singular civil enforcement. In this area, we are not usually concerned with efficient credit protection, or costs but we are aiming to achieve a suitable framework for the exercise of executive power and coercion of the State over the person and property of the debtor.

Should we therefore test enforcement Law by application of the proportionality principles of Constitutional Law? Faced with this question, it could be argued that there would be damage suffered by the procedural principles and maxims if they were not compatible with proportionality, and it could even be claimed that they go against principles and rationales applicable on a much more general level to the legal system, such as justice, fairness or the guarantee of the fair and due process of law. A legal system without principles is destined to degenerate and lead to anarchy, injustice, or lack of consistent observance of the Law as a result of the loss of legitimacy.

2.5. Enforcement necessarily entails the exercise of executive actions; that implies the existence of an enforceable title and also a procedure with formalities that must be observed, which are not required in declaratory proceedings. The first requirement of the effective action is primarily an enforceable title, which is usually written. Two topics deserve special attention. First, the constitutional principles

transactions in a certain way so that he or she had acquired the capacity to trade in forward contracts” (KERN, Germany National Report)


54 KERN, Germany National Report.


56 In this contribution the meaning of “principles” might be understand as rules or standards. For discussion about the traditional differentiantion see Alexy (Theorie der Grundrechten (Berlin: Suhrkamp, 1986) and Dworkin, Ronald, Taking Rights Seriously (Massachuset: Harvard U. Press, 1977), ch. 4 and 340–41. Cf. Against this view and further discussion see ALEXANDER Larry and KRESS, Ken “Against Legal Principles,” in A. Marmor, ed., Law and Interpretation: Essays in Legal Philosophy (1995) 279, reprinted in 82 Iowa L. Rev. 739.
considered in the underlying dispute and adjudication in the declaratory proceeding does not arise at the enforcement stage. However, secondly, certain principles pertinent to the declaratory proceedings could be applied to the enforcement proceedings. Something similar to this has happened with celerity and procedural economy, which should also now be found in enforcement proceedings.

The importance of the principles or general foundations in the Law of Enforcement, assumes a key role when they relate to the triangular relationship\(^57\). (i) The creditor requests the enforcement organ to act in enforcement proceedings. Where there is still a lack of compliance by the judgment debtor, the enforcement organism uses all suitable mechanisms and adequate proportionality to achieve the satisfaction of the creditor’s rights.\(^58\) (ii) The relationship between the enforcement organism and the debtor or person against whom judgment has been executed cannot be explained only using the classic principles of the due and fair process of declaratory proceedings. It is the debtor who is going to be limited in his assets and personal sphere. (iii) The substantive and procedural relationship between the creditor and debtor (obligation) must also be remembered, given this relationship increase the legitimacy of aggression towards the personal or property sphere of the debtor. I will now discuss the delicate field of fundamental rights and the constitutional justification for benefitting the creditor at the expense of the debtor. The Spanish enforcement proceeding is synthesized in the inspiring principle of protecting the interest of full enforcing creditor interest minimizing the harms of debtor enforced. This principle is latent in the arts. 239 and 570 of Law 1/2000 of Civil Procedure, January 7 (LEC), which rules that enforcement will only end with the complete satisfaction of the judgment creditor, and that once initiated the enforcement proceeding does not expire until it has obtained the complete fulfillment of what has been done\(^59\). This starting statement must be qualified: the constitutional tests and standards might not be directly applied to the determination of whether enforcement should be permitted, but they are relevant because the Law of Enforcement derives its normative legitimacy from acting in with Constitutional Law\(^60\). If an enforcement act limits a fundamental right could be tested its adequacy and rationality (proportionality) according first to the Law of Enforcement and in a second stage under constitutionality standards\(^61\).

\(^{57}\) FISCHER, Nikolaj, German National Report.
\(^{59}\) PICÓ I JUNOY , Joan, Spain National Report. Art. 584 LEC, rules: "No assets are seized whose expectation value will exceed the amount which has been dispatched execution unless the assets of the debtor only they obtain goods exceeding those concepts value and condition demonstrate the need for such property for the purposes of execution ".
2.6. Where there is no act of opposition by the debtor or a third party, the enforcement procedure can theoretically be divided into three distinct sections. There may be an additional section when there is opposition to the enforcement by the debtor or an interested third party. The first phase starts with the request for enforcement or executive claim and ends with the delivery of the order of compliance and request to perform. Prior to this first phase, some legal systems have a pre-phase one step to confirm the existence of an enforceable title. The second phase consists of two sub phases that occur simultaneously and in parallel. The first sub phase concerns preparatory measures to enforcement, which acknowledge the existence of a threat to the debtor’s assets and protect against the risk of their dissipation (attachment orders, interim administration, garnishment etc.) In parallel, the second sub phase permits the debtor (the executed) or third parties to assert their respective opposing positions. It is rarely the case that such opposition is successful, but such challenges are discussed below as a fourth possible stage. The third phase entails the discharge of assets (forced auction) to obtain sufficient liquidity to satisfy the creditor. By adapting the object of enforcement and the precise claim, this basic structure can also be applied mutatis mutandi (with different enforcement measures) to non-monetary obligations.

2.7. The eventual fourth stage concerning the opposition either of the debtor or of third parties, will involve the initiation of ancillary, simplified declaratory proceedings, including an evidentiary phase in order to reach a final decision. During this stage, the procedural principles developed for declaratory proceedings are applied. The present work suggests that these principles may share some common aspects with the singular civil enforcement process. Declaratory proceedings require the necessary frameworks to be in place to hear contradictory arguments and to adjudicate on questions of rights. Formality is common in the declaratory proceeding, but it is also used with certain specificity in the enforcement stage. Even if the creditor encourages swift progress through the different stages, the enforcement process will be notoriously marked by a limited officiality.

3. The Europeanization, transnationalization and interdisciplinary character of enforcement proceedings

2.8. Numerous regulations have been enacted to protect entities on both sides of the debt relationship, and when the due date for a payment is passed, effective and ethical conflict resolution often amounts to a careful balancing act between the rights of the creditor, and the rights of the debtor. An effective judicial system is crucial for the development and optimal performance of the market. Yet, in contrast to previous studies, some economic contributions discuss these issues because there is not yet conclusive evidence on the size and magnitude of the effect of creditor rights protection

on market efficiency. Instead, macroeconomic stability appears to be crucial for the outgrowth of wide debt markets. For instance Posner argues that lenders (and creditors in general) may assume unjustified risks. The legal enforcement systems are structured with both positive and negative incentives to protect the substantive and procedural rights of the parties involved. Certain assets of the debtor, as well as earnings up to a certain amount, are exempt from attachment and seizure. These exemptions can be explained mostly by reference to the debtor’s fundamental rights as guaranteed in the Constitution, although the Constitution does not, of course, prescribe them in any detail. Certain limitations on the rights of the creditor are important for the maintenance of humanity, but also for economic reasons, as they create an incentive for creditors better to control and monitor their debtors from the outset and thereby avoid overindebtedness. Additional should be mentioned the problems in the cross-border enforcement.

2.9. The European Union provides an interesting example of the utility of an effective and fair form of enforcement proceeding. As an area of freedom, security and justice in which the fundamental freedoms must be guaranteed, the European enforcement process includes many measures, derived from public, private, and procedural law. While the enforcement mechanism has helped to achieve the gradual consolidation of the Single Market, national borders often continue to represent a barrier behind which a debtor can take refuge, and sometimes frustrate the creditor’s rights. The European judicial area should serve to support the economic activity in the single market, especially in this period of financial crisis, and procedural devices should be regulated to expedite procedures and ensure that legal decisions are taken most effectively. Two works directly consider the multidimensional nature of the creditor-debtor rights: the study by Burkhard Hess, and the important declaration contained in the Stockholm Programme of December 2009. Both took important steps towards a communitarian view of the regulation of creditor-debtor rights. Three main areas are directly linked with proposals for improving the effectiveness of cross-border enforcement within the European Union and contemplate (i) the possibility and the mechanisms for regulating the community in civil enforcement proceedings (currently

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73 Reglament 655/2014 on Bank account retention.
75 OJ C 115, 4.5.2010, p. 1
divided among many different Regulations); (ii) the possibility of establishing provisions imposing a duty on a debtor to be transparent, and to make his assets manifest. This idea is linked to improving the effectiveness of such regulation by increasing access to information about the assets of a debtor (transparency); and (iii) the role for the enforcement organism, court, bailiff or combination of these entities.

The bank account freezing injunction (as a provisional and preventive measure), currently adopted as Regulation 655/2014, and referred to, as a “Bank account preservation order” is also relevant here. The last important EU Regulation on the European Account Preservation Order Procedure 655/2014 mirrors all the supporting arguments above, and is a binding and directly applicable legal instrument of the Union which establishes a new Union procedure allowing, in cross-border cases, for the preservation, in an efficient and speedy way, of funds held in bank accounts.

“A creditor should be able to obtain a protective measure in the form of a European Account Preservation Order (‘Preservation Order’ or ‘Order’) preventing the transfer or withdrawal of funds held by his debtor in a bank account maintained in a Member State if there is a risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult.”

The fair trial rule and procedural fairness standard are also referred to:

“This Regulation should safeguard the debtor’s right to a fair trial and his right to an effective remedy.”

The order is also applicable for fast-track proceedings to obtain an enforceable title. Therefore:

“The notion of proceedings on the substance of the matter should cover any proceedings aimed at obtaining an enforceable title on the underlying claim including, for instance, summary proceedings concerning orders to pay and proceedings such as the French ‘procedure de référé’.”

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78 RIEBOLD, Julia, Die Europäische Kontopfändung, (Tübingen: Mohr Siebeck, 2014), passim.
79 OJEU, L189/59, 27/6/2014
80 Idem.
81 Ibidem.
This regulation addresses the problem of creditor-debtor rights:

“The conditions for issuing the Preservation Order should strike an appropriate balance between the interest of the creditor in obtaining an Order and the interest of the debtor in preventing abuse of the Order.”

Also reflecting this balance, the creditor bears liability for any damage caused to the debtor by the Preservation Order. In addition to this specific regulation, a rule to strike a balance has also emerged in the context of data protection.

4. General Regulation of civil enforcement proceedings

2.10. The substantive classifications with the most practical relevance in all systems is the division between monetary (debt collection) and non-monetary claims. This supports the distinction between the monetary and non-monetary enforcement, and between direct and indirect enforcement, which relates to the tools available to obtain performance from the recalcitrant debtor. Enforcement proceedings are organized and could be classified according to different theoretical or practical criteria, and the observation and respect of the enforcement rules should also be checked at the end. The criteria would be:

(i) the type or kind of claim to be enforced; (ii) the object upon which the enforcement is levied; (iii) the kind of enforcement activities (specific/non-specific performance, direct/indirect enforcement or the use of coercive measures); (iv) the kind of enforceable instruments that can give rise to enforcement proceeding (judgments or extrajudicial instrument); and (v) the enforcement organism for each enforcement.

The main criterion considered in the Central European Legal System is the nature of the claim. For example, German Law distinguishes between enforcement for the payment of money, for the delivery of property, and for the doing of or abstaining from any act. The Romanic Legal Family deals with non-monetary and monetary...
claims in the same way but is strongly concerned with the different forms of proceeding to obtain money, which vary according to the object against which enforcement is sought. Here, the object of enforcement is deemed more important than the nature of the claim to be satisfied. The ground of distinction is between enforcement against a person (natural enforcement/en nature/in natura) and enforcement against assets. Many Latin-American Legal Systems\textsuperscript{86} use the type of enforcement title as the main distinction (e.g. judicial and extrajudicial), with different procedures and scope of review and remedies available to different forms of title.

English Law\textsuperscript{87} considers the different kinds of assets upon which the enforcement is levied, and there are different procedures and distinctions integrated into enforcement by officers and by the courts (High or County). Although the old distinction between equity and common law has been lost in the USA and in England, the remnants remain in relation to enforcement proceeding for equitable remedies\textsuperscript{88}.

2.11. The parties involved in enforcement proceedings may be considered in a wide or narrow sense. They may include only those directly involved in the enforcement (the creditor and debtor) or they may include all persons who participate in the enforcement, for example the bidders in the forced sale, any concurrent creditors against the same debtor, or a third party garnishee (a person who is the debtor’s debtor). Even though compulsory enforcement primarily serves the interest of the creditor, the enforcement also takes into account the interests of the debtor and protects him or her from unfair or disproportionate enforcement. The protection of the debtor can also be traced back to the catalogue of fundamental rights in the Federal Constitution, according to the German Constitutional Court.\textsuperscript{89}

2.12. Special interest surrounds the question concerning enforcement against the State and public companies. This question is important from the creditor’s point of view because his rights might be protected more or less effectively when the debtor is the State, from whom the fundamental right to enforcement could potentially prove problematic.\textsuperscript{90} From the constitutional perspective, it could be difficult to hold the State as debtor, and therefore to enforce a judgment is complicated. In the Romanic and Latin-American systems, this entails special, indirect enforcement proceedings, where no direct coercion is allowed to compel performance from the State. The Central


\textsuperscript{89} Cf., e.g., BVerfGE 49, 220, 232 et seq. (Justice Böhmer position); 51, 97, 113; 57, 346, 356-357; HEIDERHOFF Bettina / SKAMEL Frank, Zwangsvollstreckungsrecht, at mn. 41 et seq.; for an in-depth discussion, see FISCHER, Nikolaj, Vollstreckungszugriff als Grundrechtseingriff, (Frankfurt am Main: Vittorio Klostermann, 2006), passim.

European legal systems allow (with less complication) enforcement against the State\textsuperscript{91}. Let me mention some regulations and ECHR cases. In Germany the claims of a private party against “the State” arising from public law relationships are normally satisfied once there is a final decision.\textsuperscript{92} In relation to Germany, it should be noted at the outset that the Federation and the States and their agencies normally fulfil claims that have been determined in a final judgment or for which there is another enforceable title. Thus, enforcement against the State does not play an important role. In German civil matters, as well as in some public law and social security matters, there are a few special rules for enforcement proceedings concerning a monetary claim against “the State”\textsuperscript{93}. Monetary claims against the State are most commonly based on public law relationships. In these cases, the first instance court assumes the function of a central authority. It has to warn the debtor and –in line with § 882a ZPO – may not order enforcement measures against objects which are indispensable for the fulfilment of the debtor’s public function or if the enforcement measures sought by the creditor would contradict the public interest. Furthermore, coercive measures against Federal agencies based on public law claims are, in principle, excluded\textsuperscript{94}. There is no special provision that calls for special treatment when the State is a defendant in Japan\textsuperscript{95}. If the debtor is Republic of Croatia, generally the same rules are applied, with very few exceptions. In the process of civil execution, the Debtor State has no special procedural treatment\textsuperscript{96}. Finally in Argentina the enforcement against the State became a complex enforcement regime today, which was subjected to creditors, who in order to give effect to the favorable judgments must respect certain terms and conditions that differ and impede the enforcement\textsuperscript{97}. The


\textsuperscript{92} “The rules governing the enforcement of claims of “the State” against a private party based on public law relationships are governed by a number of “execution acts”. Which of these acts applies depends on the nature of the claim and, in some cases, also on whether a claim of the Federation and its agencies or a claim of a State and its agencies is to be enforced. Thus, the enforcement of monetary claims of “the State” arising from tax law is governed by §§ 259 et seq. of the Fiscal Code (Abgabenordnung, AO). The enforcement of other claims of the Federation is regulated by the Federal Code of Compulsory Enforcement in Public Matters (Bundes-Verwaltungsverwaltungsstreckungsgesetz, VwVG). For the enforcement of other claims of the States, each of the States has its own Enforcement Code. The enforcement of claims in the area of general public law and social security law which are not owed to “the State” follows, by reference in § 167 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO) and § 198 of the Social Security Courts Act (Sozialgerichtsgesetz, SGG), the rules of the 8th book of the Code of Civil Procedure unless otherwise provided”. KERN, Germany National Report, p. 3.

\textsuperscript{93} The main provisions are the follow §§ 167, 169 VwGO; §§ 198, 200 SGG, § 882a ZPO. See KERN, Germany National Report: “First, the creditor must announce his or her intention to enforce the claim at least four weeks in advance. Second, objects that are indispensable for the State to fulfill its functions and other objects whose alienation contravenes the public interest are exempt from attachment. If a social security authority was ordered to undo the consequences of a decision which was invalidated by the social security court and the authority does not conform to the judgment, the first instance court may, on application of the creditor, impose a coercive fine up to 1,000 Euros (§ 201 SGG)”. See KERN, Germany National Report : “(§ 17 VwVG). The same is true for State agencies unless expressly authorized (see, e.g., § 22 VwVG Baden-Württemberg; Art. 29(4) VwZVG Bayern, § 73 VwVG Hessen)”. YOSHIGAKI Minoru, Japan National Report.

\textsuperscript{96} PICÓ JUNOY, Joan, Spain National Report.

\textsuperscript{97} OTEIZA, Eduardo, Argentina National Report.
enforcement against the State is primarily governed by the Argentina Supreme Court decision in the case "Pietranera"\(^98\), doctrine under which the declarative nature of recognized conviction and that the individual can not proceed to immediate enforcement\(^99\). Additional regulation up today has complicated more the situation also with restriction to order provisional measures against the State. The ECHR has decided in *Pashov and Others vs. Bulgaria* (5/2/2013)\(^100\) and also *Marinković vs. Serbia* (22/10/2013)\(^101\) cases connected with the “Debtor State”.

5. The enforcement body

a. General comments and remarks

2.13. The enforcement organism consists of the persons, officials, and individuals (judges/master/Bailiff) who intervene in the enforcement proceeding. Despite the obvious assumption that the debtor’s assets are not to be found in the judicial office, all enforcement systems (even those which are court-centred) need the necessary personnel (of varying degrees of specific qualification) to assist, especially in relation to material enforcement measures to be taken against the debtor. The discussions of the professionalization of enforcement organism, like the French *Huissier de Justice*, or the Portuguese or Netherlander Bailiffs is a central point to bear in mind. Constitutional issues arise when considering whether a system is effective at protecting the contradictory debtor-creditor interests. Some doctrine in Spain and the Latin-American systems addresses a highly-centralized court system and uses references to this to support this option against any kind of enforcement carried out the judiciary, including where the judge only has to order the beginning of the enforcement. In these court-centralised systems, all additional enforcement activities are performed by auxiliary officers,\(^102\) and the Bailiff model is deemed a dangerous privatisation of an exclusive judicial activity (enforcement) and for this reason could be held unconstitutional. A similar discussion, albeit with a specific difference, took place in Germany with regard to the liberalisation of a legal profession like the “*Gerichtsvollzieher*”\(^103\). It should be noted that in bailiff-centred systems the parties


\(^{100}\) Par. 58 “The problem was exacerbated by the fact that Bulgarian Law does not provide for enforcement proceedings against the State institutions…”

\(^{101}\) Par. 39 “When it comes to the execution of final court decisions rendered against the State or entities that do not enjoy sufficient institutional and operational independence from the State, it is not open to the State to cite either the lack of its own funds or the indigence of the debtor as an excuse for the non-enforcement of those decision”.


\(^{103}\) See HESS, Burkhard, Die Neuorganisation des Gerichtsvollzahlerswessens in Deutschland, (Berlin: Nomos, 2006), pp. 34-56; Conf. The two works of EICKMANN, Dieter Die Rationalisierung der
can request the court to control of acts of the bailiffs. The need for transparency, efficiency and fair treatment of a claim in enforcement proceedings remains as valid for a court-centred model as for a bailiff-centred model. The court-centred model reflects the “constitutional principles” regarding who should be the enforcement organism, but the system can be objected to from the perspective of efficiency, effectiveness, and transparency regarding the best interest of both the creditor and debtor\textsuperscript{104}.

Thus, there are judicial systems in which the enforcement organ is a court concerned to enforcing judgments and other enforceable titles. Spain, Italy, the Central and South America countries are high court-centred systems based on certain constitutional imperatives, which consider enforcement as an adjudicative task that is a continuation of the declaratory proceedings\textsuperscript{105}. It should be remarked that the court activity is in fact delegated to the court’s assistants who have different and varied training and limited discretionary powers in relation to the enforcement. The role of the judge is concentrated in the formal direction and control of the execution. He acts only when a conflict arises or to order coercive or compulsory measures\textsuperscript{106}.

b. The different organization criterion of enforcement body

2.14. The principle of organic design of the enforcement, based around the question of who the better enforcement body should be might be classified in two ways as follow\textsuperscript{107}: (i) centralized or decentralized models; and (ii) court-centred, bailiff-centred and administrative models.

(i) The decentralization or centralization of the enforcement proceeding refers to organic procedural elements of the enforcement. It is possible to find two extreme models. One is mainly a decentralised organization, where there are multiple enforcement organs driving enforcement proceedings that all have jurisdiction and work according to different criteria. The other model is centralised around a superior and main enforcement body, which manages all of the cases. In term of efficiency, the centralised model is criticised because the central body can become overloaded given its does not delegate different functions to different but adequate enforcement bodies. Usually a centralized system is governed by the principle of officiality. While the two

\textsuperscript{104} For a discussion about the introduction of a bailiff-centred in a court-centred system in Spain see DÍEZ RIAZA, Sara, Armonización europea en material de ejecución civil. Especial consideración de la introducción del huissier de justice en nuestro ordenamiento, (Madrid: Consejo General de Procuradores, 2002), passim; see also the same discussion in Chile NUÑEZ OJEDA, Raúl-PÉREZ RAGONE, Álvaro-VARGAS PAVEZ, Macarena, Hacia una mejor ejecución civil, (Santiago: Thomson Reuters, 2013), passim.

\textsuperscript{105} KENGYEL, M.-HARSÁGLI, Grenzüberschreitende Vollstreckung in der Europäischen Union, (München: Beck, 2010), § 1, Nr. 20-26.

\textsuperscript{106} For different clasification criteria see HESS, Burkhard, in Enforcement and Enfoceability. Tradition and Reform V AN RHEE, R.-UZELAC, A. (Ed.), Enforcement and Enforceability,Tradition and Reform, (Antwerp: Intersentia, 2010), pp. 41 -58; See also http://www.uihj.com/europe_1012039.html

alternatives given are not always absolute, and there are different levels of flexibility between them, the distinction serves properly to categorize the relationship between the structural element of enforcement and the organ that has jurisdiction to run the different proceedings. It cannot be denied that even in a centralized system where a body assumes all the activities of initiation, management, control and monitoring of the process, there will always be an network of human resources, some of whom form the decision-making body, and some of whom are officials who must run in "field". Yet sooner or later, an accumulation of functions in one central body will collapse the system. Thus both organic and territorial decentralization are positively valued. A creditor must have quick and easy access to an enforcement organism, which has been made available by the State and will perform its role with maximum efficiency. This makes it possible to classify officials as enforcement organs if they can use aggression and compliance measures to obtain effective enforcement.  

As STÜRNER argues, it might be possible to support the positive performance of decentralized systems where devices simultaneously govern priority and informative contributions, recognizing the creditor and debtor as free users of the enforcement models, leading to the possibility of a responsible action. Furthermore decentralization and exclusive powers assigned to a plurality of bodies has a double effect: first, an influx of cases will not collapse the system, because there will be no overloading of an executive body; and secondly, a decentralized system allows for greater transparency and efficiency because each enforcement body can be more specialised and focus on its assigned task.

(ii) While organic regulation is linked with the adjudicative and judicial branch (courts and the judicial function), the court-centred view assumes importance when we talk about the court as the highest organisational level involved, and view the enforcement agents as merely the court’s auxiliary. This model views enforcement as a continuation of the declaratory proceedings, and therefore only a court could be the main enforcement organ. The court determines the substantive dispute (adjudication), and also the different enforcement activities to be followed. The court’s agent has no discretionary powers, even though it enforces the court’s orders in relation to the debtor’s assets. Any enforcement, whether or not it opposed by the debtor is decided and managed by the court. The court’s auxiliaries (in Latin America, but not in Spain) are usually relatively unqualified, lacking either a university degree or extended and specialist training.

The opposite model is the bailiff-centred model, in which the responsibility for enforcement falls on a professional, specifically trained person, usually with university degree and additional training qualifications. It should be noted that the bailiff is

controlled by the Bailiff Association, and also his enforcement acts are subject to judicial control, especially when any controversy between debtor and creditor arises during the proceedings. In the bailiff-centred system, the main role is assumed by a bailiff/Huissier de justice who is highly professionalized\(^{111}\) (liberal or as public officer) and has significant discretion. Bailiffs are usually viewed as a liberal legal profession\(^{112}\) (with high standards and requirements in their academic and professional training), for example in Belgium, Hungary, the Netherlands, and France. Their costs are translated into tariffs, whether or not combined with fees\(^ {113}\).

Third, there are mixed systems which combine features of decentralisation, where the court has jurisdiction in certain cases, and enforcement officers (who are better prepared and trained in comparison to court auxiliaries in court-centred models) have jurisdiction in other kinds of enforcement cases\(^ {114}\). The enforcement officers also assist the court and other qualified court secretaries with regard to enforcement, and their enforcement and procedural activities are under the control of the court.

Finally and fourth there is an administrative or public servant-led model, which is found especially in the Scandinavian Countries, Sweden and Norway. Officials administer the procedure and are paid by the State as civil servants.

(iii) There is a connection between centralization and organism-centred enforcement. The combination of decentralized and bailiff-centred models might be seen as more effective, transparent and broadly connected with the protection of both creditor and debtor rights. To the decentralisation it is relevant to add the efficiency and better organization of a Bailiff system, with the enforcement agents forming a well-qualified, professional assistant organism of the Judiciary.

2.15. The discussion about the professionalization of the enforcement organism like the French Huissier de Justice, the Portuguese or Netherlander Bailiff is a central point to bear in mind. As organic constitutional issues shall arise, we must determine which system is more effective at protecting the conflicting debtor-creditor interests. In this highly-centralised model, all additional enforcement activities are performed by auxiliary officers. Whereas in the Bailiff model this is deemed a dangerous privatization of an exclusive judicial activity (enforcement), and therefore could be held unconstitutional. In Spain (a court-centred system), a constitutional regulation provides that enforcement is the third stage of the jurisdictional function. Art. 118 of the Spanish Constitution makes it explicit that the State is under an obligation to enforce the final judicial decision and in art. 24 par. I enlarges the right of access justice and to the


\(^{112}\) CHARDON, M., VAN RHEE, R.-UZELAC, A., Enforcement and Enforceability. Tradition and Reform, (Intersentia, Antwerp, 2010), esp. 147, 155; see the report JONGBLOED on the Netherland p. 179.


In the Austrian and German tradition, without the same constitutional disposition, arrive to the same result; there are decisions, which connect the right to property and with the creditor’s claim of seeking satisfaction of his right through enforcement. The effectiveness of enforcement is also identified at the European Convention on Human Rights art. 6 par. I.

2.16. These models can be evaluated based on three relevant vectors as follows:
(i) Organic-institutional Vector (legal framework of the organic function within the institutional model, control, responsibility, and required level of training); (ii) Functional Vector (functional competence in the implementation and beyond (official business), dedication and unofficial activities, implementation of technologies); and (iii) Financial Vector (with fees, without fees and a combinatorial system). Relevant to this study is the World Bank report on costs of implementation and enforcement officers, with further evidence to analyse each potential model. In conclusion, support for the transparency, efficiency and the whole enforcement organic favoured the bailiff-centred model. Furthermore, there are recommendations in Europe for alternative models to the court-centred approach. However the ECHR has warned about the deontological requirements and the checks and balances for a bailiff-centred model.

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115 From this general provision are derived the follow fundamental procedural rights: the right of Access to Justice; the right to obtain a judicial decision on grounds justified by the law; the right to the enforcement of the judgment; the right to appeal using the legally established appeal mechanism.


In these conclusions, the main recommendations are drawn from comparative experience based on recognised good practice outlined by the CEPEJ. The bailiff-centred model needs special attention for the checks and balances in place, control and deontological aspects already in place. The same is also true of the liberal and moderate judicialized models articulated by the International Association of Enforcement officers /Huissiers (In the congress Cape Town 2012).

c. National reports

2.17. Europe

The German Enforcement of claims is “decentralized” in the sense that there are several types of enforcement authorities whose competence depends on the type of enforcement measure at issue. The German enforcement authorities might be:

121 See https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2009)11&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6 (10.5.2014)


123 The main recommendations were: a) The system of economic incentives or income should properly combine professional fees and reimbursable activities proportional to the management and chance of success; more legal fees from certain amount because massive user or system; must ultimately be left a margin for the fee agreement criteria to be determined. The incentives should focus on an amicable settlement officer and acting as a facilitator.
b) It is appropriate to assume official functions other than those identified in the implementation, such as the notification and, as minister of faith, a cooperative activity with the notary in preconstitution test. There are obstacles, but advantages for the enforcement officer to assume the pension job execution and eventually expanding the horizon of possible revenue.
c) Duties and presets are carefully selected with an update mechanism and are (or should be) predictable and proportional, so that investment in the implementation does not exceed the amount of the benefit that it makes enforceable. In systems where the officer is a liberal professional, it is possible to determine fees in their favour (not receive salary from the State), within certain regulatory frameworks and not freely.
d) In systems with enforcement official as liberal professional, not requiring the user (creditor) to have legal representation (a lawyer) and to have access to a professional who will advise, first tries a payment agreement with the debtor and to transfer the costs. Instead of having to determine, if a judicial foreclosure proceedings, personal costs (fees) in favor of the attorney for the party, there shall be fixed costs for the enforcement officer intervened.
e) The higher the level of education (university and / or professional) of the enforcement officer, the greater its range of action and discretion may be, subject to the direct control of the parties and indirect control of the court. A less educated official’s acts are more fixed and subject to control and more intense judicial authorisation. Direct control is enacted by the parties and the court.
f) The model can organically adopt in their implementation stages a dependent state officials Model (ombudsman) that compete with professionals (eg adopted by Hungary since the implementation of the system) in competition.

123 BAUR/STÜRNER/BRUNS, pp. 37-48, 42 (mn. 4.9, 4.26); Cf. VOLLKOMMER, Gregor, Die Reform der Sachaufklärung in der Zwangsvollstreckung – ein Überblick, NJW 2012, 3681.
(i) “The enforcement officer is competent, inter alia, for receiving the debtor’s inventory of assets and the declaration in lieu of oath confirming its accuracy (§ 802c ZPO), for attachments of movable things (§§ 803 et seq., 808-809 ZPO) and for taking away movable things from the debtor (§§ 883 et seq. ZPO), e.g. as a consequence of a claim for restitution”. 125 (ii) “The first instance court is competent for the enforcement of claims to perform or not perform certain acts. If the act can be performed by someone else, enforcement consists in an authorization by the first instance court to engage a third person to perform the act at the expense of the debtor (§ 887 ZPO). If the act cannot be performed by another person, enforcement consists in an order by the first instance court that the debtor has to pay a coercive penalty or shall be imprisoned if he or she does not comply with the execution title (§ 888 ZPO). A claim not to perform a certain act is enforced by an order of the first instance court that the debtor pay a fine or be imprisoned in the case he or she nevertheless performs the prohibited act (§ 890 ZPO)”126. (iii) “The execution court is competent for enforcement measures the object of which are claims of the debtor against third party debtors, e.g., the seizure of a money claim (§§ 828, 829 ZPO), and for the auction and receivership of real estate (§ 1 ZVG)”127. (iv) “The real estate register’s office is competent for registering mortgages on real estate of the debtor”128.

125 “The costs for enforcement measures by the enforcement officer are regulated by the Act on the Costs of Enforcement Officers (Gerichtsvollzieherkostengesetz, GvKostG). Annexed to this act is a schedule which defines exactly the costs for each act of the enforcement officer. As an example, every attempt to attach a movable object costs 26 Euros (Nr. 205 KV GvKostG); if the enforcement officer takes away a movable object from the debtor, the costs are 26 Euros as well (Nr. 221 KV GvKostG); the eviction of a person from real estate costs 98 Euros (Nr. 240 KV GvKostG); receiving the debtor’s inventory costs 33 Euros (Nr. 260 KV GvKostG); the auction of movable objects costs 52 Euros (Nr. 300 KV GvKostG). In addition, the enforcement officer is reimbursed for his or her expenses, e.g. for any distance between his or her office and the spot where the enforcement measure takes place 3.25 Euros if the distance is less than 10 km, 6.50 Euros if it is less than 20 km etc. (Nr. 711 KV GvKostG)” according to KERN, Germany National Report.

126 See KERN, Germany National Report: “The costs of the first instance court are governed by the Act on the Costs of Judicial Authorities (Gerichtskostengesetz, GKG). Again, a schedule annexed to this act defines in detail the costs. For each of the measures mentioned above, the costs are 20 Euros (Nr. 2111 KV GKG) per debtor. However, the costs of a detention, if any, must be added (cf. Nr. 31010, 31011 KV GNotKG)”.

127 See KERN, Germany National Report: “The costs for enforcement measures taken by the execution court are also governed by the Act on the Costs of Judicial Authorities. The seizure of a money claim, e.g., costs 20 Euros (Nr. 2111 KV GKG),”

128 See KERN, Germany National Report: “The costs are governed by the Act on Costs of Courts and Notaries (Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare – Gerichts- und Notarkostengesetz, GNotKG) and are defined in the schedule annexed to this act. In this case, the costs depend on the value of the real estate (cf. KV GNotKG Nr. 14121). As an example, for real estate which is worth a million Euros, the costs are 5,336 Euros.”
For the creditor or the debtor it is not mandatory to hire an attorney for enforcement proceedings. However, the debtor who wishes to defend against an enforcement measure would normally hire an attorney, and the creditor who seeks difficult enforcement measures like the auction of real estate owned by a company, would also normally hire an attorney.\textsuperscript{129} The distribution of the costs of enforcement, i.e., the question who ultimately has to bear the costs, is governed by \textsection 788 ZPO. Costs are refunded to the debtor if the underlying judgment is reversed, \textsection 788(3) ZPO. If a money claim is being enforced, the costs are encased together with the enforced claim. The creditor normally has to advance the costs to the enforcement authorities before any enforcement measure is taken (see \textsection 4 GvKostG; \textsection\textsection 6(1), 7, 12(5), (6), 15 GKG; \textsection 13 GNotKG).\textsuperscript{130} The primary and natural place of mediation and other forms of is, of course, the procedural stage before to an enforceable decision. There is no possibility to discuss the claim existence once there is an enforceable title.\textsuperscript{131} As described above, the arguments which may be put forward by the debtor in such an action are limited if the enforceable title is the result of normal court proceedings due to\textit{ res judicata} of the judgment. If the title is based on a submission of the debtor to

\textsuperscript{129} See KERN, Germany National Report: “Attorneys’ fees are also governed by an act of parliament and are strictly regulated. Agreements on the fees are possible if the agreement is in writing and if the fee does not go below the statutory limit, because the legislature wants to protect the citizens from forms of price competition that go at the expense of the quality of legal services. This system of statutory fees, which does not violate EU law, has a long tradition in Germany and is one of the reasons why hiring a lawyer in Germany is affordable for the general public, why legal expense insurance works effectively and why the German system of legal aid is a bearable burden for the taxpayer, at the difference to England with its unregulated and extremely high fees for barristers and solicitors. In the absence of a fee agreement, attorneys’ fees are determined according to a schedule to the Act on Attorneys’ Fees (Rechtsanwaltsvergütungsgesetz, RVG). The fees depend on the value in litigation and on the services performed by the attorney. The law contains a table which assigns basic amounts to margins of values in litigation – here the value of the enforcement measure. These amounts are multiplied with a factor that depends on the kind of service. As an example, the attorney receives for services in the enforcement proceedings before the proceeds are distributed 0.4 times the basic value (Nr. 3311 VV RVG) plus his or her expenses which consist at least in a 20 Euros lump sum for postal and telecommunications services (Nr. 7002 VV RVG). In addition, the client must pay 19\% VAT on the fee. If the value of the enforcement measure is 200,000 Euros, the basic fee is 2,013 Euros. Thus, the client has to pay at least (0.4 * 2,013 Euros + 20 Euro) * 1.19 = 981.99 Euros (VAT included), for an in-depth discussion KERN, Christoph A. Zur Vereinbarkeit verbindlicher Anwaltsgebühren mit dem europäischen Wettbewerbsrecht und der Dienstleistungsfreiheit, Zeitschrift für Europäisches Privatrecht (ZEuP) 2008, 411 et seq.

\textsuperscript{130} See KERN, Germany National Report: “In the cases specified in \textsection 788(4) ZPO and the provisions listed therein, the court may shift the obligation to pay the costs to the creditor in part or in full if this appears to be justified for special reasons that are linked to the creditor’s behavior. In practice, such cost shifting is ordered very rarely and only in cases in which the creditor could have foreseen without any effort that the enforcement measure he or she requested entails a hardship for the debtor which is immoral due to special circumstances. This is so even if the debtor has to bear these costs (\textsection 18 GKG; \textsection 17 GNotKG). If the creditor has advanced the costs and these costs cannot be enforced against the debtor, the creditor has to bear the entire costs because the creditor who has requested that the enforcement authority take an enforcement measure is joint and severally liable with the debtor who is obliged towards the creditor to bear the costs (cf. \textsection 13 GvKostG, \textsection\textsection 23, 26 GKG, \textsection 22(1) GNotKG).”

\textsuperscript{131} Cf. FISCHER, Nikolaj, German General Report.
immediate enforcement in an official document, can mediation and other forms of ADR concern the existence of the claim.

In the enforcement proceedings as such, the creditor has the power to decide whether and when the claim shall be executed and the power to choose among the available enforcement measures. Nothing excludes that creditor and debtor start negotiations in this phase. However, the creditor has no obligation to do so and cannot be compelled to negotiate.\textsuperscript{132}

But should be mentioned, in practice, it is not rare that creditors are willing to negotiate. However these negotiations do normally not take place within formal and structured mediation or other ADR proceedings The incentive are as follow: (i) the creditor has to advance the costs of the enforcement measure and has to bear them if they cannot be enforced against the debtor; (ii) the creditor may have an interest in accelerating the fulfillment of his or her claim.\textsuperscript{133} § 802b(1) ZPO provides that the enforcement officer has to seek an amicable solution at any stage of the proceedings. This does not mean, however, that the enforcement officer could start negotiations on the claim as such, but only has the power to find a solution for the enforcement proceedings that respects the interests of both parties.\textsuperscript{134} Nevertheless, § 802b(1) ZPO as well as the rules on agreements on installments or a deferral in § 802b(2) and (3) ZPO have a “mediative” character.\textsuperscript{135}

In England and Wales historically, the courts viewed enforcement as something they should effectively take for granted. Lord Woolf said that enforcement is not part of civil procedure, and judges believed their judgments to be self-executing.\textsuperscript{136} In Parts III and IV of the Tribunals, Courts and Enforcement Act 2007, the new scheme of enforcement was introduced with the last regulations in 2013. According to the new system the enforcement falls under different bodies. (i) County Court Enforcement: In the county court the enforcement officers are warrant officers or county court bailiffs. They are underpaid and under-resourced. Inevitably, possession actions in the county court can take months. Underneath this is a private bailiff industry for rent, rates and

\textsuperscript{132} See KERN, Germany National Report.
\textsuperscript{133} See KERN, Germany National Report: “Particularly in eviction cases, debtors could delay the proceedings if they apply for protective measures and claim special circumstances. Even when the debtor cannot prove special circumstances, the court has to schedule a hearing and maybe has to administer proofs”.
\textsuperscript{134} KERN, Germany National Report.
\textsuperscript{135} On the conciliation role of the Gerichtsvollzieher see FISCHER, Nikolaj, German National Report.
parking. (ii) High Court Enforcement Officers (‘HCEO’s’): On 1 April 2004 the High Court Enforcement Officers Regulations 2004 implemented a major change. Seventy or so High Court Enforcement Officers, all former Under-Sheriffs (practicing solicitors) and Sheriff Officers, assumed responsibility for High Court enforcement. In place of the system which gave a Sheriff a monopoly for a particular county on the receipt of writs for enforcement against individuals or companies situated in ‘his county’, this monopoly was removed and the English and Welsh jurisdiction was divided into 105 districts. The High Court Enforcement Officers (HCEO’s) are responsible for the enforcement of the Orders of the High Court and Court of Appeal, which is currently known collectively as the Supreme Court of England and Wales. These Orders are known as Writs. Initially most of the newly appointed HCEO’s restricted their cover to the immediate area within they were accustomed to work. However over the past eight years most HCEO’s now offer “nationwide service”.

Any one with a judgment in their favor of £600 or more in a county court can apply to have the same collected by the HCEO’s. The bulk of money judgments are entered in the two hundred or so county courts in the country. However most HCEO’s will arrange for the judgment to be transferred into the High Court and for a Writ of execution to be issued out of the High Court.

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137 ANDREWS, Neil, England National Report: “The county court system is in desperate need of reform, but reform is not in prospect (the foreign reader should note that judgments over £600 can be transferred by Form 293A from county court to High Court (the ‘Turner’ form), but not in case of domestic tenancy debts; a claimant cannot sue in the High Court for less than £25,000; but if judgment is for £5,000 or more the county court lacks jurisdiction to enforce a judgment)”

138 ANDREWS, Neil, England National Report: “HCEOs were permitted to bid for the right to receive writs for enforcement for all or any of these districts. The Senior Master decided the extent of the franchise of each HCEO, based on an assessment of his or her ability to undertake the work, and taking into account whether they had any criminal convictions, unpaid fines or taxes, insolvency issues, their insurance cover, their financial standing in general, their knowledge of the law and practice of High Court enforcement, their business plans, provision for training staff, and many other matters. When the 2004 changes were first implemented, HCEOs were in the main restricted to operate within the areas in which they had acquired experience. But as they acquired experience, most HCEOs have been permitted to offer nationwide services”.

139 See TURNER, Robert, A Model for an Enforcement Regime The High Court Enforcement Officers of the Supreme Court of England and Wales, Cambridge 2012, passim. “a description of the form of command issued by the King or on his behalf since the earliest days of the evolution of our central national justice administration in the tenth century. The reform of the county court staff in the lower courts, through their own enforcement arm known as county courts bailiffs and the very large body of privately employed bailiffs employed in private enforcement firms and agencies had to await the provisions for their reform and regulation which were to be introduced under the terms of the Tribunal, Courts and Enforcement Act of 2007. However the “reform” of the High Court Sheriffs was a very simple matter largely undertaken by the sheriffs themselves. In place of the system which gave a sheriff a monopoly for a particular county on the receipt writs for enforcement against individuals or firms situated in “his” county, this monopoly was removed and instead the country was divided into 105 districts and the HCEO’s were permitted to bid for the right to receive writs for enforcement for any or all of these districts”.

140 See TURNER, Robert, A Model for an Enforcement Regime The High Court Enforcement Officers of the Supreme Court of England and Wales, Cambridge 2012, passim.
addressed to an individual HCEO\textsuperscript{141}. He is responsible not to the judgment creditor but rather to the High Court for the entire conduct of himself and his staff during the recovery of the money or land to which the judgment relates\textsuperscript{142}.

The Hungarian Enforcement Act has been amended more than a hundred times since 1994, in the recent past there have been some years when it changed as many as ten times. Under such circumstances one may only speak of legal certainty or predictability with reservations\textsuperscript{143}. There is increasing criticism of enforcement proceedings not only among debtors, but also on the part of various authorities and those of legal profession. In 2013 the ombudsman wrote two reports revealing abuses experienced during the enforcement and the deficiencies of statutory regulation.\textsuperscript{144} Since the majority of complaints concerned the high fees of bailiffs, the Ministry of Public Administration and Justice reduced the rates of enforcement (Decree No. 6/2013. (V. 30.) KIM of the Ministry of Public Administration and Justice). With the introduction of electronic proceedings and internet auctions, the Hungarian Chamber of Court Bailiffs endeavoured to increase the effectiveness of enforcement and the transparency of the realization of real property. The general opinion is that the Hungarian legal system favours neither debtors, nor creditors, rather, it favours bailiffs\textsuperscript{145}. As from 1 July 2010, this non-litigious procedure has fallen under notarial competence, which was unprecedented in Europe. The removal of the order-for-payment procedure from judicial competences generated heated debates, not only concerning the expansion of notarial competences, but also the constitutionality of such an amendment. The new law – apart from the amendments in competence – is an important milestone in shifting towards an electronic procedure\textsuperscript{146}. The party with a legal counsel and legal persons can

\textsuperscript{141} TURNER, Robert: “Throughout the enforcement process it is the HCEO to whom the Writ is addressed who is responsible for the proper enforcement of the Writ”.

\textsuperscript{142} TURNER, Robert: “The Statute of 2003 makes it an obligation for the HCEO to act with total impartiality throughout the enforcement process. Soon after the start of the new system of High Court enforcement in 2004, it became evident that the most effective system would involve a few firms each consisting of a small number of HCEO’s working in partnership. Each firm has chosen to offer a variety of different services to the public – something which cannot be found within the scope of the courts. Throughout the enforcement process it is for the HCEO to decide how best to act in carrying out the command of the court. He cannot be ordered by the judgment creditor to take one particular course rather than another though he may discuss with the judgment creditor the mode of enforcement.”

\textsuperscript{143} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report.

\textsuperscript{144} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: http://www.jogiforum.hu/birek/29749 accessed 30 May 2014. “He established that there had been infringements of the right to a fair process, the right to property and the requirement of legal certainty. The ombudsman also pointed out that there was no connection between the remuneration, interestedness of bailiffs and the efficiency or effectiveness of the proceedings, nor was there a time limit laid down by law for the bailiff within which to forward to the judgment creditor the collected amount of money which was due to him. There was minimal legality control over court bailiffs; the Chamber rarely applied substantial sanctions against the infringers.”

\textsuperscript{145} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “The approximately 200 private court bailiffs have very high incomes, while debtors and creditors, organs of interest representation (the Hungarian Bar Association, the Hungarian Banking Association) and the general public are all dissatisfied with the operation of court bailiffs”.

\textsuperscript{146} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “An innovation which has an essential influence on the character of the procedure is constituted by electronic, automated processing. Both innovative and economic factors played a role in the introduction of the electronic procedure.”
submit applications formulated exclusively for this purpose, issued with certified electronic signature and certified time stamp meeting compulsory requirements. Electronic procedure plays an ever-growing role in the execution of judgements as well. Due to the amendment of 2008 in the Judicial Enforcement Act, the sale by auction of property both moveable and immovable can be performed electronically as well. The new electronic enforcement system (the so-called VIEKR) allows those involved in the execution procedure to be informed swiftly of the instigation of the execution procedure, applications to be submitted electronically, which accelerates notifications the notifying of procedural acts being made by bailiffs, efficiency of data processing, and allows the faster administration before the The National Chamber of Bailiffs. The lawmaker has made it mandatory for banks and other financial institutions to join to the system, while others have to meet the following criteria: preliminary registration, agreement to the terms of use, compliance with minimum compatibility requirements (high security electronic signature, time stamp, encryption software and authentication certificate). There are databases (e.g. the land register) which are available to the bailiffs online (directly). Unless otherwise provided by law, the costs of the enforcement procedure shall be advanced by the judgment creditor and borne by the judgment debtor. The costs of an expert or appraiser and the publication of auction or shall be advanced by the party requesting such measures. Entitlement to cost and/or duty exemption or to the right for the suspension of payment of duty shall not constitute an exemption from having to advance these costs.

The Spanish System is Court-Centred. Enforcement proceeding starts at request by the judge, who has to admit the claim and issued the "general order of enforcement" followed by a few more procedural stages (so, for example, solving opposition executed. LEC arts 560 and 561, or processed and resolving third party with domain-art 603-LEC-art or better right LEC-620.) From here, the execution is directed by the Judicial Secretary who seizes the assets of the debtor, gives assurance measures of the locked foreclosures, seeks his heritage, requires the collaboration of the debtor and third parties, etc. (Art. 551.3 LEC). For the final step of the embodiment-or enforcement procedure of frozen assets the art. 641 LEC provides for the possibility of "implementation by specialized person or

Austria and Germany are in the lead in Europe in electronic data processing, while the Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order-for-payment procedure also establishes the foundations for electronic administration”

147 KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “Since the Act No. CLXXX of 2011 passed by the Parliament on the 31 of December 2011 the Information System of Applicants to Execution was replaced as of 31 September 2012 by the Electronic Service System for Judicial Execution Documents”.


150 PICÓ I JUNOY, Joan, Spain National Report: “The enforcing creditor must anticipate the costs and expenses as they occur in the execution, except those incurred in proceedings conducted at the request of the debtor or other persons, to be paid by the person requesting the action in question. But then, if the run does not preclude enforcement or opposition is rejected, the performer is entitled to obtain, at the expense of what is obtained with the completion of the attached property, reimbursement of costs and expenses that he has anticipated (art. 539.2.2 LEC)”
The Lawyer is mandatory when the enforcement amount exceeds $ 2,000. The Spanish procedural law provides for the possibility of encouraging mediation during execution and therefore always encouraged his suspension or joint will enforced is always encouraged for both creditor and debtor.

The Portuguese Civil Procedure Code had protected the debtor until they are revised in 1995-1996: the process of execution was usually unsuccessful for the creditor. From this review, with thorough reform of executive proceeding in 2003 (which established the bailiff), established a balance: the procedural acts were simplified and the debtor's rights contained within the limits imposed by fundamental procedural principles, without forgetting the creditor. But from 2008, the balance recorded some new points of imbalance, this time to the creditor. Among them: the judge powers lost control of the process and the bailiff gained greater autonomy and some decision-making powers which met the jurisdictional power; the judge can no longer dismiss, justifiably, the bailiff. These excesses were attenuated in the new Code of Civil Procedure (2013), but not entirely. On the other hand, there have been cases of lack of common sense and even abuse by enforcement officers in cases where they can make the attachment. However, the greatest guarantee of creditor rights (achieve rapid execution) is unrealized: executions are delayed. The Portuguese enforcement is judicial with a main involvement of the bailiff for the enforcement acts; but the executive acts are undertaken by the enforcement agent, chosen by the creditor or appointed by the clerk of the court, since 2003. The bailiff is a professional. The judge orders a preliminary injunction and then only participates in the enforcement when there the acts of the bailiff are objected or when the parties require it because of any ancillary issue by reason of the protection of fundamental rights or secret or confidential material or be need for its intervention to ensure the end of the run. There is mandatory the lawyer assistance in the executions of more than 30,000 euros, as well as in greater than 5,000 euros when there is a remedy against the enforcement by the debtor.

In the Netherlands, enforcement generally requires the intervention of a bailiff. Although bailiffs commonly support the interests of the creditors (who ask them to enforce e.g. a judicial decision), they are by law considered to be public servants (article 2 Gerechtsdeurwaarderswet). As such, they have a public duty to also consider the valid interests of the debtor and to ensure that the law is being observed. And in practice they act in this way. A claimant that has an enforceable title may approach any bailiff

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151 PICO I JUNOY, Joan, Spain National Report.
152 PICO I JUNOY, Joan, Spain National Report.
153 PICO I JUNOY, Joan, Spain National Report.
154 FREITAS, Jose Lebre de, Portugal National Report.
155 FREITAS, Jose Lebre de, Portugal National Report.
156 FREITAS, Jose Lebre de, Portugal National Report.
to enforce his rights. Although claimants are often represented by lawyers such is not required. Mediation and other ADR mechanisms are sometimes used to solve conflicts. They play an important role in some areas of the law (i.e. labor law, family law) but less so in other areas (i.e. debt collection of outstanding loans by banks).

The Finnish enforcement authorities are bailiffs and courts. The first step as bailiff-centered and the appeal of bailiff acts is competence of the courts. In other words, the enforcement authority in Finland is a State authority. The bailiff is the head of the local enforcement authority and s/he has competence to make the most important decisions concerning the enforcement procedure. The assistant enforcement officers carry out the practical aspects of the enforcement. The duty of enforcement belongs to special recovery authorities, which are subject to official liability. The primary executioner of the enforcement is the District Bailiff, who is always a lawyer by his/her profession and is usually qualified as a judge. They are administrated within the ambit of the National Administrative Office and the Ministry of Justice. General courts serve as appellate authorities in enforcement matters and consider the enforcement matters that have separately been assigned to them by law. The competence of the distinctive enforcement authorities covers the whole country, which means that filing for enforcement is allowed wherever. After the case is opened it will be transferred to the debtor’s personal executive officer who is in charge of all cases belonging to the same debtor and can easily take the situation as a whole into consideration. Several private companies are also active in the debt collection sector. Their operations are regulated by the Debt Collection Act and are monitored by the Consumer Ombudsman. The Act refers generally to the good debt collection practices that the debt collection agencies  

158 JONGBLOED Antoine - VERKERK Remme, Netherlands National Report: “Each bailiff has a duty to perform the tasks prescribed by law. A bailiff is entitled to take a broad range of measures and may ask for police assistance if required. A bailiff may inter alia seize goods, or garnish/seize other assets of the debtor. Whether or not assistance of a lawyer is required if the enforcement gives rise to litigation depends on the case at hand” 

159 JONGBLOED Antoine - VERKERK Remme, Netherlands National Report. 


161 ERVO, Laura, Finland National Report: “The District Bailiff shall decide on the following: enforcement of a non-final ground for enforcement; reversal; a set-off; enforcement in the absence of a debt instrument; acceptance of security; an injunction; use of an expert; the designation of an agent; setting aside an artificial arrangement; the imposition of the injunction against decisions; a payment injunction; the attachment of jointly-owned property; the issuance of the directions to a party; the imposition of the threat of being fetched by the police and on requesting that the police fetch a person; the imposition of the threat of a fine and apply for a judgment ordering that the fine be paid; and the sale of attached real estate, a vessel or mortgageable car and shares in a joint stock company entitling the bearer to possess accommodation or a building, a collectively owned object or other property if it is subject to mortgages, liens or other security rights.”

162 The Enforcement Code, Chapter 1, Section 10. 

163 ERVO, Laura, Finland National Report: “The same authority enforces the payments of all kind such as civil payments, taxes and even fines. For instance, the tax authorities may not enforce the taxes by themselves. The system is well-centralized and it is very easy and simple for clients. The enforcement procedure is based on the principles of ex officio and judicial investigation and therefore there is normally no need to consult an attorney. For the same reasons the costs of an enforcement procedure are usually very low”.

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are obliged to follow. They have no right to take coercive measures against the debtor or to enter the debtor’s premises. Therefore, the private sector collects debts paid, factually speaking, voluntarily by the debtor. The private companies have no tools with which to work if the debtor does not pay. In such situations they even use the State authorities’ services.

According to the Finnish Constitution, the delegation of the main government powers to a private sector is not allowed. It is therefore the State authority that is the executive authority with the power to use coercive measures (The Constitution of Finland, Chapter 1 Section 2). The difference between litigation and enforcement is thus more unclear today than under the traditional concept. Even the enforcement displays many characteristics of proceedings. This is very important because the enforcement officials have much power to make decisions and therefore it is most essential to establish fair institutional frameworks. It is now more important than ever that the executive officers both are impartial and independent and that they work in a fair and equal manner.

The Finnish enforcement procedure is regulated in the Code of Enforcement (15.6.2007/705). The enforcement authority in Finland is a State authority. The duty of enforcement belongs to special recovery authorities, which are subject to official liability. The courts make the most important decisions in disputes and they also act as appellate authorities. The primary executioner is the District Bailiff, who is always a lawyer by his/her profession and is usually qualified as a judge. The same authority executes all kind of payments such as civil payments, taxes and even fines. For instance, the tax authorities may not execute the taxes by themselves. The enforcement procedure is based on the principle of judicial investigation and ex officio. There is therefore normally no need for an attorney. For the same reasons the costs of enforcement procedure are usually very low. The enforcement organization can therefore be seen as an effective, safe, trustworthy and simple system for all actors. If the debtor does not pay the applicant’s receivable at the latest by the due date denoted

164 ERVO, Laura, Finland National Report.
165 The first step is to obtain a ground for the enforcement, which is the judgment. Therefore, the civil litigation or summary proceedings is needed in order for the enforcement to commence. If the losing party does not fulfil the obligations upon him / her in the judgment, the next step will be the enforcement on the basis of the execution title (the judgment).
166 ERVO, Laura, Finland National Report.
167 ERVO, Laura, Finland National Report.
168 ERVO, Laura, Finland National Report.
169 ERVO, Laura, Finland National Report.
in the demand for payment, attachment is carried out. However, the bailiff may for a special reason provide the debtor on request time for payment, if the debtor shall probably pay the receivable on being granted time for payment. At most three months may be given as time for payment, calculated from the due date in the demand for payment. If the debtor shows that the applicant has consented to this, the time for payment may be longer than this, although the time may not be longer than six months without the lapse of the application. Where needed the bailiff may carry out a precautionary attachment during the time for payment\(^{170}\).

In Croatia the general feeling is that the protection of debtors is not balanced, and that certainty, foreseeability and transparency are not granted. For the enforcement of monetary funds, the seizure of funds can as of 2012 be effected directly by the Financial Agency, sometimes without proper court involvement\(^{171}\). Therefore, some people find their account seized and money transferred without proper notice (and even without an opportunity to respond to alleged creditor’s claim). On the other side, when no money is found on a bank accounts, enforcement on other property, immovable and (especially) movable is rather inefficient\(^{172}\).

Italia has a court-centered system and is ruled in Articles 82 and 83 of the Code of Civil Procedure, providing for mandatory legal representation, applicable to enforcement proceedings as well. According to the existing case law, procedural acts performed without legal representation in enforcement proceedings must be considered as nonexistent\(^{173}\).

**2.18. Latin America**

An example of court-centered enforcement system can be found in Chile. The Chilean enforcement proceeding is seen as a system of court-centred enforcement and in the main events of the procedure, everything is performed by or under the control of the judge. Thus, other auxiliaries, although they are not employees or officials, may be involved as they are not employees or officials (without special grade or training), but the activity, at least in general orders to assist the enforcement, always depends on and is centered on the court. The judge must also participate also in the real estate forced auctions. There is mandatory the lawyer representation\(^{174}\). The efficiency of the implementation is measured by its ability to obtain full payment of the debt claimed by the performer. The main sources of credit protection are the Civil Code and the Code of

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170 ERVO, Laura, Finland National Report.
171 UZELAC, Alan, Croatia National Report.
172 UZELAC, Alan, Croatia National Report: “The governmental perception has been until recently that the system is debtor biased. However, now, in the times of economic crisis when many people lose their homes and entire property for inability to pay their debt (sometimes very small debt), the public opinion is that the debtors are underprotected. For the national reporter that the system is neither creditor-biased, nor debtor-biased, but simply misbalanced and ineffective”.
174 AGUIRREZÁBAL, Maite/VARGAS, Macarena, Chile National Report.
Civil Procedure. Within the regulation of the obligations, the Chilean Civil Code emphasizes the obligations of giving, money and to do obligations. On the other hand, in the obligations contained in art. 1553 the Chilean Civil Code grants the creditor three options: forced execution, and two additional per equivalent. Implementation of monetary obligations in Chile is governed by a model dating from 1903, which is now unresponsive to the demands of today's business and legal transactions, and as such there has been a mismatch in terms of the massive recruitment for the movement of goods and lending. The Forum for Civil Procedure Reform, which studied the reform bill currently pending believes that this system is in crisis, because it would be inefficient and would not protect adequately the creditor’s rights of the performer, since it has a broad regime of exceptions and there are no mechanisms to ensure the financial transparency of the debtor and the pursuit of property.

In Argentina the Law 26.589 established as a general principle, a system of obligatory pre-trial mediation by law, which includes all types of disputes, except those excluded issues excluded exhaustively. On the other hand, it provides another universe of disputes (Article 614) subjecting match preliminary to compulsory mediation is optional. In this type of mediation - "voluntary" or "choosing sides" - implementation processes are included, being optional for the claimant transit through alternative dispute resolution mechanism. 14 Section 6 - "Optional Applying the mandatory pre-trial mediation. In cases of execution and eviction proceedings preliminary mandatory mediation will be optional for the claimant without the required to call into question the manner. In the 2004-2008 period, register with the national courts only a very low number of disputes referred to mediation under executive processes, set of cases that in turn exhibited a high degree of further prosecution. Also, the mediations that occur by any commercial entity fluctuate between 20 and 25% of those covered by the mediations arising from contractual, casual relationships and family. Moreover, in the course of the implementation process, it is necessary to mention a special variant of this type of established dispute conciliation. For this purpose, the court may of its own motion or at the request of a party, and if circumstances suggest so, set a hearing.

2.19. Asia and Oceania

In Japan to achieve simple and efficient execution, the Civil Execution Act separates executive agency from judging agency, and the executive agency advances the execution process relying only on some determinate document (that

176 Article 558 BIS. - "During the course of the enforcement process, the court may of its own motion or at the request of a party, and if circumstances so aconsejaren, set a hearing to appear performer and executed in order to establish more quickly and effective to meet the credit, while avoiding unnecessary loss. At this hearing, the parties shall appear in person and will be held concur with that. It might not noted one new for the same purpose, nor shall the subsequently executed by past incidents promoting causes that were not cited in the hearing. "
is, title of obligation) without judging substantive rights. This expedites execution process. Debtors and other interested parties can object to the execution under certain procedures. In Japanese civil procedure, an appointment of an attorney as a counsel is not mandatory. In an enforcement procedure, a person other than an attorney at law can serve as an agent by obtaining the permission of an execution court (Civil Execution Act §13(1)). The Civil Execution Act relaxes the necessary qualifications of an agent because an execution procedure is simpler than a judgment procedure and the Act gives preference to efficiency over necessity of protection of a lay person client. In Japan compulsory enforcement and exercise of a security interest generates because of absence of performance by a debtor. Hence a debtor must incur necessary costs of those procedures (Civil Execution Act §42(1), 194). But although a debtor should eventually incur costs finally, the expenses necessary for an execution process are necessary for the time being, so a debtor must prepay the amount when filing a petition (§14(1)). Of course, the creditor can collect the execution costs that he has prepaid simultaneously in the course of an execution procedure (§42(2)). The costs that an obligor must incur are expenses that are considered it necessary to be incurred among expenses spent with the express purpose of carrying a compulsory execution, such as expenses of service of a title of obligation, expenses concerning to the grant of a certificate of execution, expenses of the petition for the compulsory execution, expenses of the registration of a seizure, expenses of the realization (for example, expenses of the investigation of current conditions, of an appraisal, of an offer seeking to have a sale), expenses of a service or notice to proceed with the procedure, expenses of a temporary restraining order for sale upon petition by an creditor effecting a seizure, expenses of a statutory deposit by a third party obligor, or expenses of a demand for liquidating distribution. When a judicial decision revoking a title of obligation on which compulsory execution is based, or a judgment declaring invalidity of a settlement pertaining to a title of obligation has become final and binding, an obligee must return, to a debtor, money equivalent to the execution costs that have been paid to the obligee (§42(3)).

The Japanese government enacted the Act on Promotion of Use of Alternative Dispute Resolution in 2004, although attempts to promote and develop ADR system have at present, and for uses of ADR other than the conciliation at the court remained flat. In 2012, the number of new receipts of the contentious case is 659,080 and the number of new receipt of the conciliation 177 YOSHIGAKI, Minoru, Japan National Report.
178 YOSHIGAKI, Minoru, Japan National Report.
179 YOSHIGAKI, Minoru, Japan National Report.
180 YOSHIGAKI, Minoru, Japan National Report.
181 YOSHIGAKI, Minoru, Japan National Report.
case is 55,862\textsuperscript{182}. Also, there is the special conciliation proceeding that debtors
who are likely to be unable to pay debts or insolvent petition and design rehabilitation plan depending on the petitioner's financial resources (Act on Special Conciliation Proceedings for Expediting Arrangement of Specified Debt)\textsuperscript{183}

In Korea the creditor can start an enforcement proceedings. He or she does not have to be represented by Lawyer in the execution proceedings. The creditor will be fully reimbursed for his or her prepayment at the end of the execution procedure.\textsuperscript{184} The Creditor, who applies for a compulsory execution, shall pay in advance the amount determined by the court for the expense necessary for it.\textsuperscript{185} Hence, costs required for a compulsory execution shall be handed back the most preferentially to the Creditor in the distribution phase of execution proceeding.\textsuperscript{186} In Korea the ‘Credit Counseling and Recovery Services’ may be included as ADR. This non-profit corporation helps the debtor to recover his or her credit without having to go through insolvency proceedings through readjusting the debt owed to the financial institutions. It also lends emergency loan, if necessary, to the individuals.\textsuperscript{187}

In China the hierarchical jurisdiction depends on the nature of the claim, the complexity of the case and its social influence, whereas the default level is the local court, because Article 17 of the Civil Procedure Law (CPL) announces that “the local people's courts shall have jurisdiction over civil cases as a court of first instance, except as otherwise provided for in this Law.” In practice, the amount of subject matter plays the most crucial role and the rules are established by the courts at different levels separately. The creditor also has other options. First of all, it is quite common that the creditor would hire some debt-collection companies to achieve their private enforcement, which belongs to the legal grey zone and may violate the criminal law in not few extreme cases. Secondly, the creditor can turn to the People’s mediation organization in order to reach a consensus which can be enforced after reviewing, according to Article 194 of the CPL. “To apply for judicial confirmation of a mediation agreement, both parties to the mediation agreement shall, in accordance with the People's Mediation Law and other laws, jointly file an application with the basic people's court of the place where the mediation organization is located within 30 days from the effective date of the mediation agreement.”

\textsuperscript{182} YOSHIGAKI, Minoru, Japan National Report.
\textsuperscript{183} YOSHIGAKI, Minoru, Japan National Report.
\textsuperscript{184} Civil Execution Act Article 53.
\textsuperscript{185} Civil Execution Act Article 18(1).
\textsuperscript{186} Civil Execution Act Article 55(1).
\textsuperscript{187} HAN, Choong-Soo, Korea National Report.
The final judicial decision is enforceable because of Article 236 Paragraph 1 of the CPL. “The parties must comply with an effective civil judgment or ruling. If a party refuses to comply, the opposing party may apply to the people's court for enforcement, and the judges may also transfer the case to the enforcement personnel for enforcement.” The record of the mediation agreement (consent judgment) is an enforceable judicial document, because Article 236 Paragraph 2 of the CPL refers that “The parties must comply with a consent judgment and other legal instruments enforced by a people's court. If a party refuses to comply, the opposing party may apply to the people's court for enforcement.” When it comes to the enforcement phase, a creditor without legal representation can also apply for enforcement. Conversely, to be qualified for this job, a valid legal representative has to obtain special authorization from his or her client rather than a general, all-inclusive one. As the basic rule, the debtor has to pay for the enforcement costs at the end of enforcement and the creditor need not to prepay them. When it comes to the reconciliation agreement, the burden of costs depends on the parties’ agreement and if necessary, the judicial decision.

New technology does not affect the practice in China much; rather there are already some attempts. On the positive side, the information of debtor and creditor who does not enforce the judgment can be searched for on internet. An online platform of the assets to be enforced is also active, although some resistance to it exists at the local level. The Rules of Court of the Philippines outline a specific process for the collection of debt and the enforcement of security interest in assets for satisfaction of debts. The Rules of Civil Procedure outline the general requirements for the institution of suits for the enforcement of obligations and contracts, including those involving sums of money or collection of credit. At the same time, there are separate procedures for the enforcement of interests on

188 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
189 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Lastly, the concept of legal representation may need to be clarified. The scope of legal representation has been limited since the new amendment of CPL in 2012. Article 58 of the CPL says right now, “a party or a legal representative may retain one or two persons as litigation representatives. The following persons may serve as a litigation representative: (1) A lawyer or legal service worker at the basic level; (2) A close relative or staff member of a party; (3) A citizen recommended by the community of or the entity employing a party or recommended by a relevant social group”.
190 http://zhixing.court.gov.cn/search/
191 http://shixin.court.gov.cn/
192 http://rmfysszc.gov.cn/
193 See FU, Yulin/CAO, Zhixun/HAN, Jingru China National Report: “On the negative side, the traditional picture of enforcement procedure has not been changed. For instance, according to Article 87 of the CPL, under certain conditions the service can be fulfilled by electronic means. “With the consent of the person to be served, a people's court may serve process by fax, email and other means capable of confirming receipt by the person to be served, except a judgment, ruling and consent judgment”
property given as security for the performance of obligations. These include an action in replevin (for the recovery of possession of movable property) (Rule 60 of the Rules of Civil Procedure) and action for the foreclosure of real estate mortgages (Rule 68 of the Rules of Civil Procedure)\(^{195}\). In substance, the Philippine legal system provide for adequate rights and remedies for both the creditor and debtor to safeguard their interests. Beyond the procedural and substantive provisions available to both creditors and debtors, however, it is in the implementation of these rules that Philippine law has tended to show a bias towards debtors, but only because the enforcement of these rights have generally tended to require active participation of courts and other tribunals. This participation has resulted in significant costs, effort and procedures, which are thereby subsumed under the general weight of court and foreclosure proceedings\(^{196}\). The Philippines Law rules the *immediate payment of money on demand.* --- The officer shall enforce an execution of a judgment for money by demanding from the judgment obligor the immediate payment of the full amount stated in the writ of execution and all lawful fees\(^{197}\). The judgment debtor shall pay in cash, certified bank check payable to the judgment creditor, or any other form of payment acceptable to the latter, the amount of the judgment debt under proper receipt directly to the judgment creditor or his authorized representative if present at the time of payment\(^{198}\). If the judgment debtor cannot pay all or part of the obligation in cash, certified bank check or other mode of payment acceptable to the judgment creditor, the officer shall levy the debtor’s assets. Gradus executionis exists if the judgment debtor does not exercise this option, the officer shall first levy on the personal properties, if any, and then on the real properties if the personal properties are insufficient to answer for the judgment. The sheriff shall sell only a sufficient portion of the personal or real property of the judgment obligor which has been levied upon\(^{199}\).

### 6. The principles of enforcement proceedings

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198 Bernardo, Pedro, Philippines National Report: “If the judgment obligee or his authorized representative is not present to receive payment, the judgment obligor shall deliver the aforesaid payment to the executing sheriff. The latter shall turn over all the amounts coming into his possession within the same day to the clerk of court of the court that issued the writ, or if the same is not practicable, deposit said amounts to a fiduciary account in the nearest government depository bank of the Regional Trial Court of the locality. The clerk of said court shall thereafter arrange for the remittance of the deposit to the account of the court that issued the writ whose clerk of court shall then deliver said payment to the judgment obligee in satisfaction of the judgment. The excess, if any, shall be delivered to the judgment obligor while the lawful fees shall be retained by the clerk of court for disposition as provided by law. In no case shall the executing sheriff demand that any payment by check be made payable to him”.
2.20. The enforcement proceeding is a triangular complex relationship, involving at least the creditor, the debtor and an enforcement organism. It cannot be analysed unitarily. Firstly, there is the relationship between the creditor and the enforcement body from whom the creditor requests the protection of his rights through the enforcement framework. Secondly, there is the relationship between the enforcement organism and the debtor. The third relationship, between the creditor and the debtor, is a necessary extension of the substantive obligation. Provisions contained in an enforceable title allow a creditor to request enforcement proceedings which are of a predominantly private, creditor-debtor nature. The link between the creditor and the enforcement organism gives rise to the pursuit of the desired result against the debtor, namely, a compliance order and the beginning of enforcement proceedings\textsuperscript{200}.

From the debtor’s perspective, its relationship with the enforcement organism is primarily defensive but, unlike in declaratory proceedings, it has options to take active or passive approaches to its opposition, and it will seek concrete chances to pursue defences that will suspend or prevent the continuation of the enforcement. In relation to the debtor, interim, provisional and final enforcement activities will have direct effects on the debtor’s fundamental personal and property rights\textsuperscript{201}. Court-centred systems are able to work with a set of court auxiliaries with less professionalism and discretionary power because the court’s power and direction is strong. There are five main common points to all three types of enforcement organisation (court-centred, bailiff-centred and mixed) (i) the enforcement jurisdiction of the State is exercised either by a court or through a bailiff. In both alternatives, the power of the state could eventually affects the fundamental rights of citizens (especially those of the debtor/executed) (ii) Enforcement requires formalities manifested through an enforceable title and the proceedings which regulate the scope and requirements of restraining the debtor’s rights. (iii) The enforcement measures ordered must conform to criteria of proportionality to be deemed legitimate, not in the constitutional sense of but rather in the sense of proportionality regulated in enforcement proceedings. (iv) There are a combination of principles of public and private law interacting in the enforcement context within the complex, triangular relationship. (v) It might be possible to establish the existence of principles of enforcement, which necessarily tend to legitimise it within specific constitutional frameworks, without requiring the substitution of the enforcement principles by standards and rules of Constitutional Law. Certainly the case law, in particular those of constitutional courts cannot be assimilated if the distinctive characteristics of enforcement by special and competent bodies are ignored. Two leading authorities in Germany, Prof. SCHLOSSER and Mr. WIESER, have simplified

\textsuperscript{200} STAMM, Jürgen, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, (Tübingen: Mohr Siebeck, 2007), pp. 5-15.

\textsuperscript{201} FISCHER, Nikolaj, German National Report.
the principles of enforcement by diluting them with constitutional principles and considerations.\footnote{WIESER, Eberhard, ZZP 98 (1985), at 50 et seq.; SCHLÖSSER, ZZP 97 (1984), 121 et seq.; Cf. with the cases adjudicated by the German Constitutional Court BverfGE 42, 64; 46, 325 ff; 48, 396; 49, 220 ( specially the Justice Böhmer disident position, p. 232 y ss.); 49, 252; BVerfGE 67, 90.}

2.21. A key principle of civil enforcement is often said to be achieving the utmost satisfaction of the creditor with the lowest possible impairment to the debtor. The principle is correct in its formulation, although in reality it refers to at least two principles, one rooted in private law (satisfaction of the creditor’s rights), the other in public law (proportionality). The principles of singular civil enforcement allows us to distinguish the fundamental bases of enforcement organisation in different systems, enabling the identification of small and substantial differences and similarities which can only be explained within the socio-political framework of the legal system in question. The principles of singular civil enforcement can be considered autonomous and independent, not only from the principles developed for declaratory proceedings, but also from constitutional principles\footnote{STAMM, Jürgen, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, (Tübingen: Mohr Siebeck, 2007), p. 98 et seq.}

In addition to these principles, there are also principles that have a special meaning in the enforcement context, for example (i) formalism\footnote{See LENT, Friedrich, Öffentlich-rechtliche Gestaltung des Zwangsvollstreckungsrechts, ZakDR, 1937, pp. 329-333}, (ii) centralization and decentralization of the enforcement organism and proceedings, (iii) celerity and timely of satisfaction of the creditor’s rights, (iv) the determination of the scope and nature of the enforcement activities, (v) priority versus the equal treatment of creditors (prior in tempore versus par conditio creditorium), and (vi) effective valuation, discharge and realisation of assets to which the enforcement proceedings can attach.

2.22. Some principles of enforcement are also relevant to declaratory proceedings\footnote{BOMSDORF, Falk, Prozeßmaximen und Rechtswirklichkeit, (Berlin: 1971), pp. 1-25.}. On the one hand, it is possible to consider the degree of readiness at the start and throughout the enforcement, the various procedural alternatives, the object of the enforcement, the kind of obligation being enforced, and finally the possibility of completing the execution. If the enforcement organ has various alternatives as described above, and has discretion as to how to act, we might describe the system as governed by the principle of officiality. Are the powers applicable to the enforcement organism also available where the enforcement organism is a non-court body? E.g. the application of § 139 of the German ZPO to the powers of a judge in enforcement proceedings regarding the ability to exercise judicial and material direction was held a correct and plausible position by the German Constitutional Court, remembering that the rule should be also applicable to enforcement proceedings. The German Federal Court held that the
application of this principle reflects appropriate due process and "fair process" that arise from the combination of the early exercise of fundamental rights and the principle of the rule of law.\(^{206}\)

The officiality principle is applicable to enforcement in many ways. (i) The enforcement organ may order such enforcement measures as necessary for the proceedings as brought by the creditor, such as making an eviction order to enforce an obligation to restore real estate. (ii) The enforcement body might alternatively decide to address both the claim of the creditor and the defence of the debtor by granting something different to what had been sought by the creditor (\textit{minus} or \textit{aliud}). The officiality principle implies that executive measures should be taken only when necessity, appropriateness and proportionality have been established, and also only in pursuit of the best way to satisfy the creditor’s rights with minimum and proportionate damage to the debtor’s rights. In declaratory proceedings, the court has managerial and directive powers of receiving information, giving warnings and procedural directions and enforcing discipline, for example if the regulations provide the possibility of the enforcement body to select which assets of the debtor to levy (especially with the regulation in some countries of the \textit{gradus executionis gradus executionis (mobilia, immobilia, nomina) principle}). On the other hand, if the creditor has to contribute relevant information and provide the impulse for the continuation of the execution, the enforcement proceedings are instead governed by the principle of party contribution.\(^{207}\) In comparable legal structures, there are not pure enforcement systems, but instead systems use a combination of discretionary powers and party-cooperation elements in varying proportions.\(^{208}\) The ability of an exercise of judicial power to influence the dynamic of the enforcement is very limited, because the enforcement body should take into account the interests of the creditor and the general interest in different enforcement measures being adopted. Therefore the debtor can apply for a review of certain measures granted for enforcement on the grounds of proportionality, necessity or inadequacy with the special remedies ruled in the enforcement proceeding.\(^{209}\)

When focusing on the beginning and end of enforcement proceedings, there are many similarities to declaratory proceedings because the principles of

\(^{206}\) See the discussion in Germany about the application of §139 (Material direction and management in the proceeding) ZPO to the enforcement proceeding PRÜTTING, Hanns/ GEHRLEIN, Markus, ZPO-Kommentar, (Köln: Luchterhand, 2012) § 139, nr. 1-4; Cf. STEIN, Friedrich, Grundfragen der Zwangsvollstreckung, 1913, pp. 9-10; Supporting in favour of applied the rule has decided the German Constitutional Court V. BVerfGE 57, 346.


\(^{208}\) Cf. STÜRNER, Rolf, Die Parteiherrschaft und die Parteiverantwortung im Vollstreckungsverfahren, Festschrift für Hans Hanisch, Köln u.a. 1994, pp. 257-265.

autonomy and party impulse are manifest, including the impetus being on the creditor. Therefore, if the creditor withdraws its enforcement request, any enforcement measures that have been adopted should become ineffective. The creditor may also waive his rights, which will also result in the nullity of any implemented enforcement measures, and the creditor may also request a temporary suspension of proceedings\textsuperscript{210}. Finally, both the creditor and debtor may agree to continue or to terminate the enforcement proceedings. However, freedom of contract and of contractual content configuration does not allow an early resignation from enforcement rights, nor may the parties, by agreement only, create enforceable titles without the support of legal mechanisms. Even if the enforcement is much more broadly connected to the exercise of the material right, the parties are unable to determine whether a title is enforceable.

2.23. There are certain reservations about the use of the term "evidence" within enforcement proceedings outside its core meaning of the need to prove a controversial allegation of one the parties\textsuperscript{211}. Within the core enforcement proceeding structure, the terms "proof" and "evidence" are raised correctly when referring to cases where the debtor or a third party opposes enforcement and disputes one or more issues. However, the main information problem found in the enforcement process concerns the location and specification of the debtor’s assets\textsuperscript{212}. Evidential devices used here could be described as evidence, for example as to the existence of a title, but since this was not a matter to be proved but rather a threshold requirement for the admissibility of enforcement proceedings and executive action,\textsuperscript{213} these devices should not be viewed in this way. The creditor doesn’t have to prove the existence of his claim to the executing organization. He only has to hand in the title obtained otherwise\textsuperscript{214}.

2.24. Another main principle is the formality of enforcement proceedings (taken from the public law side of the enforcement). This principle can also be found in declaratory proceedings. Formality also has a very specific role: when the State exercises its enforcement jurisdiction and orders coercive acts, it must observe the requirements for such activities as established by law, including the elements of proportionality and a due and fair process of law.

\textsuperscript{210} Thus, the device principle applies in comparative law for example in the German ZPO § 7, 24 . 2, § 111 number 1 of organization law enforcement officer , § 29 of the law of the auction § 243 , or code example implementing the Austrian § 3 sentence paragraph 39 one and one numeral six standard regulation of the Swiss implementation of Article 88 or the Italian CPC articles 483, 486 and 629
\textsuperscript{214} HATTA, Takuya, Japan National Report.
The formalities in relation to State power and coercive execution begin with the establishment of specific requirements to determine the existence of enforcement jurisdiction. These include ascertaining the existence of an enforceable title in favour of the creditor, in a certain and autonomous document, which contains an enforceable obligation. The presence of formality in the enforcement process not only restrains the State’s enforcement jurisdiction in the enforcement organism, but also gives protection and balance to the parties, and especially to the debtor. The formalities support the parties’ procedural objections to the enforcement proceedings and usually are sufficient; otherwise it might not be possible to apply directly constitutional principles to regulate the lack of adequate formalities during enforcement\(^{215}\).

2.25. Further principles applicable to enforcement proceedings, which also draw on public law, include the celerity, economy, efficiency and concentration of executive actions\(^{216}\). The principle of concentration is especially developed in the context of declaratory proceedings but is closely connected with celerity, procedural economy and efficiency. Procedural celerity and the consequent need to concentrate the procedural acts are as important for enforcement proceedings as it is for declaratory proceedings. This is the case in particular because enforcement proceedings are not structured to discuss wide ranging disputes of the debtor or of third parties related to the obligation, but instead are focused on the way the debtor’s assets are to be affected by enforcement\(^{217}\).

7. Information concerning the debtor’s assets for the enforcement proceeding

a. General remarks

2.29. As to the question of who can and should provide factual and evidentiary material about the debtor’s assets for the purpose of enforcement activities by enforcement bodies, different systems give different answers. Does the debtor only have a facultative “burden” or is he really under a duty to cooperate with the enforcement organ to provide all relevant information to facilitate the enforcement proceedings? The information relevant to enforcement, such as


\(^{217}\) STÄMM, Jürgen, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, (Tübingen: Mohr Siebeck, 2007), p. 63 et seq.
details of the debtor’s assets, is not used to clarify disputed facts between the parties, as it would be in declaratory proceedings\textsuperscript{218}.

Most systems require the debtor to make a statement about his assets, as this is the least expensive method of ascertaining what assets he may own. However, the need for an enforcement organ conducting its own research into the debtor’s assets arises where there is an allegation that the debtor’s declaration is untrue or that it has not been carried through. Only in these circumstances would it be acceptable to compel the debtor to provide access to certain sources of information. The question of requiring a statement to be made by the debtor about his assets raises a number of moral as well as legal dilemmas, including the conflict between the debtor's duty to cooperate and the need to respect his right to silence\textsuperscript{219}.

The statement of the debtor can be reached consensually, and need not necessarily be a tool to facilitate enforcement, or a coercive means to ensure the debt is paid. The creditor benefits from obtaining a manifest declaration of the debtor’s assets in the early stages of enforcement, thus saving the need for subsequent requests\textsuperscript{220}. Seeking an initial statement of the debtor’s assets is especially advisable in the cross-border (national, regional and international) context, as this will enable the creditor to seek enforcement in the State where the majority of debtor’s assets are concentrated, and where there will be a greater prospect of success. Finally, different systems react differently to a debtor refusing to provide the declaration or concealing of his assets. The debtor may face dissuasive criminal sanctions (for example when held in contempt of court), but other functional devices to encourage compliance include the imposition of fines or periodical penalty payments in favour of the creditor (for example French astreintes)\textsuperscript{221}. The potential for a European declaration of debtor’s assets has been discussed at the EU level, and many of the replies in response agreed that such a declaration would be useful. In some jurisdictions, it is still unclear whether the power to imprison a debtor should be viewed as a primary penalty or as a secondary penalty and coercive measure if the debtor refuses to pay the penalty fine. Some systems view the contempt of court measures not as a "debtor's prison" but as direct penalty for failing to cooperate with the

\textsuperscript{218} If it is appropriate, discuss the clarification of facts and proof of execution, where there is opposition or third parties involved, or third parties assert the limited number of remedies made. If enforcement is possible even in the cases where the evidence is necessary to clarify the allegations, the factual scope of discussion is already very limited. Cf. CAPPONI, Bruno, Alcuni problemi sul contraddittorio e processo esecutivo (alla luce del nuovo art. 11 della Costituzione), in Riv. Esec. Forz., 2001, 1, p. 28 et seq.

\textsuperscript{219} Cf. STURNER, Rolf Strafrechtliche Selbstbelastung und verfahrensförmige Wahrheitsermittlung, Neue Juristische Wochenschrift (NJW) 1981, 1757, 1760.


\textsuperscript{221} KENGYEL, Miklós, Transparency of assets and enforcement, Unif. L. Rev., 2014, 1–14.
enforcement organism. I will return to this subject as it is connected with non-money enforcement and disobedience of courts orders. There I will discuss the coercive measures and their limitation and form.

The computerised systems available to a creditor pursuing a debtor’s assets abroad vary from system to system: in states with more modern legislation, the judicial or administrative authority takes the initiative in forcing the debtor to make a statement of assets, and may also conduct searches on public, or even sometimes private, registers. This section considers the current operation of these devices in the various systems. It also addresses the optimum configuration for their use, given that the information should be protected to prevent its misuse during enforcement, and especially to protect the personal data of the debtor.

Access to registers and other databases with a public character may be sought either by the creditor, especially if the debt is significant, or by the enforcement organ, either because the system in question does not require the debtor to make a statement, or because relevant sources of information are not open to the public, for example databases managed by the tax authorities, or those that have significant safeguards and regulations in place due to the cooperation of financial institutions. There are additional complications which arise in relation to accessing foreign records. The complex and utopian scenario in which this is always possible remains far from reality. Not only are some opposed to the concept, there are also difficult technical barriers.

b. The new technologies and transparency regarding the debtor’s assets

2.30. The contribution of the new technologies in increasing the efficiency of enforcement and searching for debtor’s assets is remarkable. According to the principle of non-discrimination on grounds of nationality, access to records should not be problematic either for national or international creditors. This goal could be achieved simply by ensuring electronic access to records. However, electronic access to records without any control over the enquirer (such as an electronic signature or conditions imposed by the enforcement organism), would make it impossible to verify of the legitimate interests of the person making the enquiry. A judicial order should be required, where appropriate, compelling the enquirer only to use the information obtained for the purposes of formal proceedings.

222 See the UK case IST BTA Bank v. Solodchenko (no2) 2011 in (2011) EWHC 2163 (Ch)
223 For example, the provisions of Directive 95/46/EC.
The widespread utility of electronic records is hampered because the information made available is not of uniform scope, nor is access to similar records based on the same criteria. For example, in property registries in some countries, the search is conducted for real estate, whereas in other countries the search is for placeholders. Harmonisation of national laws will be necessary to solve this problem. It would not be sufficient merely to design a uniform pattern for the respective websites. A further difficulty arises because in certain states because the records are not centralised but are administered by regional or local authorities. Access to the tax and social security databases is usually permitted but is restricted according to the law surrounding fiscal secrecy. There are various reasons for such a limitation, including the public interest in holding these authorities to account, and also the protection of personal data. To search these databases, individuals need to gain access to the system while still being subject to controls that restrict access only to material of legitimate interest to them, which causes an increase in costs and hinders the main activities of collection and inspection. The enforcement organ might access such information when it is justified in using the data for the enforcement procedure against the debtor, and in this way the enforcement body indirectly polices the legitimate interests of the creditor concerned.\footnote{See HARSÁGI, Viktoria, Koordinierung der Offenlegung des Schuldnervermögens im Europäischen Justizraum in Grenzüberschreitende Vollstreckung in der Europäischen Union KENGYEL, M.; HARSÁGI (Ed.), (Munich: Sellier, 2011), p. 369.}

In the EU, major advances have been made with regard to the facilitation of access to data registers in the field of business and corporate registers. For example, Directive 2003/58/EC involved the standardisation of electronic registers and the harmonisation of requirements for advertising. Furthermore, the European Business Register (EBR), which was an initiative of the national authorities, now allows access to electronic business records in the associated States. Users receive the information in the language in which they carry out their inquiry, and legal issues relating to data transmission are governed by the respective national laws. To enhance the collaboration of the various authorities, a research project called Business Register Interoperability throughout Europe (BRITE), was formed to introduce a universal number of unit identification (REID) for all companies. The EBR, however, demonstrates the lack of uniformity across information: while some states only allow searches for basic company information, other states allow searches for companies, people, positions and annual accounts. In parallel, the EULIS service has sought to connect the land registers of different EU Member States for the registered consumers and users. The web page of the service works as a link between the websites of the national registers. A registered user on the website of one national
land registry can access the registry of other State through EULIS by conducting a search in accordance with the criteria on the site 227.

As evidenced by the Council in its multiannual Action Plan 2009-2013 228, the project has given rise to many issues. Firstly, there are concerns about the security of data transmission and the authenticity of signatures and acts. For this reason, work is taking place on standardizing an electronic signature within the EU. Secondly, the Council is seeking a commitment by Member States to achieve certain standardised levels of information exchange. The Council hopes in the future for legal professionals to be able to access various sources of information in the future reserved for them “through a single authentication process”.

It might be anticipated that in the future the e-justice portal could provide the enforcement organ with centralised access to all registers and databases at least at the local or national level. In particular, the e-justice portal could subsume EULIS and the EBR, so that the creditor could have centralised access to data about the debtor's assets. This information could inform an initial creditor inquiring about the debtor's assets and the possibility of commencing enforcement proceedings 229.

c. National reports

2.31. Europe

The enforcement in Germany in an enforcement for monetary claims, § 802c ZPO and § 284 AO impose on the debtor a duty to establish an inventory of his or her assets (including credit claims against third parties) and to list all transactions with close persons within the last two years and all donations within the last four years. 230

This inventory must be accompanied by a declaration in lieu of oath that the information is correct. The inventory does not contain information on income and debts, though. The inventories are kept in a central registry for every German State and can be consulted online by the execution courts, insolvency courts and the courts keeping the


commercial and other registers as well as the prosecution authorities (§ 802k ZPO). The main purpose of this duty is to simplify and accelerate the enforcement and to reduce its costs.

Apart from the rules on the inventory, which help creditors to effectively enforce a specific claim, creditors may consult the commercial register, the association register, the cooperation register and the partnership society register. As already mentioned above, the debtor has a duty to establish an inventory (§ 802c ZPO, supra sub 5). If the debtor does not cooperate, he or she can be arrested upon request of the creditor on the basis of an arrest order issued by the court (§ 802g ZPO). The arrest may not exceed six months (§ 802j ZPO). The enforcement officer may retrieve form the Federal Central Tax Office (Bundeszentralamt für Steuern) certain data concerning credit institutions to which the creditor is a client (§ 802l ZPO). The creditor can then use this information and seize the account.

§ 802l ZPO is clearly regulated and limited on who can retrieve the data and for which purpose the data may be used and the provision hold as conform to data protection law. The Federal Central Tax Authority is thus obliged to provide these data to the enforcement officer.

231 See KERN, Germany National Report: “If the creditor can present facts that there has been a significant change in the assets of the debtor, the debtor is obliged to provide a new inventory even within the first two years after the first inventory (§ 802d ZPO); if more than two years have passed, a new inventory can always be demanded (§ 802d(1) ZPO). If the debtor does not cooperate and refuses to appear at the hearing scheduled for the provision of the information on his or her financial situation without an excuse, he or she can be arrested on the basis of a warrant of arrest which can be issued by the court upon request of the creditor (coercive detention, § 802d ZPO). The maxim duration of this arrest is six months (§ 802j ZPO). The debtor is obliged to provide the information on his or her financial situation upon request of the enforcement officer. This means that the duty to provide this information is owed to the creditor, as it was the creditor who had sent the enforcement officer”; Conf. BROX, Hans/WALKER, Wolf- Dietrich, Zwangsvollstreckungsrecht, 10th ed., (Munich: Franz Vahlen, 2014) at 549 (mn. 1138).

232 See KERN, Germany National Report: “The enforcement officer can request from the debtor that he or she establish an inventory (§ 802c ZPO, see supra sub 5). In addition, the enforcement officer can, under certain circumstances, demand information on the debtor’s employer, his or her financial institutions and his or her automobiles from public authorities (§ 802l ZPO, see supra sub 4)”.

233 See KERN, Germany National Report: “All in all, there is no access to all potential sources, but access to some very important sources of information. Insofar as the enforcement officer or the creditor have no access, this is sometimes due to technical reasons like the lack of central registers, and sometimes an explicit decision of the legislature, trying to strike a compromise between the creditor’s interest in full information, the debtor’s and third parties’ interest in privacy and the State’s interest in avoiding excessive costs of searches for the taxpayer. Creditors may also consult the real estate registers. This, however, can be done effectively only if the creditor knows which real estate is or might be owned by the debtor; there is no central register in which a creditor could search simply by name”.

234 See KERN, Germany National Report: “The court has access to the collection of debtors’ inventories according to § 802k(2) 3rd sentence ZPO (supra sub 5). The enforcement officer can request certain public entities and to provide information from their databases (§ 802l, supra sub 4)”.

235 § 93b(1) AO with § 24c(1) of the Act on Credit Institutions (Kreditwesengesetz, KWG); WAGNER, in: Münchener Kommentar zur ZPO, (München: C.H. Beck, 2012), § 8021 nn. 6 et seq.

236 § 93b(1) AO, See KERN, Germany National Report; FISCHER, Nikolaj, German National Report.
The credit institutions are under a general obligation to provide these data to the Federal Central Tax Authority. A statutory “bank secrecy” does not exist in Germany; contractual obligations may not preempt statutory obligations. For this reason, credit institutions cannot invoke confidentiality.237

Although enforcement has its roots in the relation between creditor and debtor, there are – as the question takes as granted – situations in which third parties are involved in the enforcement process. For some of these situations, German law imposes on the third party a duty to cooperate. A first situation may occur in the context of the establishment of an inventory of the debtor’s assets258 and the contacting of several public authorities to get further information. These authorities are obliged to comply with the enforcement officer’s request.239 A second situation when the debtor is the creditor of a claim against a third-party debtor is cause for this claim to now be the object of an enforcement measure. In this case, the third-party debtor must, upon request of the enforcing creditor, make a number of declarations concerning the claim at issue (§ 840(1) ZPO)240

Whether the third-party debtor can be sued by the creditor to provide information about a claim which the debtor may have against the third-party debtor is controversial. According to the Federal Supreme Court (Bundesgerichtshof, BGH), the creditor has no power to sue the third-party debtor in order to enforce cooperation.241 Only the debtor him- or herself may sue the third-party debtor.242

Traditionally, German law did not provide for a general duty of the debtor to provide an inventory of his or her assets at the outset of enforcement proceedings.243 The former law was often criticized.244 Therefore, in 2009 the

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237 § 30a(5) with § 93 AO; See a leading case of the German Supreme Federal Court BGHZ 27, 241-249; Cf. KOBERSTEIN-WINDPASSINGER, Carmen, Wahrung des Bankgeheimnisses bei Asset-Backed Securities-Transaktionen, Wertpapier-Mitteilungen (WM) 1999, 473, 474 et seq.
238 See KERN, Germany National Report: “If the debtor does not fulfill his or her duty set forth in § 802c ZPO and refuses to establish an inventory or if enforcement in the assets listed in the inventory does not seem to be sufficient, taking into account the creditor’s claim, the enforcement officer may, according to § 8021 ZPO
240 See KERN, Germany National Report: “The third-party debtor must, for example, declare whether he or she acknowledges the claim and is willing to pay and whether the claim has already been seized by other creditors. If the third-party debtor does not comply with the request of the creditor by giving the information mentioned above, he or she can be held liable for any damage arising from the non-cooperation (§ 840(2) ZPO), § 840 ZPO. Obligation of the third-party debtor to make declarations
242 BGHZ 147, 230 = NJW 2001, 2178.
243 HOLZAPFEL, Carolin, Sachaufklärung und Zwangsvollstreckung in Europa, (Baden-Baden: Nomos 2006), p. 92 et seq., 113; KERN, Christoph A. Principios de la ejecución individual de acuerdo al Código
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legislature adopted an Act to Reform the Determination of Facts in Enforcement Proceedings.\textsuperscript{245} The provisions which are relevant regarding transparency of debtors’ assets entered into force on 1\textsuperscript{st} January 2013. Since then, the new § 802c ZPO imposes on the debtor of a monetary claim based on a private law relationship a duty to provide an (electronic) inventory on demand of the enforcement officer.\textsuperscript{246}. With this new regulation there are strong incentives for the debtor to cooperate\textsuperscript{247}. The execution court and the first instance court (courts involved in enforcement proceedings) have no power to investigate the assets of the debtor. The enforcement officer may under certain circumstances proceed to certain investigations. The limits are clearly prescribed by the law\textsuperscript{248}. If the debtor refuses to establish an inventory or if enforcement in the assets listed in the inventory will not be sufficient to fulfill the creditor’s claim, the enforcement officer can gather certain types of information from three institutions: the statutory pension funds, the Federal Central Tax Authority and the Federal Motor

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\textsuperscript{244} BEHR, Johannes Reform der Zwangsvollstreckung, Rechtspfleger (Rpfleger) 1981, 417, 420 et seq.; GAUL, Hans Friedhelm Zur Reform des Zwangsvollstreckungsrechts, Juristentagung (JZ) 1973, 473, 481.

\textsuperscript{245} Gesetz zur Reform der Sachaufklärung in der Zwangsvollstreckung of 29 July 2009, BGBl. I, 2258.

\textsuperscript{246} See KERN, Germany National Report: “The only condition is that the enforcement officer must first set a deadline of two weeks to fulfill the creditor’s claim (§ 802f(1) ZPO). If the enforcement officer undertakes an attempt to attach assets of the debtor and this attempt was not successful, the enforcement officer may immediately establish an inventory, unless the debtor objects (§ 807 ZPO).”

\textsuperscript{247} See KERN, Germany National Report: “First, if the debtor refuses to establish the inventory, he or she will be registered ex officio in the debtor’s register (§ 882c(1) No. 1 ZPO). This register is accessible for anyone who has a legitimate interest (§ 882f ZPO). Credit rating agencies and many businesses like banks or telecommunications services providers regularly check the debtor’s register before entering into a contract. Therefore an entry in this register has severe consequences. Second, the creditor may apply for a detention order, according to which the debtor can be imprisoned until he or she establishes the inventory (§ 802i(2) ZPO), but not longer than six months (§ 802 ZPO). Third, the enforcement officer can, on application of the creditor, gather information about the debtor’s assets with certain institutions: the statutory pension insurance funds, the Federal Central Tax Authority and the Federal Motor Transport Authority (§ 802f ZPO)”. Cf. VOLLMONMER, Gregor, Die Reform der Sachaufklärung in der Zwangsvollstreckung – ein Überblick, NJW 2012, 3681, 3684.

\textsuperscript{248} See KERN, Germany National Report: “As already described in the previous item, the enforcement officer can demand that the debtor establish an inventory (§ 802c ZPO). These inventories are registered in electronic form with the central execution court of every German State and are available online to those persons and entities who are entitled to have access to these data, in particular the enforcement officer and other enforcement authorities (§ 802k(1), (2) ZPO). According to § 806a ZPO, the enforcement officer has to transmit to the creditor any information about claims of the debtor against third parties and any security provided by the third party to the debtor if an enforcement measure was not successful or did not suffice to fulfill the creditor’s claim. In addition, if the enforcement officer does not meet the debtor in his or her premises and an attachment was not possible or sufficient to fulfill the creditor’s claim, the enforcement officer may ask adult persons living in the debtor’s household about the debtor’s employer. Any information must be transmitted to the creditor.”
Transport Authority (§ 802l ZPO). Similar provision deals with enforcement of a claim for restitution of a movable thing or a quantity of movable things²⁴⁹.

According to the new English TEA the judgment creditors can request an order compelling a judgment debtor (or in the case of a company, one of its officers) to attend the court and to supply information concerning the debtor’s means and financial commitments (assets transparency).²⁵⁰ If the judgment debtor is a company, CPR Part 71 enables an order to be made for information to be supplied by the company’s officers. The TCE Act creates new methods of obtaining information concerning debtor’s assets and indebtedness: sections 95 to 105). The enforcement organ are renewed and renamed. The High Court sheriffs and county court bailiffs are re-named as enforcement agents. It could apply for an asset Disclosure Orders nearly always to supplement a freezing injunction. The respondent is compelled to disclose details of his assets in England (or, where appropriate, elsewhere).²⁵¹ A non-party can be compelled in certain cases information.²⁵²

In France there is no obligation for the debtor to inform the state of its assets²⁵³. The bailiff (profession of private law having the monopoly of enforcement) inquires as he can from government agencies and banks (must guess what the debtor’s bank or several banks do). Even for listen the home the bailiff must enter or makes contact with the debtor’s bank²⁵⁴. In France third parties may not obstruct proceedings for the execution or conservation of receivables. They lend their support if they are legally required. One who, without lawful excuse, evades these obligations may be compelled to satisfy the

²⁴⁹ See KERN, Germany National Report: “Under very limited circumstances, the enforcement officer may search the creditor’s premises and repositories. In particular, a search in residential premises is, in principle, only permitted if authorized by the local court (§§ 758, 758a ZPO). § 755 ZPO has been reformed by the Act of 2009. It allows the enforcement officer to investigate the debtor’s place of residence or abode. The enforcement officer may, as a first step, seek information from the registration authority which works very efficiently in Germany. As a second step, the enforcement officer may, if the value of the claim equals or exceeds 500,- Euros, contact the Central Register of Foreigners, the statutory pension insurance funds and, probably most important, the Federal Motor Transport authority”.

²⁵⁰ CPR Part 71.


²⁵² E.g. If he has assisted, even innocently, another’s wrongdoing ; Cf. ANDREWS, Neil English Civil Procedure (Oxford: University Press, 2003), 26.102 to 26.128.

²⁵³ JEULAND, Emmanuel, France National Report.

²⁵⁴ Article L152-1 : The state administrations, regions, departments and communes, companies granted or controlled by the state, regions, departments and municipalities, public institutions or organizations controlled by the authority. Administrative must inform the bailiff charged with the execution, carrying an enforceable title, the information they have to determine the address of the debtor, the name and address of his employer or any garnishee or custodian liquids are payable and the composition of its real estate, to the exclusion of any other information without being able invoke professional secrecy.

Article L152-2 : Institutions authorized by law to hold deposit accounts should indicate to the bailiff justice of enforcement, carrying an enforceable if one or more accounts, joined or merged are opened in the name of the debtor and the places where the accounts are held at the exclusion of any other information, without being able to invoke professional secrecy.
need through financial penalty, without prejudice to damages. Under the same conditions, the third party in whose hands seizure may also be ordered to pay the causes of seizure, unless there is other recourse against the debtor.

In Hungary and contrary to some other European states, there is not any debtor’s assets declaration. Consequently, the information about the debtor’s assets may be obtained from public registers. It can be obtained by the enforcement organs. Apart from creditors and their lawyers, this task is mainly shouldered by court bailiffs, to whom the authorities can refuse to provide the required information free of charge. Some of the public registers are electronic; therefore, those entitled to it may easily access the required information. The situation wherein creditors who have free access only to population registers has become more difficult. The debtor’s financial situation may be revealed based on various public registers. It is the bailiff’s task to obtain, if necessary, the data relating to the debtor’s income and his assets that may be subjected to enforcement. Authorities and organizations administering registers must comply with the bailiff’s request within eight days without charging procedural duty or a fee.

The bailiff shall safeguard all data and information obtained in his official capacity from any unauthorized access, from publication, and from any illegal use or use for the purpose of any criminal act. The circumstances when such data and information can be contained in any executory documents or can be disclosed to third parties are ruled by law.

In addition, the tax authority can support the work of the bailiff, in case he needs details of the bank account of the debtor. The authorization in the law is contained the Act No. CXII/1996 on the credit institutions and financial enterprises that determines, to whom, in which procedure can be delivered the bank secrecy. The bailiff is one of them. The obligation of banking secrecy is not against the bailiff, who in an enforcement procedure claim for it.

In Italy pursuant to article 492 of the Code of Civil Procedure, when the seized assets are evidently insufficient or difficult to sell, the enforcement officer asks the debtor to provide information on other assets or credits that can be seized. The lack of collaboration is a criminal offence, pursuant to article 338 of

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256 KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: The most important provision is contained in § 47 of the Enforcement Act: (1) In the interest of carrying out the enforcement procedure successfully, the bailiff shall obtain information for the identification of the judgment debtor, and other particulars such as permanent or habitual residence, head office, place of business, place of employment (or self employment), income and any property that can be seized (movable or immovable property, payment account, deposit, securities, partnership share or other interest in a business association etc.); (2) The bailiff shall be entitled to approach the authorities and organizations so as to obtain the information defined in Subsection (1)”.
Moreover, if the debtor is a commercial enterprise, the enforcement officer can (if requested by the creditor and at his expenses) ask the debtor to locate the financial balance sheets and nominate an accountant, an attorney or a notary to examine said sheet, in order to locate more assets. Pursuant to article 547 of the Code of Civil Procedure, third parties must, if requested by the creditor, declare whether they owe money to the debtor or they are in possession of any assets of the debtor. The declaration must be rendered to the judge of the place of residency of the third party, pursuant to article 543(2) no. 4. After having being asked to cooperate with the enforcement procedure, third parties can no longer dispose of the assets freely, or pay their debt directly to the debtor.

Pursuant to article 491 of the Code of Civil Procedure, the enforcement officer can, if requested by the creditor, access the tax database and other publicly accessible databases, in order to locate the debtor’s assets. As stated above, pursuant to article 492 of the Code of Civil Procedure, the enforcement officer can access the public tax database, in order to locate the debtor’s assets and seize them. Banks and other financial institutions must declare whether they have a debt towards the debtor (e.g. a bank account constitutes a debt, within the relevant meaning of the Code) and cannot be exonerated from the duty to cooperate.

The Spanish LEC rules the duty of declaration of assets of the debtor. He must make a declaration of assets but only limited to the value of the execution. There is also a provision regarding the obligation of third to cooperate with

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260 CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: “In light of this, it can be concluded that the duty is owed to the enforcement office, and in particular to the officer asked to seize the debtor’s assets, but the claimant creditor plays a central role in asking the officer to exert its investigative powers in order to locate adequate assets and conduct further research on the debtor’s patrimony.”
261 CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report:
262 CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: “Although these databases can provide a host of useful information as far as the debtor’s assets are concerned, they do not always cover “all necessary information”, especially in cases where the debtor has tried to conceal its assets, for example with transnational financial operations or portfolio investments. In some cases, the claimant creditor also conducts private investigations, in order to locate assets effectively.”
263 PICÓ JUNOY, Joan, Spain National Report. “LEC 591 establishes the general duty to cooperate in the implementation process as follows: "Article 591 Duty to cooperate. 1. All persons and public and private entities are required to render assistance in enforcement proceedings and deliver the legal secretary in charge of the execution or the creditor’s attorney, when requested by his client and expense, any documents and data in their possession, and whose surrender has been ordered by the court clerk, without other limitations than those imposed by respect for fundamental rights or limits for certain cases expressly imposed by law. When such persons or entities argue legal or respect for fundamental rights reasons not to make delivery leaving unattended collaboration would have been required of them, the court clerk shall report to the Court for the agreed appropriate. 2. The Court, after hearing the parties concerned, may, in a separate piece, agree to impose periodic persons and entities that are not providing the cooperation that the Court has required of them under the preceding paragraph with penalty payments. In applying these constraints, the Court will consider the criteria set out in paragraph 3 of Article 589. 3. Sanctions imposed..."
the judicial enforcement bodies under penalties of fines and criminal contempt for authority. The judge and the Judicial Secretary-account with a general rule for ex officio find the particular debtor's assets. In addition, Spain has greatly facilitated the possibility that the courts implementers of public institutions obtain official information about the debtor’s assets by creating the so-called "Judicial Neutral Point". Currently, most of the information relating to the assets of the debtor that is collected in the process of implementation is obtained via the "Judicial Neutral Point," which consists of a set of databases to which the courts can access directly, even though the ownership of these databases is for other agencies and entities that made available to the courts under applicable legislation or pursuant to cooperation agreements concluded with the General Council of the Judiciary. There is no rule that covers the financial, tax and banking secrecy debtor executed against its refusal to comply with its legal obligations. In Spain banking, financial institutions and tax bodies—without troubles always collaborate with the courts, through the aforementioned "Judicial Neutral Point".

The Portuguese Civil Procedure Code contains a general rule (is applicable to declarative and enforcement proceeding) that establishes the duty of cooperation of third parties for the discovery of truth, responding to what prompted them, providing we asked for and practicing determined acts (art 417-1); in the case of confidential data on the availability of administrative services, in manual or electronic form, the judge must order the necessary information from the court, which may not be disclosed (art. 418). Specifically in place of under this Article are subject to the regime of remedies provided in Title V of Book VII of the Act Organic Judiciary".

264 PICO I JUNOY, Joan, Spain National Report: “LEC 590 provides: "Article 590 of the Judicial inquiry assets executed. At the request of creditor who is unable to designate goods run sufficient for the purpose of implementation, the Court Clerk shall decide, by measure of organization, contact financial institutions, agencies, and public records and natural and legal persons indicate the performer to to facilitate the relationship property or rights of which they are executed record".”

265 PICO I JUNOY, Joan, Spain National Report. “Part of "Judicial Neutral Point" databases belonging, among other public agencies, to the following: General Council of the Judiciary, State Agency for Tax Administration (which in practice is the source of proprietary information most relevant to Spain ), College Registrars and Commercial Property in Spain, General Directorate of Cadastre, Wage Guarantee Fund, National Institute of Employment and General Treasury of Social Security. Also, the courts can access databases corresponding to bank under the collaboration agreements signed by the General Council of Judicial Power Associations formed by said entities data banks”.

266 PICO I JUNOY, Joan, Spain National Report. Thus, for example, Art. 95.1.h of Law 58/2003, General Tax, 17 December, states: "Article 95 reserved character of tax-relevant data 1 data, reports or records obtained by the tax authority in the performance of their duties are confidential and may only be used for the effective application of taxes or resources whose management has entrusted and to the imposition of sanctions as appropriate, and may not be transferred or communicated to third parties, unless the transfer is intended for: [...]. h) Working with judges and courts to enforcing final judgments. The judicial inquiry will require specific resolution in which, after balancing the public and private interests involved in the issue in question and by other means or sources of knowledge about the existence of assets and rights of the debtor have been exhausted, motivate the need to collect data from the tax authorities [...]. "

267 FREITAS, Jose Lebre de , Portugal National Report.
execution, the Bailiff has direct access to the databases of the tax administration, social security, registries of property, commercial and vehicle registration and other records or similar files. Similarly, the Bank of Portugal is obliged to effect the attachment of bank deposit, to provide the bailiff, electronically, all information about the legally authorized to receive deposits in institutions that run hold accounts or deposits bank (art. 749-6)\(^{268}\). In all other cases (referral to other entities), and in the case of elements protected by tax secrecy also is required prior order of the court to order information (art. 749-7). In another article of the Code (article. 747) it is said that when the act of the bailiff finds that the movable property of the debtor is in possession of another, he seizes it and verifies that the third has the goods its power through pledge or lien, which, without establishing a duty to inform. It should be noted, therefore, that the seizure of credit rights of runs is done by a notification of the execution debtor to third agent and that this must be stated that the credit exists, what safeguards have in dating matures and other circumstances relevant to the execution (Article 773, paragraphs 1-3.); if the debtor third says nothing, it is presumed that recognizes the existence of credit, under which were given to the agent and that this must be included in the notification (article. 773-4)\(^{269}\). When the bailiff cannot find goods to pawn executed within three months, he must notify the creditor and the debtor to indicate attachable assets. The notification is made to run with the announcement that, if the debtor omits the existence of assets or makes a false statement shall be subject to the penalty of 5% per month on the amount of debt, would later come to be discovered the existence of attachable assets (art. 750-1)\(^{270}\).

There were, in the past, major problems with the banks, who called bank secrecy not to provide information about the run on deposits, which led in practice to the infeasibility of the seizure of the bank deposit. With the revision of the Code of Civil Procedure 1995-1996, the attachment of bank deposit came to be considered done as soon as the communication is received, usually electronically, that the existing balance is the order of the court, and the bank responsible, from that moment, the maintenance of the deposit, which amount up to the execution debt, has a duty to promptly report to the court. With the reform of executive action, in 2013, that communication has to be taken by the bailiff\(^{271}\). Nevertheless survived some difficulties for the law require prior order of the court on behalf of the protection of personal data: the order often came too late. So the new Code of Civil Procedure (2013) disregards the order, the enforcement officer may act directly. There is about in Portugal, a centralized base available for immediate seizure of all accounts at any bank in the country; on the Bank of

\(^{268}\) FREITAS, Jose Lebre de , Portugal National Report.

\(^{269}\) FREITAS, Jose Lebre de , Portugal National Report.

\(^{270}\) FREITAS, Jose Lebre de, Portugal National Report.

\(^{271}\) FREITAS, Jose Lebre de, Portugal National Report.
Portugal incumbent only the duty to provide the bailiff information about existing accounts run. In Portugal entire executive process is handled electronically, through a proprietary system for communications between the court, the parties and the bailiff. The documents themselves are transmitted electronically. The use e-signature is usual.

In the Netherlands a debtor is obliged, if requested, to identify his sources of income to the bailiff that is qualified/entitled to seize/attach/garnish the debtor’s assets. The Supreme Court ruled that there is a general duty for the debtor to provide information to a creditor about his income and assets. This duty however does not require the debtor to provide copies of bank statements and to provide an overview of the changes of stocks and bonds in the possession of the debtor. Because the creditor has an enforceable title against the debtor, the creditor may attach/garnish the debtor’s assets. The creditor could for example garnish/attach/seize a bank account (derdenbeslag). The creditor may not be aware whether or not a third party owes the debtor money or is in the possession of goods that belong to the debtor. The creditor can nevertheless request the bailiff to garnish any and all assets held by a third party. Subsequently, third parties, such as banks, will have a duty to individualize the assets and claims. In the Netherlands there is a register that can be used to determine whether or not a debtor owns real estate in the Netherlands. There is no register available (to the general public) in order to determine whether or not a debtor owns stocks in a limited (or publicly owned) company. There is no central register of bank accounts either. A bank will have to identify assets and/or claims once a bailiff attaches and/or seizes assets. Tax authorities generally do gather information based on the tax filings of individuals and companies. The information acquired by the tax authorities is not publicly available.

In Finland the has the right to obtain information from the other authorities or third parties was considerably widened in 1997. This possibility to get information is indeed very important in all kinds of enforcement, but it is of ultimate importance in respect of the special collection. According to the basic norm in the Enforcement Code, the bailiff has the right to obtain the information, documents and materials provided

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272 FREITAS, Jose Lebre de, Portugal National Report.
273 FREITAS, Jose Lebre de, Portugal National Report.
278 JONGBLOED Antoine / VERKERK Remme, Netherlands National Report.
279 JONGBLOED Antoine / VERKERK Remme, Netherlands National Report: “Tax authorities have a duty to treat the information as confidential (Article 67 Invorderingswet 1990). There are exceptions to this rule. Bankruptcy trustees for example, that would like to initiate mismanagement or fraud litigation against directors or board members of a company on behalf of creditors are entitled to receiving such information (Article 36.2 Leidraad Invordering)”.

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below if they are necessary for enforcement in a given matter. The bailiff shall assess the necessity. The information may be provided by way of an electronic interface. The Ministry of Justice may make reimbursements for the establishment and maintenance of the electronic interface. This rule then completes the possibilities to obtain information based on the other legislative acts. There are then rules included in other acts as well and, based thereupon, there are also other possibilities to obtain the confidential information. The cited rule is therefore only a minimum guarantee in order to obtain information. In addition, the bailiff can of course collect all kinds of information available publicly. The collection of further data is based on the willingness of the third party or the other authority to voluntarily divulge further information. On the request of the bailiff, a third party shall produce the contract or other document and the other immediately relevant material that concern a circumstance referred to in the rules above. The bailiff has the right to have copies made of the documents and materials. A credit, finance or insurance institution may not disclose to parties other than the authorities whether the bailiff has posed questions concerning the aforementioned information. The third party is obliged to give information when asked and therefore has no obligation to give information in an active way and on his/her own initiative. She/he has to answer the questions and to be truthful in doing so. If the third party gives false information or conceals information, she/he could commit a criminal offence or she/he may be liable to pay compensation. If information cannot be obtained from the third party in any other manner, the bailiff may compel him or her, under threat of a fine, to arrive at the bailiff’s office or at another suitable location to provide the information.

Bank secrecy is one part in the protection of privacy. The exceptions made to bank secrecy have to therefore be strictly limited and they have to be enacted in the law. For the same reason only the narrow interpretation is allowed. A credit institution and an undertaking belonging to its consolidation group shall be liable to disclose the information to a prosecuting and pretrial investigation authority for the investigation of a crime as well as to another authority entitled to this information under the law.

For instance, enforcement authorities, tax authorities and social authorities can obtain

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280 The Enforcement Code, Chapter 3, Section 64.
281 ERVO, Laura, Finland National Report: “When the obligation to obtain information is only based on the Enforcement Code, the prerequisite is that the information is necessary for enforcement in one specific enforcement matter. In addition, the information can only be demanded for single cases”.
282 ERVO, Laura, Finland National Report: “According to the Enforcement Code, a third party shall state to the bailiff inter alia: (1) whether he or she is in possession or otherwise in charge of assets belonging to the debtor, and what kind of assets are involved; (2) whether he or she has receivables from, or debts due to, the debtor, and the basis and amount of the receivable, the transactions in the accounts relating to the receivable, as well as the right granted by the debtor to dispose of said accounts”.
283 The Enforcement Code, Chapter 3, Section 66.
284 ERVO, Laura, Finland National Report.
285 ERVO, Laura, Finland National Report: “An authority and a party performing a public task shall, upon request, provide the bailiff with all information in its possession relating to: (1) the debtor’s property and assets, income, debts and other financial status, as well as banking information; (2) the debtor’s employment and service relationships, pensions and economic activity; (3) the debtor’s address, telephone numbers and other contact details”. The Enforcement Code, Chapter 3, Section 68.
286 Act on Credit Institutions, Chapter 8, Section 141.
the secret information based on special legislation. The bailiff will obtain the information based on the Enforcement Code, Chapter 3, Sections 64 – 66.\(^{287}\)

In Croatia if the object of enforcement is not found, or if the enforcement of monetary debt was not successful, the debtor may be requested to submit a solemn declaratory statement (*prokazna izjava*) on the whereabouts of the objects or the list of property that he possesses. This statement is given to the enforcement court, publicly and in an oral hearing. Untrue statements are punishable just as perjury in a court proceedings. See Art. 17 of the Law on Enforcement.\(^{288}\) Third persons are generally obliged to provide the information to the enforcement court about the debtor and his assets. In addition, some organisations, such as National pension insurance fund, Ministry of interior, Ministry of finance and tax authorities, and cadaster authorities have to provide information on the debtor and his assets to the creditor. The information that should be provided are e.g. data on income and pensions of the debtor, his social benefits, cars and other vehicles registered in his name, his tax number and address, immovables and other possessions etc. (see Art. 18 of the Law on Enforcement)\(^{289}\). The information is available to courts.\(^{290}\) Croatia currently does not have enforcement agents with power to issue any more significant decisions or investigate property of the debtors. Third persons and bodies may also be called to testify before the court of law (Art. 17 para 13), and the same penalty (criminal responsibility for perjury) is provided if they give untrue statements. Financial and tax institution have to cooperate, not only with the court, but also with the creditors. Moreover, the payment of monetary debt is since 2010 governed by the Law on Enforcement on Monetary Funds (*Zakon o provedbi ovrhe na novanim sredstvima*, ZEMF, Off. Gaz. 91/2010 and 112/2012), under which the enforcement on funds that are deposited in any bank accounts in Croatia is effected by direct application to Financial Agency\(^{291}\). Financial Agency is governmental agency under the auspices of the Ministry of Finance which has power to freeze any bank account in Croatian banks and transfer the funds directly to the creditor.

### 2.32. Latin America

In Argentina there is not implemented a debtor legal obligation to make a declaration to report in detail on the dispute over property and rights which holds that are sufficient to cover the amount of the execution.\(^{292}\) Thus, unlike other laws compared

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287 ERVO, Laura, Finland National Report.
288 UZELAC, Alan, Croatia National Report.
289 UZELAC, Alan, Croatia National Report.
290 UZELAC, Alan, Croatia National Report.
291 UZELAC, Alan, Croatia National Report.
the indictment or summons to the debtor to act as its financial information provider is not anticipated. The investigation into the assets of the debtor executed depends on the information that achieves obtain the creditor. Third parties are only required to give judges the specific information they require them, which implies a prior management performer, often provide informative evidence targeting the Central Bank of Argentina or other financial institutions in order to report whether executed are account holders or banking products. With respect to real property records or the like, such as Real Property or vehicle only respond if a specific property is the debtor but not have internal procedures to identify whether the alleged debtor has any property that can be subjected to an execution. Information on registered assets of the debtor executed enters the process through reports or certificates provided by public records, which are required by the creditor and obtained through a court order. Once the information entered by the performer, the courts ordered the registration or recording of the precautionary measures that fall on those assets. There are private sources of information related to the registration of debtors who leads the Central Bank of Argentina in Argentina the rules protect the bank and tax secrecy. The "bank secrecy", "secret tax" or "stock market secrets" are specifically regulated. However, the judge has the authority to require that such information be unveiled, but it is strictly managed. It is unusual to get it and supplied in exceptional cases in the context of executions of debts. If arise a situation of unjustified reluctance or lack of cooperation, are subject to the general rules in force for the informative test, under which if an unreasonable delay in reporting answers verified, the judge must apply progressive penalty payments “Astreintes” (art. CPCCN 398).

Under Brazilian law, Art. 656, § 1 of the Code requires that the debtor indicate "where the property subject to execution, showing proof of his property and, if applicable, certificate of negative charge, and refrain from any action that embarrass or impede the realization of the pledge". Brazilian law provides for a general duty (imposed on the parties and third parties) to proceed with loyalty and good faith (art. 14, inc. II of the Code) and "meet the accuracy that the court’s orders not create embarrassment the effectiveness of judicial provisions, anticipatory or ultimate nature "(art. 14, inc. V CPC). But aside from that general duty, there is no specific provision for the implementation imposes a duty to third collaboration for the location of the debtor's assets. The general rule, however, is eventually used (especially against the Government and financial institutions) to require information about the debtor's assets. Brazilian civil procedure coexists today with the wide acceptance of new technologies related to collecting personal data.

293 OTEIZA, Eduardo, Argentina National Report.
294 OTEIZA, Eduardo, Argentina National Report.
296 MARINONI, LG/ARENHART, S./OSNA, G., Brazil National Report.
297 MARINONI, LG/ARENHART, S./OSNA, G., Brazil National Report.
relating to the assets of the debtor, with a view to facilitating the settlement of that claim. Examples BACENJUD the system (which investigates the existence of bank deposits belonging to the debtor, and proceeds to immediate seizure) and RENAJUD (which repeats the same process with regard to the existence of motor vehicles). There is the possibility (no more resistance) than to proceed with the search, with financial institutions through the BCENJUD system, the existence of debtor’s assets in bank account and order a possible retention. On the other hand, the "puzzle" of tax secrecy (getting data from tax considerations) is also accepted. In relation to it, however, the courts are positioned in a more restrictive manner, understanding that its use would only be possible in cases subsidiary - exhausted previous attempts.

In Colombia there is no debtor’s duty to declare his assets. The tax authorities and financial sector entities cooperate with the court executive process, providing proprietary information and personal occasions debtors (financial data, location.). Not only because the judicial officer has constitutional and legal powers to obtain, but because such collaboration is the duty of all persons in Colombia mandated by sections 4. and 95 numeral 7. of the Colombia Constitution. However, when the information is required by an administrative authority exercising coercive jurisdiction and it can be inferred that this is information of a confidential nature or that are covered by some kind of secrecy or confidentiality, before providing financial institutions and tax authorities often ask the executing agency a detailed explanation of the special rules that allow their to get it.

The reform introduced the General Code of Procedure (CGP) of Uruguay in 2013, is ruled by art. 379.6 the statement of assets and rights of the debtor in the civil process. By promoting the enforcement provided by any title (except for the pledge or mortgage) the performer may, provided that the assets of the debtor known are not sufficient to cover the amount due and illiquid, the summons to executed, within five days to submit a statement of assets and rights that holds and are sufficient to deal with the execution. The breach of that duty, and in case of declaration of assets are insufficient or if concealment liens or encumbrances on the property or rights, enable the performer to push

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298 MARINONI, LG/ARENHART, S. /OSNA, G., Brazil National Report.
299 MARINONI, LG/ARENHART, S. /OSNA, G., Brazil National Report.
300 PARRA, Jairo, Colombia National Report. There is an indirect way when the Code rule: “The debtor may request that the ratio of their property and income, the judge may order the seizure and sequestration that point in order to prevent others, unless the lien is founded on security are seized”
301 PARRA, Jairo, Colombia National Report.
302 PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report.
the inquiry court of goods to which we refer when replying the next question. In principle this duty is provided solely and implicitly to public records agencies and entities of financial intermediation, these are the entities that can appeal the judge to find out if the assets of the debtor voluntarily declared or not declared insufficient, according to the reform of 2013 (sections 379.6 and 379.7 of the CGP). In 2013 the CGP is incorporated art. 379.7 governing the investigation of the debtor’s assets. It has the standard that the court may apply to the relevant agencies and public records in order to facilitate the connection of all property or property rights of those who run record is any. This, without further identifying the full name of the person or class name and legal entity, together with an official identification number. It also provides that the court may request the execution report of account balances and deposits that can be executed on the entities of financial intermediation. This is an exception to bank secrecy. Uruguay has traditionally been a country where bank secrecy was quite hard, being very reluctant to give information financial institutions. Modifying CGP in 2013 providing that the court may request the execution report of account balances and deposits which may have executed on entities of financial intermediation (art. 379.7 CGP) has just begun to be applied and implies an exception to bank secrecy. On taxation, the secret is also highly respected (Article 47 of the Tax Code) and is being discussed in Uruguay if the novel standard cited above (art. 379.7 CGP), which entered into force in 2013 provides the ability to request information public bodies, including or not the Treasury.

2.33. Asia and Oceania

In Japan when an execution court, upon petition by the obligee of a monetary claim, order implementation of a property disclosure procedure against an obligor, the obligor must appear on the property disclosure date and make a statement on his property (Civil Execution Act §197(1), 199(1)). This is a duty under the public law, and the failure of this duty (to appear, swear, and make a true statement) invites the punishment by non-penal fine of not more than three hundred thousand yen (§206(1)). When the order has become final and conclusive, an execution court designates the property disclosure date and summons the petitioner and obligor (§198). The summoned obligor must state his property in the inventory of property and submit it to the execution court before that date (Rules of Civil Execution §183). At present, this procedure is not

303 PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report.
304 PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report.
305 YOSHIGAKI, Minoru, Japan National Report.
used much. First, excessive attention for prevention of abuse and protection of privacy of an obligor makes rules unduly strict and decreases the utility of the system. Especially, requirement of past unsuccessful of execution and narrow range of disclosure (past disposition of property is out of range) are criticized. Second, sanctions against failures of duties are too light. Generally, a third party does not undertake a duty to cooperate\textsuperscript{306}. When the property disclosure procedure is introduced in 2003, the procedure that enables to make inquiries to third parties such as public offices or banks is discussed at the Legislative Council of the Ministry of Justice. However, because it may be problematic if information possessed by public offices is used for the purpose other than intended one, and it is difficult to justify the burden on third party individuals (take account of the fact that there aren’t enough databases of depositors of Japanese banks), the introduction of such a procedure is abandoned. Under existing law, a few provisions impose a duty to cooperate upon a third party. A third party obligor, when a court clerk, upon a petition filed by the obligee effecting a seizure, makes a demand to him to state the presence or absence of any claim pertaining to the seizure and any other matters\textsuperscript{307}. There is also the request for information by bar associations upon a request by an attorney who belongs to it, make inquiries to public offices or public or private organizations for information necessary for a case to which the attorney has been retained\textsuperscript{308}.

When it is necessary for civil execution, an execution court or court execution officer can request assistance from a government agency or public office (Civil Execution Act §18(1)). The words “government agency or public office” includes any state and local governmental institutions, such as, other courts, police offices, register offices, municipalities, tax offices. An execution court or court execution assesses the necessity of investigation by its own authority, and a party doesn’t have right to petition. The requested government agency or public office undertake a duty to assist (it isn’t allowed to refuse assistance on the ground of a confidentiality obligation), but there are no sanctions against breach of duties. An execution court can, if it finds it to be necessary when making a disposition of execution. Also can ask questions to an obligor or the third person who possesses real property or request such persons to present documents when he investigate the shape, possession status and any other current conditions of real property\textsuperscript{309}.

In Korea a creditor, who is entitled to commence a compulsory execution based upon the executive titles aiming at paying the money, may file a request for specification of the debtor's property with the court in the location of the debtor's general forum under Civil Execution Act Article 61. The court may order a debtor to

\textsuperscript{306} YOSHIGAKI, Minoru, Japan National Report.
\textsuperscript{307} YOSHIGAKI, Minoru, Japan National Report.
\textsuperscript{308} YOSHIGAKI, Minoru, Japan National Report.
\textsuperscript{309} YOSHIGAKI, Minoru, Japan National Report.
submit a property list which specifies the properties of his own under Civil Execution Act Article 62. This order is called as “Order to Clarify the Property”. The debtor should submit the property list to the court which specifies the varieties of properties enumerated under Civil Execution Act Article 64(2). Then, the creditor is entitled to request reading and duplication of the list to the court under Civil Execution Act Article 67310. Under Civil Execution Act Article 5, an execution officer may take adequate measures, such as searching the residence, warehouse, and other places of a debtor, and opening the locked doors or utensils, etc., and if he meets with any resistance, he may request an assistance from the police or military forces. In this case, the police and the military forces are obliged to cooperate311.

In China the debtor should report about his assets. Although the following rule does not make it clear, to whom the debtor should report his property status, the court should collect this information and review whether it is true or not.312 Art. 242 of the CPL says, “where the party against whom enforcement is sought fails to perform obligations determined in a legal instrument as required by a notice of enforcement, the people's court shall have the right to inquire the relevant entities about the deposits, bonds, stocks, fund shares and other property of the party against whom enforcement is sought. The people's court shall have the right to seize, freeze, transfer or sell the property of the party against whom enforcement is sought according to different circumstances. The aforesaid property inquiry and seizure, freezing, transfer and sale by the people's court shall not exceed the extent of obligations that the party against enforcement is sought shall perform. The people's court shall issue a ruling on seizure, freezing, transfer or sale of property, as well as a notice of enforcement assistance, and the relevant entities must assist.” If the third party fails to do so, the court could impose a fine on the related entity coupled with the related persons and even detain the responsible person. Article 114 Paragraph 1 items (2)(3)(4) and Paragraph 2 of the CPL say, “where an entity with an obligation to assist in investigation or enforcement commits any of the following conduct, the people's court may, in addition to ordering the entity to perform the obligation of assistance, imposing a fine on the entity.313 The Commercial Bank Law has also

310 HAN, Choong-Soo, Korea National Report.
311 HAN, Choong-Soo, Korea National Report.
312 See Fù, Yulin/Cáo, Zhixun/HAN, Jingru, China National Report. “Article 241 sentence 1 of the CPL says, “where the party against whom enforcement is sought fails to perform obligations determined in a legal instrument as required by a notice of enforcement, the party shall report its current property status and its property status for one year before receiving the enforcement notice”. In addition Article 241 sentence 2 of the CPL says, “if the party refuses to report or submits a false report, the people's court may, according to the severity of the circumstances, impose a fine or detention on the party which is a natural person or her or her legal representative or the primary person in charge or directly liable persons of the relevant entity”.
313 See Fù, Yulin/Cáo, Zhixun/HAN, Jingru, China National Report.
reserved exceptional rules for the confidential obligation of commercial banks to their clients\textsuperscript{314}.

In Australia although there is no express duty for a debtor to provide up-to-date information about their financial position, however, it would be in the debtor’s best interest not to mislead the court\textsuperscript{315}. The procedural rules require a debtor to provide the creditor and the court with complete information and evidence to support their financial position. Failure by a debtor to provide any or sufficient information a creditor may make an application for an Enforcement Hearing Warrant. The court will require the debtor to attend court to explain their financial circumstances\textsuperscript{316} Third parties such as financial institutions have no duty to cooperate with enforcement proceedings. Information or evidence that a debtor would seek to rely upon would need to gather this information on his or her own accord. Nevertheless, a debtor’s employer may be required to provide the court with details of a debtor’s income. This will only occur where a creditor is enforcing a judgment debtor occurs by making an application for and enforcement warrant. An enforcement warrant is aimed to redirect a debt. Here the court orders a debtor’s employer or a financial institution to take certain action, such as to regularly deduct an amount from the debtor’s wages or bank account to pay the judgment creditor or into the court until the debt is paid.\textsuperscript{317} There is no requirement or legal authority for either a tribunal or a bailiff to investigate a debtor’s assets in Australia.\textsuperscript{318} However, on a practicable basis a bailiff has the power to enter a debtor’s premises to seize property. Here the bailiff may need to undertake an investigation of the debtor’s property in order to decide what property can be sized from the debtor\textsuperscript{319}.

8. The priority and equal treatment of concurrent creditors in enforcement proceedings

a. The creditors treatment: priority vs. egalitarianism

\textsuperscript{314} See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “On the asset of individual citizens, Article 29 Paragraph 2 says that “commercial banks have the right to refuse any entity or individual to inquire about, freeze or deduct individual savings accounts, unless it is otherwise prescribed by laws”. And referring to the account of an entity, Article 30 declares that “a commercial bank has the right to refuse any entity or individual's inquiry about the account of an entity, unless it is otherwise prescribed by laws and administrative regulations; it also has the right to refuse any entity or individual's request for freezing or deducting the account, unless otherwise as prescribed by laws”.

\textsuperscript{315} VAN CAENEGEM, William/WEINERT, Kim, Australia National Report.

\textsuperscript{316} UCPR Forms 71.

\textsuperscript{317} See Uniform Civil Procedure Rules 1999 (Qld), Forms 74-78; Bluebottle Uk Ltd v Deputy Commissioner of Taxation [2007] HCA 54.

\textsuperscript{318} This is largely owing to Australia being an adversarial system of law.

\textsuperscript{319} VAN CAENEGEM, William/WEINERT, Kim, Australia National Report.
2.34. This section considers the best methods of coordinating the distribution of the debtor’s assets where there are concurrent creditors of the debtor. In particular, where there is a conflict between the rights of the multiple creditors against the same debtor.

Singular civil enforcement may occur where there is a plurality of creditors seeking enforcement against the same debtor. In this situation, there are three potential substantive-procedural approaches for enforcement proceeding policy to take: first, equal treatment of the creditors (par conditio creditoris); second, priority or preference (prior in tempore potior in iure); and third, a combination of these approaches, treating certain creditors equally but giving preference to other later creditors.

Possibility one is the legally established principle of equality of all creditors with enforcement measures (attachments) against the same debtor. The principle of par conditio creditoris rules that the creditors’ rights must be satisfied proportionately, and independently of the order in which they commenced the enforcement proceedings.

Possibility two is the principle of priority, which gives priority or temporal preference to the first creditor who requests enforcement, following the principle prior in tempore, potior in iure. Historically, singular enforcement used the principle of priority, and the equality priority was applied to collective enforcement or insolvency proceedings. The priority approach reflects a principle of substantive law: the holder of a right can only validly and effectively make a disposition of their right once. The same principle is then applied with regard to the temporal order in which limitation measures are required for rights, the transfer or alienation of which takes place once. Ultimately, as shown, the role of prevention or priority already exists in the material contractual relationship, and is thus reflected in procedural law in the area of singular enforcement. An important constitutional objection was raised in the 80s by the German Professor SCHLOSSER based on the third article of the German Constitution. Schlosser suggested that equality should be the principle applicable in the enforcement context, as required by the equality of arms and the prohibition on arbitrariness. These principles support the equal treatment of creditors and point against the application of the priority principle, which is the current principle used in German singular enforcement.

322 BAUR, Fritz, Los Principios de Prioridad e Igualdad en la Ejecucion Forzosa Singular, Sobretiro de Boletín Mexicano de Derecho Comparado, Nueva Serie Año VIII, 1975, Números 22-23, p. 67 et seq.
323 SCHLOSSER, Peter, Vollstreckungsrechtliches Prioritätsprinzip und verfassungsrechtlicher Gleichheitssatz, in ZZP 97 (1984), at 113; Cf. BGH, 14.6.2007 - IX ZR 219/05.
Possibility three is a combination of the principles of equality and priority treatment. This is the system used in Switzerland, where priority is afforded to all creditors who request enforcement and obtain attachment at the same time. They are treated as a creditor “class”, and have priority over other creditors who request enforcement later in time. There are then many creditor classes, according to when each group of creditors commence enforcement, with the same treatment being given to all members of the same class, with priority afforded based on early claims of enforcement.

b. National reports

2.35. Europe

In German law, outside insolvency proceedings invoke the principle of priority (“first come, first serve”) applies. 324 The systematic tool function as follow:

Seizures and attachments are considered creating a security right for the creditor to which, as far as priority is concerned, the normal “substantive law” rules of priority among various pledges apply (the so-called “enforcement pledge”). 325

Thus, not only between several attachments or seizures, but also between enforcement pledges and contractual pledges, the rank is determined by the moment in which the pledge came into existence. 326 For attachments of tangible movables, the creation of the enforcement pledge is stipulated by § 804(1) ZPO, the priority rule by § 804(3) ZPO The rare exceptions in this case has a limited practical importance 327. An enforcement pledge comes into existence with the seizure of a claim 328 and that it gives priority to the creditor who got his or her enforcement pledge first. 329

The Italian system recognizes the principle of par condicio creditorum: all creditors are treated equally, unless one of them has a title of privilege that allows a priority satisfaction, on substantive grounds. If no such privilege exists, all

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324 BECKER, Colin First in time, first in right. Das Prioritätsprinzip im deutschen und US-amerikanischen Zwangsvollstreckungsrecht, (Berlin: Duncker & Humblot 2000), passim
325 See KERN, Germany National Report.
326 See the German Federal Supreme Court decisions BGHZ 52, 99, 107-108 = NJW 1969, 1347; BGHZ 93, 71, 76 = NJW 1985, 86.
327 See KERN, Germany National Report: “This is regulated in § 117(1) of the ordinance for enforcement officers (Geschäftsanweisung für Gerichtsvollzieher, GVGA), according to which an enforcement officer must execute all pending applications of various creditors for an attachment at the same time”.
329 Cf. BGHZ 82, 28, 32; STURNER, Rolf, Prinzipien der Einzelzwangsvollstreckung, Zeitschrift für Zivilprozess (ZZP) 99 (1986), 291 et seq.
creditors who intervene in the proceedings have equal satisfaction, irrespective of their chronological order of intervention. The only legitimate criterion of priority between creditors is the existence of a substantive title of privilege. Another aspect of the enforcement system which can be considered debtor-biased is the wording of article 499 of the Code of Civil Procedure, which was amended with the reform of 2006, reform which changes the egalitarian treatment of creditor and could be violate fundamental rights of creditors. This is also valid for the Netherlands, all creditors are treated equally and will receive on a pro rata basis (Article 551 Code of Civil Procedure). In Spain is ruled the priority principle for the first creditor who obtain an attachment (art. 613 LEC).

2.36. In Latin-America e.g. Uruguay the priority system has ruled. The first creditor who obtained the attachment has the right to be paid prior to other creditors.

2.37. Asia and Oceania

In Japan the creditors who that have the same rank of substantive rights are all equally treated in liquidating distribution process regardless of the time of a seizure or a demand for liquidating distribution. That is to say, the time of filing a petition or demanding for liquidating distribution does not influence on the obligee’s status in the execution process (first person have no priority). This is because giving priority to the earlier person may result in unfairness since the obligees who have plenty of information (for example, main financing banks of obligors) can always get a head start over other obligees (for example, small traders).

In China according to Article 88 Paragraph 1 and 2 of the Provisions on Enforcement Procedures (For Trial Implementation), the first creditor has a priority under this circumstance. First of all, when several creditors, all of whom

331 CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: "Article 499 sets forth the mechanism of intervention of creditors, i.e. creditors different from the claimant creditor which wish to participate to the expropriation proceedings and to the subsequent distribution of income deriving from the coercive sale of seized asset(s). Before 2006, all creditors could intervene in the enforcement proceedings: the only rules governing the concurrence of claims were the ones on substantive titles of privilege. After 2006, the only creditors which can lodge a claim in a proceeding that has been already opened by a creditor with an enforceable title are: (i) Those with an enforceable title; (ii) Those without an enforceable title but whose credit is guaranteed by a privilege or protected by an attachment; (iii) Those without an enforceable title but whose credit results from accounting and balance books of enterprises. The rationale of the reform was to limit the number of creditors which could lodge a claim in the enforcement proceedings without having an enforceable title (they will need to acquire one later on, in order to participate to the distribution of the income). The reform has been criticized, because it unduly restricts the possibility to participate in the proceedings even in the absence of justifying substantive reasons (such as privilege); for this reason, some authors have argued that the new wording of article 499 constitutes an unconstitutional violation of the par condicio creditorum (equality amongst creditors) principle”.
332 JONGBLOED Tom / VERKERK Remme, Nehterlands National Report.
333 PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report.
have no real rights for security on the subject matter of enforcement, separately applying for enforcement on the same debtor according to several effective legal instruments, the sequence of repayment shall in accordance with the order of enforcement measures taken by the court. Secondly, if several creditors with different types of rights, i.e. those based on ownership and real rights for security shall be repaid prior to those with monetary claims. Thirdly, with the existence of several real rights for security, the order of repayment shall be determined by the sequence of establishment.  

9. Effective assessment and forced auction of debtor’s assets

2.38. Another important principle in the law of enforcement in civil matters is the need to maximise the profitability of a debtor’s assets. The discharge of a debtor’s assets should be conducted in the most efficient way possible, that is, trying to get the maximum possible value from the forced auction. The auction proceedings should give adequate protection to the debtor-creditor interest in the conclusive and final stage of money obligation enforcement. As will be seen, there is a close relationship between efficiency (maximizing profits) of the forced auction and the constitutional principle of proportionality. A transparent and profitable discharge is an advantage both for the creditor and for the debtor. At the final auction stage, both the time and cost risks should be divided equally between the creditor and debtor. A successfully auction results in the satisfaction of the creditor’s right, and the return of any surplus money to the debtor.

III. ENFORCEMENT PROCEEDINGS AND MEASURES: THE CONFLICTS BETWEEN CREDITOR AND DEBTOR RIGHTS

3.1. The limitations and specification of the singular enforcement proceeding has many remarkable points: (i) it is essential for the creditor to individualise the assets against which he is seeking enforcement; (ii) the enforcement organism may order and carry out executive measures on the determined assets; (iii) this is consistent with the need for legitimacy and formalism as was discussed below; and (iv) the debtor should know the limitation of his rights in personan or in rem imposed by the orders, and should be guaranteed his right to be heard guaranteed. Certain debtor’s assets and

334 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Besides, Article 170 of the Property Law stipulates that “the holder of real rights for security shall enjoy priority to receive payments from the property for security in case the obligor fails to pay its due debts or the circumstance for the realization of real rights for security as stipulated by the parties concerned occurs, unless it is otherwise prescribed by any law.”


336 BAETELS, Klaus, Dogmatik und Effizienz im Recht der Zwangsversteigerung, (Bielefeld: Gieseking, 2010), pp. 53-60.

goods are out of the creditor’s reach: property and personal assets required for his essential existence are not affected by the enforcement organism’s orders. At this point we can clearly see the use of balance and discretion to ensure enforcement procedures respect fundamental rights and constitutional standards.

Regulations must safeguard those debtor’s interests and needs which are indispensable to their existence, work, family and business or are of a purely personal nature. However, no limitations protect the debtor as a privileged assets owner. The limits on how far enforcement processes may reach must be justified according to the proportionality principle. Insolvency enforcement proceedings are different to single enforcement because they affect all the debtor’s assets for the collective interest of the creditors against a common debtor, whereas the singular enforcement proceeding relates only to a limited part of the debtor’s assets. Furthermore, this limited part of the debtor’s assets could be excluded from the enforcement process in order to respect the debtor’s dignity and minimal subsistence needs. This could change if the debtor (perhaps a company, but in particular a person) became insolvent or over indebted. Bankruptcy proceeding, as opposed to the single enforcement process, might then be commenced, which allows for a redistribution of the social costs of the insolvency or bankruptcy.

1. Limitations on creditor access to enforcement: enforceable title and general requirements

a. The first hurdle for the creditor seeking enforcement: an enforceable title

3.2. The enforceable title or instrument may be jurisdictional or may be non-jurisdictional. In Common Law legal systems, the uniquely enforceable documents are judgments, whereas in French, German, Romanic and Latin-American legal systems, notarial documents have been adopted as enforceable instruments. Additional requirements might be imposed, for example the timing and liquidity of the credit.

b. National reports

3.3. Europe


In the German legal system, there are various provisions, which constitute an exhaustive list. It contains no single list of enforceable titles. However, it clearly defines which decisions and other documents are enforceable. Other enforceable titles follow directly from EU Regulations. Read together, the following that are limited to the private law claims § 704 ZPO is completed by § 794 (Further enforceable legal documents) (1) ZPO. § 794(1) ZPO lists a number of enforceable titles other than judgments. The provision as such only provides the names or brief descriptions of the titles while their characteristics are mostly defined linked by other provisions. Additional provisions can be found in the Insolvency Code. According to § 201(2) InsO, if a claim has been accepted to the insolvency schedule of claims (Insolvenztabelle), this entry in the schedule constitutes an enforceable title. Similarly, according to § 257(1) InsO, if a claim is provided for in an insolvency plan the plan together with the insolvency schedule of claims is, with respect to this claim, an enforceable title.

Finally, the person who was awarded real estate in a public auction under the ZVG according to § 93 ZVG, has an enforceable title regarding the eviction of the real estate. Enforcement titles based on EU regulations are the judgment in a small claims procedure (art. 20(1) Regulation (EC) No 861/2007) and the European Enforcement Order (art. 5 Regulation (EC) No 805/2004).

Enforceable titles based on German law become effective in the sense that enforcement may start after an execution clause has been added to them and after they have been notified to the enforcement debtor (§§ 724 et seq., 750 ZPO). Other requirements depend on the case at issue, like the question of whether enforcement is only possible after a certain date (cf. § 751(1) ZPO). Cost orders that have been put on the judgment (see § 795a ZPO) and certain enforceable titles based on European law (see §§ 1082, 1093, 1107 ZPO) are enforceable without an execution clause; the same is the case for writs of execution unless enforcement is sought against someone else than the debtor or the creditor named in the writ (§ 796(1) ZPO).

342 See KERN, Germany National Report: E.g. “the settlement contained in the court’s record referred to in § 794(1) No. 1 ZPO in fine is a settlement which has been duly recorded according to § 160(3) No. 1 ZPO. The definition and substantive effect of a settlement is, in turn, defined in § 779 BGB. Orders assessing the costs in the sense of § 794(1) No. 2 ZPO are orders described in §§ 103 et seq. ZPO. Writs of execution in the sense of § 794(1) No. 4 ZPO are writs described in §§ 699, 700 ZPO. Decisions declaring arbitration awards as enforceable in the sense of § 794(1) No. 4a ZPO are governed by §§ 1060 et seq. ZPO and the New York Convention”.

343 See for the details of enforcement titles KERN, Germany National Report.


346 See KERN, Germany National Report: “Service of documents is governed by §§ 166 et seq. ZPO. In the proceedings preceding a judgment, service of documents is normally a task of the court. In enforcement proceedings, though, service of documents may also be initiated by the party in whose
In the French enforcement system there is a strict, clear and comprehensive definition of enforcement titles: judgments, transactions approved by a judge, judgments and awards with exequatur, deeds, title bailiff for checks and securities administration (constraint in particular)\textsuperscript{347}.

In Spain the enforceable titles are perfectly and exhaustively listed in art. 517 LEC, which specifically provides. The Spanish LEC also clearly envisages the implementation process for these securities, which is the same regardless of the specific enforcement executed (except in some very specific process which provides different rules for enforcement of judicial and extrajudicial titles: thus, for example, opposition to the execution, which is much wider for the extrajudicial execution of titles)\textsuperscript{348}.

In Portugal there is a list of enforcement titles. Are executive titles the sentence, the deed and other document formally drawn up by a notary or conservative, securities and other credit provisions of special statute (art. 703). Among the latter is the way in which the injunction process and this is what raises some problems. In enforcement proceedings where the debtor does not object, the court clerk enters the request in executive enforcement (only required under Portuguese law in this case and the rulings coming from another Member State of the European Union)\textsuperscript{349}.

The Italian Code of Civil Procedure enshrines several ways in which creditors can obtain protection of their rights against debtors. In order to start the enforcement procedure, the claimant creditor must have an enforceable title. The title must be notified to the debtor, together with a notice of enforcement (\textit{precetto})\textsuperscript{350}. Article 474 of the Code of Civil Procedure sets forth a list of enforceable titles; however, the list set forth in article 474 is only explanatory and not exhaustive. Therefore, even if all enforceable titles must be identified by the law, there is no exhaustive list of titles and it is often necessary to resort to other provisions of law, different from the list of article 474\textsuperscript{351}.

\textsuperscript{347} Article L111-3. Only are enforceable titles: Judgments of the judicial or administrative order when binding, and the agreements to which these courts have conferred enforceable; Acts and foreign arbitral awards and judgments declared enforceable by not subject to a suspensive appeal Implementing Decision; extracts of minutes of conciliation signed by the judge and the parties; deeds coated for enforcement; The title issued by the bailiff in case of non-payment of a check; The securities issued by legal persons of public law qualified as such by law or decisions which the law attaches the effects of a judgment.

\textsuperscript{348} PICO JUNYOV, Joan, Spain National Report
\textsuperscript{349} FREITAS, Jose Lebre de. Portugal National Report.
\textsuperscript{350} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report.
\textsuperscript{351} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: “As far as the effectiveness is concerned, the only common ground is that a primary source of law must explicitly attribute to a certain document
The Hungarian Enforcement Act regulates the order of enforcement in a rather complicated way. The final court judgement, the settlement or the notarial document are not sufficient for the enforcement rather the creditor has to apply to the court for the issue of an enforcement order. Based on its own decision or the approved settlement, the court issues a certificate of enforcement and affixes to the notarial document, it affixes a certificate of enforcement. The ‘certificate of enforcement’ was taken over by Hungary from Soviet law in the 50s and we have not been able to get rid of it even since the political transformation. If the claim awarded by the court is not voluntarily performed by the debtor, the court will order enforcement, at the creditor’s request, if the writ of execution contains an obligation (ruling against the judgment debtor), is definitive or is subject to preliminary enforcement, and the deadline of performance has expired (Section 13 Enforcement Act).

The enforcement titles in Finnish Law are mentioned and ruled very clear in the Chapter 2 of the Enforcement Code. An enforcement matter becomes pending and is enforceable only if the applicant has a ground for enforcement referred to in section 2, where the respondent has been subjected to an obligation referred to in chapter 1, section 1 or to a precautionary measure, and the pertinent right has not expired owing to payment, the statute of limitations or some other reason. The bailiff shall ensure that the receivable has not become time-barred and shall request supplementary information from the parties if there is doubt as to the expiration of the right. Chapters 4 and 5 contain provisions on the right of the holder of a security right to receive payment without a ground for enforcement. The bailiff may without a separate ground for enforcement execute obligations arising from enforcement proceedings, as provided in this Act.

the effects of enforceable title. However, the methods of creation of enforceable titles can vary significantly: while some are created and made effective by the competent judicial authority, others are formed outside of jurisdictional proceedings and they can become effective in several different ways, depending on the particular type of document”.


KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “General conditions of enforcement: An enforcement order may be issued only if the decision to be enforced or the claim based on a document a) contains an obligation (ruling against the debtor), b) it is final or may be preliminarily enforced and c) the deadline for performance has expired. On the basis of a court-approved settlement, an enforcement order may be issued even if the writ of approval has been contested. Below is given a non-exhaustive list of enforcement titles, based on which the court issues a certificate of enforcement: a court ruling against the debtor in a civil case; a court ruling against the defendant passed in a criminal case with regard to the civil law claim; a court-approved settlement; a decision adopted by a notary public against the debtor; a settlement approved by a notary public; judgements of various disciplinary tribunals; a judgement by a foreign court; a foreign or Hungarian arbitration award (§ 15 Enforcement Act); the court or the notary affixes a writ of execution to notarial documents and the decisions of various disciplinary authorities and also to specific decisions by employers”.

ERVO, Laura, Finland National Report: "The Enforcement Code, Chapter 2, Section 2. The following documents serve as grounds for enforcement: a court judgment in a civil or criminal matter; a court order on precautionary measures; an arbitral award that has been handed down in arbitral proceedings under the Arbitration Act (967/1992) or some other Act, and a settlement certified by such an award; a bailiff’s protocol on the settlement of account in a sale-by-instalment, a confirmed child support agreement, and an obligation or debt instrument the enforcement of which in accordance with this Act has been provided in some other Act; an order of an administrative court and the decision of some other authority in a matter of administrative adjudication; a decision of the Government, a Ministry, an agency in the central administration of the State and a State Provincial Office, as well as another administrative decision the
In Croatia there is an exhaustive definition is given in Art. 23 LE. The conditions for effectiveness are provided in Art. 25 LE. However, as the definition also leaves a possibility to have enforcement titles provided by special legislation, some other instruments may be introduced. One of them is e.g. the settlement reached in mediation proceedings. In practice, there were doubts regarding such settlements, just as with the effectiveness of some forms of notarized instruments aimed to secure debt.

3.4. Latin America

In Argentina the national procedural law does not provide a comprehensive definition on enforceable nor exhaustively lists as a system of *numerus clausus*. Indeed, rather than providing a strict conceptualization, it establishes the essential elements required of an instrument to be considered enforceable title "it shall be executively provided under a title to be enforced, it I require enforceable obligation through cash amounts of money or easily liquidated". The doctrine have identified as essential requirements that make up the enforcement order: a) that it be required from instrumented debt of a legal act or comprising an instrument to represent you, b) money c) liquid (or readily realizable) assets d) not subject to term, e) does not subject to any condition or provision f) and is expressed in one of the forms required by law. Meanwhile, the CPN Article 523 lists some of these titles, although that statement should not be considered exhaustive, since Article 524 adds more information and the 7th paragraph of Article 523 expressly states, "Other titles could be enforceable by law and not subject to a special procedure".

In Brazil is assumed that the only enforceable document is one which the law confers this attribute, the Brazilian civil procedure provides a way typified executives titles. Therefore, both the enumeration in the Code of Civil Procedure itself as indicated by sparse and specific laws. There also expressed forecasting procedures that enforcement of which in accordance with this Act has been provided in some other Act. What is provided in this Act regarding a judgment applies also in so far as appropriate to a judgment, order or interim order of a court in a civil or criminal case and a settlement certified by a court.”

355 Uzelac, Alan, Croatia National Report.
357 Art. 520 CPCCN.
358 Falcón Enrique, Procesos de Ejecución, v. I-A, (Santa Fe: Rubinzal – Culzoni, 1998) at 107;
359 Oteiza, Eduardo, Argentina National report: “This provision clearly implies that there are other titles beyond those regulations, a fact corroborated by the existence of many special laws regulating various special cases of executions. It should also be noted that there are cases of creating enforceable by the parties desire to assimilate or exceed the assumptions that make up the said list. The creation, therefore, brings documents enforceable, can not be arbitrary: it is regulated by law background; the title must meet the intrinsic requirements of the law. Finally, the code includes the ritual preparation of a summary proceeding (Art. 525 CPCCN18) as an expedient means to integrate or add titles, sufficient unto themselves, do not contain all the elements to bring enforceable”
implementation must submit, with special emphasis on the division between the form to apply for judgments and other titles.\footnote{MARINONI, LG/ARENHART, S., /OSNA, G., Brazil National Report.}

The enforcement procedure in Chile is provided as an adversary proceeding in general or special application through which the forced performance of an obligation consisting of a credible and undoubted title is pursued. The Code of Civil Procedure provides in Article 434 a long list of business titles, although this is not an exhaustive list, since in its numeral 7° states that have this quality is modifiable by "any other title that law considers enforceable ", leaving the door open to the creation of new business titles.\footnote{AGUIRREZÁBAL, Maite/ VARGAS, Macarena, Chile National Report.}

3.5. Asia and Oceania

In Japan there is not a special provision which that mention all the enforceable titles. There is a basic provision, which lists enforceable titles, which is article 22 of Japanese Civil Execution Act. Here are listed 10 kinds of enforceable title. But this is not exclusive and there are provisions in special laws, which provides for an enforceable title. How they become effective is clearly defined in the article 25 of the Japanese Execution Act, according to which Compulsory execution shall be implemented on the basis of an authenticated copy of the title of obligation attaching a certificate of execution.\footnote{HATTA, Takuya, Japan National Report.}

Any claim can be enforceable except a few claim considered as non-enforceable. In principle, a judgment cannot be executed until it becomes final and binding. But for the judgment concerning a claim on a property right, the court, when it finds it necessary, upon petition or by its own authority, can declare that provisional execution can be enforced (Code of Civil Procedure §259). With this declaration of provisional execution, an obligee can execute his right before the judgment becomes final and binding (Civil Execution Act §22(2), (4)). Thus, a declaration of provisional execution prevents delay of realization of rights by an appeal. Besides a judgment, for a demand for payment, a court clerk, upon the petition of the creditor, declares provisional execution (Code of Civil Procedure §391).\footnote{YOSHIGAKI Minoru, Japan National Report.}

The Korean Civil Execution Act defines specifically each “Title of Execution”, and also clearly provides the scope of its effect. Though Court Judgment is a typical example of “Title of Execution”, which is legal document confirming that the creditor has a legal right to execute against the debtor; easier ways to get the diverse titles are provided under Korean Civil Jurisprudence. For example, the creditor may bypass dragging formal civil litigation by “Notarial Deed” for the loan agreement. If the Notarial Deed is prepared following
requirements under Notary Public Act, it will be treated as “the Title of Execution”, which enables the Creditor to skip formal civil proceedings. Furthermore the creditor also may get “the Title of Execution” easily by motion to “Payment Order (equivalent of “Mahnverfahren” in Germany), if he or she claims the payment of money, fungibles, or marketable securities

In the Chinese Enforcement Law there is no list of enforcement titles. Article 224 of the CPL says only, “an effective civil judgment or ruling or the property portion of a criminal judgment or ruling shall be enforced by the people's court of first instance or the people's court at the same level as the people's court of first instance at the place where the property under enforcement is located. Other legal instruments enforced by a people's court as prescribed by law shall be enforced by the people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property under enforcement is located.” However, the final judgment aside, some types of such instruments can be identified with a little bit legal research inside the legal institution. In order to clarify the rules and make the list to answer this question, the related articles in different statutes have to be cited

364 HAN, Choong-Soon, Korea National Report.
365 See Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report:” (i) Consent judgment. Article 234 of the CPL makes clear that the consent judgment is one of the mentioned “legal instruments”. The provisions of this Part shall also apply to the enforcement of a consent judgment of a people's court.”However, in accordance with Article 98 Paragraph 2, “a mediation agreement which does not require a consent judgment shall be recorded in the transcripts and become legally binding immediately after both sides and the judges and court clerk affix their signatures or seals to the transcripts.” (ii) Arbitration award and conciliation statement during arbitration.(iii) Notarized creditor's right document. Article 37 Paragraph 1 of the Notary Law says, “as to a notarized creditor’s right document that states the payment and the commitment of the debtor to accept the forcible execution, if the debtor fails to perform or to properly perform its (his) duties, the creditor may file an application with the jurisdictional people’s court for execution”. (iv) Order for payment (Mahnbescheid). Article 216 Paragraph 3 of the CPL (v) Article 51 of the Labor Dispute Mediation and Arbitration Law regulates, “a party shall execute an effective mediation record or arbitral award according to the prescribed period of time. Where one party fails to execute the same before the prescribed period of time, the other party may apply for execution to the people’s court according to the relevant provisions of the Civil Procedure Law. (vi) Foreign judgment and foreign arbitration award seeking for recognition. According to Article 282 of the CPL, “after examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement”. Similarly, Article 283 of the CPL says, “where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, a party shall apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity”.

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2. Provisional enforcement of judgments

a. Provisional enforcement

3.6. A matter related to the fact that a judgment is an enforceable instrument is the provisional enforceability of a judgment, such as when a judgment becomes enforceable or the possibility of enforcement arises. The subject is closely connected with questions about appeals and the res judicata effect. Should a prerequisite of enforcement be that the judgment to be enforced is res judicata? This question is linked to so-called provisional enforceability. If exhaustion of the appellate process is not required, the judgment may be enforced notwithstanding the potential for its review and possible reversal. The general idea behind provisional enforcement is that even if a decision is not yet final, the fact that a court has decided in favour of the creditor may be seen as a prima facie case for the creditor and therefore justifies allowing provisional enforcement. Nevertheless, in such circumstances, the interests of the debtor deserve particular protection. A balanced system of provisional enforcement may be achieved by requiring the creditor, and sometimes the debtor, to provide security. The duty to provide security allows for a “fine-tuning” of the conflicting interests.

The provisional enforcement system includes a whole range of conditions on which provisional enforcement may be granted and many devices are directly connected with the appeal system. Issues such as the creditor’s liability on the reversal of the original enforced judgment, the mechanisms to balance and protect the interests of the creditor and debtor, and the possibility of having simultaneous and parallel appeal and enforcement proceedings are regulated in different ways by different legal systems.

b. National reports

3.7. Europe

The German legal system allows the enforceability of court decisions. As a general principle the Court decisions are provisionally enforceable (§§ 708, 709
ZPO). This means that the creditor may begin the enforcement even before the decision has become final, i.e., before the delay within which the debtor can appeal is over. There are cases in which the provisional enforcement can be started right away (§ 708 ZPO) However, the debtor is provided special protection in case of provisional enforcement: (i) only certain enumerated types of decisions can be enforced without the creditor providing security (§ 708 ZPO); in all other cases, the debtor can start enforcement only after he or she has provided security for the case of reversal of the decision on appeal (§ 709 ZPO). (ii) If the decision is provisionally enforceable without security, the debtor can in most cases avoid provisional enforcement by providing security in his or her turn (§ 711 ZPO). (iii) Even if the decision is provisionally enforceable, the debtor can ask for a protective order if he or she would suffer from an important disadvantage, were the judgment enforced and subsequently reversed (§ 712 ZPO). In other cases a security is required first to the creditor for the case that the decision is reversed on appeal (§ 709 ZPO); however, the creditor can be dispensed from this requirement under certain conditions (§ 710 ZPO). The basic provisions are in § 704 ZPO allowing that final judgments and judgments that have been declared provisionally enforceable are enforceable titles. The decision on the merits can be enforced if the judgment orders a performance, or the non-performance, of certain acts (Leistungsurteil). It cannot be enforced in case of a declaratory judgment (Feststellungsurteil) or a judgment that establishes or alters a legal relationship (Gestaltungsurteil).

In certain situations in which the prima facie case for the creditor is particularly strong, the creditor is not obliged to provide security at all (cf. §§ 708 Nos. 1-3, § 711 ZPO). In other situations in which the case for the creditor is still strong, but not as strong as in the situations described before, the debtor can avoid provisional enforcement by providing security unless the creditor provides security (§§ 708 nos. 4-11, § 711). In the large part of all cases with a rather neutral situation the creditor has to provide security (§ 709 ZPO) unless he or she cannot do so or can do so only with great difficulties and the absence of provisional enforcement brings about a serious disadvantage for

369 See KERN, Germany National Report.
371 See KERN, Germany National Report: e.g. “judgments based on an acknowledgment of the claim by the debtor, default judgments and judgments handed down on the basis of the record as it stands against the party failing to appear at the hearing, and judgments by which the protest against a default judgment was overruled as inadmissible”
372 See KERN, Germany National Report: E.g. “judgments delivered in simplified procedures for claims based solely on documentary evidence, especially bills of exchange and checks, judgments ordering the payment of maintenance obligations, judgments of the State courts of appeal and judgments on cases in which the value at litigation does not exceed 1,250 Euros or, if only the cost order is enforceable, the enforceable costs do not exceed 1,500 Euros”
the creditor (§ 710 ZPO). In any case, the debtor can apply for a protective order if he or she would suffer from an important disadvantage, were the judgment provisionally enforced and subsequently reversed (§ 712 ZPO). Moreover, the creditor can always apply for enforcement measures of a merely preserving character unless the debtor provides security and the creditor did not provide security him or herself (§ 720a ZPO).

Spanish procedural law provides for the provisional enforcement of the judgment without caution in order to protect the creditor.

The rule in Portugal is the provisional execution of the judgment, because the appeal does not have suspensive effect of its effectiveness. There are exceptions, among which are the decisions rendered in actions where validity is concerned, existence or termination of leases or possession or ownership of dwelling house. In addition, the debtor may, to bring the action, require the appeal has suspensive effect by its execution will cause irreparable harm, then providing security guaranteeing the creditor.

The Italian enforcement Law rules that, in general, all civil judgments are enforceable, albeit not final and even if challenged (article 337 of the Code of Civil Procedure). However, if challenged, the enforceability of the decision can be stayed on several grounds, according to the type of decision. If a first degree (Tribunal) decision is challenged before the competent Court of Appeal, the latter can stay the enforceability for ‘serious and well-grounded reasons’ (article 283). If a decision is challenged before the Court of Cassation, the judicial authority, which issued the decision, can stay the enforceability, when the enforcement could provoke a ‘serious and irreparable damage’ (article 373). When the decision is challenged by ‘revocazione’ (a specific challenge, used in a limited amount of cases – e.g. discovery of new, decisive evidence), the judge of the challenge can stay the enforceability pursuant to article 401, on the same grounds of article 373. When a third party challenges the decision, the judge can stay the enforceability, on the same grounds of article 373.

In Croatia, traditionally, the enforcement was granted only for final and binding judgments (res iudicata). Even today, it is generally provided that a judicial decision is enforceable only if it has become res iudicata (Art. 25. para 1 LE). However, it is also provided that enforcement can be ordered also for non-final decisions if it is expressly provided that appeal or other means of recourse does not stay enforcement (para 4.) Due to massive inefficiency of the judicial


\[374\] PICÓ JUNOY, Joan, Spain National Report.

\[375\] FREITAS, Jose Lebre de, Portugal National Report.

proceedings, and the proliferation of means of recourse, the non-enforceability of the non-final judgments has become a problem.\textsuperscript{377}

3.8. Latin America

The Argentine procedural law does not contain specific treatment. The CPCCN autonomously and systematically regulates the core aspects of this procedural institution. It should however be noted that in all ordinary appeal always have a comes in suspensive effect unless the law ordered in contrary (art. 243, 3rd par. CPCCN), which means that it is only possible execute advance a judgment where the law expressly authorizes it\textsuperscript{378}. Despite the procedural situations that support provisional execution, the use of such mechanisms, or those similar in its effects to a provisional execution of the judgment, is very rare in practice. This is paradoxical in a context where the duration of the process is far from ensuring the fundamental guarantee to be processed within a reasonable time\textsuperscript{379}.

In Uruguay the provisional enforcement of the judgment appealed is regulated in Art. 260 of CGP. According to this solution, allowed provisional enforcement of appealed final judgments of first instance is allowed; in that sense, it can be concluded the provisional enforcement of the judgment depends of the claim\textsuperscript{380}.

\textsuperscript{377} UZELAC, Alan, Croatia National Report: “More so, due to the fact that, under Croatian Constitution, there is a constitutional right to appeal against all decisions in judicial proceedings, no matter whether the proceedings are criminal or civil. Therefore, in order to enhance the efficiency of enforcement proceedings, the number of exceptional cases where enforcement is not stayed although the decision is not final and binding has been growing. Since the latest Law on Enforcement, in very small claims (up to 700 EUR for natural persons and 1,500 EUR for legal persons) appeals do not stay enforcement of judgments”…” These exceptional situations are still far from enough to enhance efficiency of the enforcement proceedings, which is under ECHR an integral part of the human right to a fair trial from Art. 6 (see Hornsby v. Greece judgment). The fundamental rights of the debtor (if there is a right to enforcement of res iudicatae only) in a situation where simple launching of appeal may add three or more years to the time needed to obtain legal protection, have to be awarded a lesser priority. Indeed, what would be needed in a more balanced system is more discretion to trial judges (and also a better training and quality of those judges as well)”

\textsuperscript{378} OTEIZA, Eduardo, Argentina National Report.

\textsuperscript{379} OTEIZA, Eduardo, Argentina National Report: “Although the general situation of judicial decisions suspended execution until fall on the final judgment cause, may be it justified from the perspective of who turns up in the proceedings, is also observable in the behavior of the party who has obtained a favorable court decision after which notification omitted apply for provisional execution. It seems that this is a feature of ossified system in a tradition built and driven for decades by used to settle legal disputes operators processing delays”.

\textsuperscript{380} PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report: “ie, whether an order to pay a sum money, or a sentence to restitute or to. In case of sentence to pay an amount of money, if it was previously illiquid should proceed to its liquidation Moreover, the debtor can request the suspension of the provisional enforcement for causing serious damage difficult to repair, so it should be appreciated by the court discretion”
3.9. Asia and Oceania

In Japan because a declaration of provisional execution enable an obligee to execute a judgment when the judgment can be revoked, a declaration of provisional execution only can be issued for a judgment concerning a claim that can be easily restituted. It is within the court’s discretion whether the declaration is made or not\(^\text{381}\). In making it, the court should consider the possibility that the judgment is reversed, necessity to give prompt remedy to an obligee, and the contents and degree that an obligor may suffer if the court makes such a declaration. In addition, the court should consider the contents of the declaration, such as whether it demands security from the obligee, etc. When the judgment to modify the declaration or the judgment on the merits is rendered, to the extent of the modification, the declaration of provisional execution ceases to be effective (Code of Civil Procedure §260(1)). When modifying a judgment on the merits, the obligee must return the performance provided by the obligor based on the declaration and compensate any damage suffered by the obligor due to provisional execution or in order to avoid it (§260(2))\(^\text{382}\).

In Korea, the civil execution procedure may be commenced with the final judgment of the first instance, even before the final judgment become conclusive by the appellate court. In return, the debtor may request stay of the procedure until appellate decision is made, providing security. The balance between the debtor and the creditor can be achieved with these spears and shields\(^\text{383}\).

In China, the CPL and some other laws stipulate advance or provisional enforcement. According to Article 106 of the CPL, the court may, upon application of a party, issue a ruling on advance enforcement for the following cases: (1) cases to recover support for elderly parents, support for other adult dependents, child support, consolation money or medical expenses; (2) cases to recover labor remuneration; (3) cases requiring advance enforcement under urgent circumstances. Article 74 Paragraph 3 of the Law on Protection of the Rights and Interests of the Elderly (2012 Revision), and Article 44 of the Labor Dispute Mediation and Arbitration Law also have similar regulations on advance enforcement\(^\text{384}\). Apart from the possible security, there are some other ways to protect the fundamental rights of the debtor. To begin with, Article 107 Paragraph

\(^{381}\) YOSHIGAKI Minoru, Japan National Report

\(^{382}\) YOSHIGAKI Minoru, Japan National Report

\(^{383}\) HAN, Choong-Soo, Korea National Report.

\(^{384}\) See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “With respect to the limitations on issuing an advance enforcement ruling, Article 107 Paragraph 1 of the CPL demands the court to meet several conditions. First, it is only possible upon application; the court doesn’t have the authority to issue such kind of ruling on its own. Secondly, the rights and obligations between the parties are clear, and a denial of advance enforcement will seriously affect the life or business. Thirdly, the respondent is capable of performance. Besides, the court may order the applicant to provide security and shall dismiss the application if the applicant fails to do so”
2 of the CPL announces that if the applicant loses the action, the applicant shall compensate the respondent for any property loss incurred from advance enforcement. Secondly, Article 108 of the CPL permits the debtor to apply for reconsideration on the advance enforcement ruling, but the ruling shall not be suspended during the period of reconsideration. What’s more, according to Article 31 of the State Compensation Law and Article 4 of the Interpretation of the Supreme People's Court on Certain Issues concerning Judicial Compensation in Civil and Administrative Litigation, the debtor may apply for state compensation if advance execution violating statutory provisions.385

3. Remedies against the enforcement

a. General remarks

3.10. The enforcement requirements are closely connected with the enforcement remedies. The enforcement might be objected to ex ante or ex post the court’s control for the following reasons: (i) requirements of substantive law not satisfied; (ii) the property levied upon belonged to a third person; or (iii) the procedural rules of the enforcement were not complied with. Each legal system organises the remedies around these grounds, with wider or narrower possibilities.

b. National reports

3.11. Europe

The German Law provides a focusing on compulsory enforcement of claims based on private law according to the 8th book of the German Code of Civil Procedure, a number of provisions aim at the protection of the debtor in enforcement proceedings. As a general remedy against the violation of procedural rules could be mentioned § 766(1) ZPO could be mentioned, which provides the debtor with a remedy against violations of the formal rules on enforcement proceedings. The remedies in case of substantive objections are

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385 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report
387 See KERN, Germany National Report: “These provisions in a certain sense transform the requirements set forth by the fundamental rights of the Federal Constitution”.
388 See KERN, Germany National Report: “According to this provision, the debtor can go to court if an enforcement authority – the enforcement officer, the execution court, the first instance court or the office keeping the real estate register – did not respect the formal requirements set forth by the law. Such formal requirements are the time of enforcement or the selection of objects to be seized. For example, the debtor can defend him- or herself if the enforcement officer proceeds at an enforcement measure during the night or seizes objects which are exempt from attachment. If the court finds that the enforcement measure violates formal requirements, it invalidates the enforcement measure at issue”.

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ruled in § 767 ZPO as objection to the claim being enforced which pursues to bar or stop the enforcement when the substantive grounds do not justify the enforcement. The substantive basis does not justify enforcement. However, if the title at issue is a judgment, the initial non-existence of the claim cannot be put forward any more, and only objections, which arose after the last oral hearing at trial, are relevant (§ 767(2) ZPO). This limitation does not apply to titles other than judgments. When the title is an official document in which the debtor submitted to immediate enforcement. The res judicata plays no role.

The German Enforcement provides an additional remedy against the enforcement as protection from the execution regarding the special enforcement act. When the debtor’s interests and needs so require, the court can, according to § 765a ZPO, invalidate partly or entirely a measure of compulsory enforcement or suspend it temporarily upon petition of the debtor if – but only if the enforcement entails a hardship that due to very special circumstances is “immoral” in the very special sense of grossly violating the feeling of justice of a normal citizen. However, only a severe hardship to the debtor may limit the creditor’s right to have the claim enforced by the enforcement measure at issue. Finally § 811 ZPO lists a number of objects that are exempted from attachment and while §§ 850 et seq. ZPO limit the attachment of earned income. This provision protects the minimal existence need.

See KERN, Germany National Report.

See KERN, Germany National Report: “if the underlying claim has never existed at all or has been extinguished because of an objection”

See KERN, Germany National Report: “This is so because of res judicata of the judgment. The most important objection which the debtor can raise is that he or she fulfilled the claim after the judgment (§ 362 BGB). Post-judgment fulfilment of the claim is a subsequent change that could not be taken into account in the proceedings. Therefore, invalidating enforcement for such a reason does not affect res judicata.”

See KERN, Germany National Report: “As a consequence, the debtor can plead that the claim never came into existence or has been extinguished due to an objection regardless of whether the objection arose before or after the establishment of the title. This strengthens the position of the debtor, but correctly so, because the creditor could not legitimately demand enforcement of a claim for which there is no substantive basis”.

See KERN, Germany National Report: “The interests of both the creditor and the debtor must be balanced in order to find an appropriate solution. As the economic interest of the creditor, backed by his or her fundamental right to property, has a very high weight, a definite suspension of enforcement is extremely rare and is only ordered in exceptional cases in which the hardship to the debtor is particularly important”; Cf. again BGH, NJW 2008, 1000.

See KERN, Germany National Report: “To give a few examples, the creditor may not seize clothing, linen goods, beds, household and kitchen appliances insofar as the debtor requires them for a modest lifestyle and housekeeping needs in line with his or her professional activities and his or her indebtedness. There are various ideas behind these exceptions. Some of the exempted objects are not very valuable; some objects are indispensable to lead a life in dignity and to take part in the social and political life of the community; some objects are the basis for the debtor to gain income with which the claim could be fulfilled; and so on. The idea is to make sure that the debtor is still able to live a modest life despite the compulsory enforcement and does not become a recipient of social security benefits. Thus, these rules protect not only the debtor, but also the taxpayers generally”
The detailed provisions of German enforcement law are very effective in preventing any misuse. These rules are backed by an elaborate system of remedies. A first stage to allow the enforcement is regulated and functions very well to allow a non supporting enforcement. (i) The creditor can start enforcement proceedings only if he or she is in the possession of an enforceable title, which names him or her as creditor. (ii) The debtor can ask the court to invalidate an enforceable title if the substantive basis for the claim no longer exists (§ 767 ZPO, supra sub 2 c) bb)). (iii) In addition, the debtor has a remedy against the court decision that renders a title enforceable by attaching a certificate of enforceability to the title (§ 732 ZPO). If the court decides that the title is not enforceable any more, enforcement proceedings are stalled. A second device is the regulation of the enforcement in the detail of procedural to make it hard to be misused. If the formal requirements have not been respected, both parties and also a third party can appeal to the court (§ 766 ZPO)395. When the proceeding unduly affects third party’s assets, the third party can start an action opposing the enforcement measure (§ 771 ZPO)396. If the movable object sold to the debtor who has not yet paid the full purchase price is attached by one of his or her creditors, the seller who is still the owner of the movable object can invalidate this attachment with an action according to § 771 ZPO.

The German enforcement law, as a matter of principle, does not allow postponing enforcement without fair reasons. Enforcement may be stayed only if there are reasons in the person of the debtor that clearly outweigh the creditor’s interest in effective enforcement of his or her claim. § 802b(2) ZPO allows the enforcement officer to agree with the debtor on a payment in installments or even a deferred payment397. Most importantly, the enforcement officer has to inform the creditor immediately, and if the creditor objects to the agreement, it becomes invalid and the payment is due immediately398.

In France there are two rules against abuse, improper discharge of action by the creditor in damages and interest and damages and interest for improper resistance from the debtor399. There are collection companies that obtain

395 See KERN, Germany National Report : “This provision is particularly important in the context of attachments of movable things and eviction of residential premises”.
396 See KERN, Germany National Report : “Such actions are important for retention of title cases, i.e., cases in which the debtor in a sales contract on a movable thing was allowed to pay in installments, with an agreement that property only passes to the buyer upon full payment of the purchase price. Such retention of title is frequent under German law, as German property law follows the principle of separation (Trennungsprinzip) between the “obligatory” sales contract and the transfer of title”.
397 See KERN, Germany National Report : “but only if the debtor has furnished prima facie evidence that he or she will be able to pay on the date agreed. The time frame for installments or a deferral is, in principle, 12 months”.
398 See KERN, Germany National Report : “The agreement also becomes invalid if the debtor is fully or partly in delay for more than two weeks (§ 802b(3) ZPO)”.
399 JEULAND, Emmanuel, France National Report mentions the Article L121-2. The execution judge has the power to order the release of any unnecessary or improper measurement and order the creditor to
payment amicably by telephone, courier, threat, these enterprises of his framed; they can act without enforcement through then if they hope to seek further action must have recourse with a bailiff and the judge. In case of seizure of money the enforcement could be suspended but not when the claim is totally or partially uncontested.

The Italian system takes into account the rights of the debtor into account from three different perspectives. Firstly, from the procedural point of view, the debtor has the possibility to oppose to the enforcement proceedings, both because the claimant creditor has no substantive right to proceed with the enforcement, other because a formal invalidity has occurred in the enforcement proceedings. The first type of challenge, called “opposition to enforcement”, is set forth in article 615 c.p.c.; the second type of challenge, called “opposition to enforcement acts”, is set forth in article 617 c.p.c. It can be used whenever an act of the enforcement proceedings is formally null and void, even if the substantive right of the creditor is not being questioned. For this reason, the opposition to enforcement acts can be used not only by the debtor, but also by the creditor, under particular circumstances. Secondly, the Code of Civil Procedure foresees a number of limits to the possibility of seizing assets, in order to protect the fundamental rights of the debtor to personal development. Other items are only

 damages for abuse of seizure. Article L121-3. The execution judge has the power to order the debtor to damages in case of abusive resistance.

Jeuland, Emmanuel, France National Report mentions Article R124-3 Code of Civil Procedure execution. The person in charge of debt collection can not make it after a written agreement with the creditor in which it is given authority to receive on its behalf convention. This agreement shall specify in particular: The basis and amount due, with separate indication of the different elements of receivables or on the debtor; The terms and conditions of the guarantee given to the creditor against the consequences of monetary liability incurred as a result of the activity of debt collection; The conditions for determining the compensation payable by the creditor; The conditions of repayment of funds received on behalf of the creditor.

Jeuland, Emmanuel, France National Report mentions Article R211-10. Disputes are brought before the judge of execution of the place where the debtor remains. Article R211-11 A penalty of inadmissibility, disputes relating to the seizure are formed within one month after notification of the seizure of the debtor. Under the same penalty, they denounced the same day, by registered letter with acknowledgment of receipt, to the bailiff who the seizure. The author of the dispute shall inform the garnishee by letter and provide a copy, barely lapse of the summons to the office of judge of the execution before the day of the hearing. Article R211-12. The execution judge gives effect to the entry for the undisputed portion of the debt. decision is immediately enforceable. The provisions of the second paragraph of Article R. 121-22 are not applicable. If it appears that neither the amount of the claim or of entering the debt of the garnishee are seriously questionable, the enforcement judge may order a provisional payment an amount it determines prescribing, if appropriate, guarantees.


Caponi, Remo Ortolani, Pietro, Italia National Report: “For example, the claimant creditor could use this opposition to point out that the intervention of another creditor in the enforcement proceedings is invalid, or for any other hypothesis of invalidity of the enforcement proceedings which could be detrimental to its rights”.

Caponi, Remo Ortolani, Pietro, Italia National Report: “The most important provisions in this regard are the ones concerning the seizure of salaries and other credits and the prohibition against certain
seizable in particular circumstances. Thirdly, pursuant to article 619 of the Code of Civil Procedure, third parties can oppose to enforcement proceedings. It is important to point out that this is not the tierce opposition, which third parties can bring against a jurisdictional decision, but a specific kind of challenge, which aims specifically at opposing to the enforcement. Third parties can use this instrument when they allegedly have a title of property or another right in rem over the seized asset(s).

In Spain in general, the Art. 247 LEC, which applies to any stage proscribe the use of procedural bad faith in any intervening process.

In Portugal the debtor may object the obligation (to prove that fulfillment of the obligation cannot be required, because the debt never existed (for example, the contract that gave rise to it is null). The debtor may object the procedure and the enforcement acts of the bailiff. The opposition to the enforcement does not suspend the proceeding. Only if a caution is provided, the execution is suspended.

In the Netherlands there can be sanctions in case of procedural abuses by either the debtor, the creditor or third parties. In general, abusive actions will qualify as tortuous types of seizures. From the first point of view, under article 545 of the Code of Civil Procedure, family support credits and other benefit credits aimed at ensuring basic needs cannot be seized. Moreover, from the second point of view, salaries and other credits stemming from employment can only be seized in the measure of one fifth, under article 545(4) This limit can only be exceeded when the creditor is claiming a family support credit, aimed at protecting basic rights and necessities. In this case, the credit can be seized in the measure determined by the President of the competent Tribunal, under Article 545(3). Pursuant to article 514, some assets are not seizable: religious items; wedding rings; clothes, furniture and kitchenware, inasmuch as they are absolutely necessary for the debtor’s and the debtor’s family’s living needs; food and fuel, inasmuch as they are absolutely necessary for the debtor’s and the debtor’s family’s living needs; weapons and other items that the debtor has the duty to maintain in order to perform a public duty; family documents, decorations, letters and manuscripts, unless they form part of a collection.”

CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: “agricultural tools can be seized separately from the field they are used in only if no other movables are available, but the enforcement judge can, on request of the debtor, exclude from the seizure those items which are absolutely necessary for the cultivation of the land; tools, items and books which are absolutely necessary for a job, profession or art can only be seized in the measure of one fifth, when no other items can be seized for that particular credit (this prohibition does not apply to societies and to other enterprises where capital plays a prevailing role over work)”.

CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report: “Even if all of the aforementioned oppositions are conceived to preserve legitimate rights, it has been argued that their misuse could hinder the effectiveness of the enforcement procedure, even in the absence of fair reasons. However, it must also be taken into consideration that, under article 474 of the Code of Civil Procedure, an enforcement can be commenced even in the absence of a judicial decision. Therefore, the possibility to oppose to the enforcement is particularly important, since it gives the debtor the opportunity to present its case before the competent judge before the assets are coercively transferred to third parties.”

PICÓ JUNOY, Joan, Spain National Report: “Article 247 Respect the rules of procedural good faith. Fines for non-compliance”. Also in case the opinion that the implementation has generated damages for malicious action may claim in a subsequent declaratory action”. See also PICÓ JUNOY, Joan, Mecanismos de control de la mala fe procesal en la ejecución civil, in Ejecucion Civil: Problemas Actuales, Cachon Cadenas,M./Pico Junoy,J. (Ed.), (Barcelona: Atelier, 2008), pp. 37-61.

FREITAS, Jose Lebre de, Portugal National Report.
and will give rise to actions for damages\textsuperscript{409}. For the possible procedural abuse or misuse of the enforcement for the creditor, civil liability commonly serves to deter the creditor from overly aggressive debt collection. The creditor that enforces a judgment rendered by the court of first instance does take a risk when doing so: if the court's judgment will be overturned and/or quashed, his actions would be considered tortuous and would give the debtor an action for damages\textsuperscript{410}. A debtor that tries to frustrate the enforcement process can under certain conditions face criminal sanctions\textsuperscript{411}. The debtor that feels that the enforcement proceedings are conducted in an improper manner could file an action with the court to resolve conflicts regarding the enforcement process\textsuperscript{412}. The enforcement cannot be stopped unless there is a judicial decision staying the creditor from executing and seizing the goods of the debtor. If there is already a judicial decision, the debtor has to ask the judge to stop the execution

In Hungary the Enforcement Act of 1994 endeavours, by several means, to prevent abuses concerning enforcement proceedings on the part of both creditors and bailiffs. As Protection of the debtor against unfounded claims, a judgment creditor shall immediately report to the bailiff the termination or diminution of a claim in the process of enforcement. The judgment creditor shall be responsible for the costs and damages arising from the failure to report\textsuperscript{413}. If the judgment debtor has provided documents to prove that the claim in the process of enforcement is unsubstantiated, has already been satisfied or has otherwise ceased to exist, the bailiff shall summon the judgment creditor, with reference to such evidence, to make his position known within fifteen days concerning the existence of the claim. If the judgment creditor has reported the cessation of the claim and has paid the charges specified in the summon, the enforcement procedure shall be deemed terminated. If the judgment creditor has not acknowledged the termination (diminution) of the claim, the judgment debtor may file a lawsuit for the termination (limitation) of enforcement\textsuperscript{414}. In order to protect the debtor against undue harassment the acts of enforcement may be performed on any day within a ruled time\textsuperscript{415}.

The court may accept the request of the judgment debtor and suspend the enforcement procedure if the judgment debtor is able to substantiate the reason and reasonable cause thereof, and if the judgment debtor had not been previously fined

\textsuperscript{409} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report.
\textsuperscript{410} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report.
\textsuperscript{411} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report: “It is for example a criminal act to sell or embezzle goods that have attached/seized but nevertheless remained in possession of the debtor (Article 198 Criminal Code). It is also a criminal act for a debtor to be involved in ‘fraudulent conveyances’ prior to his bankruptcy (action pauliana, Article 340-345 Criminal Code)”
\textsuperscript{412} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report.
\textsuperscript{413} Section 40 Enforcement Act.
\textsuperscript{414} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report.
\textsuperscript{415} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “With the exception of Sundays and legal holidays, between 6.00 AM and 10.00 PM. The bailiff may proceed on a legal holiday, or before 6.00 AM and after 10.00 PM only if the president judge of the court of origin for authorizing enforcement has given permission to this effect in writing (Section 42 Enforcement Act)”.
for contempt during the enforcement procedure. When deliberating reasonable cause for the suspension of enforcement, the court shall, in particular, weigh the number of dependants to be supported by the judgment debtor whether by order or necessity, if the judgment debtor or any dependent suffers in a serious illness and any natural disaster during the enforcement procedure to which the judgment debtor has also fallen victim.

The bailiff, at the request of the judgment debtor, if a natural person, may lay down the conditions for the payment of a cash debt in installments after taking measures for the search and seizure of the debtor’s assets, and if the judgment debtor has already paid off a portion of the claim to which the enforcement procedure pertains. The bailiff shall inform the judgment debtor concerning the option and the conditions of payment facilities even if the judgment debtor has no enforceable assets. Based on the statement made by the judgment creditor, the bailiff may modify the terms of payment by instalment.

The protective measures constitute one of the most effective means to prevent any abuse on the part of the debtor. If the enforcement order cannot yet be issued, but the judgment creditor has substantiated that any delay in the enforcement of such claim is in jeopardy, the court shall order the protective measures upon the judgment creditor’s request.

Legal remedies against court decisions and against measures taken by the bailiff may prevent abuses on the part of both creditors and debtors. Court decisions in connection with judicial enforcement and the implementation of enforcement are subject to appeal. In specific cases the law provides for a further legal remedy (motion for review) against the court decision made during the appeal. The judgement creditor and debtor by any action of the bailiff that constitutes a significant violation of the rules of enforcement, or by his failure to take action may file a demurrer with the court responsible for enforcement.

In Hungary in case of the jurisdiction of a notary public or a bailiff, the parties may address a remedy against the decision of the notary public or the activity of the bailiff. For example the decision of the notary public in probate procedure can be challenged by the appeal court. There are a great number of possible remedies available concerning the civil enforcement proceedings.

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422 KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “Additional rules should be mentioned. The Criminal Code contains two such offences relating to judicial enforcement: obstruction of judicial enforcement (see Short Questions 12) and breach of seal. According to section 287 of the Criminal Code any person who conceals a confiscated, seized or sequestered item from judicial enforcement is guilty of a felony punishable by imprisonment not exceeding three years.”
These remedies may be divided in two main groups: non-litigious remedies (which may be sought within the framework of the enforcement proceedings) and litigious remedies. Within the two above-mentioned main groups, we may distinguish further categories. The court is to cancel the writ of execution if the court issued the writ of execution on a document in violation of the law. Either party (the debtor and also the creditor) may apply for this remedy, but in practice, in the majority of cases, it is the debtor that applies for the withdrawal or cancellation. The court may also cancel the writ based on the bailiff’s report. This is a special procedure also in the sense that there is no time limit concerning the application for remedy. The petition for the cancellation of the writ may be successful if some legal condition was not met regarding the issue of the enforcement order at the time of ordering the enforcement. Such deficiency may be if the notarial document does not contain or does not contain precisely the conditions specified under Section 21 of the Enforcement Act and therefore judicial enforcement of the document is not possible. The ground for the cancellation of the writ of execution could also be the lapse of the right of enforcement concerning the claim to be enforced.

In Hungary the appeals filed by the debtor against the enforcement order generally do not stay enforcement, but the debtor may request a stay if he proves that an irreparable damage may occur by the enforcement of judgment. The court will decide on stay in its own discretion, and may (or may not) make issuing of an order on stay of enforcement conditional upon posting of an adequate security (Art. 65.). This regime applies only to regular enforcement orders, issued on the basis of enforceable instruments. If the enforcement order is based on an ‘authentic instrument’ (e.g. an invoice), without a prior option to have the claim addressed by the alleged debtor, an objection by the debtor stays the enforcement and leads to transfer of the case to regular litigation. So-called ‘enforcement on the basis of authentic instruments’ is one of the rather common forms of payment order procedure in Croatian law.

Decisions on postponement of the enforcement are in the discretion of the court, which needs to decide in principle after the creditor is given chance to reply. However, in practice the courts are rather tolerant in granting request for postponement of enforcement. If it deems proper, the court can also grant postponement conditionally, if a guarantee is given by the debtor. See Art. 65 LE. In Croatia there is no special sanctions provided for procedural abuses, though the Code of Civil Procedure and its rules on fines for procedural abuse may be applied analogously (however, this is almost never the case in practice).

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425 UZELAC, Alan, Croatia National Report.
426 UZELAC, Alan, Croatia National Report.
On the other hand, the Law on Enforcement gives the court the authority to impose penalty of up to 5,000 EUR for natural or up to 15,000 EUR for legal persons if they undertake actions to conceal, transfer or destroy property which was by court order preserved for enforcement, or if they act violently, obstruct enforcement and commit actions that are harmful for the creditor or other persons (Art. 16. LE).

3.12. Latin America

The legal system in Argentina rules for the enforcement proceeding reserves a fine (art. 551 2nd para. CPN) as special ex post mechanism to prevent abusive behavior at odds with procedural good faith, in order avoid the procedure delaying by the debtor. Proven that assumption of recklessness and malice, the judge is authorized to impose a fine for the performer, whose amount is a percentage of the amount of debt, as the incidence of judicial misconduct on the delay in the proceedings. The judgment can only determine who gets the execution is carried on, in whole or in part, or rejected. In the first case, the run that had litigated without valid reason or obstruction of the normal course of the process with clearly inadmissible joints, or in any way the process would have unreasonably delayed the process, has to pay a fine whose amount shall be fixed between five percent (5%) and thirty percent (30%) of the amount of the debt, as the incidence of misconduct on their procedural delay in the proceedings.

In a similar vein, having been decreed the order of auction, imposition of penalty is expected when executed caused any unnecessary delay in the performance thereof, on the basis of the amount of the settlement approved. However, in addition to the procedural tools outlined above, there are other generic devices to prevent and punish such acts of procedural abusive, liable to be described as contrary to the duty of loyalty, honesty and good faith to be observed by the parties. Moreover, the procedural system rules the appeal only for special cases in the enforcement proceeding. In addition there are a varied cast of procedural fines for disciplining behaviors at odds with procedural good faith or that obstruct the proper running of the process. In particular, in the process of enforcement the following events are planned: (a) The unjustified ignorance of a document when it is determinative in the real process by any degree whatsoever (Art. 528 CPCCN); (b) Where the debtor had litigated without valid reason or obstructed the normal course of the process with clearly inadmissible joints, or in any way had unreasonably delayed the proceedings (Art. 551 CPCCN).

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427 UZELAC, Alan, Croatia National Report.
428 OTEIZA, Eduardo, Argentina National report.
429 Art. 594 CPCCN.
430 OTEIZA, Eduardo, Argentina National report: “From a perspective that focuses on judicial practice, usually not noticed that abusive behaviors receive sanctions from the courts, and the few times it happens, are reversed by the higher courts. This obviously favors obstruction of the process since the unfounded planteos become an everyday use”.
The Brazilian civil procedural system provides, as a general rule, the punishment for bad-faith as well as for apart from presenting unfounded manner (intending to slow down the process) of appeals. This assumption would for the declaratory as for the enforcement proceeding. However, the applicability of such punishment by courts is greatly reduced, making his practice is limited. Thus, the main advance of contemporary Brazilian civil procedure, to avoid the delay caused by the unmotivated presentation of ancillary controversies in the enforcement, it is to continue and not to suspend the proceeding by appeal or any ungrounded opposition. Thus, it creates a more favorable course of the execution scenario\textsuperscript{431}.

The Uruguayan legal system does not have specific mechanisms to prevent abuse of civil enforcement or to prevent the misuse of resources and remedies could be applied. However, could be applied the general rules to prevent and punish abuse of legal remedies. In CGP, the art. 5th recognizes the duty to act in good faith and with procedural fairness, levied on all participants in the process; art. 6 requires the court the duty to take, at the request of a party or of its own motion, any measures resulting from the law or their powers of direction "to prevent or punish any act or omission contrary to the order or the principles of the process"; art. 24, in numerals 10 and 11, attributed sanctioning powers in case of indiscipline, abuse impeding development process, or conduct incompatible with the decorum and dignity of justice; art. 61 provides for the possibility to impose damages for bad faith or recklessness; art. 63 include between the requirements of procedural acts truthfulness and good faith, and are caused by a legitimate interest; etc. Also the Organic Law of the Judiciary and Court Organization provides for the possibility of imposing disciplinary sanctions to barristers and solicitors (Articles 148, 149 and 159, Law 15,750) disciplinary sanctions. The promotion of wrongful enforcement is a form of what is called abuse of the right of action; while the measures to contest abuse falls within the so-called abuse of the right of defense or contradiction\textsuperscript{432}.

3.13. Asia and Oceania

In Japan the most common obstruction of a compulsory execution is from organized crime group members (“Bouryokudan”) who unlawfully occupy real property for an auction and demand compensation for eviction from a petitioner for the real property auction. The Short-term Leases under the former Civil Law (former §395), under which a person who leases real property subject to a mortgage after the creation of a mortgage can continue to lease for five years (as to lands) or three years (as to buildings) even after the real property is auctioned

\textsuperscript{431} MARINONI, LG/ARENHART, S./OSNA, G., Brazil National Report
\textsuperscript{432} PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report
off, played a role as a cloak for obstruction of a compulsory execution (This system was abolished in 2003. Instead, the new system “the suspension of delivery by users of mortgaged buildings”, that grants a brief occupation period after an auction, is newly created (current §395)). While it is possible to eliminate the obstruction like this by a proprietary action or a mortgage claim, the Civil Execution Act provides more summary manners to prevent and eliminate.  

The Civil Execution Act provides various types of temporary restraining orders, such as prohibiting a price reducing act (meaning an act that reduces or is likely to reduce the price of real property, for example, destruction or alternation of buildings, placement of obstruction at the entrance, new construction of the building on the raw land, carrying a large quantity of dirt in, or indicating an involvement of organized crime group members), retainment by a court execution officer, or prohibiting transfer of possession (Civil Execution Act §55, 68.2, 187). And a purchaser can easily eject unlawful occupants under the procedure of the delivery order (§83). There are many sanctions against obstructions concerning to unlawful occupation.  

There is other manner of misuses in the enforcement by the appeal system. A manner of abuse of procedure to delay an execution process by filing an appeal against a disposition of execution. In Japan, there is a notorious business (known as “Koukoku-Ya” (“Koukoku” means appeal, “Ya” means business,) to demand extortionate fees for filing an appeal on behalf of owner of real property subject to compulsory auction and delaying the surrender of the real property. But against such an appeal, the court of original instance can dismiss it on the ground that “the appeal against a disposition of execution has been filed for the

433 YOSHIGAKI, Minoru, Japan National Report
434 YOSHIGAKI, Minoru, Japan National Report
435 YOSHIGAKI, Minoru, Japan National Report: “A person who has conduct any following act, such as damaging a written public notice or any other sign (Civil Execution Act §204(i), Penal Code §96), refusing to make a statement or to present a document or making a false statement in response to a request by an execution court or court execution officer (Civil Execution Act §205(1)), refusing or obstructing entry to real property for the purpose of preliminary inspection (an occasion of having persons wishing to purchase the real property enter and inspect the real property) (Civil Execution Act §205(2)), concealing or damaging, faking a transfer, faking a owing a debt, altering the existing status thereby reducing its value, or disposing property or establishing a right disadvantageously as to property subject to a compulsory execution (Penal Code §96-2), by the use of fraudulent means or force obstructing acts of compulsory execution or committing an act of assault or intimidation for the purpose of preventing from petition for the compulsory execution or making petitioner decide to withdraw the petition (Penal Code §96-3. For example, making it more difficult to know the possession status by alien occupants who can’t understand Japanese and don’t know the circumstances, or set unconfined vicious dog off to bar a court execution officer from approaching the area), impairing the fairness of a public auction or bid by the use of fraudulent means or force (Penal Code §96-4. For example, submitting a false rental agreement to an execution court, or write a name of an organized crime group in a file for inspection at the court.), is punished by imprisonment with work or a fine (if acting for acquiring a wrongful gain, punishment shall be aggravated. Penal Code §96-5).”
436 YOSHIGAKI Minoru, Japan National Report
purpose of unreasonably delaying a civil execution procedure”(Civil Execution Act §10(5)(iv)).

In China different remedies are provided for debtors. There are general disposition similar to German code. To begin with, when a debtor disagrees with the specific enforcement measures in the enforcement procedure, he is eligible to object them according to Article 225 of the CPL, which is an institution with the similar function of the German mode. This is a major path to challenge the legitimacy of the judicial enforcement. The debtor may present defense with the help of enforcement remedies. To begin with, according to Article 3 of the Enforcement Interpretation, the debtor has the right to raise a jurisdictional challenge within 10 days from the day of receiving the notice of enforcement and may apply for reconsideration to the court at the next higher level if he is dissatisfied with the ruling. Secondly, when the debtor disagrees with the specific enforcement measures in the enforcement procedure, he is eligible to object them according to the Article 225 of the CPL. This is a primary means to challenge the legitimacy of the judicial enforcement and the objection should be filed in written form. Thirdly, Article 227 of the CPL permits the debtor who is not a party to the case to file a written objection regarding the subject matter of enforcement. Although the debtor is able to present defense in enforcement in some cases, the existing regulations in our country are not detailed and cannot protect the debtor’s fundamental rights effectively.

In China, the defense filed by the debtor doesn't necessarily generate the suspension of the execution. Firstly, according to Article 3 Paragraph 3 of the Enforcement Interpretation, the enforcement shall continue during the period of examining or reconsidering a jurisdictional challenge. Similarly, Article 10 of the Enforcement Interpretation says, “pending examination and reconsideration of an objection to enforcement, the enforcement shall continue.” However, if the debtor provides a sufficient and effective security to request cessation of the corresponding disposal measures, the court may permit such a request. Secondly, Article 256 of the CPL stipulates that the court shall issue a ruling to

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437 YOSHIGAKI Minoru, Japan National Report
438 According to See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report
439 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Article 766 Zivilprozessordnung. Where a party or an interested party deems that enforcement has violated any legal provisions, the party or interested party may file a written objection with the people's court in charge of enforcement. Where a party or an interested party files a written objection, the people’s court shall examine the written objection within 15 days after receiving it and, if the objection is supported, issue a ruling to revoke or correct enforcement; or if the objection is not supported, issue a ruling to dismiss the objection. Against such a ruling, the party or interested party may apply for reconsideration to the people's court at the next higher level within ten days after the ruling is served.”
440 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
441 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
442 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
443 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
suspend enforcement if the creditor/applicant indicates that enforcement may be deferred. The enforcement may also be suspended when a person who is not a party to the case raises any justified objection to the subject matter of enforcement. In order to reverse the final substantive decision, a debtor can apply for the retrial procedure under certain circumstances. Where a party files a petition for retrial, the execution of the judgment or ruling shall not be discontinued. Moreover, the Court itself, a higher Court or a higher People's Procuratorate can open the retrial procedure on different conditions as well.

Furthermore, security provided by the debtor might be able to suspend the enforcement procedure. And, Article 233 of the CPL expresses the duty of reimbursement after a wrongful enforcement, which is obviously necessary for the suffering debtor. According to Article 238 Paragraph 2 of the CPL, similar remedy exists within the enforcement of notarized debt instrument. “If the notarized debt instrument is erroneous, the people's court shall issue a ruling not to enforce the debt instrument and serve a written ruling on both sides and the notary office.”

In China there is no specific regulation on the misuse of the enforcement proceedings. However, if we take the situation into account, that the debtor deliberately makes the enforcement impossible in result, then we do have some direct regulation. The articles on the suspension and termination of the enforcement proceedings may be related as well.

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444 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Besides, Article 206 of the CPL deems that “for a case retried according to a decision made under the trial supervision procedure, a ruling shall be issued to suspend the execution of the original judgment, ruling or consent judgment, but suspension of execution is not required for cases to recover support for elderly parents, support for other adult dependents, child support, consolation money, medical expenses, and labor remuneration, among others.”

445 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “One crucial effect of the retrial procedure is, in accordance with Article 206 of the CPL, that “for a case retried according to a decision made under the trial supervision procedure, a ruling shall be issued to suspend the execution of the original judgment, ruling or consent judgment, but suspension of execution is not required for cases to recover support for elderly parents, support for other adult dependants, child support, consolation money, medical expenses, and labor remuneration, among others”.

446 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “In the light of Article 231 of the CPL, “where, during enforcement, the party against whom enforcement is sought provides security to the people's court, the people's court may, with the consent of the applicant for enforcement, decide to suspend enforcement and decide a period of suspension. If the party against whom enforcement is sought fails to perform its obligations within the aforesaid period, the people's court shall have the power to conduct enforcement against the property posted as security by the party against whom enforcement is sought or the property of any guarantor”.

447 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Where, after completion of enforcement, the judgment, ruling or any other legal document on which enforcement is based is revoked by a people's court for any errors, the people's court shall issue a ruling on the property which has undergone enforcement to order the party which has acquired the property to return the property; and if the party refuses to return the property, the people's court shall conduct enforcement.”

448 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Article 113 of the CPL says, “where the party against whom enforcement is sought, maliciously in collusion with other persons, evades performance of obligations determined in a legal instrument by litigation, arbitration, mediation or any
In Australia the procedural rules require a debtor to file and serve a defense once a creditor has initiated recovery or enforcement proceedings. However, a debtor will have a defense where the debt if a certain period of time has passed. Where six years or more has passed since the debtor has made their last payment or confirmed their debt or the creditor has not undertaken any court action to recover the debt from the debtor in relation to simple contracts. This is often referred to as a statute-barred debt. Although the debt may be statute-barred a creditor can still ask a debtor to pay the outstanding debt and if the creditor tries to sue the debtor they will have a complete defense. The procedural step of filing and serving a defense is the right of response, which provides the debtor’s with the opportunity to present their case and to address the creditor’s pleadings. While there are no rights per se for the debtor relating to statute-barred debts the reasoning for having time limitations is not only owing to the fact that relevant evidence is likely to be lost overtime, but moreover it is considered cruel to an action to be brought long after the circumstances, which gave rise to the debt has passed. Where a debtor has filed a defense for a liquidated amount the defendant may file a statement acknowledging liability for the full or part of the amount. However, any warrant or writ of execution remains operable for one year, other means, a people's court shall impose a fine or detention on them according to the severity of the circumstances; and if suspected of any crime, they shall be subject to criminal liability.”

449 Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Article 256 of the CPL stipulates, “under any of the following circumstances, the people's court shall issue a ruling to suspend enforcement: The applicant indicates that enforcement may be deferred; A person which is not a party to the case raises any justified objection to the subject matter of enforcement; A citizen as one of the parties dies, and it is necessary to wait for his or her successors to succeed to his or her rights or obligations; A legal person or any other organization as one of the parties is terminated, and the successors to its rights and obligations have not been determined; Other circumstances under which the people's court deems that enforcement shall be suspended. Enforcement shall be resumed after the circumstances causing suspension have disappeared.”

450 Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: Article 257 says, “under any of the following circumstances, the people's court shall issue a ruling to terminate enforcement: The applicant withdraws the application for enforcement; The legal instrument on which enforcement is based has been revoked; The citizen as the party against whom enforcement is sought dies, without any estate for enforcement, and no one succeeds to his or her obligations; The person entitled to recover support for elderly parents, support for other adult dependants or child support dies; The citizen as the party against whom enforcement is sought is unable to repay his or her borrowings for living in hardship, has no source of income, and has lost his or her ability to work; Other circumstances under which the people's court deems that enforcement shall be terminated.”


453 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541.
regardless of a filing of a defense. The courts have the discretion to stay any enforcement procedure to prevent an abuse of process.

4. General protection of debtor from the fundamental rights conflicts

a. General remarks

3.14. Compulsory enforcement primarily serves the interests of the creditor. However, the enforcement should take into account the interests of the debtor and protects him or her from unfair or disproportional enforcement. The need to protect the debtor can also be traced back to the catalogues of fundamental rights in the national constitutions. In the majority of systems, the creditor may usually choose the enforcement procedure to be used, as well as the assets which will be the objects of the enforcement proceedings from those that are freely available. The creditor can freely decide whether to enforce against one or more debtors to a joint obligation, and also decide whether to seek enforcement against the debtor’s rights, personal and property spheres. These creditor rights are subject to the formality principle of enforcement, and there are a number of provisions that control the proper exercise of this choice, for example, when requesting the attachment of real property, the creditor is required to specify sufficient details for the land to be identified properly. Further limitations may also be imposed on the capacity for goods or assets to be the object of enforcement proceedings, for example when the property is non-attachable for economic or social reasons, usually because they are necessary to cover the debtor’s basic needs. On the whole, the creditor has the right to choose the appropriate procedure for, and object of, the enforcement procedures. The creditor’s choice is counterbalanced by the possibility for the debtor to request (in the alternatively), the extension, reduction, and replacement or lifting of certain executive measures, such as the attachment. Such a request may be made in ancillary proceedings, which may be started at the request of creditor as well the debtor.

3.15. The legislative regulation of enforcement is also concerned with the questions of fundamental rights. For example, the German Civil Procedure Code

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454 Supreme Court Rules (NT) O 68.05; Supreme Court Act of Queensland 1991 (Qld) s92; Supreme Court Rules 2000 (Tas) rr 104-107; Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 68.05; Rules of the Supreme Court 1971 (WA) O 7, 68.05; Civil Judgement Enforcement Act (WA) s 12; see also Geneva Finance Ltd v Bandy [2008] WASC 236.

455 Rogers v The Queen (1994) 181 CLR 251 (Mason CJ); Walton v Gardiner (1992) 177 CLR 378.

456 Cf., e.g. the German Constitutional Courts decisions BVerfGE 49, 220, 232 et seq. (Justice Böhmer decision); 51, 97, 113; 57, 346, 356-357; for an in-depth discussion, see FISCHER, Nikolaj Vollstreckungszugriff als Grundrechtseingriff, (Frankfurt am Main: Vittorio Klostermann, 2006), passim.


458 FISCHER, Nikolaj, German National Report.
contains the “hardship clause” (§ 765 a par. 1): upon petition by the debtor, the court of execution is authorised wholly or partially to cancel an act of enforcement, or to suspend it, having balanced the need for the creditor’s rights to be protected, and the special circumstances of a debtor such that he would endure hardship that is disproportionate to the creditor’s interests. This provision was designed to protect the debtor’s minimum subsistence requirements, and his dignity and respect. The German doctrine has been strongly criticised for being a “Hyper-constitutionalisation” of enforcement. However, apart from this provision for special dispensation, there is no scope for the court or enforcement organism to apply proportionality standards in order to reject or set aside enforcement measures. Since enforcement was essentially thought necessary to protect the creditor’s rights, it is deemed unnecessary to include a general proportionality clause in the enforcement procedures, even though the protection of the creditor and debtor is not necessary balanced.

Another approach adopted in some European countries to deal with the conflict between the creditor’s and debtor’s rights in enforcement procedures is to include a “public order provision” that cannot be set aside by the parties. These balancing problems are considered in Germany, and in a limited way in other countries, under constitutional standards as seen in many states within the Romanic Legal Family, it is a matter to be regulated by the legislator using mandatory rules. However, special consideration must be given to the American Case Law. Before 1969, the leading case on the enforcement proceedings was *Endicott Co. v. Encyclopedia Press*, 266 US 285 (1924). In *Sniadach v. Faily Finance Corp.*, the US Supreme Court held the local law unconstitutional under the constitutional clause requiring due process and equal protection. In *Fuentes v. Shevin*, it was held that the same constitutional provision applied to pre-judgment seizures. Other leading cases include *Stanley v. Illinois* and *Mitchell v. Grant Co.* Concerning the relationship of debtor and creditor in enforcement proceedings, the German and American Courts have sought to protect the debtor and guarantee the respect for the procedural and substantive provisions. The goal is to check the balance on a case-by-case basis, to prevent the risk of an unfounded and unjust enforcement while still considering the creditor’s right to full satisfaction of his claim. Let me mention also two decisions of the ECHR regarding the home, family protection and private life in

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459 FISCHER, Nikolaj, German National Report; GILLES, in Beys (Ed.), Grundrechtsverletzungen, at 111.
462 407 US 67 (1972)
463 405 US 645 (1972)
465 Cf. WEYLAND, Peter Der Verhältnismäßigkeitsgrundsatz in der Zwangsvollstreckung, (Berlin: Duncker & Humblot, 1987), passim.
an enforcement proceeding Kontsevych vs. Ukraine 466 (16/2/2012) and Pelipenko vs. Russia (2/10/2012). 467.

3.16. In the different legal systems the rights linked with enforcement that are protected and treated like fundamental rights are usually: the right to property, the right to life and health, the right to physical freedom, the inviolability of the home, and the right to informational self-determination. The right to property protects both the debtor from unjust enforcement and also to the creditor, because his claim seeks to guarantee his property, subject to the German exception for minimum subsistence. 468.

This broad presentation of the constitutional background of the protection of the debtor should not be understood to mean that the interests of the debtor always prevail and that German judges and lawyers would in all enforcement proceedings refer to the fundamental rights and conduct a proportionality analysis 469.

It is necessary to state some comments. First, several further arguments should be kept in mind. (i) The fundamental rights of the debtor must be considered and balanced against the fundamental right of the creditor to effective enforcement. (ii) The right of the creditor to effective enforcement is also a fundamental right linked with access to justice and to a due and fair process, which are considered to be very important and must not be undervalued. 470 (iii) Therefore, the protection afforded in recognition of the debtor’s rights are first and foremost formal requirements (e.g., requiring judicial authorisation of searches, generally prohibiting the taking of enforcement measures during the night, and requiring access to the courts in cases of alleged violations of procedural rules, etc.).
Second, the rights of the debtor must be, and have been, taken into account by the legislature in drafting the rules relating to enforcement. In typical enforcement proceedings, judges and lawyers do not discuss fundamental rights because the contents of fundamental rights are abstract and general, and the need to balance the positions of the debtor and the creditor rarely require such discussion. Moreover, only when general clauses need interpreting (e.g., § 765a ZPO) or when the rules provide two alternatives (e.g., detention or a monetary penalty), do judges and lawyers need to resort to fundamental rights.

b. National reports

3.17. Europe.

According to the German Constitution Art. 14 GG guarantees the right to property. It protects the debtor from being deprived of his or her property unless the enforcement is based on an enforceable title (final decision or an enforceable official document) and according with the due procedural rules. This is the ground for the right of the debtor to request to the courts if the procedural rules are violated. Moreover, one may trace back to the right to property the idea that the enforcement must not annihilate positions, which are valuable for the debtor if the creditor does not receive any reasonable value to the right to property. The fundamental right to life and health, guaranteed by art. 2(2) 1st sentence GG, may also command an additional limitation to enforcement measures. This protection excludes the normal psychological stress for the

471 Cf. STÜRNER, ZZP 99, at 296, 318.
473 See KERN, Germany National Report: “As a matter of principle, the German social security system provides a high level of protection for fundamental and human rights, in particular food, health and shelter. Insolvent or poor debtors receive social security benefits which cannot be seized or attached by the creditor. Moreover, fundamental and human rights are also effectively protected by the enforcement authorities. These authorities have to respect the detailed rules on enforcement. These rules, in turn, are often a consequence of the balancing of fundamental and human rights of both creditor and debtor. Judicial protection of fundamental and human rights exists under several perspectives. First, the rights of the creditor and the debtor are protected by the courts within the enforcement proceedings. If the rules on enforcement have not been respected, both the creditor and the debtor can file an action or other remedy so that a court controls the enforcement proceedings in general or a single enforcement measure. Second, the insolvent or poor debtor can enforce his or her right to social security benefits in the social security courts. Third, the German court system is highly efficient and fast. Therefore, victims of torts or unfair treatment by an employer are guaranteed access to justice.”
475 See KERN, Germany National Report: “However, this idea is problematic and should not be used too expansively”; Cf. STÜRNER, Rolf Strafrechtliche Selbstbelastung und verfahrensähnliche Wahrheitsermittlung, Neue Juristische Wochenschrift (NJW) 1981, 1757, 1760; STÜRNER, Rolf Prinzipien der Einzelzwangsvollstreckung, Zeitschrift für Zivilprozess (ZZP) 99 (1986), 291, 296.
476 “Article 2 GG [Personal freedoms]
debtor of being confronted with an enforcement measure.\textsuperscript{477} Were it otherwise, the creditor would be deprived of any effective means to realize his or her right. In the interpretation of § 765a ZPO, the general provision on the protection of the debtor, the fundamental right to life and health must be taken into account.\textsuperscript{478} “Insofar if the debtor is in a condition in which the stress of a certain enforcement measure creates real danger for his or her life or health, this may be a reason to suspend a certain enforcement measure temporarily or, in exceptional cases, even bar it definitely”\textsuperscript{479}

The right to physical protection is guaranteed by Art. 2(2)\textsuperscript{nd} sentence GG. This provision is specially applicable when the enforcement measure consists in coercive detention, which may be the case regarding actions that cannot be taken by others to break the debtor’s will so that he or she performs the action owed (§§ 888, 890 ZPO)\textsuperscript{480}. The idea of this enforcement measure is that the imprisonment should to the creditor. There is also coercive measure less invasive to break the resistance, which consist in a coercive penalty payment. The detention as coercive measure proportionally ponderate is an \textit{ultima ratio} device\textsuperscript{481}. In other words the coercive detention can only be ordered if ordering a coercive penalty payment has proven ineffective or makes no sense at all, and thus, requires that this measure be applied as only\textsuperscript{482}.

\textsuperscript{477} See KERN, Germany National Report: “This stress is only a by-product of the enforcement which cannot be avoided”. BAUR Fritz / STURNER Rolf / BRUNS Alexander, Zwangsvollstreckungsrecht, 13\textsuperscript{th} ed., (Heidelberg: C.F. Müller 2006), p. 82 (mn. 7.3).

\textsuperscript{478} See KERN, Germany National Report; Cf. BVerfG, NJW 2005, 657; BGH, NJW 2005, 1859; 2006, 508; 2008, 1000; NJW-Rechtsprechungs-Report (NJW-RR) 2011, 300; SCHUSCHKE, Winfried, Lebensschutz contra Eigentumsgarantie – Zu den Grenzen des § 765a ZPO in der Räumungsvollstreckung, NJW 2006, 874-877; KAISER Jan, Räumung und Vollstreckungsschutz bei Suizidgefahr, NJW 2011, 2412-2414; See KERN, National Report: “An example is the enforcement of an eviction claim against a very old residential tenant who might not survive the stress of being expelled from the premises he or she knows”; BVerfGE 52, 214 et seq.; 84, 345 et seq.; BVerfG, NJW 1992, 1155; 1994, 1272; 1998, 295, 296. See KERN, National Report: “It should also be mentioned in this context that an eviction from residential premises may not be ordered as an interim measure unless the debtor is liable of trespassing or there is an imminent danger for life or health of the creditor of the interim measure (§ 940a(1) ZPO)”.

\textsuperscript{479} See KERN, Germany National Report.

\textsuperscript{480} See KERN, Germany National Report: “Interestingly, the Federal Constitutional Court in two landmark cases has interpreted art. 2(1) GG as guaranteeing the personal freedom in the sense of doing whatever one wants, as long as this is not contrary to the law. However, this very broad and general right to personal freedom does not play too important a role in the context of enforcement measures because
To guarantee the inviolability of the home Art. 13(1) GG stipulates that searches must, as a matter of principle, be authorized by a judge. This fundamental right plays a relevant role in “the context of enforcement measures when an enforcement officer (Gerichtsvollzieher) has to enter the debtor’s premises in order to search for objects which can be attached or when the enforcement officer has to enforce the vacation of the residential premises”. From the right to personal freedom in art. 2(1) GG and the guarantee of human dignity in art. 1(1) GG the German Federal Constitutional Court has derived a right to “informational self-determination”. The legislature has taken this right into account in drafting § 802f ZPO and § 284 AO, according to which the debtor has to establish an inventory of his or her assets, together with § 802k ZPO, which governs the collection of these inventories and their permissible uses.

In France the Court merely stated a TV or computer was not grasped but a music channel. Article L112-2 Can be entered: The property that the law exempts from seizure; The property that the law makes transferable unless otherwise provided; Provisions, pensions and are in the nature of maintenance, except for the payment of maintenance already provided by seizing seizure part inter alias.
In Croatia, where monetary debt is concerned, there are limitations of enforcement which partly arise from the rules of civil law that limit liability of legal heirs. Also, certain social security payments are excluded from seizure (see Art. 172 LE). Some property is also excluded from enforcement dependent on its function: agricultural land within limits necessary for the maintenance of the persons whose sole occupation is agriculture, and some movables, e.g. food and firewood necessary for agricultural family for a period of 6 months (see also Art. 75 LE). If enforcement is effected on salary of the debtor, there is an amount excluded from enforcement. It is currently two thirds of the average net salary in the Republic of Croatia, unless the claim is for children maintenance (in that case, only the amount which equals one half of the average salary is excluded). See Art. 173 LE. All these exclusions are in principle not taken into account ex officio – the debtor has to invoke them.

With respect to registered small businesses and craftsmen, enforcement cannot be effected on rights and assets necessary for the conduct of registered trade, if such trade is the main source of income for the owners. Certain movables cannot be seized (eg medals and decorations), and certain social security payments are also excluded from enforcement (see Art. 148 LE). Generally, protection of dignity of debtors is positive and has to be maintained in the enforcement proceedings. Some issues may arise with respect to detail (how extensive the limitations are) and the effectiveness of limitations (in many cases, limitations are being circumvented by rules on secured debt, according to which if the debt was secured by particular property (eg. houses or apartments), this property is not subject to limitations (Art. 77 LE). As most of the debt today arises from bank mortgages, restrictions from seizure are rarely applied.

Under Hungarian law the debtor is provided protection against the creditor at several levels. The Fundamental Law of Hungary contains such general principles that, by their nature, refer not only to judicial enforcement, but based on their content, may provide, for example, an opportunity for filing a constitutional complaint against a court decision. Of these, mention should be made of the following: (i) Hungary shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position and protect the rights of consumers (Article M); (ii) Everyone shall have the right to freedom and personal security. […] Any person whose freedom has been wrongly or unlawfully restricted shall be entitled to appropriate compensation.
(Article V); (iii) everyone shall have the right to property and to succession. The ownership of property shall entail social responsibility (Article XIII); (iv) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. This right includes the obligation of such authorities to give reasons for their decisions; (v) Everyone shall have the right to demand compensation, as specified in an act of Parliament, for damages unlawfully caused by the authorities in discharging their duties (Article XXIV); (vi) In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […] Everyone shall have the right to seek remedy against judicial, administrative or other official decisions, which infringe upon his or her rights or legitimate interests (Article XXVIII). Besides the Fundamental Law, the debtor is ensured protection at the level of the legal system by the separation of singular enforcement from universal enforcement. While the former is directed at the debtor’s specific assets, the latter “seizes the debtor’s assets in their entirety to use them to settle the debtor’s debts”. 493 Coercive enforcement may restrict the debtor’s pecuniary rights in the first place but, in exceptional cases, it may also concern his civil rights. Coercive action against the person of the debtor is implemented by the police based on the measures taken by the bailiff. 494 In accordance with the Enforcement Act, during judicial enforcement, money claims are to be collected, in the first place, from the funds on the debtor’s account administered by the financial institution, and in the second place, from the debtor’s wages. If it is foreseeable that the enforcement directed at the funds deposited in a financial institution in the name of the debtor or at his wages will not lead to success within a relatively short period of time, any asset of the debtor may be subject to enforcement 495. However, the seized real property may be sold only if the claim is not fully covered by other assets of the debtor or it could be satisfied in a disproportionately long period of time (§ 7 Enforcement Act). The creditor’s right to disposition depends on the creditor’s disposition from what type of asset of the debtor he wishes to secure for enforcement of his claim. However, this right may only be exercised within lawful limits, thus e.g. it cannot be directed at pointing out specific assets during the seizure (§ 8 Enforcement Act) 496.

In Finland nowadays, human rights have more weight in enforcement matters. This trend has been current from 1995 onwards. Yet, the idea is not entirely modern: the Code of 1734 already included a rule according to which the enforcement had to be fair. However, some steps have been taken quite recently, for example the last possibility of

using custody as an ultimate coercive measure during the enforcement was abandoned in 1996. The most important coercive measure during the enforcement is now that the debtor can be brought to the enforcement inquiry by the police. However, it is not legal to take him/her beforehand into custody in order to secure that the debtor will be brought to the enforcement inquiry.\textsuperscript{497}

The enforcement authorities have to protect the interests of both creditors and debtors. The debtor does not normally need legal counsel because the enforcement authorities will take his/her rights into consideration ex officio. It is their duty to observe what is fair and that the debtor does not suffer more than needed in order to execute the judgment.\textsuperscript{498} The principle of fairness includes a norm concerning consideration of conflicting interests. Where a conflict exists it is the interests of the debtor which have more – prima facie – value than those of the creditor.\textsuperscript{499}

The main principles followed have been taken into the Enforcement Code and the meaning of the fairness during the enforcement procedure has been strongly underlined. According to the general fairness principle, the executive officer has the duty to act properly and impartially when carrying out his/her official duties. In addition, the executive duties have to be carried out rapidly, effectively and expediently. It is forbidden to cause more harm to the debtor or to the third party than is needed in order to achieve the aim of the enforcement. The executive officer also has the duty to promote the independent initiative of the debtor and the readiness of the parties to conciliate. This principle of due form has been seen as an important tool in balancing the wide powers of the executive authority and optional rules on the procedure. The principle of proportionality is also included in the fairness principle.\textsuperscript{500} For reasons of fairness, the enforcement has to be undertaken without unnecessary public attention and harm. Any harm caused must be related to the significance of the enforcement matter. Radical acts must be avoided and the execution must be done in a discreet way. In addition, the business relationships as well as neighbourhood relations and housing must not be endangered unless absolutely necessary. The bailiff has also a duty to promote a conciliatory spirit amongst the parties.\textsuperscript{501}

One of the most important principles in enforcement is transparency. The executive officer has a duty to inform the debtor and to protect him/her ex officio. The duty to inform the party is wider if s/he is without a legal counsel or an attorney. When informing the parties, the executive officer has, however, to keep in mind that he is to remain impartial: the parties have also to be treated equally. Transparency is one part in the executive service. Like the administration of justice has nowadays been seen as a court service in Scandinavia, even the executive part in civil litigation has the same function as a service for clients, who in this instance are the creditor and the debtor.\textsuperscript{502} Even if the enforcement is a liquidation process, the rehabilitative ideas have been

\textsuperscript{497} ERVO, Laura, Finland National Report.
\textsuperscript{498} The Enforcement Code, Chapter 1, Section 19.
\textsuperscript{499} ERVO, Laura, Finland National Report.
\textsuperscript{500} ERVO, Laura, Finland National Report.
\textsuperscript{501} ERVO, Laura, Finland National Report.
\textsuperscript{502} ERVO, Laura, Finland National Report.
current during the recent reforms. In respect of the debtors, who are legal persons, the idea on capability of surviving has been realized with the help of the right to beneficium and the protected portion, which – after the reform – better cover the interests of legal persons.

In order to obtain payment for the applicant the bailiff shall search, to the extent warranted by the circumstances, for assets belonging to the debtor. Provisions on the minimum measures towards a search for assets and the ascertainment of the whereabouts of the debtor are contained in a Government Decree. The rule above obliges the bailiff to search the property. In addition, there are numerous rules in the Enforcement Code according to which the bailiff may search the property. However, the prerequisite for all kinds of searches is that there is a need to search in order to obtain payment for the applicant: the enforcement matter has to be pending or in a passive register. In addition, the search must be stopped if there are already enough assets for the payment. The bailiff considers the necessary measures in casu and by himself. There is no exact rule in the legislation, only provisions on the minimum measures in a Government Decree. A search may be also carried out at the residence of the debtor without his or her consent, if there is a justifiable reason to believe that attachable assets can be found there and the bailiff has not otherwise located sufficient seizable assets belonging indisputedly to the debtor. The above provision on the debtor applies also to a third party if there is a very good reason to believe that the residence contains assets belonging to the debtor. The opportunity shall first be reserved to the third party to surrender such assets, unless immediate search measures are to be deemed unavoidable.

Modern enforcement has therefore also some characteristics of loan arrangements even if it still is liquidation procedure. The right to be heard is not as absolute a right at the enforcement level as it is in a civil proceeding. The parties have been already heard during the proceedings when the ground for the enforcement was obtained. In addition, enforcement is based on the principle of judicial investigation, which also minimizes the need to be heard. However, the debtor usually has a right to be heard. Different forms of notices also serve as tools to deliver information to the debtor. With the reform of 2003, there is now a general rule covering the hearing of the parties in the Code of Enforcement. According to the Chapter 3, Section 32, the person in question shall be reserved an opportunity in advance to be heard in a suitable manner by a bailiff. In practice, the bailiff calls the debtor and s/he gains the right to be heard straight away.

The enforcement authorities aim for a voluntary payment after the sending of a collection letter. In order to achieve a voluntary repayment of the debt, the assistant

503 ERVO, Laura, Finland National Report: “One example of that kind of thinking is that the enforcement is now time limited and its grounds are no longer valid indefinately. The usual time limit is 15 – 20 years if the debtor is a natural person. The idea is to prevent unfair long-lasting enforcement”.
504 The Enforcement Code, Chapter 4, Sections 21, 64, 65.
505 The Enforcement Code, Chapter 3, Section 48.
506 ERVO, Laura, Finland National Report.
507 ERVO, Laura, Finland National Report.
508 The Enforcement Code, Chapter 3, Section 49.
509 ERVO, Laura, Finland National Report.
enforcement officer and the debtor may set up a payment schedule. The preconditions for a schedule will be assessed on a case-by-case basis.\textsuperscript{510}

The execution officer in the area where the debtor has a domicile is competent to handle all enforcement matters against the debtor with the help of execution officers in other places where the debtor has property. The idea is that every debtor has only one personal District Bailiff and only one personal assistant executive officer, who take care of all of his /her all debts and other possible executive matters. The aim is to take the debtor’s situation as a whole into consideration all the time. Even though the creditor can file with any execution officer in the country, there is only one person who is responsible for one debtor’s whole situation. The files will therefore be transferred, after the opening tasks have been completed, to the executive officer in charge, who will be responsible for the case in future.\textsuperscript{511} The debtor is thus well protected even from the perspective of his personal integrity.

3.18. Latin America

In Argentina the National Constitution (CN) adopts a federal system of government.\textsuperscript{512} The Argentine Constitution (1853) enshrines the separation of powers property rights (Art. 16), the choice of individual life plans without state interference (Art. 19), equality (Art. 16) and due process (Art.18). In a similar vein, the Civil Code adopted in 1869, also modified in a similar vein is the aforementioned line of liberal thought. The procedure codes correspond to these rights and are a derivation of the Spanish civil procedure law of the late eight, with its strong charge concentration of power, lack of immediacy and formalities. In Argentina is ruled the principle of prohibition of imprisonment for debt is current, incorporated that country’s law through constitutional status of international instruments referred to in Article 75 inc. 22 National Constitution\textsuperscript{513}. The principle states that no one shall be detained for debt of

\textsuperscript{510} http://www.oikeus.fi/8851.htm. Last accessed on 10.02.2008..
\textsuperscript{511} ERVO, Laura, Finland National Report.
\textsuperscript{512} OTEIZA, Eduardo, Argentina National Report: “That is why the country has 25 different procedure codes that are engaged in civil-a matter for each province, one in the City of Buenos Aires and one National-, used in national and federal courts. Add to that a set of laws that deal with matters other procedures, criminal, labor, etc., which constitutes a real patchwork of rules; often with marked similarities with asymmetries derived and other travel each provincial system has experienced historically. The task of giving an overview of all of these systems, while not simple, is simplified part because many provinces have replicated the text of the Civil and Commercial Procedure Code of the Nation (CPCCN) which was sanctioned in year 1972, therefore, because most of the provinces have adopted very similar to CPCCN texts we will only discuss the mechanisms under this regulatory text…The principle states that no one shall be detained for debt of all kinds; regardless of their source and nature, but as an exception not limit the orders of a competent judicial authority issued for breaches of duties or familiar assistance or some particular fiscal or labora duties matter. From this provision are in similar form exclude any coercive measures which limit the personal freedom”.
\textsuperscript{513} The Nacional Constitution links with the rule of the American Convention on Human Rights states that “No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for breaches of duties "as well as Article 11 of the International Covenant on Civil and Political Rights which states” no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation".
any kinds; regardless of their source and nature, unless as ordered by a competent judicial authority issued for breaches of duties or familiar assistance or some particular fiscal or laboral matter duties matter. This provision similarly exclude any coercive measures, which limit the personal freedom$^{514}$.

3.19. Asia

While the fundamental aim of enforcement proceeding in Japanese law is the effective execution of claims, rights of obligors to due process, privacy, and minimum standards of living (Constitution of Japan §25) must not be ignored. So some statutes put a great deal of thought into them as follows$^{515}$. (i) The Civil Execution Act enumerates movables that must not be seized (§131). This provision is based on several policy considerations, for example, to protect the living, business, or spiritual life of obligors. And this Act restricts the seizure of a claim pertaining to a salary, etc. to protect the living of obligors (§152). So too has it been ruled to maintain the minimum standards of debtor’s living and their families, clothes, bedclothes, food and fuel that are indispensable for the living of the obligors, and living expenses for two months (the Order for Enforcement of the Civil Execution Act §1 fixes the amount of money as 660,000 yen) are forbidden to be seized$^{516}$. On this point, there are several opinions. Some critics state that it is necessary to classify the proportion or amount that must not be seized according to a salary amount or family size. In doing so, an obligee needs to investigate those conditions. But requiring such an investigation imposes an undue burden on the obligee and impairs efficiency of execution process$^{517}$. For this reason the Act adopts a uniform standard. If the obligor might be unable to maintain a minimum standards of living with an amount designated by the Act, he can by a petition request an execution court to change the scope of seizure-prohibited claims (§153). But the critics criticize this system, stating that it isn’t realistic to expect an obligor to submit a petition$^{518}$. (ii) There are regulations for maintaining the business$^{519}$. (iii) Also is protected the sphere to ensure the

$^{514}$ OTEIZA, Eduardo, Argentina National Report.
$^{515}$ YOSHIGAKI, Minoru, Japan National Report.
$^{516}$ YOSHIGAKI, Minoru, Japan National Report: “As to a claim pertaining to a compensation, wage, salary, retirement pension, bonus or any remuneration similar in nature, the portion equivalent to three-quarters of the performance to be received when such claim is due (if such amount exceeds the amount specified by the Cabinet Order (330,000 Yen per month. this amount is specified by taking into account an average household’s necessary living expenses.), the portion equivalent to the amount specified) must not be seized (§152(1)(2))”.
$^{517}$ YOSHIGAKI, Minoru, Japan National Report.
$^{518}$ YOSHIGAKI, Minoru, Japan National Report: “In addition, the Public Assistance Act §58 and the Child Welfare Act §57-5 (3) prohibit attachments of already furnished public assistance benefit, and the Labor Standards Act §83 (2) prohibit seizure of the right to receive compensation of the workers”.
$^{519}$ YOSHIGAKI, Minoru, Japan National Report: “For example, to maintain business of an obligor, agricultural equipment, fertilizers, seeds, fishnets, baits, juvenile fish, and other equipment or any other objects (excluding products) that are indispensable for the business are forbidden to be seized. While it
spiritual and private life is protected, etc. For example, to respect freedom of conscience of obligors and protect spiritual life of obligors, idols, ritual articles, religious texts, and other object that is indispensable for direct use in a religious service or worship are forbidden to be seized\(^{520}\). To protect obligors' privacy, diaries are forbidden to be seized. And so forth. To ensure cultured living of obligors, equipment necessary to learn and welfare device (hearing aids, wheelchairs, caring beds, lifters, printers of braille, etc.) are forbidden to be seized\(^{521}\). (iii) Protection of employment in execution procedure is centrally a protection of seizure-prohibited movables (See II-3). Protection of employment in a bankrupt procedure is following. First, while bankruptcy doesn't have influence on an employment contract when an employee becomes bankrupt, in practice, a person often cannot maintain their employment because they are half-compelled to pay a debt through his retirement benefits, or through the qualification limits of statutes, which doesn't permit bankruptcy to hold the position\(^{522}\). (iv) Japanese Law rules also provide for restart guarantee. In bankruptcy proceedings, the property subject to a liquidating distribution consists of any and all property that a bankrupt holds at the time of commencement of bankruptcy proceedings (Bankruptcy Act §34(1)), and so the property the bankrupt receives after the commencement is retained in the proceedings for the purpose of restarting the bankrupt individual\(^{523}\). And a bankruptcy court must make an order of grant of discharge unless a bankrupt conducts certain acts\(^{524}\). When the order of grant of discharge becomes final and binding, a bankrupt is discharged from his liabilities for bankruptcy claims, except for a liquidating distribution through bankruptcy proceedings (Bankruptcy Act §253(1)). This discharge is considered as the means to guarantee the chance of restarting for the unfortunate bankrupt individual who failed in their economic activity\(^{525}\).

In Chinese Law, there are some limitations on the enforceable assets in China for the purpose of debtor protection\(^{526}\). (i) Although there is no regulation concerning religious activity, some other limitations are imposed on the creditor’s rights to protect the privacy of the debtor\(^{527}\). (ii) Firstly, when the court

\(^{520}\) YOSHIGAKI, Minoru, Japan National Report: “In addition, a building and site owned and used by a religious corporation for the purpose of worship cannot be attached for the purpose of any monetary credits (except in the case of attachment for the purpose of exercising an execution of the mortgage and in the case where an order of commencement of bankruptcy proceedings has been issued)(Religious Corporations Act §83)”.

\(^{521}\) YOSHIGAKI, Minoru, Japan National Report.

\(^{522}\) YOSHIGAKI, Minoru, Japan National Report.

\(^{523}\) YOSHIGAKI, Minoru, Japan National Report.

\(^{524}\) YOSHIGAKI, Minoru, Japan National Report.

\(^{525}\) YOSHIGAKI, Minoru, Japan National Report.

\(^{526}\) See Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.

\(^{527}\) Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Article 5 of the Provisions of the Supreme People’s Court for the People’s Courts to Seal up, Distrain and Freeze Properties in Civil
withhold or withdraw a portion of the income of the party who fails to perform obligations determined in a legal instrument. Article 243 Paragraph 1 of the CPL demands the court to ensure that necessary living expenses for the debtor and his or her dependent family members are retained by the party. Secondly, when the court intends to seize, impound, freeze, auction or sell a portion of property of the party who fails to perform obligations determined in a legal instrument, Article 244 Paragraph 1 of the CPL demands the court to ensure that necessities of life for the debtor and his or her dependent family members are retained. It is obvious that all of these regulations reflect the principle of proportionality and try to settle different values and interests into a balance. To begin with, this limitation is in accordance with the principle of proportionality because it strikes a balance between the protection of the debtor’s fundamental rights and the protection of the creditor’s interests. Such kind of limitation not only serves as an enforcement barrier to ensure the minimum living standard of the debtor and his family, but also protects the debtor’s dignity. Secondly, this kind of limitation could eventually also be a win-win solution for all parties involved eventually. On the one hand, it ensures the existence of the debtor and his family; on the other hand, it plays a positive role in ensuring that the debtor can continue his employment or self-activity. The fact that the debtor is still working actively should be in the immediate interest of the creditor. For example, Article 254 of the CPL stipulates that when the court takes all the enforcement measures in this Law and the debtor is still unable to repay debts, he or she shall continue to perform obligations. Once the creditor discovers that the enforcee has any other property, the creditor may apply to the court for enforcement at any time.

In the Philippines the most basic protection for debtors can be found in the general requirement for due process under the Philippine Constitution, that provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” [Art. III, §1, PHIL. CONST.] Procedural Due Process:

Enforcement stipulates that the court shall not seal up, seize or freeze the following properties: articles necessary for the enforcee and his dependent family members to complete compulsory education; enforcee’s unpublicized inventions or unpublished works; medals of the enforcee, and his other articles of honor and commendation”.

528 FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “Besides, there are some similar regulations in the Provisions of the Supreme People’s Court for the People’s Courts to Seal up, Distrain and Freeze Properties in Civil Enforcement, according to Article 5, the following properties shall not be seized, sealed up or frozen by the court: clothes, furniture, kitchenware, tableware and other necessities for family life, which are necessary for the life of the enforcee and his dependent family members; living expenses necessary for the enforcee and his dependent family members. If there is a lowest local rate for security of living, the necessary living expenses shall be determined according to such rate; auxiliary devices and medical articles necessary for the physical handicap of the enforcee and his dependent family members”.

529 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.

530 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
Procedural due process is afforded to debtors through the general provisions of the Rules of Civil Procedure, where debtors are generally required to be properly served with notice of any monetary claim against them (the claim being considered a personal action). Absent such proper service of summons, the court does not have jurisdiction over the debtor and the debtor to properly participate in the suit for the collection of the credit or the foreclosure of property in satisfaction of such debt, during which time, the debtor may properly ventilate any defenses or counterclaims that he may have against the debtor.

5. Special protection of debtor’s rights by the substantive and procedural law (general and comparative overview)

a. General remarks

3.20. Under normal circumstances, enforcement does not constitute a violation of the debtor’s rights because it is justified by the creditor’s overriding fundamental right of to efficient enforcement of his rights and protection of his claims. Insofar as the enforcement measures are justified, they may affect the debtor’s fundamental rights to freedom and, depending on the measure in issue, potentially property or other fundamental rights. When the debtor believes that, on the facts, his interests should prevail, he can use various lines of defense and seek remedies against the enforcement. The substantive law provides for the protection of potential debtors by automatically invalidating certain obligations or by allowing the debtor to annul certain obligation: e.g. a legal act which must be considered to be a usury is invalid ipso iure according to German Law (§ 134(2) BGB), and a declaration obtained by fraud may be invalidated by the victim according to §§ 142(1), 123(1) BGB. These are only examples; it would be impossible to provide a whole overview of the substantive rules serving the protection of the debtor. Regardless of the type of obligation, there is also a general rule that the creditor may not abuse his or her right. In practice, however, this rule plays a limited role. Additional rules concerning good faith (bona fides) as a limit for the rights of creditor could also be mentioned. The procedural law at § 811(1) ZPO lists a number of non-attachable, tangible

531 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report
532 BERNARDO, Pedro, Philippines National Report.
534 See KERN, National Report: “However, this provision may not be used to devaluate an existing claim”; GRÜNEBERG, Christian in: Palandt (founder), Bürgerliches Gesetzbuch, commentary, 73rd ed., (Munich: C.H. Beck, 2014), § 242 nn. 1.
movables. The reasons for these exemptions are manifold and have very different roots. Some objects are indispensable to lead a life in dignity, and some are required to make use of fundamental rights, including the rights to information and freedom of religion.  

If the debtor could have made his objections during normal declaratory proceedings, these objections are barred at the enforcement stage due to the principle of res judicata, which has its justification in the conflicting values of legal certainty and fair behavior.

b. National reports

3.21. Europe

German Law allows the debtor to continue a professional activity. Finally, a rather modern aspect is the protection of the relationship with an animal living in the debtor’s household by § 811c ZPO, which is said to serve the protection of animals and the emotional well-being of the debtor.  § 812 ZPO provides that objects which belong to, and are needed in, the debtor’s household should not be attached if it is evident that their liquidation would result in proceeds which are disproportionally low taking into account the value of the object. The execution court and the first instance court have no power to investigate the debtor’s assets and that the investigative powers of the enforcement officer are limited. In addition, the gathering, keeping and use of personal data on the debtor and his or her assets are clearly governed by statutory law. Income that is payable in money may be attached only subject to the detailed rules set out in §§ 850 et seq. ZPO. All in all, it is fair to say that the current law strikes an adequate compromise between the rights of the creditor and the debtor. As a provisional conclusion in the German legal system there

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540 See KERN, National Report: “Suffice it to note that 15 sections with many subsections try to strike a compromise between the rights of the debtor and the creditor. Probably the most interesting provision for a foreign reader is § 850c ZPO. This provision contains the exact thresholds of earned income which cannot be attached”.

541 See KERN, Germany National Report: “See In particular, the reform of 2009 cured some deficiencies of the earlier law which stemmed from 1879, a time when it was easier to identify assets, and therefore
is no such thing as a “perfect” solution that “works best” regardless of the country, time and society. All in all, the current German system strikes a very balanced compromise between creditor rights and debtor protection. The same is true for the quality and efficiency of debt collection in Germany.\textsuperscript{542}

Traditionally, German law did not provide for a “fresh start”. To the contrary, the debtor’s obligations were not terminated after insolvency. This made a “fresh start” almost impossible. The Insolvency Code (Insolvenzordnung, InsO)\textsuperscript{543}, which entered into force on 1st January 1999, introduced for private persons the discharge of residual debt (§§ 286-303 InsO).\textsuperscript{544} The reform of 2013 created more important incentives for the debtor to strive for in fulfilling the outstanding debt. At the same time, it reduces the duration of the proceedings. Thus, the debtor can be discharged after three or five years if he or she fulfills a certain percentage of the outstanding debt within these periods or at least can afford the costs of the proceedings.\textsuperscript{545}

The German Law of enforcement rules provides a series of remedy devices against the enforcement. (i) If the claim does not exist and the debtor had no chance to put this forward as an objection against the claim, because the enforcement is not justified, this would therefore constitute an infringement of the debtor’s fundamental rights. The debtor can defend against enforcement with objections against the claim by suing the debtor with an action in the sense of § 767 ZPO. (ii) The enforcement normally presupposes that an execution clause has been put on a copy of the judgment or other title by a court officer, declaring the title enforceable for the execution creditor against the execution debtor at issue (§ 724 ZPO). It also presupposes that the parties (creditor-debtor) are the


\textsuperscript{543} Insolvenzordnung of 5 October 1994, BGBl. I, p. 2866.

\textsuperscript{544} See KERN, Germany National Report: “Since its enactment, these provisions have been the object of several amendments, regarding the prerequisites of discharge as well as the number of years after which the debtor will be discharged. The latest reform dates from 2013 and enters into force on 1st July 2014Act on the Abbreviation of Discharge Proceedings and the Reinforcement of Creditor Rights (Gesetz zur Verkürzung des Restschuldbefreiungsverfahrens und zur Stärkung der Gläubigerrechte) of 15 July 2013, BGBl. I, p. 2379”.

\textsuperscript{545} See KERN, Germany National Report: “The legislature took into account that most debtors do not need a probation period of six years, but a chance to a fresh start. Another reason for the reform was to align German bankruptcy law with other European bankruptcy laws which provide shorter probation times than the current six years. See Bill of the Federal Government, Offprint of the Federal Council (BR-Drucks.) 467/12 of 10 August 2012, p. 1”.

was outdated in today’s complex world”. Cf. WURDINGER, Markus Die Sachaufklärung in der Einzelzwangsvollstreckung: die Informationsgewinnung des Vollstreckungsgläubigers de lege lata et ferenda, JZ 2011, 177, 183: “jumping from the 19th to the 21st century”.

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right enforcement parties or at this time, enforcement would violate the rights of the debtor. These reasons, authorize the debtor -who believes that the title is correct, but should not be enforced against him or her, by this creditor, or at this time- to apply before the court to which the court officer belongs. The remedy tends to object the claim enforceability. In case of an execution clause based on a fact that has been considered proven by the court officer, the debtor may also sue according to § 768 ZPO. (iii) The enforcement proceeding rules strike a balanced treatment of the rights of the parties. It must be remarked that not every violation of such a rule also constitutes a violation of a fundamental right of the creditor or the debtor. Additionally having the debtor and creditor such issues by object to the violation of procedural rules, indirectly serves to protect their fundamental rights. Both parties can apply to the court for any such violation and thereby also protect their fundamental rights. The remedy is provided for in § 766 ZPO. (iv) Against a provisional enforcement the debtor’s means to defend themselves by providing security have been accounted for. To avoid a provisional enforcement the debtor can provide a security and makes use of this additional of protection of their fundamental rights. (v) The most interesting ground for objection is an open hardship clause. In case of an enforcement, which would causes, a particular hardship for the debtor, he may apply to the court for protection. This remedy is in that context, the most evident and that which makes most explicit the conflicting rights of debtor and creditor. There are many situations where the clause could be applied, e.g. in case of provisional enforcement of judgments (§ 712(1) 2nd sentence, cf. supra sub 9), or when the debtor is not able to provide security, the court must deny provisional enforcement or limit it to merely “preservational” measures. (vi) § 765a ZPO is the general rule for protective orders in the context of enforcement proceedings. This protection orders is limited only to certain enforcement measures or to a temporary stay of enforcement. Finally (vii) although the debtor can appeal against a judgment, which is provisionally enforceable, does not automatically entail suspension of provisional enforcement. On the contrary this only occurs when the rules on avoiding provisional enforcement by providing security apply.

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546 See KERN, Germany National Report: “e.g., in case of death of the original debtor, because the debtor is not the heir of the original debtor and therefore not liable; or in case of death of the original creditor, because the creditor who wants to enforce is not the heir of the original creditor”.

547 See KERN, Germany National Report: “e.g., because the title ordered the debtor to pay only in exchange of a delivery of the creditor which, contrary to the allegations of the creditor, has not taken place yet”.

548 See KERN, Germany National Report: “This application is called “reminder” (Erinnerung) but has nothing to do with “reminding” in the strict sense, is provided for in § 732 ZPO”.

549 See KERN, Germany National Report: “However, it should be noted that this only concerns provisional enforcement and therefore is not too heavy a limitation to the creditor’s rights”.

550 See KERN, Germany National Report: “And exceptionally only in certain circumstances enforcement can be excluded definitely. When the enforcement is the auction of real estate, §§ 30a-30c ZVG contains special rules for a temporary stay of the enforcement proceedings”.
The same is valid for actions based on an objection against the claim or its enforceability.\textsuperscript{551}

In Hungary after the initiation of the enforcement proceedings there are many remedies. (i) The debtor may provide documentary evidence that it is probable that he no longer owes a debt or that the claim is unfounded. Such announcement has to be submitted to the bailiff accompanied by the appropriate document, who will set a 15-day deadline for the person requesting the enforcement to make a statement.\textsuperscript{552} If the person requesting the enforcement acknowledges the cessation of the claim and pays the costs incurred, the enforcement is terminated. However, it is more common that the person requesting the enforcement does not acknowledge that the debtor has fully performed his obligation. The controversy between the parties is usually concerning the amount. In such cases the dispute may be resolved within the framework of an enforcement action. (ii) A special remedy relating to the implementation of enforcement is the demurrer of enforcement. The demurrer of enforcement cannot be linked to the person of the notary public drafting the notarial document or his actions. The demurrer of enforcement as an institution of remedy is always based on the bailiff’s unlawful actions or his failure to take action. The demurrer may be submitted either by the debtor or the creditor to the court effectuating the enforcement. More than six months after the bailiff’s actions, it is not possible to file a demurrer of enforcement. No justification is accepted for the failure to meet the deadline [§ 217 Enforcement Act]. The special nature of the demurrer is constituted by the fact that it is a non-dutyable remedy and has no suspensory effect on the actions. If it is successful, the court suspends the bailiff’s actions or orders him to take different action.\textsuperscript{553} Finally (iii) an appeal may be lodged against any court order passed in the course of the implementation of enforcement.\textsuperscript{554}

In Italy are ruled several types of protections of the debtor’s rights exist. (i) First of all, not all kinds of assets and credits can be seized for the purpose of coercive expropriation. The most important provisions in this regard are the ones concerning the seizure of salaries and other credits and the prohibition against certain types of seizures.\textsuperscript{555} This limit can only be exceeded when the creditor is claiming a family support credit, aimed at protecting basic rights and necessities.

\textsuperscript{551} See KERN, Germany National Report: “According to § 769 ZPO, the competent court for these actions may, on application, order that enforcement be stayed with or without provision of security. Only a decision or certain documents which are favorable to the debtor, and not the filing of the defense, have immediate effects according to § 775 ZPO”.

\textsuperscript{552} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report.


\textsuperscript{554} KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report.

\textsuperscript{555} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report : “From the first point of view, under article 545 of the Code of Civil Procedure, family support credits and other benefit credits aimed at ensuring basic needs cannot be seized. Moreover, from the second point of view, salaries and other credits stemming from employment can only be seized in the measure of one fifth, under article 545(4)”.
In this case, the credit can be seized in the measure determined by the President of the competent Tribunal, under Article 545(3). Pursuant to article 514, some assets are not seizable. These limitations are only restricted to credits and items which serve the purpose of ensuring minimum standards of life. In this regard, it is important to underline that the only credit that cannot be seized is the so-called “credito alimentare”, that is to say the form of credit which aims at ensuring a minimum sum of money, in order to satisfy basic needs, such as food. Similarly, the only assets that cannot be seized are the ones, which are strictly indispensable for basic life needs, such as a certain amount of clothes or kitchenware. Outside of these narrow limits, the claimant creditor can in general seize credits and assets freely. (ii) In terms of procedural remedies of protection, the Code of Civil Procedure sets forth two different types of challenges to the enforcement proceedings, which the debtor can use in different cases. This first type of challenge, called “opposition to enforcement”, is set forth in article 615 c.p.c. It must be used when the debtor wants to oppose to the enforcement proceedings, because the claimant creditor has no substantive right to proceed with the enforcement. On the contrary, the second type of challenge, called “opposition to enforcement acts”, must be used whenever the debtor wants to oppose to the enforcement proceedings because a formal invalidity has occurred. Opposition to enforcement acts is set forth in article 617 c.p.c.

Although the Italian system is theoretically conceived for a balance of opposing interests, some particular rules and mechanisms are often considered debtor-friendly. This idea is commonly referred to in Italian scholarship with the concept of favor debitoris; however, it must be noted that some problems of the Italian system, such as the aforementioned duration and costs of enforcement proceedings, are caused not only by provisions of law, but by external factors, such as the economic context. This basic concept is, in principle, favorable to...
creditors. However, articles 615-622 of the Code of Civil Procedure set forth types of oppositions, which can be used in order to challenge the validity of the enforcement proceedings from different points of view. It is important to underline from the outset that the result of these provisions is to balance the basic approach of the enforcement system with several possibilities, for the debtor or for third parties, to request that the existence of the substantive right of the claimant creditor is investigated. Under particular circumstances, the enforcement can be provisionally stayed because of these challenges. Another aspect of the enforcement system, which can be considered, debtor-biased is the wording of article 499 of the Code of Civil Procedure, which was amended with the reform of 2006. Article 499 sets forth the mechanism of intervention of creditors, i.e. creditors different from the claimant creditor who wishes to participate in the expropriation proceedings and to the subsequent distribution of income deriving from the coercive sale of seized asset(s).

In the Netherlands one rule protecting the debtor is that a creditor is often unable to enforce his rights unless the creditor has an appropriate judgment or court order. That basically provides a procedural warranty and enables the debtor to be heard. There are important specific rules to protect the debtor include. E.g. there are limits as to the share of the debtors income that a creditor may seize/attach\textsuperscript{560}, including also specific goods, such as a bed, blankets, a workers tools, and normal amounts of food which cannot be seized or attached by a creditor\textsuperscript{561}. There is special bankruptcy proceeding for natural persons that release a debtor that acted in good faith provided that the debtor lives of a very low allowance for a period of three years (wet schuldsanering natuurlijke personen). Finally, there are many rules that protect specific categories of debtors, such as consumers that take a loan from a bank\textsuperscript{562}.

\begin{quote}
"Certain aspects of the Dutch legal system are very favorable to creditors. Security rights are broadly available and generally unaffected by the bankruptcy of a debtor. Furthermore, the Dutch system has very broad rules that enable the creditor to obtain an asset freezing order from the court (conservatoire beslag). Such orders can be obtained even without hearing the debtor (ex parte order). Other aspects of the Dutch legal system are more favorable to the debtor. Whether the system as such should be system of coercive satisfaction of an alleged right, whose existence is not (further) investigated, in the presence of an enforceable title".
\end{quote}

\textsuperscript{560} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report:”A debtor should always be allowed to retain a minimum monthly income (beslagvrije voet, article 475d Code of Civil Procedure). The precise minimum depends on the age of the debtor, the composition of the debtors household and several other factors. It may range from almost EUR 500 per month to more than EUR 1200. For example: if the debtor supports a family with several children the minimum will be higher than if the debtor is single and does not support any children”.


\textsuperscript{562} JONGBLOED Antoine - VERKERK Remme, Netherlands National Report.
considered creditor biased or debtor biased is a political question rather than a legal one. We are the opinion that the Dutch system is a balanced system.”

3.22. Latin America

In Argentina if the relationship is between private parties, the system is balanced in its normative aspects but has certain distorting elements in practice. Excessive slowness and low interest from judges on implementing processes determines the mechanism that ultimately affects the ease or difficulty in collecting debts in the form of an interest rate. Regarding the implementation of obligations to, tolerate, do not cease and also the difficulties do not cease and are also of a practical nature. Normatively there some balance but the biggest problem is the slowness and inefficiency of the courts. If a broad concept of civil enforcement is used, understanding the relationship with the state, the answer is that the latter has rules that allow a position of advantage over private individuals.

3.23. Asia and Oceania

Japanese law provides protection to the obligors with different remedies. (i) First provision is the Guarantee of opportunities of expressing objections. Although the execution process basically proceeds upon the petition of an obligee and materials submitted by him, an obligor is heard timely in certain procedures for complaint. (ii) There are also provisions for prohibiting seizure of properties. Statutes prohibit seizures of some sort of property for various purposes (for example, protection of living, job, privacy and religion of obligors, and considerations of education and social welfare)(Civil Execution Act § 131, 152, 192, 193(2), Trust Act §16, Religious Corporations Act §58, Public Assistance Act §58, Child Welfare Act §45, Labor Standards Act §83(2).) (See II-3 for details). (iii) The debtor is protected against oppressive execution. There are a few provisions to protect obligors against oppressive executions. For example, although obligees can generally select the type of property for execution among other properties of obligors, when there are a number of movables in one place where a court execution officer are going to execute, “a court execution officer shall give consideration to the interests of the obligor as long as they do not harm the interests of the obligee”(Rules of Civil Execution § 100).

564 OTEIZA, Eduardo, Argentina National Report.
565 YOSHIGAKI, Minoru, Japan National Report: “Such procedures include objections about execution procedures (the appeal against a disposition of execution and the objection to a disposition of execution) and objections about substantive rights (the action to oppose execution and the action to oppose a grant of a certificate of execution)”.
566 YOSHIGAKI, Minoru, Japan National Report: “And as to the indirect compulsory execution for a monetary claim pertaining to duty to support, an execution court must take into account the financial
to allow the debtor a grace period for payment. In actions on small claims and actions in a summary court, if a court finds it particularly necessary or appropriate while taking into consideration the defendant's financial resources and any other circumstances concerned, the court may stipulate in the judgment a provision concerning the period for payment or provision authorizing installment payment (The Code of Civil Procedure §275-2, 375)\footnote{YOSHIGAKI, Minoru, Japan National Report.}. (v) With regard to civil execution, only a person involved in the case may inspect or copy the record thereof (Civil Execution Act §17). The property disclosure procedure (Civil Execution Act §196 ~ 203) requires very strict requirements for property disclosure, contents to be disclosed are very narrow, the procedure and its records are not open to the public, and the information obtained by this process are forbidden to use for purposes other than the legitimate one.

In Korea a lot of efforts has been devoted to maintaining the balance between the creditor and the debtor at least under the related legislations. In particular, that country is trying to sustain balance among creditors as well as between normal creditors and secured creditors. In addition, transparency in the execution procedure is well maintained by assuring both certainty and predictability through delicate and exquisite provisions under Civil Execution Act. The Korean Civil Execution Process cannot be biased either on the debtor or the creditor, because one of the most important purposes of Korean Civil Execution Jurisprudence is to maintain balance between normal creditors and secured creditors as well as among creditors\footnote{HAN, Choong-Soo, Korea National Report.}.

From the substantive side, the surety may make a defense of peremptory notice and inquiry upon the demand of performance of the creditor under Civil Act Article 437. Under that defense the creditor (obligee) must demand from the creditor (principal obligor) and he must first levy execution on the property of the creditor (principal obligor), before demanding performance of the surety. On the other hand, such special legislation as Provisional Registration Security Acts was enacted to coordinate the interests between creditors and debtors. Under Article 4 of the Act, the creditor shall not acquire the ownership of secured real estate, unless he pays the debtor an amount left by deducting the amount of credit from the value of secured real estate\footnote{HAN, Choong-Soo, Korea National Report.}.

From the procedural side there are the following safeguard for the debtor\footnote{HAN, Choong-Soo, Korea National Report.}: (i) Under Fair Debt Collection Practices Act, both illegal methods of debt collection and abuse of right by debt collectors are prevented and the

\begin{footnotesize}
\footnotetext{567}{YOSHIGAKI, Minoru, Japan National Report.}
\footnotetext{568}{HAN, Choong-Soo, Korea National Report.}
\footnotetext{569}{HAN, Choong-Soo, Korea National Report.}
\footnotetext{570}{HAN, Choong-Soo, Korea National Report.}
\end{footnotesize}
peaceful and human lives of the debtors are to be protected; (ii) Civil Execution Act Article 195 excludes certain tangible properties from seizure, and especially prohibits the creditor from garnishing the debtor’s wage exceeding certain amounts to ensure the debtor has minimum living expenses; (iii) Rehabilitation of either individual or corporate debtor has been promoted through rehabilitation process as well as liquidation process under Debtor Rehabilitation and Bankruptcy Act.

The most frequent and important compulsory execution in Korea is the forced sale (a.k.a. compulsory auction) of real estate. The court shall revoke the forced sale procedure, when it deems that there remains no surplus if all encumbrances preceding the claim of execution creditors and the costs of procedures are reimbursed with the minimum auction price. It is because there is no need to sell real estate of no value. The debtor, the owner, or the 3rd party other than them may make an appeal against a decision on permit for sale.

In China because the current civil enforcement procedure is still lacking in many institutions, which are common from a comparative perspective, there is still a failure to improve the certainty, foreseeability and transparency of this procedure. On the other hand, the enforcement department pays great attention to the enforcement process and judges in this department work very hard. Courts at different levels release lots of judicial interpretation and detailed requirement of enforcement. However, at the operational level, there are still some courts, which may violate the rules explicitly or implicitly and try to fulfill their institutional interests. According to the Chinese Enforcement law it is hard to draw a simple conclusion about the system in favor of creditor or debtor. From the creditor biased side, the pressure on the debtor is always growing stronger and the difficulty in the enforcement phrase gains more and more attention in the annual report of SPC to the National People’s Congress every year. From the debtor-biased side, it is also easy to observe that the enforcement mechanism is to push the creditor into the disadvantageous status. The enforcement settlement might serve as an adequate example. Article 230 Paragraph 1 of the CPL stipulates that “where, during enforcement, both sides reach a settlement agreement, the enforcement personnel shall record the provisions of the settlement agreement in

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571 Under Korean property law, each land and building is treated as a separate real estate.
572 HAN, Choong-Soo, Korea National Report: “However, any person who intends to file an appeal against the decision on permit for sale shall deposit as the guarantee the money equivalent to one tenth of the successful bid price or the securities recognized by the court, he or she shall not request a return of the money or securities furnished as the guarantee, if the appeal filed by a debtor and owner has been dismissed. The 3rd party shall not also request a return of the deposited amount, if the appeal filed by him or her has been dismissed. This is to deter the filing of abusive appeal and make the procedure to proceed more quickly”.
573 See FU, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
the enforcement transcripts, to which both sides shall affix their signatures or seals⁵⁷⁴. Although it may seem that respect for the parties’ disposition exists, and that this may lead to a win-win solution, nevertheless, since the judicial decision has been made and the creditor’s right has been confirmed, there is normally no space for a later settlement. It is actually not a settlement, but only a partial waive of the creditor’s right. If the court deems settlements as a good path in closing the enforcement cases, which it has the system should be considered creditor biased⁵⁷⁴.

There is no special or separate enforcement proceeding when the debtor is the State in China. In fact, the State rarely becomes the party of creditor-debtor relationship; by contrast, the administrative organism is the permanent defendant in administrative proceedings. According to Article 65 Paragraph 3 of the Administrative Procedure Law, if an administrative organism refuses to perform the judgment or order, the court may adopt some special measures different from the ones imposed on a citizen, legal person or any other organization. Specifically, the special measures in Article 65 include informing the bank to transfer from the administrative organism’s account the amount of the fine that should be returned or the damages that should be paid; putting forward a judicial proposal to the administrative organism superior to the administrative organ in question or to a supervisory or personnel department; if an administrative organ refuses to execute a judgment or order, and the circumstances are so serious that a crime is constituted, the head of the administrative organism and the person directly in charge shall be investigated for criminal responsibility according to law⁵⁷⁵. When the enforcee is an enterprise without announcement of bankruptcy, the court shall ensure to retain the production equipment and factory buildings, which are necessary for the enforcee’s regular production⁵⁷⁶. The system of personal insolvency does not exist in China and there is only the Enterprise Bankruptcy Law, and therefore, the debt discharge and ‘fresh start’, which plays an active role in the U.S. and some other common law countries is not available in that country. According to Article 257 of the CPL, when the citizen as the party against whom enforcement is sought is unable to repay his or her borrowings for living in hardship, has no source of income, and has lost his or her ability to work, the court shall issue a ruling to terminate enforcement⁵⁷⁷.

The general adversarial nature of court proceedings in the Philippines under the Rules of Court allows the debtor to participate and defend against any claim of judgment for the payment of sum or money or enforcement of security interest in property. The Rules of Court also provides for appropriate procedures

⁵⁷⁴ See Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report
⁵⁷⁵ See Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
⁵⁷⁶ Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
⁵⁷⁷ Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
for the appeal of any decision adverse to the debtor, including an ultimate appeal to the Philippine Supreme Court. The debtor may similarly apply to the appropriate court for the issuance of a temporary restraining order or writ of preliminary injunction under Rule 58 of the Rules of Court, in order to preserve the status quo. The Rules of Court also provides for additional remedies that allow debtors to set aside judgments depending on available grounds and other circumstances (such as, for example, whether the judgment has already attained finality). Within the same period, the aggrieved party may also move for reconsideration upon the grounds that the damages awarded are excessive, that the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law.

On balance Australia’s procedural framework does achieve just and expeditious resolution of debt related disputes. The procedure outlined below illustrates how debt recover in Australia is just, fair, transparent, predictable and is accessible for creditors and debtors. The creditor must not commence enforcement proceedings against a debtor until a debtor receives a default notice. The NCC further stipulates that a default notice must pertain the following requirements: the default; and the action necessary to remedy the default; and period for remediying the default; and the date after which enforcement proceedings in relation to default; and if applicable, repossession of mortgaged property may occur if the default is not remedied; and the repossession and sale of mortgaged property may not extinguish the debtor’s liability.

The commencement of enforcement proceedings is undertaken at the state and territorial jurisdiction within Australia. Enforcement hearings can only be initiated when a creditor has obtained a judgment against a debtor. Procedural rules states that a creditor must file and serve an application, which states the following: the enforcement debtor to be summoned to an enforcement hearing; and the enforcement debtor is to provide the creditor with documents relating to

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578 BERNARDO, Pedro, Philippines National Report.
579 BERNARDO, Pedro, Philippines National Report: “Relief from Judgment (Rule 38) – available only within 60 days from notice of the aggrieved party but in no case beyond 6 months from entry of the judgment or final order. “Section 1. Petition for relief from judgment, order, or other proceedings. “Section 2. Petition for relief from denial of appeal. (1a)” “Section 3. Time for filing petition; contents and verification. Another remedy to mention is Annullment of Judgment (Rule 47) – available only when the foregoing remedies are no longer available not due to the fault of the petitioner, and if based on extrinsic fraud, the action must be filed within four (4) years from its discovery; and if based on lack of jurisdiction, before it is barred by laches or estoppel”.
581 National Credit Code: 88.
582 VAN CAENEGEM, William- WEINERT, Kim, Australia National Report: “However, a default notice in not required where the creditor reasonably believes that a credit contract was induced by fraud, goods are going to be destroyed or removed, or the court authorizes the creditor to commence enforcement proceedings. See National Credit Code s 88(5)(a)-(d)”.

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their finances or documents which may demonstrate their ability to pay the creditor the amount which is owed. Accompanying this application is a creditor’s affidavit which must address following: the amount owed; the steps undertaken to recover this amount; whether or not a financial statement has been completed; why they are not satisfied with the information contained in the financial statement; and an offer to pay conduct money for the enforcement debtor’s attendance at the hearing. The court will set a date for the enforcement hearing and issue a summons, which must be served by the creditor on the enforcement debtor at least 14 days prior to the hearing date.

Debtors may challenge the application by a creditor to appoint a receiver and manager. The grounds for such a challenge include the failure by the creditor to lodge the charge, or the charge is a voidable disposition in that it could be an unfair preference, or in a commercial transaction a liquidator is appointed to the debtor company. Enforcement or judgments against and by the Crown (the state) is regulated by various federal and state and territory legislation. Overall this specific legislation does not provide for special procedural treatment when the Crown is a party to a proceeding.

In relation to real property the general rule is:

“That [sic] if the debt has not been actually paid, the Court will not, at any rate as a general rule, interfere to deprive the mortgagee of the benefit of his security, except upon the terms that an equivalent safeguard is provided to him, by means of the plaintiff bringing in an amount sufficient to meet what is claimed by the mortgagee to be due.”

The exceptions to this general rule are as follows: the amount claimed by the mortgagee is wrong; there is doubt as to the existence of the power of sale or doubt as to whether it has become exercisable at all; the validity of the

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583 VAN CAENEGEM, William-WEINERT, Kim, Australia National Report.
584 VAN CAENEGEM, William-WEINERT, Kim, Australia National Report.
587 Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161, Walsh J at 164-165 (Quoted by VAN CAENEGEM, William-WEINERT, Kim, Australia National Report)
When a mortgagee exercises their power of sale over real property both the common law imposes and statute imposes duties and obligations upon mortgagee when exercising this power. These obligations afford the debtor opportunities to retain ownership of the real property (by way of refinancing or substituting security) and to protect the debtor’s interests. Further, a debtor may be granted interlocutory relief such as, an injunction. Lastly, the National Credit Code (NCC) is applicable to all credit contracts, mortgages and guarantees. Pursuant to s 88 of the NCC a creditor must not commence enforcement proceedings against a debtor until a debtor receives a default notice, which affords a debtor with 30 days from the date of the default notice to remedy the default and/or for a debtor to exercise their rights by negotiating with the creditor to postpone repayments.

6. The conflicts of creditor-debtor rights in money-judgments enforcement

a. General remarks

3.24. As a rule, it is always possible to claim the enforcement of money obligations and to enforce monetary obligations. A ‘monetary obligation’ includes every obligation to make a payment of money, regardless of the form of payment or the currency. The payment of interest or of a fixed sum of money as damages are included even though they are secondary obligations. The central

590 Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161 (Quoted by VAN CAENEGEM, William- WEINERT, Kim, Australia National Report)
591 Competition and Consumer Act 2010 (Cth) (Quoted by VAN CAENEGEM, William- WEINERT, Kim, Australia National Report)
593 VAN CAENEGEM, William- WEINERT, Kim, Australia National Report: “When the mortgagee exercises its power of sale the mortgagee must no wilfully or recklessly sacrifice the interests of the mortgagor and must act in good faith”. See Forsyth v Blundell (1973) 129 CLR 477; Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161; James v Australia & New Zealand Banking Group Ltd (1986) 64 ALR 347.
594 VAN CAENEGEM, William- WEINERT, Kim, Australia National Report: “The courts in granting an injunction will give weight to: the balance of convenience; sufficiency of undertaking; the strength of applicant’s claim and whether or not relief might worsen the debtor’s position”.
595 National Credit Code s 5.
596 National Credit Code s 88(3).
597 National Credit Code ss 94-95.
feature in every case is that the monetary obligation must be due before it can be enforced.

b. National reports

3.25. Europe

According to German law, there is no central enforcement authority, which decides on the enforcement measures. To the contrary, the creditor addresses the competent enforcement authority or officer with a request for enforcement, e.g., a request to seize a certain object or a certain claim against a bank, employer, etc. Therefore, the creditor is in control of the enforcement measures. As regards monetary claims, the creditor can choose among various enforcement measures like attachment of a car, seizure of a claim, mortgage on real estate, auction of real estate. In order to facilitate the choice among the various enforcement measures for the creditor, the debtor has to provide an inventory of his or her assets (§ 802c ZPO).

The English Tribunals, Courts and Enforcement Act (TCE Act) 2007, (Parts 3 to 5), have modified the law of enforcement. The Part 5 of the TCE Act especially introduces various categories of protection for debtors. First, it introduces a new regime for ‘taking control of goods’, replacing the system of ‘seizure of goods’. Secondly, it creates new methods of obtaining information concerning debtor’s assets and indebtedness. Thirdly, it introduces a portfolio of measures to help those: (i) who are willing and able to pay off their debts over time and (ii) a new personal insolvency procedure for some people who have fallen into debt but have no foreseeable way out of.

The judgment

598 SANDBROOK, C., Enforcement of a Judgment (London: Sweet & Maxwell, 2006). The principle of the enforceability of monetary obligations require as general prerequisite that the monetary obligation has not yet been earned via the creditor’s own performance and that the debtor will refuse to receive the creditor’s future performance.

599 See KERN, Germany National Report: “Thanks to the detailed legal provisions mentioned above, the debtor of a claim knows the possible means of enforcement, but does not know beforehand which means the creditor will choose. The debtor of a claim for restitution, in turn, knows exactly what enforcement will be like as in claims for restitution, the object of restitution is fixed and there are no options on how to enforce such a claim”.


601 Tribunals, Courts and Enforcement Act, sections 62 to 70, Schs 12 and 13.

602 Ibid, sections 95 to 105.

603 The following background materials are available at http://www.dca.gov.uk/legist/tribenforce.htm#b
creditors are free to choose from the devices of available enforcement methods.\textsuperscript{604} Money judgments can be enforced by: (i) a writ of fieri facias or warrant of execution re-named “writs of control” and “warrants of control” by the new TCE;\textsuperscript{605} (ii) a third party debt order;\textsuperscript{606} (iii) a charging order (against land), stop order (against securities or funds in court), or a stop notice (against securities);\textsuperscript{607} (iv) by appointment of a receiver.\textsuperscript{608} (v) Some measures are only available in county courts: attachment of earnings orders\textsuperscript{609} and ‘administration orders’\textsuperscript{610}

The judgments can be enforced as follows: goods, by warrants of specific delivery or delivery (in county courts)\textsuperscript{611} and writs of specific delivery or of delivery (in the High Court);\textsuperscript{612} land, by warrants of possession (in county courts);\textsuperscript{613} and writs of possession (in the High Court);\textsuperscript{614} injunctions and other orders, by committal proceedings.\textsuperscript{615} The Seizure of Goods (renamed in the new English Enforcement Law taking control of goods: \textit{writ of control and warrants of control}): is the most common form of enforcement. The traditional operation of this method of enforcement has been (i) to seize or physically secure the debtor’s goods and (ii) to sell them at public auction, or threaten to sell them, (iii) in order to satisfy the judgment debt.

The High Court writ of \textit{fieri facias} is renamed a ‘writ of control’ and county court warrants of execution have become ‘warrants of control’. Property in all the debtor’s goods are become ‘bound’ by the writ or warrant once that document is received by the enforcement agent. Enforcement officers can gain physical ‘control’ of goods. ‘Control’ involves physically ‘securing’ them (including removing them) or entering into a ‘controlled goods agreement’ with the debtor.\textsuperscript{616} An additional form of enforcement is the \textit{Third party debt orders}:\textsuperscript{617} (known previously as ‘garnishee orders’). This enforcement measure permits the

\textsuperscript{604} CPR 70.2(2).
\textsuperscript{605} Tribunals, Courts and Enforcement Act, sections 62 to 70, Schs 12 and 13.
\textsuperscript{606} CPR Part 72.
\textsuperscript{607} CPR Part 73.
\textsuperscript{608} See RSC Orders 30 and 51, in Sch 1, CPR, which apply both in the High Court and county courts.
\textsuperscript{609} CCR Ord 27, in Sch 2, CPR.
\textsuperscript{610} County Courts Act 1984, s 112; such an order prevents named creditors from petitioning for bankruptcy against the judgment debtor, and makes provision for payment of creditors by instalments; the order can last for three years.
\textsuperscript{611} CCR Ord 26, r 16 in Sch 2, CPR.
\textsuperscript{612} RSC Ord 45, r 4 in Sch 1, CPR.
\textsuperscript{613} CCR Ord 26, r 17 in Sch 2, CPR; or by summary proceedings for the recovery of land against trespassers, CCR Ord 24 (see Sch 2, CPR) and CPR Part 55.
\textsuperscript{614} RSC Ord 45, r 3 in Sch 1, CPR.
\textsuperscript{615} RSC Ord 45 and 52; CCR Ord 25, 29 in Schs 1 and 2, CPR.
\textsuperscript{616} See ANDREWS, English national report: “To gaining the control, the enforcement agent must give the debtor ‘notice’. Enforcement agents can use: (i) reasonable force to enter premises (it include the domestic one); (ii) force, however, is not to be exercised against a person”
\textsuperscript{617} CPR Part 72; PD (72).
creditor to divert or intercept money payable to the debtor, for example money held to his order in a bank or building society.\(^{618}\) The procedure concerns any amount of any debt due, or accruing due, to the judgment debtor from the third party.\(^{619}\) Finally it is important to mention the Charging orders,\(^{620}\) which can be made in respects to a money judgment and are regulated in CPR Part 73 governing charging orders against the judgment debtor’s land or interest in land. A ‘stop orders’ prevents various dealings in respects of securities or funds in court, while a ‘stop notices’ is use for preventing various dealings in respect of securities. A charging order can also be applied against the proceeds of sale of land held under a trust for sale. In all these situations, the procedure involves an interim and a final order.\(^{621}\)

In Italy there are three main types of enforcement proceedings, which can be used depending on the type of obligation of the debtor towards the creditor. Firstly, whenever the obligation consists in the payment of a sum of money, the enforcement procedure to be used is coercive expropriation. Coercive expropriation aims at seizing one or more of the debtor’s assets and selling or assigning them through a special procedure. The seizure procedure changes, depending on the particular type of seized asset: for example, the seizure of movables has different rules from the seizure of land and from garnishment. Given that creditor others than the creditor claimant can participate in the procedure and lodge their claims, all intervening creditors share the profit of the coercive expropriation. The order in which the claims are satisfied in the procedure does not depend on procedural aspects, but rather on the substantive rights of the parties and, in particular, on the existence of titles of privilege of one credit other another.\(^{622}\)

3.26. Latin America

In Brazil with regard to the money claims, it is believed that the Brazilian system, close account, ultimately and disproportionately the debtor over the creditor. This is because in the prevailing court’s decisions, according to which it is still understood that for obligations of that nature wherein it would not be

\(^{618}\) CPR 72.1(2); provided the bank or building society ‘lawfully accepts deposits in the United Kingdom’; banks and building societies can become subject to obligations to reveal details of all accounts which the judgment debtor holds with them: CPR 72.6; for money in court standing to the credit of the judgment debtor, CPR 72.10; on the threshold level of proof that a bank etc account exists, See Alawiye v Mahmood [2006] EWHC 277 (Ch); [2007] 1 WLR 79.

\(^{619}\) CPR 72.2(1)(a).

\(^{620}\) CPR Part 73; PD (73); Charging Orders Act 1979.

\(^{621}\) Charging Orders Act 1979, s 1(5). The criteria for making a final charging order include: ‘(a) the personal circumstances of the debtor and (b) whether any other creditor would likely be unduly prejudiced by the making of the Order.

possible to use any coercive measure, the enforcement should be limited to attempts to seize assets and the forced auction thereof.\(^{623}\)

### 3.27. Asia and Oceania

The Australian legal system affords a creditor the protection against defaulting and/or insolvent debtors.\(^{624}\) First, creditors under the *Personal Property Securities Act 2009* (Cth) (PPSA) may attach and, subsequently, perfect a registrable security interest over a debtor’s property (being either consumer or commercial property that is tangible and/or intangible).\(^{625}\) The application of the PPSA is a functional ‘in substance’ approach to determine whether or not a security interest exists.\(^{626}\) Many commercial transactions such as, retention of title, commercial consignments, PPS leases and finance lease agreements and the traditional forms of security interests qualify as a registrable security arrangement. These security arrangements must be perfected by registration with the PPSA registry (PPSR). Although perfection may occur by taking control of the collateral, but registration will provide stronger priority.\(^{631}\) The PPSA also introduced a Purchase Money Security Interest (PMSIs), which is taken in collateral that secures all or part of the collateral’s purchase price, or intrinsically related to a specific class of collateral. PMSIs provide ‘super priority’ which defeats other security interests in the same collateral other than those perfected by control.\(^{632}\) However, common law liens fall outside the scope of the PPSA.\(^{633}\) Statutory liens remains subject to numerous state, territory and commonwealth

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625 Personal Property Securities Act 2009 (Cth) s 10.
626 Personal Property Securities Act 2009 (Cth) ss 12(1),(2).
627 Personal Property Securities Act 2009 (Cth) s 12(2)(h).
628 Personal Property Securities Act 2009 (Cth) s 12(2)(i). Defined by s 13 of the Personal Property Securities Act 2009 (Cth) a PPS lease means: (i) a lease or bailment of goods for a term of more than one year; and (ii) a lease or bailment of serial-numbered goods for a term of 90 days or more. Further, this definition excludes transactions where the lessor or bailor is not in the business of leasing or bailing goods and gratuitous bailments. (Quoted by VAN CAENEGEM, William/WEINERT, Kim, Australia National Report)
629 A finance lease and other similar agreements such as, conditional sale agreements, hire-purchase agreement were referred to as ‘quasi-securities’. However the PPSA has abolished the distinction between a quasi-security and security as the statute applies to every transaction regardless of its form. See Personal Property Securities Act 2009 (Cth) ss 12, 12(3), 13. (Quoted by VAN CAENEGEM, William/WEINERT, Kim, Australia National Report)
630 Personal Property Securities Act 2009 (Cth) s 21(2).
631 Personal Property Securities Act 2009 (Cth) ss 14(1).
632 Personal Property Securities Act 2009 (Cth) s 8(1)(c). See also Personal Property Securities Act 2009 (Cth) s 73. A common law lien or general lien allows a creditor to retain possession of a debtor’s property until the debtor pays the lien holder (or creditor) for the work performed on those goods. For example, a solicitor’s lien.
legislation, such as the *Sales of Goods Act 1896* (Qld), *Storage Liens Act 1973* (Qld), *Carriage of Goods Act 1979* (NSW) and the *Corporations Act 2001* (Cth). Furthermore, statutory liens are also outside the PPSA’s priority regime. 634

In Japan when an obligee makes an execution deed (This is a notarial deed prepared by a notary with regard to a claim for payment of money which contains a statement to the effect that the obligor will immediately accept compulsory execution), the obligee can execute their claim without final and binding judgments (Civil Execution Act §22(v)). Indeed, when an obligor does not contest the existence and content of credit, an obligee can use the demand procedure (Code of Civil Procedure § 382-402). This is the procedure that a court clerk, upon the petition of the creditor, issues a demand for payment (“Shiharai-Tokusoku”) with regard to a claim for payment of a certain amount of money. By doing so, obligees can execute their claim without final and binding judgments (Civil Execution Act §22(iv)).635 Secured creditors, on submission of certain documents that prove the existence of the security interest, can execute their claim without final and binding judgments (Civil Execution Act §180(i)). Additionally there are many substantive measures through which creditors can collect debts without executive procedures, such as the right to set off or secure by way of assignment. The Civil Execution Act permits not only collection by payments through auction of properties of obligors, but also collection by earnings by lease of real property of obligors (§93-111, 180(ii)).636

7. The conflicts of creditor-debtor rights in Non-money enforcement

a. General remarks

3.28. Performance and remedies for non-performance have central importance in the law of obligations, especially in contract law. The rules on performance and non-performance have been thoroughly developed over a long period of time, firstly during the development of the PECL and now in the preparation of the DCFR.637 The basic rule remains the same — where personal performance by the debtor is not required, the creditor cannot refuse performance by a third party, if: (i) the third party acts with the assent of the debtor; or (ii) the third party has a legitimate interest in performing and the debtor has failed to perform or it is clear that the debtor will not perform at the time performance is due. The right to enforce performance may be regarded as the most important legal remedy.638 The

634 *Personal Property Securities Act 2009* (Cth) s 93.
635 YOSHIGAKI Minoru, Japan National Report.
636 YOSHIGAKI, Minoru, Japan National Report.
637 PECL (Principles of European Contract Law); DCFR (Draft Common Frame of Reference)
638 SILVESTRI, Elisabetta, Rilievi comparativistici in tema di esecuzione degli obblighi di fare e di non fare, in Riv. dir. civ., 1988, p. 533 et seq.
creditor’s main interest is presumed to lie in the debtor’s performance of the debtor’s obligation. Enforcement of performance is essentially different from all other remedies and is the most important of them all. Monetary obligations and non-monetary obligations should be distinguished when one is speaking about enforcement of performance.

More continental German, Romanic and Central European legal systems differ the English system because monetary compensation is only a subsidiary and secondary remedy in the continental systems. The creditor has the right to demand and to enforce specific performance. If the creditor has obtained a title to specific performance, but specific performance cannot be enforced – which may happen if the object of restitution does not exist any more – the creditor may still claim monetary compensation. This makes sure that the creditor who demands specific performance is not placed at a disadvantage. In practice, creditors mostly claim damages. Nevertheless, the psychological implications of the fact that specific performance can be demanded and enforced should not be underestimated.

b. National reports

3.30 Europe

The German substantive law gives the creditor of any claim a right to demand specific performance as long as specific performance has not become impossible or, if the debtor so pleads, completely unreasonable (§ 275 BGB). In contractual matters, the creditor can, however, (i) terminate the claim for specific performance if he or she revokes the contract for non-performance or late performance (§§ 281, 326(5) BGB), or (ii) for defects of the goods or real estate sold or the work provided (§§ 437 No. 2, 634 No. 3 BGB). As a matter of

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644 See KERN, Germany National Report.
principle, such revocation presupposes that the creditor had set a time limit to the
debtor and that the debtor did not perform in due time. (iii) The creditor can also
terminate the claim for specific performance if he or she demands damages in
lieu of performance (§ 280(1), (3), §§ 282-283 BGB). In most cases, a claim for
damages presupposes that the debtor refused performance or correct performance
intentionally or negligently (cf. § 276 BGB)

In the non-money enforcement there are three regulated cases: due to
restitution of a thing (movable or real estate); when the debtor owes performance
of an act (performable or not by a third person) o when they owe not to perform a
certain act; and finally if the debtor owes a will declaration 646. (i) If the debtor
owes restitution of a movable thing or real estate, the enforcement officer takes
the thing away from the debtor and gives it to the creditor (§§ 883, 884 ZPO) or
evicts the debtor from the real estate (§ 885 ZPO). (ii) If the debtor owes
performance of an act that can be performed by a third party, the court allows the
creditor to have the act performed by a third party at the cost of the debtor (§ 887
ZPO). If the debtor owes performance of an act that cannot be performed by
anyone else, the court will issue a penalty or an order for detention in order to
make the debtor perform the act (§ 888 ZPO). If the debtor is ordered not to
perform a certain act, the court will issue a penalty or order detention if the
debtor does not obey (§ 890 ZPO). (iii) If the debtor owes a declaration of will,
this declaration is reputed and made by the debtor as soon as an execution clause
has been placed on the judgment (§ 894 ZPO)

In tort matters and even more frequently than in contract matters, the
debtor normally claims monetary compensation from the outset. Nevertheless,
here as well the starting point is specific performance, the debtor owes in
principle “restitution in nature” (Naturalrestitution), i.e., removal of the actual
damages, restoration of the situation before the damaging event occurred
(§ 249(1) BGB). This principle has many exceptions. According to § 249(2) BGB,
the creditor may claim monetary compensation if a thing has been damaged or a
person injured. Moreover, the creditor can claim monetary compensation if the
debtor did not perform within a time limit the creditor had set (§ 250 BGB).
Monetary compensation is owed if restitution in nature is impossible or not
sufficient (§ 251(1) BGB). Under German law, there are no punitive damages.

645 See KERN, Germany National Report.
646 See KERN, Germany National Report.
647 See KERN, Germany National Report: “This is so because the creditor-victim will normally not let the
debtor-tortfeasor repair the thing which the latter had damaged before, and the victim is typically even
less willing to let him- or herself be cured by the tortfeasor, lacking skills apart”; BGHZ 63, 182, 184;
648 See KERN, Germany National Report: “The debtor is allowed to pay damages if restitution in nature
can only be performed with excessive cost (§ 251(2) BGB). Finally, the debtor always owes monetary
compensation for loss of earnings and other gains not realized as a consequence of the damaging event
(§ 252 BGB) and for “immaterial” damages, i.e., pain and suffering (§ 253 BGB)”.

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Sanctioning the debtor and thereby creating deterrence is considered a matter of criminal law and not private law.\(^\text{650}\)

The English Injunctions have to be backed by credible threats (also the positive order for specific performance of a contract). This is also valid for contempt to fail to comply with an order for disclosure of assets within a freezing injunction. Who disobeys an injunction will be guilty of contempt even if he later persuades the court to set aside the relevant order or injunction.\(^\text{651}\). Nor is this coercive regime confined to litigants. Also a non-party who receives notice of an injunction is guilty of contempt if he aids or abets breach of that injunction, or acts independently to undermine it. A company is in contempt of court if it breaches an order because of the conduct of its employee. This is so even if the company expressly prohibited such conduct. It is enough that the employee’s conduct took place within the course of his employment. Civil contempt is qualified as a quasi-criminal wrong. The standard of proof is ‘beyond reasonable doubt’ rather than the lower civil standard of proof ‘on the balance of probabilities’. A person found guilty of contempt can be imprisoned for up to two years or fined.\(^\text{652}\).

The court might instead make a disciplinary costs order.\(^\text{653}\)

In France the creditor may seek enforcement of the requirement but cannot force the debtor to execute an obligation to do it resolves damages. The creditor can also impose obligations (work, for example) at the debtor's expense (1,144 s).

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\(^{650}\) See KERN, Germany National Report: “Admittedly, courts and parts of the literature hold that in determining the amount of damages for pain and suffering the behavior of the debtor-tortfeasor may be taken into account to a certain degree. However, this would never bring about the amounts U.S.-style punitive damages are known for”. BGHZ (GS) 18, 148 et seq.; very generous LG Trier, Versicherungsrecht (VersR) 1983, 791: uplift up to a third for the humiliation implied in intentional bodily injury; cf. BROCKMEIER, Dirk Punitive damages, multiple damages und deutscher ordre public, (Tübingen: Mohr Siebeck, 1999), p. 46 et seq.; BGHZ 118, 312, 343 et seq.; STIEFEL Ernst C. / STURNER Rolf / STADLER, Astrid The Enforceability of Excessive U.S. Punitivve Damage Awards in Germany, 39 Am. J. Comp. L. 779, 788, 795 (1991); MORSDORF-SCHULTE, Juliana, Funktion und Dogmatik US-amerikanischer punitive damages, (Tübingen: Mohr Siebeck 1999), passim; MÜLLER, Peter Punitivve Damages und deutsches Schadensersatzrecht, (Berlin: Walter de Gruyter 2000), p. 72 et seq.

\(^{651}\) ARLIDGE, EADY and SMITH on Contempt (3rd edn, London, 2005). See ANDREWS, Neil: “The injunction was devised by the Court of Chancery and before the 1870s had administered a separate procedure grounded and so called ‘Equity’. The ‘Common Law’ courts had a separate jurisdiction. But the Supreme Court of Judicature Acts of 1873 and 1875 amalgamated these procedural systems. The injunction as ‘equitable order’ was enforced by applying quasi-criminal sanctions against those who failed to comply with such an order. This tough approach towards breach of injunctions has survived the procedural changes of the 1870s, just mentioned, in this way a person will be guilty of contempt of court if he breaches an injunction addressed to him”.

\(^{652}\) See ANDREWS, Neil: When deciding on the appropriateness of punishing the contemnor, the court will consider the following points: (i) whether the contemnor has ‘contumaciously’ flouted the law; (ii) whether it has become evident that he will not accept the court’s authority; (iii) the contemnor has already received adequate punishment; (iv) or he has ‘purged’ his contempt; (v) whether his conduct or omission was deliberate or negligent. As for this last consideration, inadvertent breach of an injunction will not normally justify punishment.

which can be implemented though an interim injunction to obtain the supply of goods, but this is relatively rare\textsuperscript{654}, however in French law for contractual liability and tort. For the second there is no prior obligation and is therefore analogous to requesting damages. For the first one can solicit for the fulfillment of the obligation and, in case of failure or refusal of a request, seek resolution of the contract and damages.

In Italy, if the obligation consists of delivering a movable item or releasing an unmovable item, articles 605-611 of the Code of Civil Procedure provide for a specific form of enforcement. In this case, the enforcement is generally managed autonomously by the enforcement officer, who has the power to force the delivery or release of the item. If the obligation consists in the performance of a certain activity, or in restraining from performing a certain activity, the procedures of enforcement are set forth in articles 612-614 \textit{bis} of the Code of Civil Procedure\textsuperscript{655}. In particular, pursuant to article 612(2), the enforcement judge designates the enforcement officer that must perform the activity that the debtor has not performed. This system of enforcement is available whenever the obligation is “fungible”, i.e. the debtor can be substituted by someone else in the required activity. However, in cases where the identity of the debtor is relevant and cannot be substituted with a different subject, such as an enforcement officer, the mechanism set forth in article 612 cannot operate\textsuperscript{656}. In this regard, the reform of 2006 introduced article 614 \textit{bis}. This article sets forth an \textit{astreinte} mechanism: the judicial decision imposing a certain behavior can also, on the request of the claimant, contain an injunction to pay a certain amount of money for every disregard of the obligation. However, this injunction cannot be granted by the enforcement judge, but only by the judge providing declaratory relief. Article 614 \textit{bis} is considered a form of “indirect enforcement”, since it aims at convincing the debtor to perform the required obligation by foreseeing an economic disadvantage in case of non-compliance\textsuperscript{657}. It is possible to enforce the specific performance, but the creditor cannot choose freely between specific performance and damages at enforcement stage. Rather, it is necessary to consider the nature of the obligation that is enshrined in the enforceable title that the creditor wishes to activate. The creditor subsequently has to choose the appropriate enforcement method\textsuperscript{658}.

\textsuperscript{654} JEULAND, Emmanuel, France National Report. Art. 1142 Code civil. Any obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor. Art. 1144. A creditor may also, in case of non-performance, be authorized to have the obligation performed himself, at the debtor’s expense. “The latter may be ordered to advance the sums necessary for that performance” (Act no 91-650 of 9 July 1991).

\textsuperscript{655} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report.

\textsuperscript{656} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report.

\textsuperscript{657} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report

\textsuperscript{658} CAPONI, Remo/ ORTOLANI, Pietro, Italia National Report.
The Spanish LEC also favors the creditor choice (favor creditorii), either in the specific implementation or though non-monetary means, as their goal is to make the implementation in natura is achieved in most cases. This provides for several procedural solutions like enforcement by third parties or the forecast of a penalty. And just finally, if despite all these measures, the execution is not possible in nature, the debtor is expected to pay the economically converted value of the action to be performed or pay damages to the performer.\(^{659}\)

In the Netherlands contract law enables the creditor to demand specific performance. It is common to enforce such claims by requesting the court to order the debtor to pay to the creditor a procedural fine (dwangsom (in French: astreinte), Article 611a Code of Civil Procedure) if the debtor fails to comply. A creditor may also demand imprisonment of the debtor in case the debtor would fail to comply with a judgment (article 585 Code of Civil Procedure). Such imprisonment is however not common. Often a creditor may opt to claim either damages or specific performance. It depends on the specific circumstances of the case what is best for the creditor.\(^{660}\)

According to 6:138 of the Hungarian Civil Code in the event of non-performance, the aggrieved party shall be entitled to require performance of the obligation. The principle of law laid down by the new Civil Code codifies the doctrine of specific performance applied generally in continental jurisdictions, based on which in the case of breach of contract the aggrieved party may primarily claim specific performance in kind.\(^{661}\) The right to claim performance in not unlimited, thus e.g. performance is excluded if it is frustrated by physical or legal reasons, or it would otherwise be against the law. Claiming performance in kind is also not permitted by law where it means a disproportionately greater burden for the judgment debtor.\(^{662}\)

In Finland the creditor may chose in which way s/he wants to react. It is but even in that case the judgment on that is needed as a ground for enforcement. Grounds for enforcement include even the type of the judgment where someone is obliged to fulfill an action or for instance to sign a document.\(^{663}\)

### 3.31. Latin America

According to Argentinean Law it can be argued that the "normal effects" emerging from the contractual obligations are to satisfy the right of the creditor in his right in the form of specific performance. The Civil Code in subsections 1 and 2 of Article 505: "The effects of obligations to the creditor are: (1) the right to employ legal devices, so that the debtor will attempt that which has been forced". There are different modes of specific performance. The realisation of

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659 PICÓ I.\, Joan, Spain National Report
663 ERVO, Laura, Finland National Report.
these actions is found in the fact that the provision may be made by the debtor voluntarily or forced by court at the insistence of the creditor, or by the execution of the act by a third party. The creditor's right to specific performance of the obligation is subject to the concurrence of three conditions: 1) that the thing exists; 2) that is in the debtor's assets; 3) that they has possession of the thing due.

According to the Brazilian law the non-monetary obligations to perform an action (or prohibition thereof) seems to provide better balance. This is because, although they should preserve the lower burden of the debtor, no offer of large and atypical powers to the judge can achieve pled protection (see art.461 of the Code of Civil Procedure). Thus, the normative text presents greater concern for the effectiveness of the process and the adequacy of its instruments than to the needs of the case.

Legal enforcement in Uruguay, if the obligation is likely to be fulfilled by a third party (fungible), accepts that the creditor may choose between specific forced execution by the debtor or a third party (art. 398.2); if the performance is not capable of being fulfilled by a third party (non-consumable), the creditor can request for specific performance (in kind), with imposition of astreinte, which are in their favor (art. 398.3) and, if compliance is not achieved, execution by equivalent. In this case, the damages are settled incidentally. This process is regulated as executing special obligation to the fulfillment of obligations to grant a deed done and, where appropriate, grant the tradition of a thing (art. 398.4).

3.32. Asia and Oceania

In Japanese contract law, as a general rule, if an obligor voluntarily fails to perform any obligation, the obligee can demand the specific performance to the obligor and if necessary can request the enforcement of specific performance from the court (Civil Code §414(1)), alternatively, they may cancel the contract (the Civil Code §541, 543). And concomitantly with these means or aside from these means, the obligee can demand damages arising from such a failure (Civil Code §415). In conclusion, the obligor can select a specific performance as primary remedy. Under this Act, obligees of non-monetary claims may choose the most effective means among various compulsory measures (the direct compulsory execution, the indirect compulsory execution, the execution by substitute, etc.) depending on the situation.

664 OTEIZA, Eduardo, Argentina National report.
666 PEREIRA CAMPOS, Santiago/VALENTIN, Gabriel, Uruguay National Report.
667 YOSHIGAKI Minoru, Japan National Report
668 YOSHIGAKI Minoru, Japan National Report
Specific performance in Korea depends on the purpose stated in the contract. If the obligor can let things return to the original state, the creditor generally solicits restitution. However, the creditor may choose either restitution or damages, if the Act (Civil Act 311(2)) provides so. Any person who commits tortuous activity shall make compensation to the victim for damages arising therefrom. The Korean Civil Act takes monetary compensation as a principle by providing that the damages shall be recovered in money, unless otherwise agreed by the parties under article 394 and 763. Therefore, the tort victim does not have a choice between monetary damages and restitution.

In China the specific performance acts as the primary remedy and the creditor can make the choice. Article 110 of the Contract Law says, “where a party fails to perform the non-monetary obligations or its performance of non-monetary obligations fails to satisfy the terms of the contract, the other party may request it to perform it except under any of the following circumstances: It is unable to be performed in law or in fact; The subject matter of the obligation is unfit for compulsory performance or the performance expenses are excessively high; The obligor does not require performance within a reasonable time”. Article 107 of the Contract Law clearly shows the emphasis on the specific performance as well.

In Australia a creditor may be awarded damages under s 1324(10) of the Corporations Act 2001 (Cth). Further, this provision also permits the court to awarded damages in addition to other or in substation of an injunction. While Australian courts are capable of making an order for remedy of specific performance, based on discretionary grounds, the courts are willing to order this award. The courts can make an order of specific performance, might subsist an award of damages only when at the material time the contract is suspected of specific performance.

8. The coercive measures in the enforcement proceedings and the sanction system ensuring its effectively

a. Introduction

3.33. As a general introduction, the different enforcement methods such as seizure, garnishment, and other enforcement measures integrate a whole series of sanction devices and realise the enforcement by levying the debtor’s assets.
However, when a debtor disobeys the orders granted to carry forward the enforcement, additional and special sanctions (in the narrow, coercive sense) must be imposed on the debtor. The basis for the imposition of these additional sanctions is the noncompliance with the enforcement orders, rather than the non-compliance with the primary claim and the substantive obligation. The species of claim is important to determining the admissibility or not of certain coercive measures: when the claim is a monetary claim, the use of fines or astreintes are exceptionally ordered, but they are limited their scope of application to support some kinds of noncompliance.

3.34. A purely illustrative example of the complex delimitation of acceptable coercive measures is provided by the Irish case of McCann. In this case, the system for enforcement of civil debt (section 6 of the Enforcement of Court Orders Acts 1926 and 1940) was found by the High Court of Ireland to be unconstitutional because it did not secure the fundamental rights under the Constitution: the right to the fair administration of justice (Article 34); the guarantee of fair procedures (Article 40.1.3); and the right to personal liberty (Article 40.4.1). The Court found that a person facing imprisonment for non-payment of a civil debt should be treated in a similar manner to a person facing a criminal charge in terms of the safeguards that should apply to the judicial process.

The most important statements regarding the three fundamental constitutional rights to be secured are as follow: (i) the person (the debtor) should be in court to represent themselves; (ii) the Judge should inform the debtor of his or her entitlement to legal representation, and the debtor should be provided with legal aid if they cannot afford legal representation otherwise, and (iii) the Court, in applying fair procedures, should not make an order for arrest and imprisonment unless satisfied that the failure to pay the debt is due to the wilful refusal or culpable neglect of the debtor. The Irish system for enforcement of civil debt seemed to violate these fundamental rights. The right to liberty was violated because the legislation in question permitted a disproportionate interference with this right as the penalty was not rationally connected to the objective to be achieved (payment of the debt). It did not restrict the impairment of the right to liberty as much as possible. The Court expressed also considered the penalty in term of costs that would be borne by the State in securing any

676 McCann -v- Judges of Monahan District Court & Ors [2009] IEHC 276 (18 June 2009)
remedy for the creditor, insofar as the State would bear the cost of the court proceedings and the imprisonment of the debtor.

The Court also referred to the difference between arbitrariness and proportionality, which includes an assessment of whether detention was necessary to achieve the stated aim. “The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.... The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.... The duration of the detention is a relevant factor in striking such a balance....”

3.35. Some legal systems also protect effective enforcement by sanctions for conduct that are contrary to the proceedings. This is done using criminal sanctions and not coercive measures. For example, according to § 136 of the German Criminal Code (Strafgesetzbuch, StGB), it is a crime to destroy or damage movable property, which has already been seized or attached by an enforcement measure, and to destroy or damage an official seal attached to movable property in the context of an enforcement measure. According to § 289 StGB, it is a crime for the owner or someone acting in his or her interest to take away property from someone who holds a lien over the object.

b. National reports

3.36. Europe

The law contains some means of sanctioning procedural abuses of the persons involved in enforcement proceedings. E.g. if the debtor does not show up to give information on his or her assets, he or she can be fined or arrested (coercive detention) to “break his or her will” and make him or her provide this information, § 802g ZPO. If the creditor behaves in an unacceptable way, the court can order cost shifting as described above (§ 788(4) ZPO, sub b in fine). If a third-party debtor does not make the declarations provided for in § 840(1) ZPO, he or she is liable to the creditor for damages according to § 840(2) ZPO (see supra sub 4 in fine). However, “contempt of court” sanctions are not available in the German legal system. In particular, §§ 888(1), 890(1) ZPO do not contain

677 McCann -v- Judges of Monahan District Court & Ors [2009] IEHC 276 (18 June 2009)
sanctions for contempt of court, but rather a means to enforce a claim to perform or not to perform a certain act.\(^{678}\)

In Hungary the court of origin for authorizing enforcement shall fine the judgment debtor or the person or organization obliged to participate in the enforcement procedure for contempt for failure to satisfy the obligations prescribed by law in connection with enforcement, or for engaging in any conduct aiming to obstruct the authority carrying out the enforcement procedure. The fine for contempt may not exceed the enforceable amount. No fine for contempt may be imposed for the sole reason of the judgment debtor's failure to comply with his obligation prescribed in the enforcement order.\(^{679}\) If the bailiff receives information concerning any potential grounds for fine for contempt, he shall forthwith summon the offender to perform his obligations or to cease the conduct, or stand to receive the fine. The bailiff shall make out such summons in writing, and if it brings no result he shall forward the necessary documents to the court to impose the fine for contempt. Upon receipt of such documents the court shall rule the case without delay, and shall deliver its ruling to the bailiff and to the offender if the fine is imposed, or to the bailiff only if the motion is denied.\(^{680}\) If the subject of the fine is a legal person or an unincorporated organization, and if the fine is substantiated, the head or the authorized representative of such legal person or organization may also be fined for contempt concurrently. The ruling for ordering the fine for contempt may be appealed.\(^{681}\) If the fine is imposed for failure to perform some obligation and if the person penalized provides proof with the appeal of having satisfied the obligation in question, the court may overturn its own decision for ordering the fine, unless the injury caused by such negligence cannot be remedied by subsequent performance of the obligation.\(^{682}\) If unable to collect a fine for contempt the bailiff shall report it to the court and the court shall file criminal charges against the person in question. The court shall take this action also if it reaches the same conclusion within its own sphere of competence.\(^{683}\)

The institution of fine for contempt serves the purpose of sanctioning conduct aimed at obstructing the proceedings and defying the measures taken by the bailiff, and

\(^{678}\) See KERN, Germany National Report.


\(^{681}\) KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report.

\(^{682}\) Kengyel Miklós / Harsági Viktória, Hungary National Report: “The final ruling of the court for ordering a fine for contempt shall be deemed and treated as an enforcement order, and shall be sent by the court ordering the fine to the bailiff. If the fine is imposed against the judgment debtor before the procedure is concluded, the bailiff shall collect it as part of the enforcement procedure”.

\(^{683}\) KENGYEL Miklós / HARSÁGI Viktória, Hungary National Report: “[Section 45/A, Enforcement Act] In the case of any resistance the bailiff shall turn directly to the nearest local police precinct, which shall lend immediate assistance for the enforcement procedure in order to end such resistance. The bailiff shall indicate any police involvement in the enforcement report”.
it is imposed on the debtor or other persons or organizations participating in the enforcement by the court implementing the enforcement. The fine for contempt may not exceed the enforceable amount. No fine for contempt may be imposed for the sole reason of the judgment debtor's failure to comply with his obligation prescribed in the enforcement order (Section 45/A Enforcement Act). Any person who was fined for contempt in the course of judicial enforcement and continuing the conduct for which the fine was imposed, or fails to comply with his obligation prescribed by law in connection with the enforcement proceedings, other than the obligation contained in the enforcement order, is guilty of a misdemeanor punishable by imprisonment not exceeding one year (Section 288 Criminal Code). Under Hungarian enforcement law there is no possibility to impose coercive fines (astreinte).

In Coratia the possibility to impose fines or prison exists, and the both options are possible under the LE (see Art. 16 LE). However, the maximum amount of fines are limited to 5,000 EUR (for natural) and 15,000 EUR (for legal persons) – but the court may impose fines more than once during the same proceedings. When the prison penalty (as replacement for fines or a separate penalty) is imposed, the maximum single penalty is three months. If repeated prison penalties are being ordered, the total amount of time should not exceed six month in prison.

3.37. Latin America

In Argentina judges and courts may impose compulsory and progressive fines to ensure that the parties comply with their mandates. Fines in favor of the litigant injured by the infringement can be levied. Penalty payments to third parties may apply in cases where the law provides. The sentences will graduate in proportion to the economic wealth of the party that should complete performance, but and may be rendered ineffective, or subject to adjustment, if such actions reduce their strength and/or are wholly or partly justified by their conduct.

3.38. Asia and Oceania

In Japanese law, if an obligor fails to perform any obligation, an obligee can request the three types of enforcement from the court: direct compulsory execution (enforcement of specific performance), indirect compulsory execution, or execution by substitute. In direct compulsory execution, an executive agency directly realizes the contents of an obligee’s right by a seizure of obligor’s property. In indirect compulsory execution, an executive agency indirectly

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687 OTEIZA, Eduardo, Argentina National Report.
realizes the contents of an obligee’s right by psychologically compelling an obligor to perform his obligation by imposing a penalty depending on the period of the delay. As to indirect compulsory execution, it had been said that such an oppression of obligor’s free will is inconsistent with ideal of respect for personality and it is an ineffective manner as compared with direct compulsory execution, and so it should be avoided as much as possible. Recently however, it has been said that indirect compulsory execution is well-suited for the ideal of respect for personality because it permits the obligor to choose between performance and payment of penalty, and in some cases it is more efficient than direct compulsory execution (for example, when an obligee doesn’t know the location of movables to be delivered).

Thus the current Civil Execution Act provides that an obligee can use indirect compulsory execution as compulsory execution of delivery of the object or compulsory execution for an obligation of action or inaction (Civil Execution Act §172(1), 173(1)). And furthermore, it is said that indirect compulsory execution is inefficient for realization of a monetary claim. And so, other possible manners (for example, confinement, and publication of the blacklist of debtors) are discussed. Compulsion by confinement, although sparsely supported, is generally attributed to inhumanity or the Middle Ages and is said to be against the principle of proportionality. And the publication of a blacklist is said to be in direct, serious conflicts with privacy.

In China for the imposition of personal coercion, Article 111 of the CPL empowers the court to impose a fine or detention on the enforcee who refuses to execute any effective judgment or ruling. Meanwhile, according to Article 113 of the CPL, the court shall impose a fine or detention on the enforcee who maliciously in collusion with other persons evades performance of obligation determined in a legal instrument. However, in consideration of the due process, Article 115 to Article 117 of the CPL set up some procedural conditions for the use of fines and detention. The period of detention shall not be longer than 15 days. Besides, according to the State Compensation Law, the party may apply for state compensation if the adoption of compulsory measures (personal coercion) violates the law.

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688 YOSHIGAKI, Minoru, Japan National Report.
689 YOSHIGAKI, Minoru, Japan National Report.
690 YOSHIGAKI, Minoru, Japan National Report.
691 See Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report.
692 Fu, Yulin/CAO, Zhixun/HAN, Jingru, China National Report: “(i) A summon by face, a fine or detention must subject to the approval of the president of court. A warrant shall be issued for a summons by force while a written decision shall be made to impose a fine or detention. (ii) A party is permitted to apply to the court at the next higher level for reconsideration of the decision on fine or detention. (iii) The amount of a fine on an individual shall not be more than 100,000 yuan; the amount of a fine on an entity shall not be less than 50,000 yuan but not be more than 1 million yuan”.

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Australia does not have a civil prison, but penalties for contempt of court do apply in all Australian jurisdictions. Contempt of Court in Australia is a criminal offence and anyone found to be in contempt of court will either be fined or face a fixed prison term. Contempt of Court may arise in two ways. First, where a person is rude or disrespectful to a judge or a person causes a disturbance in a courtroom. Secondly, a party fails (without lawful justification) to obey a court order. The failure to follow a court order relating to enforcement proceedings, by either a debtor or creditor, may result in contempt of court charges where a court is of the view that such a charge is warranted. Non-compliance with court orders, which amounts to contempt of court, will warrant a sequestration order that involves the seizure of the defaulting party’s property. Here a sequestration order will deprives the judgment debtor of possession of property until the debtor has complied with the judgment or purging of the contempt. Across all the jurisdictions of Australia are the State and Penalties Enforcement Act and its accompanying regulations. Where a debtor has defaulted on an amount or an installment amount pursuant to an enforcement order within 28 days of the date of that order, the State and Penalties Registrar has the power to issue an enforcement warrant, a fine collection notice or an arrest or imprisonment warrant. Further, the State and Penalties Enforcement Acts allows the Registrar to issue enforcement warrants to seize and sell personal property, which is subject to a charge under section 73 of the PPSA.

9. Data protection and fundamental rights: transparency and the safeguarding of rights

a. General remarks

Accountability and the formality of the proceedings are important for those involved in enforcement: the creditor, debtor and enforcement organism. It is difficult to describe an Enforcement System either as clearly debtor biased or clearly creditor biased. Any enforcement primarily serves the creditor’s interests. However, as mentioned above, a number of formal requirements aim to strike a balance between the positions of the creditor and the debtor. For example, in the German Enforcement system, the court will only issue a

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694 Supreme Court Rules (NT) O 66.02(1); Uniform Civil Rules 2005 (NSW) pt 39, dv 40.3; Supreme Court Rules 2000 (Tas) r 873(2); Supreme Court (General civil Procedure) Rules 2005 (Vic) O 76. See National Australia Bank Ltd v Satchithanantham (No 2) [2009] FMCA 229.
695 Australian Consolidated Press Ltd v Morgan (1965) 11 CLR 483.
696 State Penalties Enforcement Act 1999 (Qld) dv 4.
698 BAUR/STÜRNER/BRUNS, p. 2-4 et seq. (mn. 1.3-1.10).
699 See KERN, Germany National Report.
protective order in favour of the debtor if the debtor’s fundamental rights are affected to such an extent that it is justifiable for those to take precedence over the fundamental right of the creditor to effective enforcement. 

Even in that situation, a protective order would also take into account the creditor’s right, and therefore would usually not entail a finite bar to enforcement, but only that a temporary pause in enforcement\textsuperscript{700}. 

3.40. The general regulation of transparency in relation to the debtor’s assets and the number of related procedural requirements has been described above as an important element of enforcement proceedings. Access to information about the debtor’s assets is relevant to ensuring acceptable regulation of data protection. For this reason, it is important for the regulation not only to concern who may legitimately request the information about the debtor, and the scope of the information they may seek, but also to protect the information that is obtained. The debtor’s fundamental rights in relation to private life and data protection must be taken into account\textsuperscript{701}.

b. National reports

3.41. Europe

In the German legal literature is currently discussing whether § 802c ZPO, the provision imposing a duty on the debtor to establish an inventory of his or her assets, violates the right against self-incrimination.\textsuperscript{702} The right against self-incrimination can be derived from art. 2(1) – right to personal freedom – and art. 1(1) GG – right to human dignity.\textsuperscript{703} The problem according to the National Report is that § 802c ZPO contains no exception for information by which the debtor might accuse him or herself of a crime, but obliges the debtor to provide all information and can be even enforced with coercive detention\textsuperscript{704}. From the other side with respect to data protection, it should be mentioned that the level of protection has been increased with a reform in 2013.\textsuperscript{705} The influence of data

\textsuperscript{700} KERN, Germany National Report.
\textsuperscript{701} SIMOTTA, Daphne-Ariane, Der Datenschutz im Zwangsvollstreckungsverfahren, Grundrechtsverletzungen bei der Zwangsvollstreckung (Athen: Dike International, 1996), p. 369 et seq.
\textsuperscript{702} See WEB, Udo Selbstbezichtungsfreiheit und vollstreckungsrechtliche Vermögensauskunft, NJW 2014, 503-509.
\textsuperscript{703} BVerfGE 95, 220, 241 = NJW 1997, 1841, 1843; BVerfG, NJW 1999, 779
\textsuperscript{704} See KERN, Germany National Report: “The exception which is being discussed could consist in a prohibition to use the incriminating information for the purpose of criminal prosecution. This, of course, would be hard to control. Up to now, the Federal Constitutional Court has not yet declared § 802c ZPO unconstitutional and invalid”.
\textsuperscript{705} Gesetz zur Reform der Sachaufklärung in der Zwangsvollstreckung of 29 July 2009, BGBl. 2009 I, p. 2258.
protection principles can be found in a number of provisions. § 802l ZPO is characterized by clear limitations on who can retrieve the data and for which purpose the data may be used. Therefore, it is generally admitted that this provision is in conformity with data protection law. Apart from § 802l ZPO and § 840 (see supra sub 4), there are no further obligations of credit institutions and tax authorities in the context of enforcement.

In Finland the data protection in the enforcement has, however, been criticized in the legal literature, especially from the debtor’s point of view. It has been said that it should be improved in the near future. The effective furnishing of the information has been seen as a risk to a debtor and it is said that the enforcement begins to resemble bankruptcy. If the bailiff pools the information furnished from different sources, the result is that the bailiff gains a very detailed general view on the debtor’s financial situation. From the debtor’s point of view it can of course be criticized if there are more effective tools in a single enforcement matter compared with the general enforcement, that is bankruptcy.

Every person has the right to receive, from the local enforcement authority, a certificate from the enforcement register concerning a person specified by him or her as a respondent in an enforcement matter. All the data entered into the Enforcement Register that may be included on a certificate are public; the other data stored in the register are confidential. A certificate may usually be given covering the two years preceding the request. However, it can be given covering up to four years if the requester demonstrates that the information is necessary for his or her livelihood or otherwise for the safeguarding of his or her important personal or public interest. Before a certificate is issued, the name, profession and place of residence of the person requesting the certificate as well as the essential justification shall be entered into the Enforcement Information System. The idea is to control unnecessary requests and to act fairly in relation to the debtor. However, it is possible to obtain the information based only on the requesting party’s inquisitiveness. As one part of the docket information is public it is thus possible to search for it based only on the name of the debtor. It is not possible to obtain the information based on the date of the grounds of the enforcement or based on the creditor’s name. Notwithstanding provisions on confidentiality, a credit reference agency has the right to receive docket information concerning enforcement matters related to payment liabilities in which a certificate of an impediment has been issued; this docket information can be obtained within the two months preceding the request. If the ground for enforcement is repudiated, the bailiff

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706 See KERN, Germany National Report: “Suffice it to mention § 802k(2) ZPO with its closed and clear list of people and institutions that may receive copies of a debtor’s inventory and may have access to the databank with the debtors’ inventories”.
707 See KERN, Germany National Report.
708 ERVO, Laura, Finland National Report.
709 ERVO, Laura, Finland National Report.
710 ERVO, Laura, Finland National Report.
711 ERVO, Laura, Finland National Report.
712 ERVO, Laura, Finland National Report.
713 ERVO, Laura, Finland National Report.
714 ERVO, Laura, Finland National Report.
shall, upon request, notify the credit reference agency of the deletion of the respective entries in the register. The same procedure applies if it becomes apparent that, for some other reason, the enforcement is unfounded. The aforementioned information may be transferred in an electronic format.\textsuperscript{715} The function of the provisions referred to above is to act as a source of information concerning the debtor’s credit status.\textsuperscript{716} Notwithstanding provisions on confidentiality, in order to attend to his or her duties the right is granted to an authority or another person attending to a public function to obtain the necessary \textit{docket information} from the preceding four years as well as \textit{cooperation information} from the enforcement register. The enforcement authority does not control if the request is appropriate. The enforcement official can only ask for reasons for the request if there is a visible imbalance between the authority’s duties and the request.\textsuperscript{717} There have been some national problems concerning the right not to incriminate oneself, for instance the ECtHR\textsuperscript{718} where the Court decided the case against Finland and found the violation of article 6 ECHR. The case is based on the Supreme Court’s decision 2002:116. It must, however, be pointed out that the case is based on the situation before the latest reform on the duty to give information as a debtor. Nevertheless, the collision between the right not to incriminate oneself and the debtor’s duty to give information to the bailiff can still be seen as being somewhat problematic in the Finnish national law\textsuperscript{719}.

In Croatia the enforcement legislation does not have any special rules on the protection of privacy or data protection in the enforcement proceedings. From the number of provisions that give creditors (or even only intended creditors) the right to request information on debtor’s private data, it seems that the right of the creditor to effective enforcement significantly overshadow the right of debtor to privacy. This is only a general normative assessment, as in practice the transparency of debtor’s assets still does not guarantee effective collection of information on debtors in many enforcement cases\textsuperscript{720}.

\textbf{3.42. Latin America}

In Argentina the legal system contains general data standards to protect the people, whose scope exceeds the specific situation of the information concerning debtor defendants debtors in implementation processes, where there is no specific protection. As such, to protect the informational self-determination 1994 incorporated with constitutional habeas data into the National (Article 43, Paragraph 3) and various Provincial Constitutions. The exercise in substance guarantees everyone take cognizance of data about oneself and its purpose,

\begin{flushright}
\textsuperscript{715} The Enforcement Code, Chapter 1, Section 32.  \\
\textsuperscript{716} ERVO, Laura, Finland National Report.  \\
\textsuperscript{717} ERVO, Laura, Finland National Report.  \\
\textsuperscript{718} Case Marttinen \textit{v.} Finland (21.4.2009)  \\
\textsuperscript{719} ERVO, Laura, Finland National Report.  \\
\textsuperscript{720} UZELAC, Alan, Croatia National Report.
\end{flushright}
contained in public or private records and databases, intended for reports and check if said data is false or discriminatory, and subsequently demanding the suppression, rectification, confidentiality or updating of these. The action of habeas data was regulated both by national legislation (Law No. 25.326) and by local law. In particular, Article 397 of the CPCCN states that "where the order is appropriate, report or transfer of the case can only be denied in the presence of any just cause or secret reservation." The legal discussion of Law No. 25326 on the subject introduced by the matter has focused on the so-called "right to be forgotten" about occurrences then after a certain time situations. Some people have questioned litigation data tenure for a longer period than five years by private records.  

The Uruguayan system provides secrecy or confidentiality regulations in various statutes, some of which have exceptions in relation to the enforcement proceeding. 

3.43. Asia and Oceania

The Korean Supreme Court has moved toward electronic litigation in judgment procedures, and aims at having “paperless court” after all. Public announcements in civil execution proceedings can be done through electronic telecommunication methods. The Court opened its the auction site and provides relevant information accurately and quickly to the public. However, the public cannot participate in the auction over the internet yet.

According to the Korean Law no general power to access to the information about the properties of the debtor is vested in the court. As seen earlier, the court may only issue “Order to Clarify the Property” upon the request of the creditor. However, credit information companies may access to the debtor’s personal credit information, such as property of the debtor or defaults of the debtor, under certain conditions provided by Use and Protection of Credit Information Act. In Korea, no one is allowed open access to the personal credit

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721 OTEIZA, Eduardo, Argentina National Report.
723 Civil Execution Regulation, article 11(1).
724 Available under http://www.courtauction.go.kr/
725 HAN, Choong-Soo, Korea National Report.
726 HAN, Choong-Soo, Korea National Report.
information without a court’s search and seizure warrant. Civil execution procedures are not treated as an exception to the general rules to protect personal information. Furthermore, illegal access to the personal information is also prohibited under other legislations, such as Personal Information Protection Act, Act on Real Name Financial Transactions and Confidentiality, Act on Promotion of Information and Communications network Utilization and Information Protection, etc. In Korea, the companies, which are doing credit checks, investigation and debt collection, are increasing in number on account of Use and Protection of Credit Information Act. The tax authorities do not owe any duty to provide the information regarding properties of the debtor to the court under current Civil Execution Act, and the court also cannot request it as a right, nor can any other financial institutions.

In Japan the content of the provisions which can be qualified as the protection of the debtor’s privacy is as follows: Within the Property Disclosure Procedure mentioned in 5., the debtor is exempt from providing further information about his properties when the disclosed properties are enough to give full satisfaction to the creditor’s claim. The persons who have access to the information provided by the debtor in this procedure are limited to the creditor who requested this procedure and creditors who have the effective title against the debtor. The creditor who obtained information about the debtor’s assets can only use this information in order to get satisfaction for his claim.

In Australia the strict provisions within the Privacy Act 1988 (Cth) that apply to the handling of personal information. Some personal information is included in an individual’s credit report, such as Personal insolvency

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727 HAN, Choong-Soo, Korea National Report: “In civil cases, especially in the execution procedure, the court also has no power to discover personal credit information on its own motion. As mentioned earlier, the court may only issue “Order to Clarify the Property” upon the request of the creditor”.

728 HAN, Choong-Soo, Korea National Report: “Hence personal credit information receives the same protection in the execution context as is applied in the other context. In Korea, personal information is strongly protected by law. Therefore, provision or use of personal credit information without consent is restricted under Use and Protection of Credit Information Act article 23”.

729 HAN, Choong-Soo, Korea National Report: “In addition, a leakage of personal information has become a social issue, because the occasions under which organizations or business entities, mostly financial institutions, archiving the information leaked it happen quite a lot”.

730 HAN, Choong-Soo, Korea National Report: “The duty to search the properties of the debtor is vested solely in the creditor, and the court is limited only to the passive role of processing execution procedure upon the request of the creditor”.

731 Article 200 (1) of the Japanese Civil Execution Act.

732 HATT, Takuya, Japan National Report.

733 VAN CAENEGEM, William-WEINERT, Kim, Australia National Report: Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable: whether the information or opinion is true or not; and whether the information or opinion is recorded in a material form or not. Privacy Act 1988 (Cth) s 6.

734 VAN CAENEGEM, William-WEINERT, Kim, Australia National Report: information like “Full name; date of birth; current (or last known) address and two previous addresses; the name of current (or last) employer; driver’s licence number; name of any credit providers that have provided consumer credit and where they are licenced by the Australian Securities and Investments Commission (ASIC); they type
agreements; a direction or an order under the Bankruptcy Act 1996 (Cth) to take control of the individual’s property; and the opinion of a credit provider that an individual has committed a serious credit infringement. 735 An individual’s credit is obtained by creditor providers from credit reporting agencies or bodies. The obtaining of an individual’s credit report is limited to the following uses: assess an application for consumer credit; assess an application for consumer credit, if an individual has consented; assess whether to accept an individual as a guarantor; to collect overdue payments; assist an individual to avoid defaulting on credit obligations in certain circumstances; where the use is required or authorized by law; and where a credit provider believes that the individual has committed a serious credit infringement. 736 Part IIA of the Privacy Act 1988 (Cth) outlines credit reporting standards, which permits credit-related personal information to be held in credit reporting systems and imposes specific privacy standards in relation to that information. 737 Personal information which is publicly available in the credit reporting system relates to an individual’s activities in Australia (and its external Territories) and their creditworthiness. 738 Credit providers and credit reporting bodies when handling and individual’s credit report in addition to the Privacy Act 1988 (Cth) must follow only some of the Australian Privacy Principles (APPs)739.


For example, credit reporting bodies allow an individual to access their own credit record. Disclosure of an individual’s repayment history to a credit reporting body is permitted only if the credit body holds a credit license under the National Consumer Credit Protection Act 2009 (Cth) s 21D(3)(c)(i).

Privacy Act 1988 (Cth) Pt IIIA, s 6N(k).

For instance, the APPs do not apply to credit reporting bodies when handling personal information in an individual’s credit report. Whereas, a credit provider that is an APP entity must comply with all the APPs when handling other types of personal information such as, information not contained in, or produced using, an individual’s credit report. An APP entity is a credit provider has an annual turnover of $A3,000.00 and is a health service provider or trades in personal information. See Office of the Australian Information Commissioner, Privacy Factsheet 40 ‘Credit Providers, the APPs and your Credit Report’ (May, 2014) <http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/credit-and-finance/privacy-fact-sheet-40-credit-providers-the-apps-and-your-credit-report>.
IV. GENERAL CONCLUSIONS: OPEN QUESTIONS

4.1. An additional fundamental right is necessary to enforce a judgment when the sentenced party has not fulfilled his duty that was established in the judgement, because the right to obtain judgment on merits is not sufficient. The enforcement organism does not automatically enforce civil judgments because it is necessary for successful parties to make an application to the court for enforcement. It may also be necessary to adopt some provisional cautionary measures in order to ensure a later, successful enforcement, for example in the preventive taking of assets from the debtor by means of a judicial order. Once the judgment is enforceable, the enforcement organ could order all the necessary measures in order to obtain the amount of money that is owed by the debtor (including costs), usually by public auction: the item seized from the debtor is sold, and after deduction of the expenses of execution (costs that should be paid by the enforcement debtor) the judgment creditor is paid, and their rights are satisfied.

4.2. The constitutionalisation of civil procedure as a whole is a reality, and provides an invitation to discuss the constitutionalisation of enforcement. Which constitutional constraints, requirements and are applicable to enforcement? Let me conclude this General Report with some proposals.

(i) First, there is a constitutional structure and requirements according to which effective right protections need a fully-functional enforcement law. In order to respect the fundamental rights of both creditor and debtor, enforcement law is constitutionally required. This relates to requiring full enforcement and implementation as an additional stage, rather than merely having a binding judicial declaration about a substantive right.

(ii) Second, in the course of enforcement proceedings, conflicts between the rights of the creditor and debtor might arise. Are the procedural law regulations sufficient to resolve these conflicts? Would it be better the direct application of Constitutional Law?

(iii) The third aspect to be considered is the fact that enforcement will always affect and touch the debtor’s personal and propriety rights. The principles of enforcement proceedings create a proposal for an intermediate solution, which combines principles of procedural, private and public Law, with an adequate and strong link to Constitutional Law. The constitutional norms should not be directly and exclusively applicable to enforcement, but may be applied on a case by case when enforcement law is not sufficiently clear and complete.

(iv) The proportionality principle is usually ruled with other designation in the enforcement proceedings as balance for the specific application case by case. The

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741 VERBEKE, Alain , Execution Officers as a Balance Wheel in insolvency cases, TFLR-Civil Law 2001, p. 7 et seq.
proportionality in the enforcement has a double role\textsuperscript{742}, first as limitation for the enforcement acts, and second as balance to ponderate the admissibility of the enforcement and each measure. The enforcement acts are under reasonableness control as sub-constitutional law.

4.3. In any enforcement case where there is no opposition (Bailiff, Gerichtsvollzüchter, huissier de Justice, Master, etc.), there might be a temptation to immediately assimilate and reduce all the principles of enforcement down only to the constitutional imperatives. This might even provide an argument to support the direct and substitutive application of constitutional principles instead of those principles of the singular enforcement proceeding. However, the risk of directly applying constitutional standards to single enforcement subjects directly is that enforcement law may be frustrated. Thus, for example, the proportionality according to which there must be tailored acts of aggression on the freedoms and equality of citizens by acts of the both the State and the enforcement organism are intimately related to the rule of law and principles of justice. But the constitutional tests and standards to be applied to acts of enforcement seem to be more rigid and less apt for the adequate functioning of enforcement Law\textsuperscript{743}.

4.4. The economical and social costs of an adequate regulation of creditor-debtor remedies and collect enforcement procedure, economic argument for the protection of the debtor: the debtor protection as "social protection" through “Social state principle”: the right to assistance and care, and to the means which are essential for a dignified the existence. From this entitlement might cause a debtor to go below subsistence level due to garnishment/seizure. The provisions for the protection of debtors (enforcement barriers) limit the obligation of the debtor to meet the demand with their assets. In other words, the enforcement barriers determine whether and to what extent at this time to satisfying the claim of the debtor is foreseeable and reasonable. The attachment/seizure’s barriers can eventually be a win-win solution for all parties involved eventually. Many barriers not only ensure the existence of the debtor and his family, but also play a major part in ensuring that the debtor can continue his employment or self-activity. This can initially be in the immediate interest of the creditor by him thus for the future in the form of a substrate of income garnishment substrate secured for the future. The fact that the debtor is still actively working is also naturally of economic interest.\textsuperscript{744}

4.5. There are possible coalitions of various fundamental rights that might be more or less relevant to a specific case of enforcement, depending on the protected debtor’s and creditor’s interests\textsuperscript{745}. Although these principles are in fact general principles not only of enforcement but also of the legal system in general, the review of State action assumes special features in the enforcement\textsuperscript{746}. These must therefore be

\textsuperscript{742} Cf. STÜRNER, Michael, Der Grundsatz der Verhältnissmässigkeit im Schuldvertragsrecht, (Tübingen: Mohr Siebeck, 2010), p. 285 et seq.

\textsuperscript{743} CRIVELLI, Alberto, La natura e le fonti dell’esseuzione forzata, Esecuzione forzata e processo esecutivo Alberto Crivelli (Ed.) (Torino: Utet, 2012), pp. 25-51


\textsuperscript{745} VOLKOMMER, Max, Verfassungsmäßigkeit des Vollstreckungszugriffs, Rpfleger 1982, 1-9.

\textsuperscript{746} TARZIA, Giuseppe, Il giusto processo di esecuzione, in Riv. dir. proc., 2002, p. 329 et seq.
considered on a case-by-case basis\textsuperscript{747} which allows us to differentiate the assumptions in enforcement that are either different or similar to general principles concerning the exercise of force and coercion of the State, for example those addressing the exercise of punitive and preventative provisions. Maybe it is possible to focus on balance and fairness when talking about conflicts between fundamental rights\textsuperscript{748}. The fairness principle covers both procedural and material fairness. The procedural fairness in the enforcement process is not identical to fairness required at the trial stage. During the enforcement procedure, the legal protections can be different and are not subject to the same extent of protection as in civil litigation\textsuperscript{749}. The need for legal protection is higher when the material basis for the enforcement is investigated during the trial. As the enforcement is one part of the administration of justice, the fairness required is, however, higher when compared with other procedures.\textsuperscript{750} The social psychological theory\textsuperscript{751} of procedural justice emphasizes the role and the fundamental importance of procedural fairness in shaping citizens' satisfaction and compliance with the outcome of a legal process and in strengthening the legitimacy of legal institutions. I think this statement could be translated and applied to the enforcement proceedings. There is no other magical solution to the conflicts of fundamental rights in the enforcement than to explore the benefit of applying procedural justice criteria (participation, neutrality, respect, and trust) in all enforcement procedure to satisfy the procedural justice and fairness requirements. Could be said that “The key question every law enforcement is the relationship between creditor and debtor protection power, the ratio of effectiveness and social consideration”\textsuperscript{752}.

\textsuperscript{747} FISCHER, Nikolaj, German National Report.

\textsuperscript{748} BAER, Susanne, Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism The University of Toronto Law Journal, Vol. 59, No. 4 (Fall, 2009), pp. 417-468


\textsuperscript{750} ERVO, Laura, Finland National Report.


\textsuperscript{752} STÜRNER, Rolf, Grundlinien der Entwicklung des deutschen Vollstreckungsrechts. DGVZ 1985, 6-12 , p. 8.
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NATIONAL REPORT: FINLAND

I. GENERAL QUESTIONS

1. Which are the main aspects in your legal system, both under substantive and procedural law, which give creditors an effective and efficient protection of their rights against debtors? Please refer and quote the main rules.

The Finnish enforcement authorities are bailiffs and courts. In other words, the enforcement authority in Finland is a State authority. The duty of enforcement belongs to special recovery authorities, which are subject to official liability. The primary executioner of the enforcement is the District Bailiff, who is always a lawyer by his/her profession and is usually qualified as a judge. They are administrated within the ambit of the National Administrative Office and the Ministry of Justice. The bailiff is the head of the local enforcement authority and s/he has competence to make the most important decisions concerning the enforcement procedure. The assistant enforcement officers carry out the practical aspects of the enforcement.

The District Bailiff shall decide on the following: enforcement of a non-final ground for enforcement; reversal; a set-off; enforcement in the absence of a debt instrument; acceptance of security; an injunction; use of an expert; the designation of an agent; setting aside an artificial arrangement; the imposition of the injunction against decisions; a payment injunction; the attachment of jointly-owned property; the issuance of the directions to a party; the imposition of the threat of being fetched by the police and on requesting that the police fetch a person; the imposition of the threat of a fine and apply for a judgment ordering that the fine be paid; and the sale of attached real estate, a vessel or mortgageable car and shares in a joint stock company entitling the bearer to possess accommodation or a building, a collectively owned object or other property if it is subject to mortgages, liens or other security rights. The District Bailiff may also distribute the sale price of the property and the sale price of other property when the party list has been prepared; impose a payment or return obligation; decide on the correction of one’s own decisions; issue instructions in contested enforcement and stay of enforcement; render

2 The term “bailiff” here does not mean the same as a summoner or a process-server but an executioner of the enforcement.
3 The Code of Enforcement Chapter 1 Section 14.
4 The Code of Enforcement Chapter 1 Sections 11 – 12.
5 Niemi-Kiesiläinen, 2007, p. 130.
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an account between the seller and buyer in a sale-by-instalment; decide on the enforcement of a decision on child maintenance and visiting rights and attend to other duties provided by law for the sole competence of the District Bailiff.6

General courts serve as appellate authorities in enforcement matters and consider the enforcement matters that have separately been assigned to them by law.7

The same authority enforces the payments of all kind such as civil payments, taxes and even fines. For instance, the tax authorities may not enforce the taxes by themselves. The system is well-centralized and it is very easy and simple for clients. The enforcement procedure is based on the principles of ex officio and judicial investigation and therefore there is normally no need to consult an attorney. For the same reasons the costs of an enforcement procedure are usually very low.

The competence of the districtive enforcement authorities covers the whole country, which means that filing for enforcement is allowed wherever. After the case is opened it will be transferred to the debtor’s personal executive officer who is in charge of all cases belonging to the same debtor and can easily take the situation as a whole into consideration. In addition, the new nationwide database is of great assistance when the executive officer in charge collects the information concerning his/her clients.

The enforcement authorities consist of the central administration (National Administrative Office for Enforcement) and its subordinate local enforcement offices. The National Administrative Office for Enforcement was founded on 1 January 2010 as a result of an administrative reform. The tasks of the new authority originate from the Ministry of Justice and the former Provincial State Offices of Finland.8

The Office is responsible for the administrative management, guidance and supervision of the enforcement service. In particular it is responsible for the regional availability of enforcement services. Provisions on the duties of the Office have been laid down in the Act on the National Administrative Office for Enforcement and in the Enforcement Code.9

The office is led by a director and the number of staff is approximately 20. The office has three units that are each led by Senior Administrative Bailiffs. The Administrative Unit is in charge of financial and personnel administration and communication. The Legal Unit investigates, for example, complaints and claims for damages against enforcement service. The Development and Supervision Unit prepares management by result, auditing, training and development issues as well as co-operation with stakeholders and interest groups. The Ministry of Justice has a role in strategic planning, budgetary planning and legislative planning. The National Administrative Office for Enforcement has its main office in the City of Turku and an office in the City of Helsinki.10

6 The Enforcement Code, Chapter 1, Section 9.
7 The Enforcement Code, Chapter 1, Section 10.
District Bailiffs and their subordinate civil servants function in enforcement offices. The Senior District Bailiff serves as director of the office.\(^{11}\) The area of operations of an enforcement office (enforcement district) consists of one or more population register districts.\(^{12}\)

The National Administrative Office appoints the Senior District Bailiff and the District Bailiff. A Finnish citizen who has completed the degree of Bachelor of Laws or Master of Laws, who is familiar with enforcement or who has acquired in other duties the skill necessary for successfully managing the position and who has the personal qualifications necessary for the position may be appointed as a District Bailiff. In addition to the foregoing, the appointment as a Senior District Bailiff requires the applicant to have good leadership skills.\(^{13}\)

Several private companies are also active in the debt collection sector. Their operations are regulated by the Debt Collection Act and are monitored by the Consumer Ombudsman. The Act refers generally to the good debt collection practices that the debt collection agencies are obliged to follow. They have no right to take coercive measures against the debtor or to enter the debtor’s premises.\(^{14}\) Therefore, the private sector collects debts paid, factually speaking, voluntarily by the debtor. The private companies have no tools with which to work if the debtor does not pay. In such situations they even use the State authorities’ services.\(^{15}\) According to the Finnish Constitution, the delegation of the main government powers to a private sector is not allowed. It is therefore the State authority that is the executive authority with the power to use coercive measures.\(^{16}\) This system was already adopted in Sweden and Finland prior to 1734 when the nationwide Code was implemented in Sweden-Finland.\(^{17}\) The exceptional system is organized like an administrative body, yet it makes judicial decisions.\(^{18}\)

Originally, bailiffs were understood and used as instruments to enforce the decisions made by courts. However, today they have more and more power to make judicial decisions of a different kind and their role converging on that of a judge.\(^{19}\) The difference between litigation and enforcement is thus more unclear today than under the traditional concept. Even the enforcement displays many characteristics of proceedings. This is very important because the enforcement officials have much power to make decisions and therefore it is most essential to establish fair institutional frameworks. It is

\(^{11}\) The Enforcement Code, Chapter 1, Section 13.

\(^{12}\) The Enforcement Code, Chapter 1, Section 11.

\(^{13}\) The Enforcement Code, Chapter 1, Section 14.

\(^{14}\) Niemi-Kiesiläinen, 2007, p. 131.

\(^{15}\) The first step is to obtain a ground for the enforcement, which is the judgment. Therefore, the civil litigation or summary proceedings is needed in order for the enforcement to commence. If the losing party does not fulfil the obligations upon him / her in the judgment, the next step will be the enforcement on the basis of the execution title (the judgment).

\(^{16}\) The Constitution of Finland, Chapter 1 Section 2.

\(^{17}\) At that time they were one country.


\(^{19}\) Koulu/Lindfors 2009, p. 51.
now more important than ever that the executive officers both are impartial and independent and that they work in a fair and equal manner.\textsuperscript{20}

2. Which are the main aspects in your legal system, both under substantive and procedural law, which give debtors a reasonable protection in a civil enforcement or other collection procedure before creditors? Please referred and quote the main rules.

Nowadays, human rights have more weight in enforcement matters. This trend has been current from 1995 onwards. Yet, the idea is not very modern: the Code of 1734 already included a rule according to which the enforcement had to be fair.\textsuperscript{21} However, some steps have been taken quite recently, for example the last possibility of using custody as a coercive measure during the enforcement was abandoned in 1996.\textsuperscript{22} The most important coercive measure during the enforcement is now that the debtor can be brought to the enforcement inquiry by the police.\textsuperscript{23} However, it is not legal to take him/her beforehand into custody in order to secure that the debtor will be brought to the enforcement inquiry.\textsuperscript{24}

The enforcement authorities have to protect the interests of both creditors and debtors.\textsuperscript{25} The debtor does not normally need legal counsel because the enforcement authorities will take his/her rights into consideration ex officio.\textsuperscript{26} It is their duty to observe what is fair and that the debtor does not suffer more than needed in order to execute the judgment.\textsuperscript{27} The principle of fairness includes a norm concerning consideration of conflicting interests. Where a conflict exists it is the interests of the debtor which have more – \textit{prima facie} – value than those of the creditor.\textsuperscript{28}

The main principles followed have been taken into the Enforcement Code and the meaning of the fairness during the enforcement procedure has been strongly underlined.\textsuperscript{29} According to the general fairness principle, the executive officer has the duty to act properly and impartially when carrying out his/her official duties. In addition, the executive duties have to be carried out rapidly, effectively and expediently. It is forbidden to cause more harm to the debtor or to the third party than is needed in order to achieve the aim of the enforcement. The executive officer also has the duty to promote the independent initiative of the debtor and the readiness of the parties to conciliate.\textsuperscript{30} This principle of due form has been seen as an important tool in balancing


\textsuperscript{21} Linna, 2000, p. 691.

\textsuperscript{22} Before that, it was possible to use custody in order to have a defendant to fulfil an order (however, not a payment order, but another kind duty to fulfil) given against him/her on a ground of enforcement.

\textsuperscript{23} Linna, 2000, p. 698.

\textsuperscript{24} Linna, 2000, p. 698.

\textsuperscript{25} Linna/Leppänen, 2003, p. 29.

\textsuperscript{26} Cf. Linna/Leppänen, 2003, p. 290.

\textsuperscript{27} The Enforcement Code, Chapter 1, Section 19.

\textsuperscript{28} Koulu/Lindfors, 2009, pp. 39 – 40.

\textsuperscript{29} Linna/Leppänen, 2003, pp. 10 – 11.

\textsuperscript{30} The Enforcement Code, Chapter 1, Section 19.
the wide powers of the executive authority and optional rules on the procedure. The principle of proportionality is also included in the fairness principle. The fairness principle covers both procedural and material fairness. The procedural fairness in the enforcement process is not identical to fairness required at the trial stage. During the enforcement procedure, the legal protection can be different and is not subject to the same extent of protection as in the civil litigation. The need for legal protection is higher when the material basis for the enforcement is investigated during the trial. As the enforcement is one part in the administration of justice, the fairness required is, however, higher compared with administrative procedures.

The main elements of the fairness are: 1) the right to be heard, 2) the impartiality of the State Office, 3) the publicity, 4) the duty to give grounds for decisions, 5) the right to appeal and 6) the right to use counsel or an attorney. For reasons of fairness, the enforcement has to be undertaken without unnecessary public attention and harm. Any harm caused must be related to the significance of the enforcement matter. Too radical acts must be avoided and the execution must be done in a discreet way. In addition, the business relationships as well as neighbourhood relations and housing must not be endangered unless absolutely necessary. The party’s wishes concerning the place and time of execution have to be taken into consideration if it is possible without endangering the principle of judicial investigation. The bailiff has also a duty to promote conciliatory spirit amongst the parties.

One of the most important principles in enforcement is transparency. The executive officer has a duty to inform the debtor and to protect him/her ex officio. The duty to inform the party is wider if s/he is without a legal counsel or an attorney. When informing the parties, the executive officer has, however, to keep in mind that he is to remain impartial: the parties have also to be treated equally. The transparency is one part in the executive service. Like the administration of justice has nowadays been seen as a court service in Scandinavia, even the executive part in civil litigation has the same function as a service for clients, who in this instance are the creditor and the debtor.

Even if the enforcement is a liquidation process, the rehabilitative ideas have been current during the recent reforms. One example of that kind of thinking is that the enforcement is now time limited and its grounds are no longer valid indefinitely. The usual time limit is 15 – 20 years if the debtor is a natural person. The idea is to prevent unfair long-lasting enforcement.

31 Linna/Leppänen, 2003, p. 11.
32 Linna/Leppänen, 2003, p. 22.
33 Linna/Leppänen, 2003, p. 25.
36 Linna/Leppänen, 2003, p. 312.
38 Linna/Leppänen, 2003, pp. 35 – 36.
39 The Enforcement Code, Chapter 2, Section 24.
40 Linna/Leppänen, 2003, p. 18.
In respect of the debtors, who are legal persons, the idea on capability of surviving has been realized with the help of the right to beneficium and the protected portion, which – after the reform – better cover the interests of legal persons.\textsuperscript{41}

In addition, the appeal is examined as a whole at the first instance\textsuperscript{42}. This means that the District Court may examine if the decision made by an executive officer is entirely correct and the Court is not bound to the claims made by the complainant.\textsuperscript{43} This is the other example of how the parties are protected ex officio during the enforcement procedure.

The modern enforcement has therefore also some characteristics of loan arrangement even if it still is liquidation procedure.\textsuperscript{44}

The right to be heard is not as absolute right at the enforcement level as it is in a civil proceeding. The parties have been already heard during the proceedings when the ground for the enforcement was obtained. In addition, enforcement is based on the principle of judicial investigation, which also minimizes the need to be heard. However, the debtor usually has a right to be heard. Different forms of notices also serve as tools to deliver information to the debtor.\textsuperscript{45}

With the reform of 2003 there is now a general rule covering the hearing of the parties in the Code of Enforcement. According to the Chapter 3, Section 32, the person in question shall be reserved an opportunity in advance to be heard in a suitable manner by a bailiff. An inability to ascertain the contact details of the person in question or the inability to hear him or her for another corresponding reason shall not prevent continuation of enforcement. Also in situations other than those specifically mentioned in law, the bailiff shall hear the parties and third parties if the matter is deemed to be of considerable significance to the person to be heard and if there is no impediment to the hearing. The person in question shall be reserved an opportunity to be heard anew if essential new evidence is obtained in the matter. In addition, there are very many special paragraphs on the right to be heard in different situations during the enforcement.\textsuperscript{46} In practice, the bailiff calls the debtor and s/he gains the right to be heard straight away.\textsuperscript{47}

The bailiff can even organize voluntarily meetings for all parties in the enforcement case. Yet, there are no rules on this kind of procedure. However, this is the only possibility to encourage communication and discussion between parties; otherwise, they cannot meet. It is namely not suitable to invite the creditor to the enforcement inquiry because the debtor has to have a possibility to concentrate on the duty to give information there. It is also not possible to invite the creditor to the debtor’s home if the enforcement happens there\textsuperscript{48}. This has been seen to be against the debtor’s protection and his/her privacy.\textsuperscript{49}

\begin{flushright}
\textsuperscript{41} The Enforcement Code, Chapter 4, Sections 21, 64, 65 and Linna/Leppänen, 2003, p. 22.
\textsuperscript{42} Only at the district court and no longer at the court of appeal.
\textsuperscript{43} The Enforcement Code, Chapter 11, Section 16.
\textsuperscript{44} Linna/Leppänen, 2003, p. 18.
\textsuperscript{45} Linna/Leppänen, 2003, p. 27 – 28.
\textsuperscript{46} The Enforcement Code, Chapter 3, Section 32 and Linna/Leppänen, 2003, pp. 407 – 410.
\textsuperscript{47} Linna/Leppänen, 2003, pp. 408 – 409.
\textsuperscript{48} It is nowadays very rare that enforcement takes place in the debtor’s home. Linna, 2000, p. 696.
\textsuperscript{49} Linna/Leppänen, 2003, pp. 408 – 409.
\end{flushright}
The information has also been given by notices. There are three legal *notices* in the situation where an enforcement ground is based on a liability to pay. First, the bailiff should contact the debtor and notify him/her of the filing: the idea is to declare the enforcement matter. Secondly, a *prior notice* is given: the idea is to inform the debtor of the property that will be seized; it is therefore called as a declaration of an object. The third notice is called a *notice after the fact* and means information on the facts, what has happened and when. It can be also called as a second declaration of the matter.  

The enforcement authorities aim for a voluntary payment after the sending of a collection letter. In order to achieve a voluntary repayment of the debt, the assistant enforcement officer and the debtor may set up a payment schedule. The preconditions for a schedule will be assessed on a case-by-case basis. 

The enforcement authority may, instead of attachment of salary or business income, set up a payment schedule if the debtor can credibly guarantee that he or she is able repay the amount in accordance with the payment schedule. The payment schedule is set up for the same amount as the garnishment of wages or business income. If a payment schedule is set up instead of garnishment of wages or business income, the same rules for awarding leniency that are applied to these distraint types are applied to the payment schedule. In addition to setting up the payment schedule, distraint will also be carried out when this is necessary to ensure that the schedule will be adhered to. If the debtor fails to keep to the schedule then the seized assets will be sold by compulsory auction. The officer in charge may decide that the payment schedule has lapsed also if the debtor’s new debts enter enforcement proceedings or if the debtor mismanages the seized assets. The alternatives here are to establish up a new payment schedule to reflect the change of circumstances, or to sell the seized assets. 

The creditor files for enforcement to the execution officer either in writing or through an electronic application. The creditor can file with any execution officer in the country. If the execution officer has no competence in the case, s/he will transfer the case to the competent enforcement authority. The execution officer in the area where the debtor has a domicile is competent to handle all enforcement matters against the debtor with the help of execution officers in other places where the debtor has property. 

The idea is that every debtor has only one personal District Bailiff and only one personal assistant executive officer, who take care of his /her all debts and other possible executive matters. The aim is to take the debtor’s situation as a whole into consideration all the time. Even though the creditor can file with any execution officer in the country, there is only one person who is responsible for one debtor’s whole situation. The files will therefore be transferred, after the opening tasks have been completed, to the executive officer in charge, who will be responsible for the case in future. 

The responsible executive officer is usually one of the officers who works in the same area of residence as the debtor. If this is not the case the debtor’s factual possibilities to attend his/her interest have to otherwise be taken into consideration. The

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50 The Enforcement Code, Chapter 3, Sections 33, 34 and 36 as well as *Linna/Leppänen*, 2003, p. 394. 
54 *Linna/Leppänen*, 2003, p. 42.
other main principle is to choose the executive officer in charge so that s/he can execute the enforcement in a most expedient way.\textsuperscript{55}

3a. Is your legal framework balanced and fair in providing certainty, foreseeability and transparency to the civil enforcement procedure of money claims and restitution?

The Finnish enforcement procedure is regulated in the Code of Enforcement (15.6.2007/705). The former Execution Act was originally enacted in 1895 but it was – of course – amended several times since then. The Act has been under a huge reform process during the past 15 years. There have been very many partial reforms and finally a fresh and totally renewed Code of Enforcement came into force on the 1 January 2008.

The enforcement authority in Finland is a State authority. The duty of enforcement belongs to special recovery authorities, which are subject to official liability. The courts make the most important decisions in disputes and they also act as appellate authorities. The primary executioner is the District Bailiff, who is always a lawyer by his/her profession and is usually qualified as a judge. The same authority executes all kind of payments such as civil payments, taxes and even fines. For instance, the tax authorities may not execute the taxes by themselves.

Every debtor has only one personal District Bailiff and only one personal assistant executive officer, who take care of his/her all debts and other possible executive matters. The aim is to take the debtor’s situation as a whole into consideration all the time. Even if the creditor can file with any execution officer in the country, there is only one person who is responsible for debtor’s whole situation.

The system is well-centralized and it is very easy and simple to clients. The enforcement procedure is based on the principle of judicial investigation and ex officio. There is therefore normally no need for an attorney. For the same reasons the costs of enforcement procedure are usually very low.

The enforcement organization can therefore be seen as an effective, safe, trustworthy and simple system for all actors.

In the legal literature the Enforcement system has been – on the other hand – seen also as a complicated system which is based more and more on the principle on the judicial investigation.\textsuperscript{56} At the same time, bankruptcy has become simpler and it has been greatly privatized during the latest reforms.\textsuperscript{57} The bailiff is allowed to decide such substantial matters that have become current after the ground for execution have been

55 The Enforcement Code, Chapter 3 Section 14.
56 On the other hand, the same authors have seen the reformed enforcement also as more party-based function as earlier. The independent initiative of a debtor has been underlined as one aim in the Enforcement Code. The applicant has quite a lot disposition power. The applicant can, for instance, decide if s/he wants the limited enforcement or normal one. In practice, the applicant may also make initiatives such as giving hints concerning where to search for the assets. The bailiff usually follows the wishes of an applicant if such wishes are easy to fulfill and they do not mean much extra work. In that way, the principle of the judicial investigation and the power to dispose as an applicant are standing together in the reformed enforcement procedure. A debtor can also make some initiatives like ask mitigation to the execution. Koulu/Lindfors, 2009, pp. 35 – 36.
57 Koulu/Lindfors, 2009, p. 420.
The bailiff therefore has to have very good professional skills. Due to this kind of development, the enforcement gains more binding force but it also begins to resemble a judicial procedure.\footnote{According to the so called non-intervention principle, the bailiff may in no case interpret a ground for enforcement or decide anything concerning that. On the other hand, courts may not give any orders for enforcement without statutory authority. Due to this intervention principle the bailiff cannot interpret even the substantive law on which the enforcement ground is based. \textit{Linna, Tuula: Ulosotto-oikeuden yleiset opit – missä ja mitä?} Lakimies 2009, pp. 3 – 33, pp. 16 – 17 and p. 29.}

It has also been said that the system in the Enforcement Code is complicated and difficult to understand. It is thus important that the bailiff’s duty to inform and assist parties, which is included into the Enforcement Code\footnote{Koulu/Lindfors, 2009, p. 36.}, is fulfilled in a sufficient way.\footnote{It is included into the principle of transparency. \textit{Koulu/Lindfors}, 2009, p. 134.} This critique is fair and I agree. The legislation is difficult to understand and it is very difficult even for a lawyer to gain a comprehensive view on the enforcement system. This is, however, a different matter, and does not mean that the system would be complicated in itself. In my opinion it is working well and in practice (when parties are using it) it is simple to the clients as well. However, it is difficult to understand the system based on the legal texts and statutes. I would say that the theory is complicated yet the practice is simple, which is, of course, much better than the reverse situation.

The Enforcement Code has even been seen as a problematic system because it promotes the regular creditors; especially the institutionalized creditors can find the system very easy because they can use the system in a very effective way.\footnote{Koulu/Lindfors, 2009, p. 134.} It is true that the institutionalized creditors have some priorities in the current system; they can use the modern technique very well and therefore simplify their collection procedures. Still, I would not say that this is a risk to legal policy as I consider it normal to elaborate easy systems to those who really need them and use them regularly.

Linna has picked up on the question of equality from debtors’ perspective. She asks if the system can be found as fair if the enforcement is effective only concerning the salary earners, pensioners or when tax refunds are seized. She thinks that the enforcement should be effective in all kind of matters and situations.\footnote{Linna, 2009, p. 18.}

### 3b Would you define your legal system debtor biased or creditor biased? Explain why and referred and quote to main rules.

Due to the recent wide reforms in the area of enforcement, the protection of debtors is very modern and up-to-date. The enforcement authorities have to protect the interests of debtors ex officio. The debtor therefrom does not usually need an attorney. It is the duty of a bailiff to observe that the debtor does not suffer more than needed in order to execute the judgment and what is fair.

Even if the enforcement is a liquidation process, the rehabilitative ideas\footnote{Linna and Hupli have found three kinds of elements in the modern enforcement. First, it still is a liquidation procedure. Second, the enforcement authorities have to protect the debtor in a defensive way. Linna and Hupli have found three kinds of elements in the modern enforcement. First, it still is a liquidation procedure. Second, the enforcement authorities have to protect the debtor in a defensive way.} have been current during the recent reforms. One example of that kind of thinking is that the...
enforcement is nowadays time limited and the ground for enforcement is no longer valid for a lifetime. The usual time limit is 15–20 years if the debtor is a natural person. The idea is to prevent unfair long lasting enforcement. The objectives of a voluntary payment, time limited execution, the systems of the personal executive officer and the protected portion are protecting debtors very well. In addition, there are some types of property that may not be seized, for instance, social benefits and compensation of costs. In such situations there is also a strong social aim in the enforcement. The compensation based on the pain and suffering, injury, compensation because of a temporary or permanent handicap and the compensation paid by the State because of the deprivation of liberty of innocent persons are kept outside of the enforcement. It is also usually not acceptable to use physical force in the enforcement of a monetary claim. The debtor is thus well-protected even from the perspective of his personal integrity.

The data protection in the enforcement has, however, been criticized in the legal literature, especially from the debtor’s point of view. It has been said that it should be made better in the near future. The effective furnishing of the information has been seen as a risk to a debtor and it is said that the enforcement begins to resemble bankruptcy. If the bailiff pools the information furnished from different sources, the result is that the bailiff gains a very detailed general view on the debtor’s financial situation. Koulu and Lindfors are of opinion that the bailiff has better tools for that during the enforcement procedure compared with the bankruptcy. From the debtor’s point of view it can of course be criticized if there are more effective tools in a single enforcement matter compared with the general enforcement, that is bankruptcy.

The current situation is somehow dualistic and this trend has been seen even more so in the future visions. On the one hand, routine matters, such as co-operative salary earners or impecunious debtors, are handled automatically and in a manner which saves the most work where the enforcement is concerned. In such situations, the enforcement resembles more administration (in the sense of bureaucracy) than the administration of justice. On the other hand, the enforcement authorities have a duty to co-operate with the other authorities and the private sector. The aim is then to take the debtor’s situation into consideration in a comprehensive way. The bailiff has nowadays a new rehabilitative role as well. The second question is what is to be done with contumacious debtors. They are currently objects in a more effective and individual enforcement. In such cases the enforcement procedure resembles more the

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65 The Code of Enforcement Chapter 2 Section 24.
68 There has also been some discussion in Finnish legal literature if the enforcement is included in administration or in the administration of justice. Havansi, Linna and Hupli see the enforcement as an administration of justice, whereas Tuori thinks it is only administration. Hidén finds characteristics of both elements. Linna/Hupli, 2001, pp. 596–625 and Linna, 2009, p. 19.
administration of justice than administrative matters. The enforcement becomes long-lasting and comprehensive and resembles bankruptcy.69

Havansi has also picked up the same problem. He thinks that the enforcement has become softer concerning the honest debtors who have pure financial difficulties. The opposite trend on the more intensive enforcement concerns the debtor, who probably is solvent, but contumacious.70

4. In your civil enforcement procedure, does the legal framework impose on third parties a duty to cooperate with individualization of assets of the debtor to facilitate the proceeding? Please refer and quote the main rules.

The bailiff’s right to obtain information from the other authorities or third parties was considerably widened in 1997. This possibility to get information is indeed very important in all kinds of enforcement, but it is of ultimate importance in respect of the special collection.71

According to the basic norm in the Enforcement Code, the bailiff has the right to obtain the information, documents and materials provided below if they are necessary for enforcement in a given matter. The bailiff shall assess the necessity. The information may be provided by way of an electronic interface. The Ministry of Justice may make reimbursements for the establishment and maintenance of the electronic interface.72 This rule then completes the possibilities to obtain information based on the other legislative acts. There are then rules included in other acts as well and, based thereupon, there are also other possibilities to obtain the confidential information. The cited rule is therefore only a minimum guarantee in order to obtain information. In addition, the bailiff can of course collect all kinds of information available publicly.73

When the obligation to obtain information is only based on the Enforcement Code, the prerequisite is that the information is necessary for enforcement in one specific enforcement matter. In addition, the information can only be demanded for single cases. The collection of further data is based on the willingness of the third party or the other authority to voluntarily divulge further information. However, giving such further information is only permitted if there are no legal prohibitions on doing so. The possibility to give extra information voluntarily thus only covers the situations where there are no legal restrictions to do so and the third party or an authority wants to assist the bailiff more than he is required to do so by the legislation.74

The enforcement inquiry is not a measure against the third party as only a person who is a representative of a debtor is subject to such an inquiry.75 Although it is

69 Koulu/Lindfors, 2009, p. 419.
71 Linna/Leppänen, 2003, p. 482. The special collection has been covered in the chapter 10.2.3.
72 The Enforcement Code, Chapter 3, Section 64.
73 Linna/Leppänen, 2003, pp. 483 and 485.
74 Linna/Leppänen, 2003, pp. 486 – 487.
75 See the chapter 7.2.
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possible to also hear the third party, the answers given to questions posed by a bailiff have to be within the limits of the Enforcement Code, Chapter 3, Sections 64 – 67.

According to the Enforcement Code, a third party shall state to the bailiff: (1) whether he or she is in possession or otherwise in charge of assets belonging to the debtor, and what kind of assets are involved; (2) whether he or she has receivables from, or debts due to, the debtor, and the basis and amount of the receivable, the transactions in the accounts relating to the receivable, as well as the right granted by the debtor to dispose of said accounts; (3) whether he or she has concluded a transaction with, or to the benefit of, the debtor that may have significance in the search for the debtor’s assets, and the contents of the transaction; (4) information concerning the income and emoluments in kind received by the debtor, information concerning working hours, the basis for the payment of income and the contact details of the debtor that the third party has as employer or as the party paying the income; (5) the address and telephone numbers of the debtor as well as the other contact details of the debtor in the possession of the third party as a telecommunications or postal enterprise. On the request of the bailiff, a third party shall produce the contract or other document and the other immediately relevant material that concern a circumstance referred to in the rules above.

The bailiff has the right to have copies made of the documents and materials. A credit, finance or insurance institution may not disclose to parties other than the authorities whether the bailiff has posed questions concerning the aforementioned information.

The third party is obliged to give information when asked and therefore has no obligation to give information in an active way and on his/her own initiative. S/he has to answer the questions and to be truthful in doing so. If the third party gives false information or conceals information, s/he could commit a criminal offence or s/he may be liable to pay compensation. However, it must be underlined that the third party can be viewed as a debtor if the bailiff makes a decision according to which the third party is identified as such. This is possible when the bailiff suspects artificial arrangements.

As the third party has no general obligation to help the bailiff and give information, the role of a third party differs from the role of a witness in court proceedings. The third party can, of course, voluntarily give additional information. Otherwise, for instance a spouse, a neighbour or other third party who has knowledge of the information concerning the debtor, has no general obligation to give information based on his or her position. On the other hand, if a relative or other close person has the duty to give information based on the Enforcement Code, s/he has no right to refuse;

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76 The provision applies also to receivables and debts falling due in the future, if the commitment has already been given or the other legal basis arisen, as well as to receivables and debts whose basis or amount is unclear or subject to conditions. The Enforcement Code, Chapter 3, Section 66.
77 The provision applies also to procedures, arrangements and other measures the effects of which are comparable to a transaction. The Enforcement Code, Chapter 3, Section 66.
78 The Enforcement Code, Chapter 3, Section 66.
80 The artificial arrangements are covered in the chapter 10.2.2.
81 Linna/Leppänen, 2003, p. 489.
82 Linna/Leppänen, 2003, pp. 483 – 484.
83 Linna/Leppänen, 2003, p. 489.
this is not the case where a witness is concerned. The third party also has no right to refuse to give information even if s/he has to give information that may be self-incriminating. It has been said in legal literature that the third person has to even incriminate his/herself if this is needed in order to fulfil the obligation to provide information. However, the latter duty can be contested if human rights and the case law of the European Court of Human Rights are taken into consideration.

If a third party refuses to provide information the bailiff may compel him or her to provide the information at once or within a time limit; failure to do so may result in the imposition of a fine. If information cannot be obtained from the third party in any other manner, the bailiff may compel him or her, under threat of a fine, to arrive at the bailiff’s office or at another suitable location to provide the information. There is no need to use coercive measures against the third party if the interest is minor or the information is not very significant taking the situation as a whole into consideration. The same is also true for situations where it is not clear if the third party actually has an obligation to give information.

When information is being procured from third parties, efforts shall be made to avoid a situation where the bailiff is in possession of personal data not relevant to the enforcement matter at hand and considered sensitive, except as regards information on social welfare benefits received by the debtor. The bailiff has the right to obtain the information specified in the legislation even if information on the financial status of a third party would be disclosed at the same time, this is unless the information can be obtained in some other manner.

An authority and a party performing a public task shall, upon request, provide the bailiff with all information in its possession relating to: (1) the debtor’s property and assets, income, debts and other financial status, as well as banking information; (2) the debtor’s employment and service relationships, pensions and economic activity; (3) the debtor’s address, telephone numbers and other contact details.

The bailiff has no possibility to use the threat of a fine against the authority. However, the authority be committing a criminal offence if it will not fulfil its duties to give information. In any event s/he may be neglecting his or her official duties. The Parliamentary Ombudsman and the Chancellor of Justice enforce that the authorities follow the laws and fulfil their duties. Every person has the right to receive, from the local enforcement authority, a certificate from the enforcement register concerning a person specified by him or her as a respondent in an enforcement matter. All the data entered into the Enforcement Register that may be included on a certificate are public; the other data stored in the register are confidential. The certificate will include the following information: 1) the name of the applicant and the respondent as well as the respondent’s date of birth and the place of residence; 2) the enforcement matter, when it

84 Code of Judicial Procedure, Chapter 17, Section 20.
85 Linna/Leppänen, 2003, pp. 491 – 492.
86 The Enforcement Code, Chapter 3, Section 68.
87 Linna/Leppänen, 2003, p. 499.
88 The Enforcement Code, Chapter 3, Section 65.
89 It it not significant if the contact details are confidential or not. Linna/Leppänen, 2003, p. 496.
became pending, and the registration of passive receivables; 3) the amount of the applicant’s receivable and the amount remitted to the applicant; 4) the nature and date of a certificate of impediment. The certificate shall be given as a print-out from the Enforcement Information System. If there are no register notations, a certificate to this effect shall also be given. A certificate may usually be given covering the two years preceding the request. However, it can be given covering even four years if the requester demonstrates that the information is necessary for his or her livelihood or otherwise for the safeguarding of his or her important personal or public interest. Before a certificate is issued, the name, profession and place of residence of the person requesting the certificate as well as the essential justification shall be entered into the Enforcement Information System. At the request of the registered person, he or she shall be informed of to whom a certificate, which concerns the registered person, has been issued from the enforcement register during the preceding six months. The idea is to control unnecessary requests and to act fairly in relation to the debtor. However, it is possible to obtain the information based only on the requesting party’s inquisitiveness.

As one part of the docket information is public it is thus possible to search for it based only on the name of the debtor. It is not possible to obtain the information based on the date of the grounds of the enforcement or based on the creditor’s name.

Notwithstanding provisions on confidentiality, a credit reference agency has the right to receive docket information concerning enforcement matters related to payment liabilities in which a certificate of an impediment has been issued; this docket information can be obtained within the two months preceding the request. Information regarding a certificate of impediment concerning limited enforcement may be given only on the condition that the credit reference agency deletes this information from the register if the debtor pays the debt that was collected in limited enforcement. If the receivable is collected in full after data have been transferred, the bailiff shall, at the request of the debtor, notify the credit reference agency thereof. If the ground for enforcement is repudiated, the bailiff shall, upon request, notify the credit reference agency of the deletion of the respective entries in the register. The same procedure applies if it becomes apparent that, for some other reason, the enforcement is unfounded. The aforementioned information may be transferred in an electronic format.

The function of the provisions referred to above is to act as a source of information concerning the debtor’s credit status.

Notwithstanding provisions on confidentiality, in order to attend to his or her duties the right is granted to an authority or another person attending to a public function to obtain the necessary docket information from the preceding four years as well as cooperation information from the enforcement register. The data may be transferred electronically if, in accordance with provisions on the protection of personal data, the recipient of the data has the right to store and process such personal data.

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91 The Enforcement Code, Chapter 1, Sections 30 and 31.
92 Linna/Leppänen, 2003, p. 516.
94 The Enforcement Code, Chapter 1, Section 32.
95 Linna/Leppänen, 2003, p. 513.
96 The Enforcement Code, Chapter 1, Section 33.
However, this right does not cover special information or a national directory. The right concerns all the authorities and persons attending to a public function irrespective of authority he or she is. The only requirement is that the authority requires the information in order to carry out his or her duties. The enforcement authority does not control if the request is appropriate. The enforcement official can only ask for reasons for the request if there is a visible imbalance between the authority’s duties and the request. The authority is subject to official liability, which seems to be a sufficient guarantee against malpractices. Furthermore, it should be underlined that “the person attending to a public function” may even cover a private sector to the extent that it exercises public functions. The provision covers also state-owned business and public societies.

The National Administrative Office may decide on the establishment of a technical link and the transfer of data from the Enforcement Register using such a link if the recipient of the data has, under law, a right to receive data electronically from the enforcement authorities. Before the technical link is opened, the recipient of the data shall indicate that the data will be protected in an appropriate manner.

5. In your civil enforcement procedure, does the legal framework impose on the defendant debtor a duty to provide up-to-date information on income, assets, credits against third parties and other relevant matters? If so, to whom is this duty owed (i.e. to the claimant creditor, the court or both)? Please refer and quote the main legal rules.

The obligation of the debtor to provide information became more obvious and concrete with the reform in 2003. The reform thus completed this obligation in a necessary way. The debtor has a duty to respond to the questions posed by a bailiff, but otherwise there is no need for an active obligation to provide information. The list of the questions is included in the Enforcement Code. There is otherwise no need to be active as a debtor: the debtor has no duty to contact a bailiff in the event that his/her income or wealth changes and the obligation to provide information is then limited to answering to the questions posed by a bailiff.

Upon the bailiff’s request in an enforcement matter the debtor shall truthfully provide the following information that the bailiff needs for enforcement: (1) the debtor’s personal and contact details and, insofar as is necessary for the enforcement matter, information on his or her family and persons maintained by him or her; (2) information

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97 Linna/Leppänen, 2003, p. 525.
100 The Enforcement Code, Chapter 1, Section 35.
102 Koulu/Lindfors, 2009, p. 150.
103 The Enforcement Code, Chapter 3, Section 32.
104 Linna/Leppänen, 2003, p. 448.
on his or her property and other assets, income, debts, shareholdings and memberships in other corporations with a bearing on his or her financial status; (3) information on any likely changes to the information that can be anticipated for the following year; (4) information on how wages, salary or other recurring income is determined, as well as information on his or her place of employment and the contact details of the employer or other payer of wages or salary; (5) information on the whereabouts of an object or document subject to a relinquishment liability or a statutory duty of relinquishment to the bailiff; (6) information on contracts and commitments affecting his or her financial status as well as on assets administered or used by him or her on the basis of an assignment or a comparable basis, arrangement or contract; (7) information on assets conveyed, payments made and transactions concluded against consideration or without consideration, though if the information is necessary in order to determine whether an action for recovery can be used to recover assets for enforcement, as well as on procedures, arrangements and other measures that have effects comparable to such transactions; (8) other comparable information on his or her financial status and operations.\textsuperscript{105}

The list is not exclusive. Based on the above mentioned paragraph 8 of Chapter 3, Section 52 of the Enforcement Code, the bailiff always has a possibility to pose other similar kinds of questions to the debtor. However, the factual limit is that the question has to concern the economic situation of the debtor and information must be necessary in order to fulfil the execution of the enforcement order.\textsuperscript{106}

The obligation to provide information also covers contested property and property that is difficult to realize. It is also irrelevant if the property can or cannot be seized. The same also covers property abroad even if the Finnish bailiff has no competence to execute the enforcement where such property is concerned.\textsuperscript{107}

A debtor who is a natural person shall provide the information him-/herself. If the debtor has a guardian, the guardian shall provide the information in so far as s/he is administering the assets. In addition, an individual who is or has been the effective manager of the debtor’s business or manages or has managed the debtor’s assets is subject to the obligation to provide the information. With regard to a decedent’s estate, an executor or administrator of the estate is subject to the obligation to provide information. If the shareholders of the estate are jointly in charge thereof then every shareholder is subject to the same obligation.\textsuperscript{108}

In the event that the debtor is a corporation or a foundation, the information shall be provided by: (1) an individual who is a member of the board of directors or a comparable organ, or is the chief executive officer or has a comparable position; (2) an individual who is personally liable for the commitments of the corporation; (3) an individual who is entitled to sign for the corporation or foundation alone or jointly with

\textsuperscript{105} The Enforcement Code, Chapter 3, Section 52.

\textsuperscript{106} However, it is not forbidden to ask other kind of questions if the debtor has been informed that responding to them is voluntary. Even in that case the questions must be necessary in order to fulfill the pending execution. \textit{Linna/Leppänen}, 2003, p. 456.

\textsuperscript{107} \textit{Linna/Leppänen}, 2003, pp. 457 - 458.

\textsuperscript{108} The Enforcement Code, Chapter 3, Section 53.
another individual; (4) an individual who, in view of the circumstances\textsuperscript{109}, is effectively managing the operations of the corporation or foundation or seeing to its administration or the administration of its assets\textsuperscript{110}. In addition, an individual who has held a position referred to above during the year preceding the request for information is subject to the obligation to provide information. If there are no individuals subject to the obligation to provide information, the individual who has last held a comparable position is subject to the same obligation.\textsuperscript{111}

Furthermore, an employee of the debtor and the auditor of a corporation or foundation shall, upon request, provide information referred to above and relating to their tasks. However, this is only in the event that the bailiff considers that the information is essential for the enforcement and cannot be obtained in any other manner.\textsuperscript{112} The first alternative is always to ask the debtor personally, thus the role of employees and auditors is a secondary alternative. The requirements for interviewing employees and auditors are that the information cannot be found otherwise and this information must also be necessary for the execution of the enforcement. The role of the employee plays a significant role during the interviewing process. The employee can only be asked questions that relate to his/her responsibilities. It must also be taken into consideration that the position of an employee is not to be endangered through his/her participation in providing information; as such interviewing employees is only permitted as an ultimate means of obtaining information.\textsuperscript{113} In addition, only the higher-ranking employees should be questioned. It is not recommended that lower clerical employees or workers be interviewed.\textsuperscript{114} Even the auditor should be questioned only if really needed and the auditor’s privileged position as a debtor’s trusted employee should be taken into consideration.\textsuperscript{115}

The list of questions in the Enforcement Code\textsuperscript{116} is exclusive concerning the third parties who have an obligation to give information to the bailiff based on the Enforcement Code. They have no obligation to respond to any additional questions.\textsuperscript{117}

There is no particular order in the list in the Enforcement Code according to which the bailiff should interview the persons with the duty to obtain information.

\textsuperscript{109} This refers to the different kinds of arrangements of intermediaries in the operation of a corporation or a foundation. This kind of intermediary uses the operative power that usually belongs to the corporation organs. These kinds of arrangements can be typical, for instance, in family business or in one-man companies. The internal hallmark on this kind of arrangement can be, for example, that the person has the credit card of a corporation in his/her possession or in his/her factual control. \textit{Linna/Leppänen}, 2003, p. 454.

\textsuperscript{110} S/he is obliged to give information like a debtor him-/herself. S/he has even a duty to attend in the enforcement inquiry. His or her position can therefore be seen as a parallel to the debtor’s position. \textit{(Linna/Leppänen}, 2003, p. 452.\textsuperscript{)}

\textsuperscript{111} The Enforcement Code, Chapter 3, Section 54.

\textsuperscript{112} The Enforcement Code, Chapter 3, Section 55.

\textsuperscript{113} \textit{Linna/Leppänen}, 2003, p. 452.

\textsuperscript{114} \textit{Linna/Leppänen}, 2003, p. 455.

\textsuperscript{115} \textit{Linna/Leppänen}, 2003, p. 456.

\textsuperscript{116} The Enforcement Code, Chapter 3, Section 52.

\textsuperscript{117} \textit{Linna/Leppänen}, 2003, p. 482 and 456.
However, in practice the first source of information is the debtor or the creditor. This is based also on the principle of fairness and on the protection of privacy.\textsuperscript{118}

The bailiff may procure information from a person subject to the obligation either informally or by carrying out an enforcement inquiry. There are no rules on the informal procurement of information; thus the fairness principle is the only guideline to follow.\textsuperscript{119} In the Government Bill it was stated that the bailiff should avoid interviewing the debtor in all situations. The informal procurement of information should not take place without the debtor’s consent if colleagues, family members, neighbours or other persons are present. However, an exception exists whereby the debtor has attempted to avoid the bailiff. In such instances third parties may be present when the questions are posed to the debtor.\textsuperscript{120}

An enforcement inquiry may be carried out on an employee and the auditor only if a special reason exists. If said individual refuses to provide information then the bailiff may, under threat of a fine, compel him or her to do so at once or within a time limit. In an enforcement inquiry and, where necessary, also when information is being procured informally, the individual subject to the obligation to provide information shall be reminded of the duty to give truthful answers and be notified that the provision of false information or the concealment of information may result in punishment.\textsuperscript{121} The offences based on the dishonesty by a debtor are to be found in the Criminal Code. The offences are dishonesty by a debtor, aggravated dishonesty by a debtor, fraud by a debtor, aggravated fraud by a debtor, deceitfulness by a debtor, a violation by a debtor and a favouring a creditor.\textsuperscript{122} The debtor has the duty to always be truthful, that is this duty does not depend on whether the debtor is interviewed informally or if the bailiff carries out an enforcement inquiry. The duty to be truthful covers all kind of situations even when the debtor has been met by chance.\textsuperscript{123}

Prior to the reform in 2003 the enforcement inquiry was mostly only the ex post facto possibility to find reasons to the fact that the debt was not collected and the enforcement has been terminated because of the lack of means. Usually the enforcement inquiry was carried out because there were doubts that the debtor had hidden some property. With the reform the enforcement inquires became a normal way to search property and to maintain contact with the debtor. There is thus a huge change in the ratio of the law.\textsuperscript{124}

According to the current Enforcement Code, the bailiff shall carry out an enforcement inquiry if the creditor’s receivable cannot be collected in full and the financial situation of the debtor has not been credibly ascertained in some other manner.\textsuperscript{125} This rule has been seen to be based on the traditional starting point concerning when the enforcement inquiry is obligatory, namely when it is ruled as

\begin{thebibliography}{125}
\bibitem{LinnaLepp\"{A}nen2003} Linna/Lepp\"{a}nen, 2003, p. 446.
\bibitem{LinnaLepp\"{A}nen2003a} Linna/Lepp\"{a}nen, 2003, p. 447.
\bibitem{GovBill} Government Bill 216/2001, p. 152.
\bibitem{EnforcementCode} The Enforcement Code, Chapter 3, Section 56.
\bibitem{CriminalCode} Criminal Code, Chapter 39, Sections 1 – 6.
\bibitem{LinnaLepp\"{A}nen2003b} Linna/Lepp\"{a}nen, 2003, p. 447.
\bibitem{LinnaLepp\"{A}nen2003c} Linna/Lepp\"{a}nen, 2003, p. 464.
\bibitem{EnforcementCode2} The Enforcement Code, Chapter 3, Section 57.
\end{thebibliography}
such.\textsuperscript{126} In practice, the enforcement inquiry is nowadays the usual way to search for the assets and to maintain contact with the debtor.\textsuperscript{127} The legislator’s idea to change the situation seems to have been successful.

In the event that an enforcement inquiry has already been carried out whilst the matter is pending and (1) no more than six months have passed since the inquiry, there shall be no need to carry out a new enforcement inquiry, unless it is known that the circumstances have changed; (2) more than six months but no more than one year have passed since the inquiry, a new enforcement inquiry shall be carried out if this is to be deemed justified in view of the circumstances; (3) more than one year has passed since the inquiry, a new enforcement inquiry shall be carried out unless this is manifestly unnecessary. If the wages, salary or other recurring income of the debtor have been attached, an enforcement inquiry shall be carried out if necessary owing to new applications or some other reason. At least once a year, the bailiff shall verify the amount of the recurring income paid to the debtor, unless this is manifestly unnecessary.\textsuperscript{128} The creditor may also request a bailiff to carry out an enforcement inquiry, but it is always the bailiff who makes the decision. The creditor has then no right to evoke the enforcement inquiry.\textsuperscript{129} An enforcement inquiry may also be carried out very frequently, such as every week or even every day if there is a valid reason for doing so, e.g. the circumstances concerning the debtor’s financial status varies very rapidly. However, an enforcement inquiry cannot be utilized as a sanction, even in circumstances in which the debtor is contumacious. Such activities would be contrary to the fairness principle.\textsuperscript{130}

The enforcement inquiry is a most formal act of execution of the enforcement. The debtor must be summoned at least two days before the inquiry. S/he has to appear in person and is not allowed to use a representative. Being fetched by the police or a threat of a fine can be used as coercive measures.\textsuperscript{131} The presence of legal counsel may also be prohibited or his or her attendance may be subject to conditions if the attendance of counsel would considerably hamper the enforcement. However, legal literature has viewed this possibility as unjust because the debtor has to be truthful and s/he is therefore responsible for the correctness of information that is given.\textsuperscript{132}

The enforcement inquiry shall be carried out by drawing up a protocol of the responses to the questions put by the bailiff. In addition, the person giving the information may be required to draw up a list of the debtor’s property and assets, income and debts, or to provide the information needed for such a list. The protocol and list shall be given for review to the person subject to the obligation to provide information, and the corrections and additions mentioned shall be noted in them. The person subject to the obligation to provide information shall sign a statement to the

\textsuperscript{126} This is because, the enforcement inquiry is a time-consuming task and it would serve no purpose to carry it out for no reason.
\textsuperscript{127} The Enforcement Code, Chapter 3, Section 57, Paragraph1 and Koulu/Lindfors, 2009, p. 151.
\textsuperscript{128} The Enforcement Code, Chapter 3, Section 57.
\textsuperscript{129} Linna/Leppänen, 2003, p. 465.
\textsuperscript{130} Linna/Leppänen, 2003, p. 467.
\textsuperscript{131} Coercive measures cannot be used where it is not necessary to carry out an enforcement inquiry even though the debtor is being evasive.,Linna/Leppänen, 2003, p. 471.
\textsuperscript{132} The Enforcement Code, Chapter 3, Sections 58 and 59; see also Koulu/Lindfors, 2009, p. 152.
effect that the information he or she has provided is correct; this statement shall then be taken into the protocol and list. In a simple matter the enforcement inquiry may be carried out via telephone or in some other suitable manner to the person subject to the obligation to provide information. In this situation, the necessary entries concerning the enforcement inquiry shall be written down in a document.\textsuperscript{133}

An enforcement inquiry shall neither last longer than is needed for the procurement of the necessary information nor, unless the person subject to the obligation to provide information consents to this, for longer than six hours without interruption.\textsuperscript{134} If the inquiry is \textit{essential for the purpose of the enforcement, a person who has been brought to the enforcement inquiry by the police or who attends under threat of being fetched by the police} may be prevented from leaving from the inquiry. In addition, another person subject to the obligation to provide information may be prevented from leaving from the inquiry if there is \textit{a very important reason} for this that is related to the enforcement and \textit{if the prevention cannot be deemed unreasonable} in view of the circumstances. The inquiry shall be postponed in full or in part if the bailiff deems that the person subject to the obligation to provide information cannot reasonably do so, e.g. owing to illness or some other comparable reason.\textsuperscript{135}

The possibility to prevent a person from leaving from the inquiry has been seen as a very difficult question concerning fundamental rights. It is said in the legal literature that a bailiff should be careful even if liberty is deprived of for only a short period. This possibility to prevent a person from leaving by a deprivation of liberty is a test of the limits of a constitutional State. Ultimate carefulness is therefore required.\textsuperscript{136}

A person in possession or in charge of accounting data belonging to a debtor liable to keep accounts shall submit the following, at the request of the bailiff and for purposes of the enforcement inquiry: (1) accounting journals, receipts and other accounting material; (2) documents and other records relating to the management and agreements of a corporation or foundation; (3) other documents and records pertaining to the business or professional activity of the debtor.\textsuperscript{137} If a person subject to the obligation to provide information refuses to do so in an enforcement inquiry or a person referred to above refuses to submit data referred to in said section, the bailiff may, under threat of a fine, require him or her to fulfill the obligation at once or within a time limit.\textsuperscript{138}

6. In order to the fast and effective search and seizure and the whole collection proceeding: is available to the courts/ Enforcement agents

\textsuperscript{133} The Enforcement Code, Chapter 3, Section 60.
\textsuperscript{134} The principle of fairness requires that there are some breaks even if the inquiry does not last over six hours. In addition, even travelling to the enforcement inquiry has to be taken into consideration when calculating the time-limit. The inquiry can last a maximum six hours, this includes the travel time to it. If six hours is not enough then it is allowed to continue in straight days. \textit{Linna/Leppänen}, 2003, p. 476.
\textsuperscript{135} The Enforcement Code, Chapter 3, Section 61.
\textsuperscript{137} The Enforcement Code, Chapter 3, Section 62.
\textsuperscript{138} The Enforcement Code, Chapter 3, Section 63.
access through their powers to all necessary information on defendants' assets to access contained in registers and other sources?

In order to obtain payment for the applicant the bailiff shall search, to the extent warranted by the circumstances, for assets belonging to the debtor. Provisions on the minimum measures towards a search for assets and the ascertainm ent of the whereabouts of the debtor are contained in a Government Decree.\(^\text{139}\) The rule above obliges the bailiff to search the property. In addition, there are numerous rules in the Enforcement Code according to which the bailiff may search the property.\(^\text{140}\) However, the prerequisite for all kinds of searches is that there is a need to search in order to obtain payment for the applicant: the enforcement matter has to be pending or in a passive register. In addition, the search must be stopped if there already are enough assets for the payment.\(^\text{141}\)

The bailiff considers the necessary measures in casu and by him- /herself. There is no exact rule in the legislation, only provisions on the minimum measures in a Government Decree. First, the bailiff will make a basic search based on the enforcement register. The search will continue further on the basis of this data. Additionally, these further measures belong to the minimum measures. The search will end when it is apparent that nothing more can be found. The bailiff may search in registers and also collect necessary data from them.\(^\text{142}\) In addition, the bailiff may freely search all the locations belonging to the debtor; even the locations, belonging to third party may be searched if it can be presumed that there will be property belonging to the debtor at this location. The latter possibility to search locations belonging to a third party has been criticized in legal literature.\(^\text{143}\)

According to the Enforcement Code, assets may be sought in buildings, storage sites, vehicles and other indoor or outdoor premises owned or used by the debtor. The above provision on the debtor also applies to a third party if there is reason to believe that premises owned or used by him or her contain assets belonging to the debtor. A search may be also carried out at the residence of the debtor without his or her consent, if there is a justifiable reason to believe that attachable assets can be found there and the bailiff has not otherwise located sufficient seizable assets belonging indisputedly to the debtor. The opportunity shall first be reserved to the third party to surrender such assets, unless immediate search measures are to be deemed unavoidable.\(^\text{144}\) A very good reason means that the bailiff has to have a concrete and clear assumption that there will be assets belonging to the debtor in the residence of the third party. It is not necessary for him to clearly specify the assets beforehand.\(^\text{145}\) It must also be underlined that even the

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\(^{139}\) The Enforcement Code, Chapter 3, Section 48.
\(^{140}\) Linna/Leppänen, 2003, p. 432.
\(^{141}\) Linna/Leppänen, 2003, p. 434.
\(^{142}\) The Enforcement Code, Chapter 3, Section 48, Paragraph 1 and the Government Decree Sections 5 and 6.
\(^{143}\) Koulu/Lindfors, 2009, p. 149.
\(^{144}\) The Enforcement Code, Chapter 3, Section 49.
\(^{145}\) Linna/Leppänen, 2003, p. 440.
representative of a debtor is a third party within the meaning of this rule. However, searching the representative’s residence is not permitted unless the requirements concerning the third party are fulfilled; this is also the case even when the representative is subject to the same duty as the debtor to give information.\footnote{Linna/Leppänen, 2003, p. 438.}

Insofar as is appropriate, the same provisions also apply to the search for evidence necessary in an enforcement matter. The bailiff may, as appropriate, seize evidence that has been found in adherence to the provisions on attachment. The evidence shall be returned once it has no use in the enforcement matter. In taking possession of the evidence the business or livelihood of the debtor or a third person may not be unnecessarily impeded.\footnote{The Enforcement Code, Chapter 3, Section 51.} A search of a person is not allowed as a search for evidence.\footnote{Linna/Leppänen, 2003, p. 442.}

\section*{6b. Has the court or other enforcement agent the power to compel defendant debtor to produce a complete declaration on their assets? Has the court or other enforcement agent access to data base (public or private) or power to compel thirds to refer on any debtor’s assets? Please refer and quote the main legal rules.}

Please, see my replies to earlier questions.

\section*{7. Taking into account the relevant human and fundamental right to personal development and private rights as the data protection law (Information priviledged) does foresee your legal system such kind of rules to protect those debtors' fundamental rights in the enforcement proceeding? Please quote the main legal rules.}

There have been some national problems concerning the right not to incriminate oneself, for instance the ECtHR case Marttinen v. Finland (21.4.2009), where the Court decided the case against Finland and found the violation of article 6 ECHR. The case is based on the Supreme Court’s decision 2002:116. It must, however, be pointed out that the case is based on the situation before the latest reform on the duty to give information as a debtor. Nevertheless, the collision between the right not to incriminate oneself and the debtor’s duty to give information to the bailiff can still be seen as being somewhat problematic in the Finnish national law.

More generally I refer to my other replies.

\section*{8. Taking into account confidentiality principle under relevant tax and financial laws, does your legal system impose on financial institutions and tax authorities a duty to cooperate with the enforcement authorities? To what extent are financial institutions}
and tax authorities are allowed to use confidentiality rules to be exonerated of any duty to cooperate?

Bank secrecy is one part in the protection of privacy. The exceptions made to bank secrecy have to therefore be strictly limited and they have to be enacted in the law. For the same reason only the narrow interpretation is allowed.  

Both individuals and legal persons are protected by bank secrecy. Traditionally, the bank secrecy was based on the customary law supported by ethic and moral as well as graces. In 1970, the bank secrecy was taken into statute. The main rule is currently included in the Act on Credit Institutions. According to this Act, anyone who, in the capacity of a member or deputy member of a body of a credit institution or an undertaking belonging to its consolidation group or of a representative of a credit institution or of another undertaking operating on behalf of the credit institution or as their employee or agent, in performing his duties, has obtained information on the financial position or private personal circumstances of a customer of the credit institution or of an undertaking belonging to its consolidation group or to a conglomerate referred to in the Act on the Supervision of Financial and Insurance Conglomerates or of another person connected with its operation or on a trade or business secret shall be liable to keep it confidential unless the person to whose benefit the secrecy obligation has been provided consents to its disclosure. Confidential information may not be disclosed to a General Meeting of Shareholders, a General Meeting of Trustees, a General Meeting of a Cooperative or a General Meeting of the Delegates or a General Meeting of a Mortgage Society or to a shareholder or member attending the meeting. A credit institution and an undertaking belonging to its consolidation group shall be liable to disclose the information to a prosecuting and pretrial investigation authority for the investigation of a crime as well as to another authority entitled to this information under the law.

The section referred to above covers both the bank secrecy and bank’s trade secrets. These two categories must be separated. The bank secrecy covers the situations where the client of the bank can be identified by the information. It is then the client who can give the consent to disclosure. The client information is included into the bank’s trade secrets when it is only meant for bank’s internal purposes. It is then a bank who can give consent to the disclosure.

There are very many exceptions to the general bank secrecy in Finland. Prosecuting and pretrial investigation authorities are named in the referred section of the Act on Credit Institutions. In addition, there is a general reference to other possible

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151 Act on Credit Institutions, Chapter 8, Section 141.

statutes with the same provisions. For instance, enforcement authorities, tax authorities and social authorities can obtain the secret information based on special legislation. The bailiff will obtain the information based on the Enforcement Code, Chapter 3, Sections 64 – 66. The bailiff is subject to official liability. The bank will thus not control if the prerequisites for requesting confidential information exist, but it will fulfil the bailiff’s request as such.

The bank will not inform the client on its own initiative if it has disclosed confidential information to the authorities based on the special legislation. It is prohibited in in enforcement matters to inform the client if the bailiff has or has not obtained information; this is also applicable even if the client asks. However, it is permitted to state if some executive acts, such as a garnishee order, have been given.

Still, the exception does not cover the foreign bailiffs and the bank will not give any confidential information based on the inquiries by foreign authorities. In such a situation foreign authorities have to first ask for executive assistance from the Finnish authorities.

9. Please could you detail the main costs in your legal system in relation to enforcement procedures? Is the defendant debtor obliged to born these costs? When would the claimant creditor have to pay costs? Is there any procedural or substantive sanction for the procedural abuses of either creditors or debtors or third parties?

The costs consist of the enforcement costs, enforcement fees and party costs. As it is a bailiff who searches the assets and collects the data for that purpose, there are no special party costs or fees for the State for that part of enforcement. In addition, the enforcement is also generally quite inexpensive for the parties because the execution fees collected by the State are not very high. The costs for the parties are also typically very low because there is, for instance, usually no need for legal counsel. This is due to the enforcement being based on the principle of judicial investigation.

It is the respondent who is otherwise primarily liable to pay the costs that arose in the enforcement of the payment obligation or other obligation, for the transport, storage or sale of property or the other enforcement measures taken by the bailiff. Secondarily they are the liability of the applicant. Separate provisions apply to fees that are to be paid to the State as compensation for the costs of enforcement.

The costs shall initially be paid from the accrued assets; in other cases they shall be collected from the respondent. The bailiff shall collect the costs from the applicant in

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153 See the chapter 6.2.
155 The Enforcement Code, Chapter 3, Section 66.
158 The Enforcement Code, Chapter 9, Section 1.
the event that the costs cannot be collected from the respondent or s/he is not obliged to pay them.\textsuperscript{159}

10. Does your legal system set up mechanism to prevent misuse of the enforcement proceedings by either creditor or debtor?, Are there substantiative or procedural grounds to postpone the enforcement process without fair reasons?

No, there are no specific systems for that. There are no grounds to postpone the enforcement process without fair reasons.

11. What is the role of mediation and other ADR mechanism to facilitate debt recovery in your country?

During the enforcement procedures at court the normal rules on friendly settlements and court-annexed mediation cover. There are also specific procedures for loan arrangements for private persons and companies. Otherwise, if the matter already covers enforcement done by a bailiff, there is still the possibility to agree about the time for payment according to the Chapter 4, Section 6 which is as follows:

If the debtor does not pay the applicant’s receivable at the latest by the due date denoted in the demand for payment, attachment is carried out. However, the bailiff may for a special reason provide the debtor on request time for payment, if the debtor shall probably pay the receivable on being granted time for payment. At most three months may be given as time for payment, calculated from the due date in the demand for payment. If the debtor shows that the applicant has consented to this, the time for payment may be longer than this, although the time may not be longer than six months without the lapse of the application. Where needed the bailiff may carry out a precautionary attachment during the time for payment.

If the receivable being collected is a child maintenance payment, the bailiff may not grant time for payment without the consent of the applicant.

A decision on the time for payment is not subject to appeal.\textsuperscript{160}

In addition the schedule of payments and payment agreement are possible according to the Chapter 4 Sections 59 and 60 of the Enforcement Code.

Instead of garnishment of wages or salary, the bailiff may establish a written schedule of payments for the debtor if the debtor shows it credible that in accordance with the schedule he or she will remit a regular amount or the amount referred to in sections 51 through 54 to the bailiff. The bailiff shall require an account from the debtor

\textsuperscript{159} The Enforcement Code, Chapter 9, Section 2.
\textsuperscript{160} The Enforcement Code, Chapter 4, Section 6.
at least once a year on income and benefits belonging to the debtor’s base income. If the debtor without an acceptable reason defaults on the schedule of payments or the rendering of an account and the default cannot be deemed to be insignificant, the bailiff may decide on the lapse of the schedule of payment and immediately garnish wages or salary.\textsuperscript{161}

According to the Section 60 also the agreement among parties on payments is possible. The bailiff may, namely, garnish wages or salary on the basis of a written agreement between the debtor and the applicant (payment agreement) if the agreement can be implemented in the enforcement proceedings and the agreement cannot be deemed unreasonable. The bailiff may instead of garnishment of wages or salary give the debtor permission to remit payments in accordance with the agreement to the bailiff. In the payment agreement the parties may agree on the amount to be garnished, limit the amount of the applicant’s receivable or the duration of the garnishment or agree how the assets are to be allocated among the applicant’s receivables or a part of a receivable. However, the protected portion referred to in section 48 shall be left to the debtor.\textsuperscript{162}

12. Does your legal system prescribe an exhaustive definition and lists all enforceable titles? Is it clearly defined how they become effective?

Yes, this is very clear and regulated in the Chapter 2 of the Enforcement Code.

An enforcement matter becomes pending and is enforceable only if the applicant has a ground for enforcement referred to in section 2, where the respondent has been subjected to an obligation referred to in chapter 1, section 1 or to a precautionary measure, and the pertinent right has not expired owing to payment, the statute of limitations or some other reason. The bailiff shall ensure that the receivable has not become time-barred and shall request supplementary information from the parties if there is doubt as to the expiration of the right. Chapters 4 and 5 contain provisions on the right of the holder of a security right to receive payment without a ground for enforcement. The bailiff may without a separate ground for enforcement execute obligations arising from enforcement proceedings, as provided in this Act.\textsuperscript{163}

The following documents serve as grounds for enforcement:

(1) a court judgment in a civil or criminal matter;
(2) a court order on precautionary measures;
(3) an arbitral award that has been handed down in arbitral proceedings under the Arbitration Act (967/1992) or some other Act, and a settlement certified by such an award;

\textsuperscript{161} The Enforcement Code, Chapter 4, Section 59.
\textsuperscript{162} The Enforcement Code, Chapter 4, Section 60.
\textsuperscript{163} The Enforcement Code, Chapter 2, Section 1.
(4) a bailiff’s protocol on the settlement of account in a sale-by-instalment, a confirmed child support agreement, and an obligation or debt instrument the enforcement of which in accordance with this Act has been provided in some other Act;

(5) an order of an administrative court and the decision of some other authority in a matter of administrative adjudication;

(6) a decision of the Government, a Ministry, an agency in the central administration of the State and a State Provincial Office, as well as another administrative decision the enforcement of which in accordance with this Act has been provided in some other Act.

What is provided in this Act regarding a judgment applies also in so far as appropriate to a judgment, order or interim order of a court in a civil or criminal case and a settlement certified by a court. 164

13. Does your legal system provide an appropriate and efficient service of documents?

Yes, there are no problems in that. I refer to my replies in the beginning of the questionnaire.

14. Is the TIC available and used in your legal system for enforcement procedure? Please could you explain and detail how it works? (internet browser and data bank, register access on line, service of document by e-mails, electronic signature).

The Enforcement Information System is an information system maintained with the help of automatic data processing. It is established for the management of functions incumbent on enforcement authorities and intended for the national use of enforcement authorities. The National Administrative Office manages the maintenance and development of the Information System. 165

The Enforcement Information System includes the Enforcement Register, which is maintained and operated for the performance of the tasks of the enforcement authorities. The purpose of the Information System and the Enforcement Register is not only to promote appropriate and debtor-based consideration of enforcement matters, electronic services as well as the performance of the management, guidance, and inspection and supervisory functions over the administration of enforcement but also to keep statistics. 166

The Enforcement Register is maintained by local enforcement authorities. The authority entering the data is responsible for the correctness of this data as well as the legality of the entry and use of data in its activities. The National Administrative Office

164 The Enforcement Code, Chapter 2, Section 2.
165 The Enforcement Code, Chapter 1, Section 24.
166 The Enforcement Code, Chapter 1, Section 24.
is responsible for the general maintenance of the Register and issues orders on the technical manner in which data are to be entered and processed.\[167\]

The following data may be collected and entered into parts of the local registers for use in the Enforcement Register: 1) for the purpose of the administration of enforcement matters, identification and contact details of parties and their representatives and data on remittance addresses, the nature of enforcement or the receivable, the applicant’s receivable, enforcement measures taken by the bailiff and their time, amounts collected and remitted to the applicant, impediments to enforcement, registration of passive receivables, as well as other comparable information related to enforcement matters and enforcement measures (\textit{docket information}); 2) for the purpose of arranging cooperation among authorities, information or requests for information on the place where a debtor is to be found or on his or her property (\textit{cooperation information}); 3) information related to enforcement matters and received from a party or a third person or otherwise obtained by the enforcement authority, not however sensitive personal data, with the exception of data on social welfare benefits received by the debtor and that affect attachment (\textit{special information}).\[168\]

The Personal Data Act applies to the processing of personal data collected for and entered into the Enforcement Register.\[169\] Notwithstanding the provisions on confidentiality, the District Bailiffs, their subordinate civil servants and the appropriate civil servants in the Ministry of Justice and the National Administrative Office may process data in an enforcement matter or in an administrative matter, however, where the aforementioned special information is concerned, only to the extent necessary for the enforcement.\[170\]

The data subject has a right of inspection based on the Personal Data Act. However, if the right of inspection significantly hampers enforcement, the right of inspection may, to the necessary extent, be postponed until the attachment or other enforcement measures have been carried out and property has been taken into the possession of the bailiff. However, the right to inspection can only be postponed for a maximum of six months from the submission of the inspection request. If the right of inspection has been postponed, the Data Protection Ombudsman may, at the request of the data subject, inspect the legality of the data.\[171\] The notion is that the bailiff has a right to freeze the situation in order to prevent the debtor from acting to hamper the enforcement. S/he then has time in order to carry out the most important acts first, for instance, issue a garnishee order. A third party has no right to control the enforcement register data as the inspection right belongs to the data subject. The exception is of

\[167\] The Enforcement Code, Chapter 1, Section 25.
\[168\] The Enforcement Code, Chapter 1, Section 26.
\[169\] If the bailiff furnishes very much information on the debtor’s assets and pools them together with the enforcement register, the result is a new person register. That should be avoided and therefore the bailiff should destroy that kind of asset information quite quickly. The other possibility is to save the most necessary asset information into the enforcement register as special information. Linna/Leppänen, 2003, pp. 485 – 486.
\[170\] The Enforcement Code, Chapter 1, Section 27.
\[171\] The Enforcement Code, Chapter 1, Section 28.
course if there are data in the register that directly concern the third party him-/herself.\textsuperscript{172}

The following shall be deleted from the enforcement register: 1) docket information: 30 years after the matter has become pending; 2) cooperation information: when it is no longer necessary, but in any case at the latest when the matter is no longer pending or the time for passive registration has ended; 3) special information: 10 years after the entry was made or earlier if the information is apparently no longer needed. Special information may be retained longer than 10 years if there is justified reason for this, but in any case not for longer than 20 years after the entry was made.\textsuperscript{173}

Special information includes, for instance, information obtained from the debtor on his/her employment and other sources of income, the hints given by a creditor on the debtor’s assets, bank information on the debtor’s balance, other third party information, enforcement inquiries, etc.\textsuperscript{174}

15. Has the claimant creditor got a direct access to justice either to a court or enforcement agent without legal representation to file enforcement procedures?

Yes, the access is direct. Legal representation is optional only if you need assistance to make it.

16. Is there possible in your system to enforce as primary remedy the specific performance? Would the creditor chose between specific performance and damages in contractual matters?

Yes, it is but even in that case the judgment on that is needed as a ground for enforcement. The ground for enforcement can be even that type of the judgement where someone is obliged to fulfill something or for instance to sign the document. Yes, the creditor may chose in which way s/he wants to react.

17. Is there possible in your system to enforce as primary remedy the specific performance? Would the creditor chose between specific performance and damages in tort matters?

Yes, it is but even in that case the judgment on that is needed as a ground for enforcement. The ground for enforcement can be even that type of the judgement where someone is obliged to fulfill something or for instance to sign the document. Yes, the creditor may chose in which way s/he wants to react.

18. Does your system foresee punitive damages? In case of affirmative answer, please explain the requirement and contents of them.

\textsuperscript{172} Linna, Tuula/Leppänen, Tatu: Ulosottomenettely, Talentum, Helsinki 2003, p. 537.
\textsuperscript{173} The Enforcement Code, Chapter 1, Section 29.
\textsuperscript{174} Linna/Leppänen, 2003, p. 512.
No. Punitive damages are not allowed in Finland.

**SHORT QUESTIONS:**

1. **In your legal system is there a Debtor’s assets transparency duty for the defendant to declare his assets in a civil enforcement proceeding?**

   Yes, please see my replies above concerning the enforcement inquiry.

2. **Has the tribunal or bailiff in an enforcement procedure power to investigate the debts assets (Please indicate if the any TIC are currently available)**

   Yes, please see my replies above concerning the enforcement inquiry.

3. **Regarding the rights to privacy of the debtor and his family, do you have any regulation which limits in such cases the creditors rights? (1) protect the privacy of the debtor. Example by leaving of assets needed to carry out a religious activity (2) guaranteeing minimum income for the debtor and his family, especially by limiting the income seizureable and leaving the competence pieces.**

   The debtor’s basic living costs are taken into consideration with the help of the system of the protected portion, which means that a certain minimum income is protected from the enforcement. The debtor’s protected portion is 20.82 Euro per day for him-/herself and 7.48 Euro per day for a spouse, a child of the debtor and a child of the spouse depending on his or her maintenance until the date of payment of the next wages or salary. In the calculation of the protected portion a month corresponds to 30 days. A spouse includes a married spouse or a person living in marriage-like circumstances. A person is deemed to depend on the debtor for maintenance if his or her income is less than the protected portion calculated for the debtor him-/herself, as well as such child regardless of whether or not the spouse shares in his or her maintenance. The maintenance paid by the debtor can also be taken into consideration. The amount of the protected portion shall be reviewed annually by a Decree of the Ministry of Justice. The following shall not be garnished from the base income: 1) the debtor’s protected portion and, in addition, one-third of the amount of the wages or salary that exceeds the protected portion (income limit garnishment); 2) two-thirds of the wages or

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175 The Decree of the Ministry of Justice. 27.11.2008/772, which came into force on the 1 January 2009.
176 The Enforcement Code, Chapter 4, Section 48.
salary if the wages or salary are greater than twice the amount of the debtor’s protected portion; 3) less than the amount referred to in subparagraph 2, but at least one-half of the wages or salary, if the wages or salary are greater than four times the amount of the debtor’s protected portion. More detailed provisions covering the third aforementioned situation (3) will be given by the Decree of the Ministry of Justice.\footnote{177}{The Enforcement Code, Chapter 4 Section 49.}

Furthermore, the debtor’s assets can be repossessed. The assets that the debtor and his/her family need for their normal life, and for instance the tools and educational materials, are protected from repossession. This is called the right to beneficium and has to be taken into consideration ex officio.\footnote{178}{On the interpretation of the beneficium, see the case-law of the Supreme Court 1997:168, 1999:5, 2001:100 and 2004:136.} This right may also not be renounced: even if the debtor would like to voluntarily give these kind of items to the executive officer, s/he cannot take them. The only possibility for the debtor is to sell these items and then to give the money to the executive officer.\footnote{179}{The Enforcement Code, Chapter 4, Section 21 and Linna/Leppänen, 2007, p. 67.} The period of limitation for enforcement was adopted in the Finnish enforcement legislation in 2003. This was a huge reform towards a rehabilitation of debtors and even the total change of attitudes concerning the obligation of payment was needed. There were few negative attitudes towards the novel change and the new thinking of the release from the debt. At that time there were only rules on the period of limitation for enforcement in the Enforcement Act. It did not mean a final statute of limitations on debt; only the enforcement was limited but materially the debt was still valid even after this time-limit. The enforcement was not possible after the limitation period had expired, however private collection of a debt was allowed although there were not very many legal tools to do so. Set-off was possible as well as to take the debt from the security. It was also legal to get the payment from the estate of a deceased person.\footnote{180}{This possibility was found to be very complicated. It was very laborious for creditors to collect the payment at the estate. At the same time, they had the most unsure and the smallest possibility to get the payment compared with the other creditors. This kind of situation was also seen as a disadvantage to the rehabilitation of a debtor. S/he did not want to become active in an economic meaning because in the end it benefits only creditors and not his/her heritor. It was therefore usual to funnel the credit directly to the heir. See Tuunanen, Pekka: Täytäntöönpanon määräaikaistuminen ja velallisen kuolema. Lakimies 2004, pp. 862 – 882, p. 882.} In practice, the debtor had mostly only a moral obligation to pay. As a whole, the situation of a debtor was unclear. It was not obvious, how this kind of debt affects taxes, social benefits etc. The situation was seen as unsatisfactory and the next step was taken by the legislator in 2008. With those amendments, even the final limitation of the debt was included into the new Enforcement Code. The reason for these reforms is the economic crisis in the beginning of the 1990s. As the legal possibility to get a loan arrangement or the voluntary releasing program did not help, these rules on periods of limitation and final statute of limitations were taken into law.\footnote{181}{Koulu/Lindfors, 2009, p. 112. For the reasons, see also the Government Bill 83/2006.}

The maximum period of limitation is now 32 years. After that period there are no tools to continue to collection of the debt. The debt no longer exists.\footnote{182}{Koulu/Lindfors, 2009, p. 114.} A ground for...
enforcement imposing the payment liability to a natural person\(^ {183}\) is enforceable for 15 years. The period of limitation is extended to 20 years if the creditor is a natural person or if the debt is based on a crime for which the debtor has been sentenced to imprisonment or community service. If the debtor shows that, before the issue of the ground for enforcement, the debt had been transferred to a natural person by someone other than a natural person, the time limit is 15 years.\(^ {184}\) The period of limitation is calculated from the date of the judgment by default or the final judgment or other final ground for enforcement.\(^ {185}\) In the case of taxes and other public obligations of payment, the final statute of limitations on debt provides that the limitation period is 5 years. This is based on the special Act on the Enforcement on Taxes.\(^ {186}\) This Act has been said to be older but more modern than the Enforcement Code even though the latter has been subject to a number of reforms.\(^ {187}\)

The expiry of the period of limitation will also mean final limitation of the debt.\(^ {188}\) This amendment came into force on the 1 March 2008. When the period of limitation for enforcement expires, the debt can no longer be collected through any means and the debt is permanently statute barred even in a material meaning. The debt can no longer be recovered, for instance, by a collection agency or from the assets of an estate of a deceased person. This period of limitation cannot be interrupted.\(^ {189}\) Still, set-off is usually possible and it is also permitted to take the debt from the security.\(^ {190}\) Nowadays, the heir is released as well.\(^ {191}\)

However, the creditor has the right to take legal action against the debtor and require an extension to the period of limitation for the enforcement order. The court may extend the period of limitation by 10 years from the expiry of the original period of limitation if the debtor has essentially complicated the receipt of the payment, for example by concealing or donating his or her assets, concealing information or giving false information about his or her financial circumstances. The creditor must take such actions at the latest within two years from the expiry of the original period of limitation.\(^ {192}\)

In the case that the debtor has paid the debt after the final limitation of the debt, s/he has a right to reimbursement of the payment. The bailiff controls ex officio that such of mistakes do not happen.\(^ {193}\)

Whether the limitation periods even cover foreign judgments and other foreign grounds for enforcement is unclear in legal literature. However, the legislator is of the opinion that it is possible to execute when it is based on the foreign ground of enforcement. Still, Linna and Leppänen do not agree: the foreign grounds of

\(^{183}\) It is, however, allowed that the debt can be based on the business activities. *Koulu/Lindfors*, 2009, p. 113.  
\(^{184}\) The Enforcement Code, Chapter 2, Section 24.  
\(^{185}\) The Enforcement Code, Chapter 2, Section 25.  
\(^{186}\) The Act on Enforcement Taxes and Other Public Payments Section 20.  
\(^{188}\) The Enforcement Code, Chapter 2, Section 27.  
\(^{190}\) Government bill 83/2006.  
\(^{191}\) *Koulu/Lindfors*, 2009, p. 113.  
\(^{192}\) The Enforcement Code, Chapter 2, Section 26.  
\(^{193}\) *Koulu/Lindfors*, 2009, p. 113.
enforcement cannot be put in a better position than the Finnish grounds. In such situations, it would be useful for the creditors to always apply the foreign ground for enforcement. However, Linna and Leppänen think that the situation is different if there are international rules which oblige Finland. They think that the presumption in those situations is, that if the ground of enforcement is still valid for execution in the original country, it is not possible to deny its enforcement in Finland. This will cover all the situations where no exequatur is needed. However, the situation is more complex if the exequatur is needed. For instance, based on Brussels I Regulation, the enforcement will then (after the exequatur) be based mostly on the national statutes. In such a situation it is possible to think that even the Finnish statutes on period of limitation for enforcement and final statute of limitations on debt will be applied.194

However, the debtor will not be released if the creditor has not attained a ground for enforcement. For instance, the debt will not fall under the statute of limitations if the debtor and creditor have agreed upon and adhere to the payment schedule.195

4. Are the assets transparency duties proportionally acceptable regarding the creditors-debtors rights? Or should the creditor has the burden of identification of the necessary debts assets and indicate them to the enforcement’s authority?

I think they are quite proportional. Please, see my earlier reply.

5. Do you consider your domestic creditors protection in general and not only regarding an enforcement proceeding pro debtor/anti creditor; pro creditor/ anti debtor; a Balanced system? How do you define and qualify the efficiency in the debt collection field in your country.

The rather well-protected situation of debtors can be seen as a problem from the creditors’ and comparative point of view when the effective collection of monetary claims is seen as the most important aim.196 The Finnish enforcement system and legislation are mainly based on the idea of rehabilitation of a debtor and, in that kind of thinking, the interests of debtors have to give place to the interests of creditors. However, in the long run it is society as a whole that will benefit more when the debtors can later continue their lives or businesses normally again. On the other hand, the promotion of creditor’s interests contributes to the credit- and financial markets as a

195 Koulu/Lindfors, 2009, p. 112.
196 On the other hand, Linna has seen the Finnish enforcement system as a quite neutral concerning the both parties. She thinks that, especially from the normative perspective, the applicant and the debtor are in the same, that is neutral, position. The debtor is not seen as a weaker party like the employee in employment legislation or consumer in consumer legislation. Linna, 2009, p. 18. However, I see the situation as a little bit different, especially from the normative perspective. The debtor is protected by very many rules and there is the strong aim of rehabilitation included. In my opinion, it is mostly the applicant who will lose in such situation, where creditor’s interest and debtor’s interest are in collision.
whole. Linna thinks that the most important function of the enforcement is, still, the liquidation, which is also at the same time the most important tool to promote the trustworthiness to the whole system. For this reason it is the State’s important duty to organize the enforcement in an effective way. At the same time, Linna reminds that the ineffective enforcement is a different matter compared with the regulation of the enforcement’s intensity. That is the other question. There must be a balance between the intensive enforcement and judicial relief. The ineffective enforcement, however, does not fulfil those aims.

The measures planned by EU on the attachment of European bank accounts and on the transparency of the debtor’s assets in Europe fit, in principle, well with the Finnish enforcement system. I cannot see any difference between the Finnish enforcement authorities insofar as the foreign enforcement authority is a State authority and his/her competence is based on EU regulation. However, in the case the foreign actor is a private one or if the competence and the way how to work are based on the different national laws, there are very many risks in the vision and I do not see it as a realistic model. The European cross-border enforcement should therefore be limited to the State authorities only and it should be based only on the harmonized European regulation.

6. Are protected the existing employment of the debtor, in particular by location of professional tools; the granting of a "fresh start" by personal insolvency?

Please, see my earlier replies. After the reform all professions are taken into consideration a little bit better whereas before the reform this rule was in the need to be up-dated when it covered only tools of traditional professions like craftsmen who have tools with less value.

Benefit of separation covers for instance:

3) tools needed by the debtor and the school and study material needed by the debtor or his or her family members;
4) objects comparable to tools, up to a sum established as reasonable by a Decree of the Government, and animals needed for the pursuit of a trade, up to a reasonable value,

197 Linna/Hupli, 2001, p. 600.
198 The liquidation is of course the main function of the enforcement procedure and therefore it is also important that the general audience has a feeling that they can rely on the enforcement system and, when they have a ground for enforcement, the garnishment is done in an effective way. This is the main step in order to fulfill the access to the justice. Ervo, Laura, Perustuslaki ja oikeuden saatavuus. Lakimies 2000, pp. 1085 – 1105, p. 1102.
199 Linna, 2009, pp. 20 – 21.
if they are necessary to ensure the livelihood of the debtor and the family members dependent on him and her for maintenance;

5) property referred to in subparagraph 4 regardless of value, if the debtor uses this to earn income that can be attached and is sufficient to pay the applicant’s receivable and separation could not otherwise be deemed to be against the interests of the applicant, or if the applicant consents to separation;

6) one and a half times the protected portion of the debtor’s cash assets or other property referred to in section 48 for a period of one month, unless the debtor has other, corresponding income;

7) a licence, benefit or right required for the use or utilization of property referred to in subparagraphs 1 through 5, and compensation that has been received in place of property referred to in said subparagraphs if this is used to obtain corresponding property. In addition to what is provided in paragraph 1, also other objects shall be separated from attachment if the separation can be deemed acceptable on the basis of the illness or disability of the debtor or of his or her family member. A family member’s right of separation applies also in a decedent’s estate.²⁰²

7. Are there limitations arising from the preservation of fundamental guarantees for the debtor’s asset, as goods that are not subject to equity constriction or reserve assets to preserve the existential minimum of the debtor and/or his family?

Yes, there are. Please, see my earlier replies.

8. If your answer is yes, which is your position with regard to such kind of limitation?

The limitations are reasonable and necessary to guarantee the minimum living for the debtor and his/her family and to give him/her the possibility to rehabilitate him-/herself. The latter is also the benefit for the creditors now and in the future. Too effective (pre-emptive) execution is not fruitable for the society, debtors and their families or in the long run for creditors either.

9. In your country, what is the understanding about the possibility - and any limitations – the enforcement of judgments before the final judgment, especially in view of the protection of fundamental rights of the debtor?

In principle, only final judgments which have res judicata are enforceable but there are wide exceptions into this rule.

²⁰² The Enforcement Code, Chapter 4, Section 21.
A legally final judgment shall be enforced without the applicant being required to post security. The respondent cannot prevent enforcement by posting security. Extraordinary appeal does not preclude the enforcement of a legally final judgment. However, the court seised of an extraordinary appeal may prohibit or stay the enforcement observing, in so far as appropriate, the provisions in chapter 10, sections 20 through 26.  

Unless otherwise provided elsewhere in the law, a judgment that is still subject to appeal shall be enforced regardless of appeal as provided in sections 5 through 12. If the court, in accordance with the law, has issued a direction on the enforcement of its judgment while it is non-final, said direction shall be observed.  

A non-final judgment of a District Court establishing a payment liability may be enforced, unless the debtor posts security for the claim of the applicant, the enforcement fee and the possible costs of enforcement. Also a partial security may be posted, so that the security and the attached property combined cover the sum referred to above. The attached assets may be liquidated without the consent of the debtor only if the assets are rapidly depreciating or costly to maintain and if the applicant posts security for the possible loss and costs arising from the liquidation. If the applicant fails to post security, the attachment may be reversed. The funds thus collected may be remitted against security.  

A non-final judgment of a District Court on eviction may be enforced if the applicant posts security for any liability in damages arising from the annulment or amendment of the judgment, for costs and for the reversal of the enforcement. The provision in paragraph 1 applies also to a non-final judgment of a District Court where the respondent is ordered to relinquish to the applicant real estate or shares or other instruments entitling the bearer to the possession of accommodations or other premises, if the enforcement of the judgment requires eviction.  

A non-final judgment of a District Court where the respondent is ordered to relinquish to the applicant certain chattels may be enforced if the applicant posts security for the return of the assets and for costs. In other cases the bailiff shall at the request of the applicant ensure the preservation of the assets until the judgment becomes final, observing in so far as appropriate the provisions in chapter 8 on the precautionary seizure of chattels.  

A non-final judgment of a District Court on an obligation other than one referred to in sections 5 through 7 may be enforced unless an appeal will become futile owing to the enforcement, and if the applicant posts security for any liability in damages arising

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203 The Enforcement Code, Chapter 2, Section 3.  
204 The Enforcement Code, Chapter 2, Section 4.  
205 The Enforcement Code, Chapter 2, Section 5.  
206 The Enforcement Code, Chapter 2, Section 6.  
207 The Enforcement Code, Chapter 2, Section 7.
from the overturning or amendment of the judgment, for costs and for the reversal of the enforcement.\textsuperscript{208}

A non-final judgment by default shall be enforced in the same manner as a final judgment.\textsuperscript{209}

A non-final judgment of a court of appeal that is subject to appeal only if leave for appeal is granted, shall be enforced in the same manner as a final judgment. However, the funds thus collected may be remitted only against security. A non-final judgment of a court of appeal acting as the court of first instance is subject to the provisions in sections 5 through 8.\textsuperscript{210}

An interim order issued by a court in accordance with chapter 5, section 7 of the Code of Judicial Procedure on the restoration of possession or a disrupted state of affairs or on the taking of some other measure shall be enforced without the applicant being required to post security. The respondent may not prevent enforcement by posting security.\textsuperscript{211}

A settlement confirmed by a court shall be enforced in the same manner as a final judgment.\textsuperscript{212}

10. If you have restrictions, such as the impossibility of seizure and which serves as the residence of the debtor’s family, they undergo some preset limit and can also protect valuable assets?

The right to beneficium is limited to reasonable value only. In the case the item which is covered by beneficium is very valuable it is possible to change the item to the one which has less value but can be used to the same purpose.

Namely, if the value of the object referred to in section 21, paragraph 1, subparagraph 4 as comparable to tools clearly exceeds the amount specified in the Decree of the Government, the object may be attached and sold. The amount referred to in the Decree shall be returned to the debtor from the purchase price for the obtaining of a substitute object. The debtor shall be heard before the sale. Service shall be given to the debtor of the decision on the amount to be returned.\textsuperscript{213}

11. For the preservation of fundamental and human rights in your country, do you have an efficient public enforcement (administrative

\textsuperscript{208} The Enforcement Code, Chapter 2, Section 8.
\textsuperscript{209} The Enforcement Code, Chapter 2, Section 9.
\textsuperscript{210} The Enforcement Code, Chapter 2, Section 10.
\textsuperscript{211} The Enforcement Code, Chapter 2, Section 11.
\textsuperscript{212} The Enforcement Code, Chapter 2, Section 12.
\textsuperscript{213} The Enforcement Code, Chapter 4, Section 22.
or judicial throught class action or collective procedure)? Ie. :Access to food and health.

I am not sure if I caught the point but there is no collective enforcement, not even in the case of class actions. Even if the judgement is reached by the class action, the enforcement happens individually. Still, the whole enforcement system is a public one; the State based which works basically quite effectively in all situations, also when the state or community is the defendant.

12. When the debtor defendant is the State , does it have special procedural treatment in an enforcement proceeding? The fundamental due process guarantees in your enforcement and civil procedure are obstacle in their country, for imposition of personal coercion, such as civil prison or coercive fine (or such kind of Comtenpt of Court (Civil and Criminal) or Astreintes)?

The State is a regular defendant like the others. No specific treatment except that there are some exceptions to the obligation to post security.

No security shall be required of a applicant or creditor which is a public corporation or public institution, an asset management corporation referred to in the Act on the Government Guarantee Fund (379/1992), or a credit or insurance institution whose capital adequacy is subject to public supervision in Finland or in another State of the European Economic Area, nor of the Finnish Centre for Pensions. However, the bailiff may, if necessary, require that a credit or insurance institution post security.\(^{214}\)

13. In your legal System is the creditors right to specific perfomance guaranteed?

Yes, it is but in that case the judgment on that is needed as a ground for enforcement. The ground for enforcement can be even that type of the judgement where someone is obliged to fulfill something or for instance to sign the document.

14. Where the debtor is a Corporation , there is acceptance in your country of piercing the corporate veil under the implementation for the achievement of its equity partners ?

Actually, not. The corporation is treated as a separate legal person, who is solely responsible for the debts it incurs and the sole beneficiary of the credit it is owed. There are some exceptions in the legislation covering the limited companies which do advocacy. In that case, even the persons behind the company are responsible. In addition, there are rules on artificial arrangements.

\(^{214}\) The Enforcement Code, Chapter 3, Section 44.
According to Enforcement Code, artificial arrangements can also be seized to quite a wide extent. This possibility was incorporated into the Enforcement Act in 1999 and it remained in the Enforcement Code 2008. This possibility is very important in order to make the enforcement effective. However, garnishments of the artificial arrangements have been rare in practice.

The system was taken into the Enforcement legislation because of the economic crisis in 1990s. In the late 1990s it was especially difficult to enforce debts because of offshore trusts. The traditional Finnish concept of ownership was based on the idea of exclusive ownership, but the concept of dualistic ownership gained grounds in practice when offshore trusts were established into tax havens. As a result of this challenge, the new rule concerning the artificial arrangements and the possibility to garnish them was adopted in the enforcement legislation.217

According to Chapter 4, Section 14 of the Enforcement Code, a plea that property belongs to a third party does not prevent the attachment of the property if, firstly, it is observed that the position of the third party is based on a financial or other arrangement that has been given a legal form that does not correspond to the actual nature or purpose of the matter, taking into consideration the powers available to the debtor comparable to the authority as owner, measures comparable to those of an owner, the benefits received by the debtor from the arrangement and the other corresponding factors. Secondly, if such a legal form is apparently being used to avoid enforcement or to retain the property beyond the reach of the creditors. Thirdly, the applicant’s receivable shall probably not otherwise be collected from the debtor within a reasonable time. However, attachment shall not be carried out if the third party involved in the arrangement shows it to be probable that attachment would violate his or her actual right. The bailiff shall hear the debtor and the third party and, if necessary, the applicant in an appropriate manner, unless this would significantly hamper the enforcement.

This general rule has been said to be very open to various interpretations. The rule is one kind of general clause and its significance is decided by the case-law.219

Section 14 of the Enforcement Code is mainly the competence norm for the bailiff, but at the same time it also has some substantive characteristics because it includes the substantive criteria for the artificiality. However, the norm does not cause that the arrangement would be null and void even in the material meaning. The only effect is that the arrangement does not hinder the garnishment.220

The requirements for garnishment are that 1) the factual basis of the arrangement does not coincide with its judicial basis (requirement of discrepancy); 2) the arrangement is made in order to avoid the enforcement, that is called as a (requirement

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215 *Linna/Leppänen*, 2007, p. 139.
218 The same applies also to income directed by the debtor into the arrangement. The Enforcement Code, Chapter 4, Section 14, Paragraph 3.
220 *Linna*, 2009, p. 29. The material basis of the Chapter 4, Section 14 of the Enforcement Code has been disputed in legal literature. See also Lindfors, Heidi: Sivullisen asema ulosotossa – erityisesti omistusolettaman ja keinotekoinen järjestelyn näkökulmasta. Edita, Helsinki 2008, pp. 394 and 404.
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of a motive); 3) the third party involved in the arrangement does not give probable evidence that his/her real right will be injured if the arrangement is annulled in the enforcement (requirement of no harm) and 4) it is not probable to cover the debt by other property or income in a reasonable time (requirement of necessity).

The parties’ idea is then to hide the property from the creditors with the help of an artificial arrangement. As such the creditors cannot get the payment in the enforcement in reasonable time. The requirement of necessity is needed in order to protect the third party.

The arrangement has to be artificial, but it does not mean illegal. The arrangement is artificial when legal means are used for gimmickry and venture and in order to damage creditors. The artificial arrangement does not mean that it would be null and void but it can be passed in the enforcement by seizing the property behind the arrangement. The possibility to do that is one specific example on the general prohibition of chicanery.

The elements of the artificiality are classified as objective and subjective requirements. The objective elements are that the judicial form does not coincide with the factual situation. The proof of the parties’ subjective purpose to make an artificial arrangement is not needed. If the arrangement is seen as artificial it is for the third party has to prove that it is not. The bailiff’s opinion that the arrangement is artificial is based on the intuitive presumption and the bailiff does not have to clarify all single transactions behind the arrangement or their purpose and the documents concerning them. The bailiff may assume that the arrangement is artificial, for instance, if the debtor has the power to decide and use the property like an owner and if s/he takes care of the property with insurance, extra investments and otherwise by his/her own funding. The other possible elements are if it is the debtor who gets the virtues based on the arrangement, such as profits and increase in value, or who assumes the risk of depreciation. In addition, one aspect can be how easily the arrangement can be annulled or if it is only meant to be temporary. However, the most important issue concerns who is a factual owner, rather than who is the official owner. The idea is to find out if the official owner is acting only as a technical tool without any substantial and autonomous interest of his own. The situation is viewed as a whole.

Even transparency is one significant factor when estimating the arrangement’s artificial character: the arrangement could be factual and not artificial if the arrangement has been made in an open and transparent manner. An example from case-law can illustrate this point:

The third party (the official owner) had taken a bank loan in order to finance the arrangement. In this case the third party would have to pay the loan back to the bank had the arrangement been annulled in the enforcement. The third party therefore had an autonomous, economic interest and the arrangement was not seen as an artificial.\textsuperscript{226}

Tuomisto has commented the case in the legal literature and he shares the opinion that the court case fulfils the requirements given in the Enforcement Code. In the given case it was obvious that the arrangement was made in order to avoid the enforcement, but it was unclear if the arrangement was artificial, that is if it did not coincide with the factual basis or not. The third party, who was a sister of the debtor, had a significant autonomous economic risk connected with the arrangement. Her role was therefore not artificial. It is not prohibited to help the debtor.\textsuperscript{227}

The Supreme Court decided, however, in the case 2005:97 that even if there were loan arrangements made by the third party, his/her economic risk was not seen as a significant because the part payments of the loan were made by the debtor. The situation was estimated as a whole, and the fact that the third party had taken out a bank loan because of the arrangement was not hindering the garnishment and the arrangement was anyway seen as an artificial.

In this case, the artificial owner was a firm. One important criterion is if the firm has other actual business activities as well, or if the firm exists mostly for this arrangement only. It has to therefore also be estimated, how much harm the possible annulations of the arrangement cause to the firm’s business. The interests of the firm’s own creditors must be taken into particular consideration. The annulations must not cause harm to them.\textsuperscript{228}

In addition, the subjective element is needed that the artificial arrangement is made with the purpose of hiding the property and, by doing so, to damage the creditors. The full proof thereof is not needed; it is sufficient if this kind of purpose is apparent, for example if the arrangement has been hidden in the enforcement inquiry, or if the arrangement was made in the situation of excessive indebtedness, or when the indebtedness was close. However, the artificial arrangement (in its objective meaning) does not automatically mean that even the subjective element is realized. The debtor may have an acceptable reason for the arrangement, such as gaining funding.\textsuperscript{229}

The arrangement has to damage the creditors, but this requirement does not mean that they should have final damages. It is sufficient that the arrangement makes the collection of money more difficult to the extent that it is reasonable to seize the property behind the arrangement. In addition, the creditors have to have a sufficient interest, which means that there is not enough other kinds of property or regular salary or other income in order to get the payment by the enforcement in a reasonable time.\textsuperscript{230}

\textsuperscript{226} Helsinki Court of Appeal, 2002.03.12; S 01/459.

\textsuperscript{227} Tuomisto, 2002, p. 15.

\textsuperscript{228} Tuomisto, 2003, pp. 17 – 21.

\textsuperscript{229} Koulu/Lindfors, 2009, p. 239 and Linna/Leppänen, 2007, pp. 147 – 148.

\textsuperscript{230} Linna/Leppänen, 2007, p. 149.
If there are probable grounds to estimate the arrangement as an artificial, the burden of proof turns to the third party, who has to prove that the arrangement is factual and not artificial. The full proof is not needed; it is enough if s/he can give probable reasons. The low standard of proof covers both the enforcement level and, when the matter goes before court, the court level.

The legal protection is, of course, very important when the bailiff has doubts that the arrangement is artificial and contemplates the seizure of the property. The idea is not to garnish the property belonging to the third party but to hide the playing the market.

14b. If yes, how are backed fundamental rights of these members or shareholders?

Attachment shall not be carried out if the third party involved in the arrangement shows it to be probable that attachment would violate his or her actual right. The bailiff shall hear the debtor and the third party and if necessary the applicant in an appropriate manner, unless this would significantly hamper the enforcement.

Otherwise, there are no specific rules. They are protected as usually in the case of being debtor. Please, see also my earlier replies.

15. What are the requirements put in your country for the presentation of defense in enforcement by the debtor, and how they articulate with their fundamental rights?

Actually, the defense happens when the court handles the case concerning the ground for execution. However, even the enforcement authorities have the general duty to hear the parties whenever needed based on the Enforcement Code. Namely, where this Act provides that the bailiff shall hear someone, the person in question shall be reserved an opportunity in advance to be heard in a suitable manner. An inability to ascertain the contact details of the person in question or the inability to hear him or her for another corresponding reason shall not prevent continuation of enforcement.

Also in situations other than those specifically mentioned in law, the bailiff shall hear the parties and third parties if the matter is deemed to be of considerable significance to the person to be heard and if there is no impediment to the hearing.

The person in question shall be reserved an opportunity to be heard anew, if essential new evidence is obtained in the matter.

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231 This kind of burden of proof belongs to the enforcement authorities. The full proof is, however, not needed and the evidence is usually based on the indications. Linna, 2004, pp. 633 – 634.


234 One specific tool for legal protection is hearing. Linna/Leppänen, 2007, p. 164.

235 The Enforcement Code, Chapter 4, Section 14, Paragraph 2.

236 The Enforcement Code, Chapter 3, Section 32.
16. In your country, the defense filed by the debtor must generate the suspension of the acts of execution or, on the contrary, the allocation of this effect involves related to the fundamental right to satisfaction of the credit requirements?

The authority may enforce the judgment only as such. In the case, there is a need for further claims due to the post events; the bailiff will refer the parties to start the enforcement proceedings at the court. However, this possibility is limited to ex post reasons only; otherwise the judgment is a valid ground for the execution as such. See the Chapter 10 (the Code in English is attached.)

In addition, it is possible to apply based on the enforcement. See the Chapter 11.

17. Does the Seizure/garnishment and seizure for the first creditor in your system give him a priority regarding future creditors and seizures or are all creditors equal treated?

No. The relationship among creditors is basically equal. There are some rules in the Code like these:

Attached property can be attached also for a receivable of another applicant until the meeting of parties has been held in accordance with chapter 5 or, if no meeting of parties is held, the sale has been held. Funds accrued other than through the sale shall be remitted to those applicants for whose receivables the assets had been attached at the time that they had been paid to the bailiff in accordance with section 83.\(^237\)

An effected precautionary seizure or other precautionary measure does not prevent attachment. However, if a precautionary measure has been ordered to secure the right of ownership of a third party, the property may not be sold until the decision on the enforcement of the precautionary measure has been reversed or has lapsed.\(^238\)

A right of lien or other right of security on property of the debtor does not prevent attachment of said property for another receivable. A creditor who has attached property in his or her possession on the basis of a right of lien has the duty to transfer the property immediately to the bailiff. The right of security shall be taken into consideration in the sale and in the distribution of assets as provided in chapters 5 and 6. A right of use or other special right on property does not prevent attachment. Chapter 5 contains provisions on the taking of a special right into consideration in sale.\(^239\)

\(^{237}\) The Enforcement Code, Chapter 4, Section 42.
\(^{238}\) The Enforcement Code, Chapter 4, Section 43.
\(^{239}\) The Enforcement Code, Chapter 4, Section 44.
In addition, the special act exists where the credits with priority have been regulated. Such a prioritized credits are based for instance on pawn, mortage and the maintenance for children is also priorited.

18. Which are the civil / criminal sanctions against a debtors who sell an attached/seizure asset? In your system are there special provision for the customer as creditor and/or debtor?

Offences by a debtor are criminalized in the Criminal Code.

A debtor who
(1) destroys his or her property,
(2) gives away or otherwise surrenders his or her property without acceptable reason,
(3) transfers his or her property abroad in order to place it beyond the reach of his or her creditors or
(4) increases his or her liabilities without basis
and thus causes his or her insolvency or essentially worsens his or her state of insolvency, shall be sentenced for *dishonesty by a debtor* to a fine or to imprisonment for at most two years.\(^{240}\)

If in the dishonesty of a debtor
(1) considerable benefit is sought,
(2) considerable or particularly substantial damage is caused to the creditors, or
(3) the offence is committed in a particularly methodical manner and the dishonesty by a debtor is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated dishonesty by a debtor to imprisonment for at least four months and at most four years.\(^{241}\)

(1) A debtor who, in order to obtain unlawful financial benefit for himself or herself or another in bankruptcy, enforcement, debt adjustment or restructuring proceedings
(1) conceals his or her property,
(2) reports a liability that is false in full or in part, or based on a sham transaction,
(3) gives other false or misleading information on a circumstance that is significant from the point of view of the creditors, or
(4) fails to report a liability,
shall be sentenced for *fraud by a debtor* to a fine or to imprisonment for at most two years.

(2) If the debtor rectifies the misleading information or otherwise prevents the effect of his or her act on the proceedings before he or she attests to the correctness of the

\(^{240}\) The Criminal Code, Chapter 39, Section 1.
\(^{241}\) The Criminal Code, Chapter 39, Section 1a.
estate inventory or before the misleading information otherwise affects the proceedings, the act is not deemed fraud by a debtor.  

If in the fraud by a debtor
(1) considerable benefit is sought or
(2) the debtor attests in court to the correctness of the false or misleading information
and the fraud by the debtor is aggravated also when assessed as a whole, the offender shall be sentenced for *aggravated fraud by a debtor* to imprisonment for at least four months and at most four years.  

If the debtor without the intention of gaining benefit commits the act referred to in section 2 either intentionally or through gross negligence, he or she shall be sentenced for *deceitfulness by a debtor* to a fine or to imprisonment for at most one year.  

If the fraud by a debtor or the deceitfulness by a debtor, when assessed as a whole, with due consideration to the minor significance of the false or misleading information given by the debtor from the point of view of the creditors, or to the other circumstances connected with the offence, is to be deemed petty, the offender shall be sentenced for a *violation by a debtor* to a fine.  

If a debtor, knowing that he or she is unable to meet his or her liabilities, in order to favour a certain creditor at the expense of the other creditors
(1) repays a debt before its maturity in circumstances where the repayment is irregular,
(2) gives, for receivables of a creditor, collateral that had not been agreed upon or that the debtor had not promised at the time the debt arose,
(3) uses an unusual means of payment to meet a liability in circumstances under which the payment cannot be deemed regular, or
(4) undertakes another similar arrangement that improves the position of the creditor, he or she shall be sentenced for *favouring a creditor* to a fine or to imprisonment for at most two years.  

The provisions in this chapter on enforcement proceedings apply, where appropriate, also to the action by an enforcement authority undertaken in order to ensure enforcement.  

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242 The Criminal Code, Chapter 39, Section 2.  
243 The Criminal Code, Chapter 39, Section 3.  
244 The Criminal Code, Chapter 39, Section 4.  
245 The Criminal Code, Chapter 39, Section 5.  
246 The Criminal Code, Chapter 39, Section 6.  
247 The Criminal Code, Chapter 39, Section 8.
No, there are no special provisions for the customers as creditors and debtors in Finland.

19. Does The legal system of your country imposes procedural changes to executive rite because the debtor shall be the Convention?

Sorry, I didn´t totally understand the point in this question. The debtor shall be the Convention?? In the case you refer to the European Convention on Human Rights it is a valid instrument in Finland and courts follow it carefully. Its provisions are taken into consideration also in execution whenever the Convention covers that part of proceedings and in such situations the Convention has the priority and the national rules are applied in the way that they don´t collide with the Convention.

20. If yes , might you be more flexible them in favor of the fundamental right of the creditor ?

Equality is important in the light of convention and in the sense of fundamental rights. It is not possible to give any privileges for creditors. If we think about the effectiveness of execution, in a long run, it is more important to rehabilitate debtors. This makes more sense from the societal point of view and also creditors will get more benefits in a long run.

21. Should the grant of such relief be discretionary? Should It be available on (a) a showing of a case on the merits to a standard of proof which is less than that required for the merits under the applicable law; and (b) on showing that the potential injury to the plaintiff outweighs the potential injury to the defendant?

I refer to my earlier reply. In addition, there is so called “special collection” in Finland which covers hard cases. It is better to effective the enforcement procedure instead of lowering the standard of proof or to allow unbalance between creditors´and debtors human rights.

Some information on special collection here:

In practice the enforcement is divided into a normal collection, which covers routine matters, and into a special collection, which covers problematic matters. However, there are no statutory rules on special collection, which it utilized in the most difficult enforcement cases. Yet, special collection is, in practice, a very important way to work. The special collection has developed because there has been a need for it – there are legal, organizational, financial and political reasons behind this construction. One can also note societal requisition, the main reason for which being the low concurrency at the beginning of the 1990s. For this reason the special collection developed very rapidly over a five year period. The other reason is the internationalization, which gave new possibilities to avoid the execution and to be contumacious as a debtor. As such there was a need to specialize in the enforcement.
The routine tasks are centralized to some bailiffs, when at the same time the other bailiffs work only with the special collection.\textsuperscript{248}

The special collection is then based only on the practice. There is no legislation on this kind of specialization. In practice, the special collection is, however, quite well-established. The special collection concerns the enforcement matters where the results cannot be achieved by normal collection. The special collection means that the enforcement authorities take advantage of co-operation and they effectively consult other authorities and also use the tools and powers they have more effectively. The bailiffs who carry out special collection have no more powers and tools compared with other bailiffs, but they just use all the capacities they have. In routine cases there is no need and it is not reasonable to take all possible resources into use, but the situation is the opposite where the special collection is concerned. The tools in the special collection are then the effective flow of information between the authorities, concentration, specialization and effective usage of powers.\textsuperscript{249}

The general requirement for starting a special collection is that the collected money claim is a huge sum of money. The other requirement is that the debtor has many firms in its control; many firms of the debtor are now bankrupt; the matter concerns the firm controlled by many debtors; the position of a debtor is based on an artificial arrangement or similar arrangement, which does not coincide with the reality; the debtor has been suspected of white-collar crimes or that the matter concerns many local enforcement districts at the same time.\textsuperscript{250} The special collection continues as long as it is needed. After that the enforcement of the matter continues in a normal collection.\textsuperscript{251}

It has been asked if the special collection violates the equality of debtors. Linna thinks that it is not the question of equality if some enforcement matters need more work than the others. The powers are legal and the same in all kind of enforcement matters. They are only used in the special collection when they are not used in routine matters. Linna thinks that the opposite situation, where the difficult enforcement matters could not be executed in an effective way, would be a risk from the perspective of equality. The only risk is that the debtor can feel that the special collection is stigmatized. However, there is no special register on the special collection. It is also otherwise impossible to know if the special collection has been used or not. As such, Linna considers the risk of stigmatization as minor. In addition, the enforcement fee is the same in normal and special collection.\textsuperscript{252}

These opinions have also been criticized in the legal literature. In the special collection, the debtor is an object of intensive execution, which can be seen to include even problems of equality. Koulu and Lindfors do not think that the opposite situation, where the collection does not succeed, could be seen as an equality problem, like Linna has done. Koulu and Lindfors appear to look at the enforcement from the more social concept, whereby the equality is seen more as a question of debtor protection and


\textsuperscript{250} Linna, 2001, pp. 207 – 208.


\textsuperscript{252} Linna, 2001, pp. 220 – 221.
debtors’ equality is in focus. Koulu and Lindfors think that there are some risks included into the special collection, especially if the classification of enforcement matters into normal collection and into special collection happens intuitively. It should therefore be avoided that the more effective measures are used for the debtor, who has been classified as a contumacious debtor only by some reason, which even can be intuitive. It is always problematic if the threshold to use maximalist measures is set at the low level.

However, Linna wishes that the differences between the normal collection and the special collection will be diminished in the future. She hopes that the normal collection would become more efficient and the same routines would be used there.

22. Should provisional measures and injunctions be issued as an interim order on the basis of a claim form which informs the third-party debtor about the effects of the seizure and which requires the third-party debtor to provide any information on the account seized. This information shall be given on the form of the European Third Debtor Assets Declaration.

In Finland, preliminary injunctions are generally possible according to Chapter 7, Sections 1 – 3 of the Procedural Code. According to the Enforcement Act an enforcement officer can execute the provisional measure once judgment on such measure has been passed by a court. The enforcement of the provisional measure based on Chapter 7 of the Procedural Code is regulated in Chapter 8 of the Enforcement Code. The system consists of two steps, as can also be seen in other Scandinavian countries and Germany.

The law does not fix the content of the provisional measure. The judge is instead given wide discretion to grant such a measure according to the circumstances. Where monetary claims are concerned, the content of the remedy is usually an attachment or seizure of a part of the defendant’s property to the amount sufficient to cover the claimed sum.

The provisional measures based on Chapter 7 of the Procedural Code and on Chapter 8 of the Enforcement Code are then used when the case is pending before the court or even beforehand.

Where the judgment has already been passed but it is not possible to enforce it straightaway, the provisional measure can be exempted by an execution officer as according to the Enforcement Act. In this situation a provisional measure operates for six months. The bailiff may even extend this period if there is a special reason for doing so.

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253 Koulu/Lindfors, 2009, p. 166.
258 The Enforcement Code, Chapter 8, Section 13.
In addition, interim measures based on the Chapter 3, Paragraphs 18 – 20 of the Enforcement Code, are possible if the attachment cannot be carried out at once owing to: disqualification, a hearing, the lack of a document, uncertainty as to ownership, or some other reason. In such a situation the bailiff may take interim measures if this is necessary to ensure the continuity of the enforcement. The interim measures are then used when there is a ground of enforcement but some other reason hinders its immediate execution.

According to Chapter 7, Section 1 of the Procedural Code, it is possible to use provisional measures if the petitioner establishes a probability that s/he holds a debt that may be rendered payable by a decision referred to Chapter 2, Section 2 of the Enforcement Code, and that there is a danger that the opposing party hides, destroys or conveys his/her property or takes other action endangering the payment of the debt. In this type of case the court may order attachment of the real or movable property of the opposing party to an amount securing the debt.

According to the case law, the standard of proof is set at a low level. For instance, in the case where the debt was based on damage, the standard of proof was set to the level where the petitioner proved that the act, damage and liability were “not manifestly unjust” taking both facts and legal matters into consideration. The petitioner has to prove that the danger was “not improbable” where there is a danger that the opposing party hides, destroys or conveys his/her property or takes other action endangering the payment of the debt.

The court will not order which property will be seized when it makes its decision: only the amount is specified in the decision and the executive officer decides on the other practical issues. However, in some special situations the court will even decide on the property that is to be seized. For instance, when the object is a vessel that is situated in Finland, but owned by a foreign ship-owner, and there is a danger that it will be removed from Finland, the court will give such a specific decision.

Although the general court makes the decision on a provisional measure, it is the executive officer who enforces it. The executive officer thus decides if it is sufficient to order the prohibition of transfer or if the attachment has to be executed through seizure of the property. In order to become valid, the petitioner will also need to file for the enforcement of the precautionary measure according to Chapter 8 of the Enforcement Code.

It is not required that the debt should have already accrued. However, the debt must have accrued by the time the main claim has been brought.

It is possible to order a provisional remedy in most types of matters of real estate or movables or in any matter of contract or tort. The same applies to almost all kinds of economic and commercial disputes. On the other hand, most disputes in the fields of labour and social security are excluded. Provisional protection of a person’s privacy, integrity, and reputation, as against the mass media, should also be available.

The decision to undertake the precautionary measures referred to above shall be made, on a petition, by a general court of law. The issue of precautionary measures shall be heard by the court where the proceedings on the main claim or right of the petitioner are pending. If the hearing of the main issue has concluded and the time provided for appeal or response has not yet elapsed, the issue of precautionary measures shall be brought before the court that heard the main issue. If no proceedings are pending the competent court shall be determined in accordance with the provisions of normal rules on forums. Chapters 4 and 21 of the Maritime Code contain provisions on the seizure of a vessel and the competent court in certain cases.264

Even if the main issue is pending or will be pending in the arbitrary court, the general court of law is the only forum competent to make a decision on provisional measures. The arbitration tribunal court cannot even decide on the repeal of the precautionary measures.265 Where the foreign forum has jurisdiction according to the Lugano Convention or Brussels I Regulation, the Finnish court may make a decision on precautionary measures according to Finnish law.266

The petition for precautionary measures shall be submitted in writing. If the precautionary measures relate to pending proceedings then the petition may be submitted orally at the hearing where the main issue is pending. The petition shall be considered urgent and shall not be granted without granting the opposing party an opportunity to be heard in due course. However, if the purpose of the precautionary measures might otherwise be compromised, the court may, on the request of the petitioner, give an interim order on precautionary measures without reserving the opposing party’s said opportunity.267

In some situations the petition should be decided even on the same day or at least within a few days. If, for example, the vessel is due to set sail, the petition should be decided straightaway, that is, while the petitioner is waiting in court. The standard of proof is low. The petitioner should prove only that s/he probably has a debt, which means about a 50 % standard. Where the risk is concerned the standard of proof is set even below this level . In most cases it will suffice that the petitioner makes the relevant claim.268 It is also sufficient to only have a risk of losing the property for some reason. The risk does not have to be based on the mala fides of the opposing party. Of course, the court may reject the petition if it seems highly unlikely that there is a risk of injustice to the applicant, but in normal situations there is a presumption that the claim is correct.269

When the petition has been granted, the petitioner shall bring an action on the main issue within one month of issue of the order before a court; alternatively he can bring the main issue up for consideration in other proceedings that may result in a decision enforceable in accordance with Chapter 2, Section 2 of the Enforcement Code.

264 The Procedural Code, Chapter 7, Section 4.
266 Article 24 Lugano Convention and Article 31 Brussels I Regulation.
267 The Procedural Code, Chapter 7, Section 5.
When the precautionary measures have been directed at real property to secure the payment of an undue debt, for which the real property is collateral, the period shall begin on the due date. If the consideration of the issue is not initiated within the said period, or if the case is discontinued, the precautionary measures shall be revoked.  

If, due to no fault of the petitioner, an arbitral award has not been rendered, or if the award is void or it is annulled, the action shall be brought or considered, under the threat that the precautionary measures shall be cancelled, within one month of receipt of notice of the impediment in the arbitration proceedings or the official voiding of the arbitration award or, when the award has been annulled, from the date when the court order has become final. When granting a petition for precautionary measures the court shall inform the the petitioner how s/he is to act in order to prevent the precautionary measures from being repealed.

If the petitioner neglects the duty to bring an action on the main issue before a court, the executive officer will repeal the precautionary measure at the request of the opposing party. Enforcement shall also be reversed if it is shown that the action on the main claim has been rejected on the merits, withdrawn, or dismissed without considering the merits.

In addition, interim measures based on the Enforcement Code are possible if the attachment cannot be carried out at once owing to: disqualification, a hearing, the lack of a document, uncertainty as to ownership, or some other reason. The bailiff may take interim measures if this is necessary to ensure the continuity of the enforcement. Interim measures may not be taken if it is probable that the debtor’s payment liability has expired. If there is a justified reason then interim measures may also be taken conditionally when searching for assets belonging to the debtor. No unnecessary impediments to the business or livelihood of the debtor or a third party may be caused by way of interim measures. It is possible to use interim measures only when the case concerns the liability to pay.

The bailiff may take interim measures in order to take possession of assets, to ban the debtor or a third party from relinquishing assets, to issue a prohibition on payments notice or a similar notice, to request that necessary entries be made into a register, to arrange for the guarding of assets or to carry out other similar actions. In addition, a bailiff other than the bailiff-in-charge may take interim measures and the deputy bailiff may take interim measures in a matter within the exclusive competence of the bailiff. Interim measures have the same effect as an attachment. Interim measures are not subject to appeal.

Interim measures are a form of precautionary measure for a bailiff. They can be seen as his or her tools to secure ex officio the forthcoming foreclosure. The security of a petitioner is not needed and he also has no liability for damages.

Interim measures shall be reversed immediately when they are no longer necessary, and no later than three weeks after having been taken. In the case of

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270 The Procedural Code, Chapter 7, Section 6.
271 The Procedural Code, Chapter 7, Section 6, Paragraphs 2 and 3.
272 The Enforcement Code, Chapter 8, Section 4.
273 The Enforcement Code, Chapter 3, Section 18.
274 The Enforcement Code, Chapter 3, Section 19.
275 Linna/Leppänen, 2003, p. 301.
conditional interim measures, the measures shall be reversed no later than a week after the bailiff is informed of a receivable or some other assets of the debtor. If the assets subject to interim measures are attached, the interim measures shall be deemed to have been reversed by the decision on attachment.\(^{276}\)

The threshold to use interim measures is not high and the idea is that the threshold to revoke the interim measure should also be at the low level.\(^{277}\)

The possibility to use interim measures is a much easier way to act in comparison with the possibility to use precautionary measures exempted by an executive officer where the judgment has already been given, but it is not possible to enforce it straightaway.\(^{278}\) In both situations there has to be a substantial risk that the enforcement is endangered. However, the precautionary measure is possible only if the ground of enforcement is lawful. In addition, the petitioner must apply for the precautionary measures. The security of a petitioner is also needed and the appeal is granted. There is no possibility to appeal where interim measures are concerned. It is thus much easier to use interim measures instead of the precautionary measures based on the Enforcement Code Chapter 8, Section 13 if it is probable that the obstacle to enforcement is only short term.\(^{279}\) The interim measure can even be conditional if there is a justified reason for such interim measure. The conditional interim measure can be used mainly in the case of attachment of receivables.\(^{280}\)

Furthermore, a bailiff other than the bailiff-in-charge may take interim measures. Even deputy bailiffs may take interim measures in a matter within the exclusive competence of the bailiff as well as an impartial bailiff. The ratio is to ensure that the measure can be taken very rapidly if needed so. For instance, there is no time to seek a competent bailiff if there is a risk that the property can be taken out of the country, yet it is more important to take an interim measure rapidly.\(^{281}\)

However, an interim measure is not possible if it is probable that the debtor’s payment liability has expired. Such kind of serious doubt prohibits the use of interim measures. Still, there can be some uncertainty concerning the attachment object, for instance a collision concerning a proprietary right and also in the situations in which there exists the doubt of an artificial arrangement. The reason for the using interim measures can even be something else and the list of reasons is not exclusive. This issue has been subject to criticism in legal literature and the provisions to use interim measures have been seen to be too wide.\(^{282}\)

The judicial safeguards when using interim measures are, firstly, the principle of proportionality; secondly it is also forbidden to sell the assets frozen by an interim measure; thirdly it is generally also prohibited to use interim measures in an irreversible manner.\(^{283}\)

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\(^{276}\) The Enforcement Code, Chapter 3, Section 20.

\(^{277}\) Linna/Leppänen, 2003, p. 300.

\(^{278}\) The Enforcement Code, Chapter 8, Section 13.


\(^{280}\) Linna/Leppänen, 2003, pp. 309 – 310.

\(^{281}\) Linna/Leppänen, 2003, p. 303.

\(^{282}\) Linna/Leppänen, 2003, p. 305.

\(^{283}\) Linna/Leppänen, 2003, p. 306.
23. In addition, may the court order that the debtor gives a European Assets Declaration on the whereabouts of his or her assets? As a rule, should the defendant be heard before the order is issued. If the order is (for reasons of urgency) obtained ex parte, the defendant should be heard within a reasonable time and should be granted the opportunity to object to the order?

Please, see my earlier response concerning the execution inquiry.

24. Should The court have authority to require a security from the plaintiff or to impose other conditions to ensure the compensation of any loss or damage suffered by the defendant or third parties which may result from the granting of the order?

Yes. Please, see my earlier replies.

25. Freedom of forum shopping and respect before the option of one parte forum non convenes, is your legal system flexible to accept it? Is your legal system friendly with the creditor’s, the debtor’s jurisdictions noption or do is not a matter in your rules?

The Insolvency Regulation (EC) 1346/2000 concerning the rules of jurisdiction for opening insolvency proceedings in the EU covers also Finland.

If the lis pendens is working or not depends also in Finland on EU-law and other international instruments.

Other comments:
National Report

The Conflicts between the Fundamental Rights of the Creditor and the Debtor in the Enforcement Proceeding in Korea.

I. Introduction

1) Civil enforcement represents the compulsory process in which rights under private law are realized through public authorities. The process of civil enforcement of the Republic of Korea had been regulated by civil procedure act such as German civil procedure code. However, since the civil procedure act was divided into 2 separate acts, the civil enforcement act (including preservative procedure such as prejudgment attachment and preliminary injunction) and civil procedure act which regulate pure judgment procedure on Jan. 26th, 2002, the civil enforcement process is now prescribed apart from the civil procedure act.

2) According to the Art. 1 of the civil enforcement act (CEA), this law aims at regulating 1) mandatory execution 2) auction for exercising security rights 3) auction based on decrees of civil act, commercial act and other codes 4) stipulation of the processes of preservative measures. Hence, the civil enforcement act not only incorporates compulsory execution, which is based on execution titles, like judgments and notarial deed but also preservative procedures, such as auction for exercise, etc. of security rights between creditors and debtors, preliminary measures(attachment and injunction).

3) There are enforcement decrees and enforcement rules as the subordinate statutes of the civil enforcement law and multiple statutes, which stipulate the execution process. Moreover, despite the fact it is authorized by constitution or legislation, the Established Rules of Korean Supreme Court by the Korean Supreme Court, which is the last resort, play critical roles in the civil enforcement process even in very important sector could infringe the rights of the interested parties.

4) The most rudimentary process among civil enforcement processes is the compulsory execution in the Part II of civil enforcement act and it accounts for the most of the CEA. According to Art. 268 CEA, the provisions of compulsory execution...
procedure apply mutatis mutandis to auction procedures for exercising the security right to immovables. Even in preservative procedure the provisions of compulsory execution procedure applied mutatis mutandis (Art. 291, 301 CEA). Therefore, in order to grasp the principal structure and characteristics of the civil enforcement process, it is crucial to comprehend the compulsory execution process.

Ⅱ. Fundamental Principles and the Authorized Entities

1) Korean civil enforcement process begins and terminates at the request of the person of interest (mainly creditors) and so does the judgment procedure (so called Dispositionsmaxime). Thus, the process cannot be commenced by (deciding or execution) court or court executors on their own motion without an execution request from parties (creditors or judgment creditors). Even if there is a request from parties, it can be terminated in the midst of the procedure by withdrawing the request.

2) In Korea the creditor does not have to be represented by lawyer in the execution proceedings. The judgment creditor will be fully reimbursed for his or her prepayment at the end of the execution procedure (Art. 53 CEA). The creditor, who applies for a compulsory execution, shall pay in advance the amount determined by the court for the expense necessary for it (Art. 18 para. 1 CEA). Hence, costs required for a compulsory execution shall be handed back the most preferentially to the judgment creditor in the distribution phase of execution proceeding (Art. 53 para. 1 CEA).

3) Civil execution shall be performed by a court executor, the court official who performs execution against tangible personal property, unless otherwise expressly prescribed in CEA (Art. 2 CEA). Usually she acts upon application by the creditor directly or in exceptional cases through the clerk’s office of the court to which she is attached. However, most executions are carried out under the supervision of the local courts in their role as “execution courts” (Art. 3 CEA) or exceptionally deciding court (a court issuing judgment). A court executor is authorized, by virtue of possession of an execution title, to proceed with a compulsory execution and even a creditor shall not make any allegation of the defects or limitations in such authority against the court.

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1 A court executor may take adequate measures, such as searching the residence, warehouse, and other places of a debtor, and opening the locked doors or utensils, etc., and if he meets with any resistance, he may request assistance from the police or military forces. In this case, the police and the military forces are obliged to cooperate (Art. 5 CEA).

2 According to the Art. 46 CEA, the court, issuing judgment, upon a motion of a party, order to suspend a compulsory execution with or without having the security furnished, not later than the time when a judgment is rendered, or order to continue such execution with having the security furnished, or order to revoke the effected execution dispositions.
executor (Art. 43 para. 1 CEA). It is the court executor’s job to collect the sum provided in the execution title, to receipt for same, and when the judgment is satisfied in full, to deliver the execution title to the judgment debtor (Art. 42 para. 1 CEA).

III. Specific Issues between Creditors and Debtors in Korea

1. Information concerning the debtor’s assets for the enforcement proceeding

1) In Korea, creditors basically do not reserve the rights to collect information concerning the debtor’s assets. Private background check upon or investigation on debtors by creditors is not allowed in principle. Therefore, debtors falsely transfer the property to others or conceal properties in various ways usually before the creditors’ provisional remedies, and it is highly unlikely to discover these illegal activities and information of concealed properties.

2) A judgment creditor, who is entitled to commence a compulsory execution based upon the execution titles aiming at paying the money, may file a request for specification of the debtor's property with the court in the location of the debtor's general forum (Art. 61 CEA). The court may order a debtor to submit a property list which specifies the properties of his own (Art. 62 CEA). This court order is called as “Order to Clarify the Property”. The debtor should submit the property list to the court which specifies the varieties of properties enumerated under Art. 64(2) CEA. Then, the creditor is entitled to request reading and duplication of the list to the court (Art. 67 CEA).

3) If the properties on the property list presented by the debtor fall short of the satisfaction of execution claims concerning the formalities of property specification (CEA Art. 74 para. 1 sub para. 2), the court that exercises jurisdiction over the formalities of property specification may, according to the application of the creditor who has applied for such property specification, inquire about the property under debtor’s title of the public agencies, financial institutions, organizations, etc., which control the computer networks on the property and credit of individuals. The public agency, financial institution, organization, etc. shall not refuse, without any justifiable grounds, the inquiry.
4) Now in Korea “Credit Information Business” has good prospects under “Use and Protection of Credit Information Act (UPCA)”. Credit Information Business Firms deal with claims collection, credit inquiry and investigation (Art. 4 para. 1 UPCA). The claims collection in this law means recovering claims on behalf of and with the authorization of creditors, through asset investigation into persons who fail to repay claims within the agreed deadline, dunning, or recovery of payments from debtors (Art. 2 sub-para. 10 UPCA). However, these firms could collect only such claims as commercial credits or civil credits with execution titles (Art. 2 sub-para. 11 UPCA). They can be entrusted by creditors and they could also collect information on the financial status of debtors in a circumscribed way based on the “Use and Protection of Credit Information Act”. However, usually credit information business firms just could access to debtor’s information about real estate, automobile, and credit-card delinquency related matters.

2. Diverse Title of Execution

1) The Korean Civil Enforcement Act defines specifically each “Title of Execution”, and also clearly provides the scope of its effect. A Court Judgment is a typical example of “Title of Execution”, which is legal document confirming that the creditor has a legal right to execute against the debtor. In Korea, judgment which contains a declaration of provisional execution also is one of the titles of execution as a judgment with res judicata (Art. 56 sub-para. 2 CEA). Also there are easier ways to get the diverse titles of execution provided under Korean Civil Jurisprudence. For example, the creditor may bypass dragging formal civil litigation by “Notarial Deed” for the loan agreement. If the Notarial Deed is prepared following requirements under Notary Public Act, it will be treated as “the Title of Execution”, which enables the Creditor to skip formal civil proceedings. Furthermore, the creditor also may get “the Title of Execution” easily by motion to “Payment Order (equivalent of “Mahnverfahren” in Germany), if he or she claims the payment of money, fungibles, or marketable securities (Art. 462 CPA, Art. 56 para. 3 CEA).

2) For the monetary and non-monetary claims, there is a compromise procedure before initiate law suit (Art. 385 CPA). A party may file a motion for compromise with the court as for a civil dispute, especially even before real

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3 For a judgment on a claim for property rights, the court shall pronounce that a provisional execution may be carried out ex officio with or without any security furnished, unless there exists a fair ground for not attaching a pronouncement of provisional execution (Art. 213 para. 1 CPA).

4 (Art. 56 sub para. 4 CEA)
dispute is not arisen. The function of the court is analogous to a notary, namely to ascertain the intention of the parties and reduce it to a minutes (Protokolle) in the official case record. The creditors such as lessors could get a title of execution without judgment procedure with low cost, speedy and simple certificate procedure by a single judge.

3. Provisional enforcement of judgments

Judgments not subject to further appeal are enforceable without any security (CEA Art. 24). However, judgments subject to appeal could be enforceable with or without security. Especially in Korea, judgments on a claim for property rights should be enforceable even though they are subject to appeal (CPA Art. 213 para. 1). The court ex officio should pronounce it in the text of judgment unless there exists a fair ground for not attaching a pronouncement of provisional execution (CPA Art. 213 para1 & 3). This provisional enforcement system is one of the important reasons that lost defendants in the first instance could not appeal easily. Not only the lost defendants in the first instance should stay a provisional enforcement proceeding besides filing appeal (CPA Art. 501, 500) but also they have to deposit whole amount of the claims in cash\(^5\) practically as security in order to suspend the provisional enforcement until the rendition of appeal court. Furthermore, the court usually does not demand the judgment creditor to deposit security for damages could be caused by provisional execution by the judgment of the first instance.

In Korea, the civil execution procedure may be commenced with the final judgment of the first instance, even before the final judgment become final and conclusive not subject to appeal by the appellate court. In return, the debtor may request stay of the procedure until appellate decision is made, providing security. The balance between the debtor and the creditor can be achieved with these spears and shields.

4. Remedies Against the enforcement

1) Appellate Review of Execution Proceeding

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\(^5\) Korean Established Rule of Court No. 936 Art. 5 sub-para. 1. Usually, a security could be furnished in certificate of guaranty issued by insurance company with the court. And this time security provider does not have to pay whole amount of the claims and just pay forgurantee fee. However, sometimes including suspension of provisional enforcement the lost defendants have to deposit whole amount of the claims in cash according to the abovementioned Rule.
As a general remedy against the violation of procedural rules, could be mentioned, Art. 15, 16 CEA which provides the debtor, creditors and even third parties with a remedy against violations of the formal rules on enforcement proceedings. Most defective actions of the court executors may be raised by the debtor, creditors and even affected third parties simply by filing objection with the execution court (CEA Art. 16 para 1). Decisions of the execution court rendered in the course of execution proceedings are subject to immediate miscellaneous appeals only when there are any special provisions relating thereto. Other decisions of the execution court are subject to review by objection.

2) Actions to Arrest Execution

The remedies in case of substantive objections are ruled in Art. 44 CEA as objection to the claim being enforced which pursues to bar or stop the enforcement when the substantive grounds do not justify the enforcement. If a debtor intends to raise any objection against the judgment with res judicata, he shall file a lawsuit of demurrer against the claims before the court of first instance which rendered such judgment (CEA Art. 44 para 1). For the demurrer under para. (1), any grounds therefor shall be those which have arisen subsequently to a closure of pleadings (in the case of a judgment without holding any pleadings, it shall be subsequent to a declaration of judgment). (CEA Art. 44 para 2.). This limitation does not apply to titles other than judgments. When the title is an official document in which the debtor submitted to immediate enforcement. The *res judicata* plays no role.

3) Protection of the interests of third parties

When the enforcement proceeding unduly affects third party’s assets, the third party can start an action opposing the enforcement measure. According to the Art. 48, CEA, any third party alleges that he has ownership on the object of compulsory execution, or that he has a right entitled to prevent a transfer or delivery of the objects, he may file a lawsuit of demurrer against the creditor about such compulsory execution.

5. Special protection of debtor’s rights by the substantive and procedural law (general and comparative overview).
1) The most frequent and important compulsory execution in Korea is the forced sale (a.k.a. compulsory auction) of real estate (Under Korean property law, each land and building is treated as a separate real estate). The court shall revoke the forced sale procedure, when it deems that there remains no surplus if all encumbrances preceding the claim of execution creditors and the costs of procedures are reimbursed with the minimum auction price. It is because there is no need to sell real estate of no value. The debtor, the owner, or the 3\textsuperscript{rd} party other than them may make an appeal against a decision on permit for sale. However, any person who intends to file an appeal against the decision on permit for sale shall deposit as the guarantee the money equivalent to one tenth of the successful bid price or the securities recognized by the court, he or she shall not request a return of the money or securities furnished as the guarantee, if the appeal filed by a debtor and owner has been dismissed. The 3\textsuperscript{rd} party shall not also request a return of the deposited amount, if the appeal filed by him or her has been dismissed. This is to deter the filing of abusive appeal and make the procedure to proceed more quickly.

2) In Korea a lot of efforts have been devoted to maintain the balance between the creditor and the debtor at least under the related legislations. In particular, we are trying to sustain balance among creditors as well as between normal creditors and secured creditors as well as among creditors. In addition, transparency in the execution procedure is well maintained by assuring both certainty and predictability through delicate and exquisite provisions under Civil Enforcement Act. First of all, normal creditors are all equal in execution process. For example, in execution process for real estate, the price of execution sale will be distributed to every normal creditor in proportion to the amount of their claim. On the other hand, secured creditors under the Civil Act, the Commercial Act and other Acts have the right to claim a preferential reimbursement. Among secured creditors, the person having the prior right is always entitled to obtain proceeds of sale in preference to persons having the junior right.

3) From the substantive side the surety may make a defense of peremptory notice and inquiry upon the demand of performance of the creditor under Art. 437 Civil Act. The creditors must demand from principal obligor and they must first levy execution on the property of principal obligor, before demanding performance of the surety. On the other hand, such special legislation as Provisional Registration Security Act is enacted to coordinate the interests between creditors and debtors. Under Art. 4 of the PRSA, the creditor shall not acquire the ownership of secured real estate, unless he pays the debtor an amount left by deducting the amount of credit from the value of secured real estate.
4) From the procedural side there are the follow safeguards for the debtor: (i) Under Fair Debt Collection Practices Act, both illegal methods of debt collection and abuse of right by debt collectors are prevented and the peaceful and human lives of the debtors are to be protected; (ii) Art. 195 CEA excludes certain tangible properties from seizure, and especially prohibits the creditor from garnishing the debtor’s wage exceeding certain amount to ensure the debtor having minimum living expenses; (iii) Rehabilitation of either individual or corporate debtor has been promoted through rehabilitation process as well as liquidation process under Debtor Rehabilitation and Bankruptcy Act.

6. The conflicts of creditor-debtor rights in monetary judgment enforcement

1) Execution on monetary claims differs in methodology of execution according to the types of property that debtors own. That is, with respect to personal properties, it is proceeded with levy on an attachment and sales at auctions by court executors. Meanwhile, in regards to the real estate, only involuntary execution sales and administration are recognized in Korea. Judgment creditors could levy intangible property such as bank accounts, uncertificated securities or claims against third parties with written application. The court decides ex parte based on the application and other papers of record in the proceeding and issue an order of attachment. In these procedures, judgment debtors have a right to lodge a prompt objection to following issuance of order justify these procedures in light of the right to be heard.

2) A creditor can elect one or a combination of these remedies and it depends on the situation of judgment debtors, especially what they have at the time of enforcement. However, there is no boundary for Koreans when creditors make a choice of objects of civil enforcement. Specifically, even if debtors do own sufficient amount of bonds or chattels to satisfy creditors’ bonds, creditors can file a request to the court so that it can initiate an auction to sell the house of debtors. In addition, creditors can request a compulsory auction on any kind of real estate even though debtors own real estate other than residential ones. It is essential to contemplate the ways to perform execution on residential real estate only as the last resort and to enable the prior execution on chattels first, in consideration of its residential rights.
7. The conflicts of creditor-debtor rights in non-monetary judgment enforcement

1) Korean Civil Procedure provides a variety of remedies for the enforcement of judgments not for money, but for delivery of a specific thing, for the performance or abstention from performance of specified conduct, or for the establishment of specific obligations.

2) The specific performance in Korea depends on the purpose stated in the contract. If the obligor can let things return to the original state, the creditor generally ask restitution. However, the creditor may choose either restitution or monetary damages, if the Act (for example, Art. 311(2) Civil Act) provides so. Any person who commits tortuous activity shall make compensation to the victim for damages arising therefrom. The Korean Civil Act takes monetary compensation as a principle by providing that the damages shall be recovered in money, unless otherwise agreed by the parties under Art. 394 and 763 Civil Act. Therefore, the tort victim does not have a choice between monetary damages and restitution.

3) Judgments requiring the debtor to surrender possession of real estate are executed by the court executor, whose assignment is to remove the judgment debtor from possession and place the judgment creditor in possession (Art. 258 para. 1 CEA). If judgment debtor (tenants) do not surrender possession of real estate voluntarily, landlords should apply to a court to compel performance by a third person at the expenses of the obligor (Art. 389 para 2 CA). It is so called Substitutional Execution(Art. 260 para 1 CEA). Following issuance of the eviction judgment, debtor can order a stay of execution or a postponement of a stay of execution, as the case may be. In a substitutional execution proceeding, a judgment debtor could have another chance to stay execution whereas a judgment creditor usually has to wait for a few months again.

4) Korean substantive law contains additional tenant-protective provisions that affect the process of eviction. For example, tenants have a right to demand renewal of contract and right to demand purchase of building, etc. if buildings, trees, or any other facilities on land remaining after the expiration of the period of the lease of land where the object is to own a building or any other structure, or is for planting, collecting salt, and stock farming (Art. 643, 283 CA).

8. Data protection and fundamental rights: transparency and the safeguarding of rights
1) According to the Korean Law no general power to access to the information about the properties of the debtor is vested in the court. As seen earlier, the court may only issue “Order to Clarify the Property” upon the request of the creditor. However, Credit Information Company may access to the debtor’s personal credit information even in restricted area, such as information about property of the debtor or default of the debtor, under certain conditions provided by Use and Protection of Credit Information Act.

2) The tax authorities basically do not owe any duty to provide the information regarding properties of the debtor to the court under current Civil Execution Act, and the court also cannot request it as of right. Under specific circumstances and exceptionally, the court that exercises jurisdiction over the “Order to Clarify the Property” may, according to the application of the creditor who has applied for such “Order to Clarify the Property”, inquire about the property under debtor's title of the public agencies, financial institutions, organizations, etc., which control the computer networks on the property and credit of individuals (Art. 74 para 1 CEA). Neither do any of other financial institutions.

3) However, a leakage of personal information has become a social issue, because the occasions under which organizations or business entities, mostly financial institutions, archiving the information leaked it happen quite a lot even if illegal access to the personal information is also prohibited under many legislations, such as Personal Information Protection Act, Act on Real Name Financial Transactions and Confidentiality, Act on Promotion of Information and Communications network Utilization and Information Protection, etc.

9. ADR related with civil procedure and bankruptcy and electronic litigation process

1) The Republic of Korea has been mainly focusing on arbitration as well as vitalizing ADR since 1980s. Specifically, a special conciliation committee was established in court to promote a swift resolution of the case. However, it does not account for much of the cases until now. The entire civil cases in 2012 reach up to 1.1 million, yet the number of cases processed by the special conciliation committee accounted for only 50,000 of them. Besides, the arbitration was underlined but in terms of solving cases, it is given a modicum of weight.
However, it is an undeniable fact that the number of arbitration cases is augmenting every year.
2)
3) Meanwhile, it is plausible that the Credit Counseling and Recovery Service, which provides an opportunity to an individual who is highly likely to fall into insolvency procedures run by the court, may be classified as ADR in a broad sense. In Korea the ‘Credit Counselling and Recovery Services’ may be included as ADR. This non-profit corporation helps the debtor to recover his or her credit without having to go through insolvency proceedings through readjusting the debt owed to the financial institutions. It also lends emergency loan, if necessary, to the individuals.
4)
5) The Korean Supreme Court has moved toward electronic litigation in judgment procedure, and aims at “paperless court” after all. Public announcements in civil execution proceedings can be done through electronic telecommunication methods (Art. 11(1) Civil Execution Regulation). The Court opened the auction site and provides relevant information accurately and quickly to the public (available under http://www.courtauction.go.kr/). However, the public cannot participate in the auction over the internet yet.

IV Conclusion

1) So far, I have examined the relationship between creditors and debtors in the execution process of Korea. I believe among the foreign legal systems, which have different infrastructure, the execution process is particularly difficult to comprehend. Hence, there is a high chance of misapprehending it yet I believe it is possible to understand the rudimentary frame of it.

2) Korean execution process is heavily influenced by that of Japan and Germany and therefore it underlines the relief of rights of interested parties and is prudent in terms of executing the process. However, this indicates that the process is extremely tardy. It is definitely problematic since it takes such a long time to earn the title of execution yet the process gets delayed again in the execution process by raising objections or even new law suit by debtors. This is probably why the penchant of deeds of notary through a simple process, not that of court judgment, is steadily increasing.

3) As we seen above, there are so many enforcement decrees and enforcement
rules as the subordinate statutes of the civil enforcement law and multiple statutes, which stipulate the execution process. Korean Supreme Court Regulation and even the Established Rules of Korean Supreme Court enacted by the Korean Supreme Court, which is the last resort, play critical role in the civil enforcement process. These should be supplementary subordinate statutes but sometimes role as main statutes where the acts were not enacted.

4) On the other hand, human rights protection along with protection of debtors’ private lives is emerging as serious problems as the number of requests on credit information company is augmenting. In response to it, Fair Debt Collection Practices Act has been implemented since 2009 but it is required to establish a criterion of act of collection via more specific and detailed provisions.