

PART XI

SPECIAL FORMS OF PROCEDURE:

PRIORITISING EFFICIENCY IN THE JUDICIAL SYSTEM

CHAPTER 2

DEFAULT PROCEDURES AND PAYMENT ORDER PROCEDURES

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1 INTRODUCTION TO THE CHAPTER

- 1 This chapter analyses two special forms of procedure: payment order procedures and default procedures. These procedures have the broader goal of simplifying, speeding up and reducing the costs of litigation, as they are an expeditious mechanism for the protection of credits with greater efficiency and effectiveness. In addition, they also exempt the judge from dealing with claims in which there will probably be no controversy, contributing to unburdening the Judiciary. These procedures share some of the objectives of summary procedures presented in Ch 4 because they also aim at providing efficient procedural avenues to rapidly solve disputes. However, payment orders and default judgments are simplified procedures, not because the amount at stake is small nor because the legal issue can be easily resolved, but because the defendant does not contest the claim.
- 2 Before delving into the particularities of these procedures to understand how they affect typical procedural mechanisms and how they may hinder, or on the contrary enhance, the respect of fundamental rights, it is necessary to explain what these two procedures consist of and why they are treated together within a common chapter on debt recovery.

1.1 Definitions

1.1.1 *Payment Order Procedure*

- 3 The payment order procedure is a fast and simplified procedure, based on the possibility that the judicial order to pay a specific sum is not contested by the debtor, so the creditor who does not have an enforceable title can obtain an executable award without going through an ordinary procedure.

1.1.2 *Default Procedure*

- 4 In legal terms, the word 'default' has several meanings. It may designate the inability of a debtor to pay, either in general or during bankruptcy proceedings. It may also cover the situation where, a debtor 'defaults' on a loan, because she is unable to reimburse the loan or because she finds herself in a situation that the underlying contract defines as a 'default'. This chapter does not refer to this definition of default but it envisaged default as a procedural notion. In procedural terms, default designates the absence of the defendant. The procedure is conducted without the 'defendant in default' and it may lead to a 'default judgment'.
- 5 In this chapter, procedural 'default' designates the default of the defendant and not the claimant's default. It is possible that a claimant starts a procedure and abandons it while it is still ongoing. This situation is much rarer in practice than the defendant's default and it is also less problematic. The defendant will usually agree to a stay of proceedings and stop spending time and resources on a case that is not progressing. She may, however,

decide to take the matter into her own hands notwithstanding the inertia of the claimant and request a decision on the merits or simply a decision on costs to obtain reimbursement of the costs she already incurred. In these situations, the defendant brings counterclaims, and the original claimant becomes a defendant in default. Thus, the issue can be analysed in the same way as the original defendant's default. Finally, if both parties cease to make any efforts for the case to progress, the court will often remove the case from its docket and there is no procedure left to analyse.¹

1.2 Commonalities between Payment Orders and Default Judgments

- 6 Payment order procedures and default procedures share a fundamental procedural feature. They are both contradictory procedures in which contradiction does not actually take place. In both procedures, the defendant is called and is asked to participate. In payment order procedures, it is presumed that the defendant agrees to the claim and the defendant can simply contest the payment order without appearing in court. In default procedures, the defendant's absence of reaction is not presumed *ab initio* but the procedure is adapted when the defendant does not react. Hence, both procedures are contradictory even without any action from the defendant and they are fundamentally different from unilateral procedures which are conducted without the defendant being called (in case of unilateral contentious measures) or without any defendant (eg, in non-contentious matters).

1.3 Payment Orders and Default Procedures as Special Forms of Procedure

- 7 Orders for payment and default judgments are the main special procedures that are designed to recover debts in civil procedure. Not all countries have a designated order for payment procedure. In some countries the default procedure may fulfil a similar function, ie, to provide a simplified procedural regime for (monetary) claims that are uncontested.
- 8 Both procedures – orders for payment and default judgments – are designed to overcome the passivity of the defendant in order to efficiently satisfy the claimant's request. In order for payment procedures, the debtor's passivity is presumed, while default procedures are a device to adapt normal proceedings in case the defendant does not react.

¹ See for example, Art 470 of the French Code of Civil Procedure stating the court may strike out the case if none of the parties completes the acts of the procedure within the required time limits or Art 414 (3) of the Spanish Civil Procedure Act. Conversely, common law courts seem more reluctant to strike out dormant claims. In 2011, The Hong Kong Court of Final Appeal ruled that 'inordinate and inexcusable delay' was not sufficient to strike out the claim after an interesting analysis of the consequence of the 2009 Civil Justice Reform on parties' duty to move the proceedings (see, *The Liquidator of Wing Fai Construction Company Limited (In Compulsory Liquidation) v. Yip Kwong Robert and Others*, Case FACV 3/2011, (Court of Final Appeal, Hong Kong), Decision 8 December 2011).

- 9 There are specific payment order procedures in many jurisdictions, like in France (Art 1405—1424 of the French Code of Civil Procedure), Spain (Art 812—818 of the Spanish Civil Procedure Act), Brazil (Art 700—702 of the Brazilian Code of Civil Procedure), Taiwan (Art 508—521 of Taiwanese Code of Civil Procedure) and China (Art 214 of the Civil Procedure Law of the People's Republic of China). Within the framework of transnational procedures, there are the European order for payment (EOP)² and the Organization for the Harmonisation of Business Law in Africa (OHADA) payment order³.
- 10 For many claimants, a default procedure is not a choice, but an accident whereby the other party refuses to take part in the ongoing procedure. Thus a 'typical' procedure becomes a default procedure. In most civil law jurisdiction, such as France, Italy, Spain and in most of Latin America, the default of a defendant does not affect the conduct of the proceedings such that this procedure becomes 'special'. Without contradiction, there is no need for a lengthy exchange of documents and arguments between parties will be shorter. Nonetheless, a hearing will be scheduled. If there is no hearing it is because the claimant may have renounced it, because the judge may have dispensed of it or because the typical procedure in that case is entirely written. A judicial decision will nevertheless be adopted by a judge, or a panel of judges and the end result will barely be distinguishable from a typical judgment where contradiction actually took place. In these jurisdictions, the default of the defendant triggers some adaptation of the civil procedure that are interesting to study in a comparative law perspective. This chapter will notably analyse two important procedural adaptations in reaction to the absence of the defendant. These are the adaptation of rules of service of documents⁴ and the shift in the judge's behaviour⁵. Nonetheless, these adaptations are not comprehensive enough that the procedure overall be considered a special procedure. It would be better characterised as a procedure with some specifics, acknowledging of course that the distinction between these two characterisations may be blurred.
- 11 In most jurisdictions, default procedures are not considered a special form of procedure.⁶ It starts as an ordinary lawsuit initiated by the claimant, but the absence of the defendant, who fails to appear after being summoned, forces the procedure to be adapted so that a decision can be made without his participation.
- 12 However, in some legal systems, default procedures should be characterised as a special form of procedure because they are used for a precise purpose. In these legal systems,

² Regulation creating a European Order for Payment Procedure, 1896/2006 of 12 December 2006 (EU).

³ The Organization for the Harmonization of Business Law in Africa (OHADA) is an international uniform business law system in Sub-Saharan Africa (SSA) comprising 17 member states. The organization was created by a Treaty in 1993 (Port Louis, Mauritius) later revised in Quebec in 2008. The specific instrument regulating simplified debt recovery is the OHADA Uniform Act organising Simplified Recovery Procedures and Measures of Enforcement adopted on 10 April 1998 at Libreville, Gabon.

⁴ See below para 91 ff.

⁵ See below para 85 ff.

⁶ For example, in Brazil, France, Spain and Taiwan.

default procedures are often anticipated by claimants, and they represent the main procedural techniques used for debt recovery. In the United Kingdom, the United States, and the Netherlands, for example, default judgments represent a high percentage of the total judgments issued by civil courts. The systems are designed to flag default procedures rapidly and to handle them in an expedited way. If default procedures are swift, they become functionally equivalent to payment order procedures.

- 13 Default may not only be anticipated by the claimant starting the proceedings. In some jurisdiction, particularly in the US, default may be anticipated in a contract through *cognovit* clauses.⁷ These clauses, also known as ‘confession of judgment’ clauses, allow a debtor to acknowledge, in advance within the contract that the plaintiff’s demand is founded. In the clause, the debtor waives its right to a trial. When a creditor decides a debtor has breached the contract, the creditor files a complaint in court, attaches the *cognovit* note clause in which the debtor confessed judgment to the defendant in advance, subsequently seeks a fully enforceable default judgment, and does not inform the debtor of the pending lawsuit. In the US, this type of clauses has been considered legal and in conformity with the right to due process.⁸ In essence, they can be seen as a fast-track procedure to default judgments, thus fulfilling the role of payment order procedures in other jurisdictions.⁹ Robert Millar makes a parallel between common law *cognovit clauses* and civil law payment order procedures. He writes that both mechanisms originate in the Roman law maxim ‘*confessus in iure pro judicato habetur, et quodammodo sua sententia damnatur*’, which may be translated as ‘One who makes a confession in court is considered as having judgment passed upon him, and is, in a manner condemned by their own sentence’. In default judgment procedures, a confession is sometimes deduced from the defendant’s silence¹⁰ whereas for *cognovit* clauses, confession is not made in court, but anticipated in a contract.
- 14 In rare cases, jurisdictions will not have any of the above discussed special proceedings: in South America, this is the case for Argentina¹¹ and Uruguay¹², where there is no payment

⁷ R J Efron, ‘The Invisible Circumstances of Notice’ (2021) 99 North Carolina Law Review 1521, 1565.

⁸ *D. H. Overmyer Co., Inc. v. Frick*, Case 405 U.S. 174 (Supreme Court, US), Decision 24 February 1972.

⁹ R W Millar, *The Formative Principles of Civil Procedure* (Northwestern University Press 1923) 1, 8.

¹⁰ See below para 87 ff.

¹¹ According to Art 60 of Argentine Code of Civil and Commercial Procedure (approved by Law n 26.994/2014 and emended up to the Decree n 62/2019): ‘Default shall not alter the regular course of the proceeding. The defaulting party may oppose the statute of limitations under the terms of article 346. The sentence will be pronounced according to the merits of the case and the provisions of article 356, paragraph 1. In case of doubt, the declared and firm default shall constitute a presumption of truth of the lawful facts asserted by the one who obtained the declaration. The costs caused by the default shall be borne by the defaulter.’ (free translation).

¹² According to the Art 103 of Uruguayan General Procedural Code (Law n 15.928/88), ‘the silence, ambiguous or evasive answers, as well as the lack of answer, will be taken as admission of the facts alleged in the demand, as long as they are not contradicted by the evidence on file and as long as it does not involve unavailable rights’.

order procedure nor the use of the default procedure as a simplified procedure to recover debts.

2 THE CATEGORIES OF SPECIAL PROCEDURES USED FOR DEBT RECOVERY

2.1 Payment Order Procedure

- 15 Whenever there is an enforceable title (eg, a contract or a letter of credit), which represents an obligation that is certain, liquid, and payable, the debt recovery is carried out by an execution procedure (*nulla executio sine titulo*). Without an enforceable title, the creditor must file an ordinary procedure, usually long and costly, to obtain the recognition of the obligation, in order for it to be enforceable.
- 16 The payment order procedure is applicable in those cases where the creditor has no document to prove the existence of an obligation, or where the document lacks the legal requirements to become an enforceable title. Instead of initiating an ordinary procedure, the law permits the creditor to ask for a judicial order to incite the debtor to comply with the obligation whose existence is presumed. Then, if this attempt is frustrated, ie, the debtor does not oppose the order, the creditor will have an enforceable title.
- 17 Unlike the enforcement procedure, that requires an enforceable title to be initiated, which is an undoubted document, the order of payment procedure requires only a *prima facie* evidence or even a simple statement on the existence of the obligation.
- 18 As an example, in the Spanish legal system, the creditor can apply for a payment order when in possession of documents, no matter their form, containing the debtor's signature; invoices, delivery notes, certifications, telegrams, faxes or other documents, even those unilaterally created by the creditor; and documents stating the debt, accompanied by commercial documents proving a previous commercial relation, among others.¹³
- 19 In a few legal systems, there is no need to present documents. One may simply describe its existence or produce a sworn statement, as in the case of the European order for payment procedure¹⁴ and the Colombian¹⁵ order of payment procedure, respectively.

Although the Art 354 of the Uruguayan General Procedural Code (Law n 15.928/88) refers to 'procedimiento monitorio', it does not mean a special procedure of payment order, but the procedural acts of the execution procedure (Art 353).

¹³ Art 812 of the Spanish Civil Procedure Act (Law n 1/2000).

¹⁴ Art 7 of the Regulation (EU) 1896/2006 (n 2).

¹⁵ Article 420.6 of the Colombian General Procedural Code (Law n 1.564/2012).

- 20 Although it bears different denominations in different jurisdictions (order for payment, *injonction de payer*, *proceso monitorio*, *ação monitória*, *Mahnverfahren*, *Mandatsverfahren*), the proceedings that aim the recovery of debts through a judicial order are substantially similar.
- 21 The procedures under this scope have a common objective, which is to quickly obtain an enforceable title and/or the direct payment of the amount owed by the debtor. In some legal systems, this kind of special procedure also aims to compel the defendant to comply with obligations other than the obligation to pay a sum of money.¹⁶ When compared to the ordinary procedure, the purpose of the payment order procedure is not the enforcement, but rather the establishment of a judicial enforceable title from a reduced and abbreviated cognition phase.

2.1.1 Brief Historical Development of the Payment Order Procedure

- 22 A procedure related to the payment order procedure was developed in medieval Italy in the 13th century to meet the legal needs generated by the development of trade¹⁷. For the efficiency of the transactions, it became necessary to abbreviate the proceedings to initiate enforcement and to facilitate the pursuit of a credit that was not backed by an enforcement title, but only by a precarious document. The order for payment was subsequently exported by Italian traders and spread throughout a large area of Europe.
- 23 Many countries have introduced the payment order procedure in their legislation. In Europe, this is an older phenomenon: in France, for example, the payment order procedure was instituted by the Decree-Law of 25 August 1937. It was largely inspired by the procedure in force in Alsace and Lorraine at the time, which was created in 1915 and based on the model of the German '*Mahnverfahren*' (payment order procedure). Both procedures coexisted in France until 1981, when they were unified into the Decree 81-500 of 12 May 1981, applicable throughout the whole territory. In Spain, the payment order procedure was introduced later than in France, by the Law n 8/1999, which has amended the Law n 49/1960 (*Ley de Propiedad Horizontal*); subsequently, the order of payment was provided for by the Law n 1/2000, the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*).
- 24 As regards Taiwanese law, originally 1930 Taiwanese Code of Civil Procedure adopted the German '*Manhverfahren*'. The procedure had two phases: firstly, the issuance of

¹⁶ In Brazil, the payment order procedure (called *ação monitória*) aims not only (i) the payment of a sum of money, but also (ii) the delivery of fungible or non-fungible property or of movable or immovable property; and (iii) the performance of an obligation, or the duty to refrain from certain conduct (Art 700 of Brazilian Civil Procedure Code). In Taiwan, besides monetary claims, the payment orders are also allowed for replaceable things or securities (Art 508 (1) of Taiwanese Civil Procedure Code).

¹⁷ J-P Correa Delcasso, 'Le titre exécutoire européen et l'inversion du contentieux' (2001) 53 (1) *Revue internationale de droit comparé* 61.

payment order and secondly the declaration of provisional enforcement of the payment order. In 1971, this two-phase-model was simplified. According to Art 521 of 1971 Taiwanese Code of Civil Procedure, under the current single-phase-model, if the debtor fails to raise objections to the payment order, the payment order will have the same effect as a final judgment. However, this effect has been reduced by the reform of 2016, whereby failure to raise objections shall only lead to an enforceable title.

- 25 In South America, the advent of payment order procedures is recent. The Brazilian order of payment procedure (*ação monitória*), for example, was introduced in 1995 when a new chapter was included in the Brazilian Code of Civil Procedure (BCPC/1973, amended by Federal Law n 9.079/1995); and then maintained in the Brazilian Code of Civil Procedure Code of 2015.
- 26 More recently, the need to create agile procedures in the context of transnational commerce led to the development of payment order procedures within free trade blocs, such as the European Union (EU) and the Organisation for the Harmonisation of Business Law in Africa (OHADA). In the EU, there is a simple, fast, and low-cost procedure to obtain the payment of a debt without a written document, by simply filling the available forms.¹⁸ The payment order procedure is based on the assumption that the alleged claim is not likely to be contested, which happens quite frequently. In Sub-Saharan Africa a transnational payment order procedure was created in 1998.¹⁹

2.1.2 An Overview of the General Steps of The Payment Order Procedure

- 27 In general, this procedure is commenced on the creditor's motion who requests the issuance of a payment order from the competent authority. This authority will conduct a *prima facie* examination of the claim. If the claim satisfies the requirements of the applicable procedural law, the order for payment is granted and served to the debtor.
- 28 The debtor only has a relatively short period of time to contest the request. This procedural technique, called '*inversion du contentieux*'²⁰, consists precisely in the

¹⁸ The Regulation (EC) n 1896/2006 of the European Parliament and of the Council created the European order for payment (EOP) 'for the collection of pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted'. According to Art 1, its objectives are 'to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims' and 'to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement'.

¹⁹ OHADA Uniform Act organizing Simplified Recovery Procedures and Measures of Enforcement adopted on 10 April 1998 at Libreville, Gabon.

²⁰ G De Leval, 'Les ressources de l'inversion du contentieux' in M-T Caupain et G De Leval (ed), *L'efficacité de la justice civile et Europe*, (Larcier 2000) 83 ff.

rendering of the decision before communicating it to the defendant so that she can oppose it.

- 29 If the defendant does not oppose the claimant's application within the allotted time limit, the order for payment immediately turns into an enforceable title – a directly enforceable decision ordering payment. This conversion happens automatically, when the proceedings are said to be 'single-phase' (as is the case in Spain, France, Brazil, Taiwan, and China); or the conversion only takes place after the issuance of an award by the judge, in which case the proceedings will be considered 'biphasic' (as is the case in Germany).
- 30 The absence of opposition by the defendant means that there is no effective contradiction in the payment order. Payment order procedures are based on the assumption that the claim is uncontested, which is why the court's decision is based only on a *prima facie* examination of the evidence or even without proper examination of said evidence. The procedure is fast and streamlined and this may entail a limitation of the evidence that may be produced by the claimant to written documents only.
- 31 According to Plósz, cited and supported by Calamandrei²¹, the order becomes an enforceable title not because of a procedural agreement based on the expression of will that is deduced from the defendant's silence, but because of the impossibility of rediscussing the facts brought by the claimant, which justifies the granting of the request. The silence of the debtor justifies the issuance of an executable award, immediately or deferred. However, if the debtor challenges the claim, the procedure becomes contentious and returns to the ordinary form, followed the submission of evidence and the full examination of the merits by the judge.
- 32 As shown below, payment orders correspond to relatively uniform procedures across several jurisdictions but there might be some slight differences in the proceedings in the various legal systems. These differences relate to the entity before which the procedure can be conducted, the role of the judge, the existence of a restriction concerning the value of the claim, the rules on service of process, the extent to which the claimant must produce documents before the court, the possibility of the court to request additional documents, the need for legal assistance, the use of digital technology, the requirement to appear before court for an attempt at conciliation, the object boundaries, the time limits regarding the opposition, the existence of incentives for the debtor to pay and for the creditor to refrain from pursuing groundless claims.

²¹ P Calamandrei, 'Il Procedimento Monitorio nella Legislazione Italiana', *Opere Giuridiche*, vol. IX, Morano, Napoli, (1983), 30 ff.

2.1.3 Peculiarities among Payment Orders Procedures

2.1.3.1 The Authority before Which the Procedure Can Be Conducted and the Role of the Judge

- 33 In the majority of the legal systems, the judge is the authority in charge of issuing a payment order. This is the case in France, Spain, China, and Brazil.²²
- 34 In Taiwan²³ and Germany²⁴, as a matter of principle the judge is responsible for issuing the payment order. However, district courts can delegate this power to judicial officers, which, in practice, they often do. If the claim is uncontested, the issuance of the order will be based on a *prima facie* examination of the existence of the debt where the participation of the judge is dispensable. Moreover, this delegation enhances the objective of unburdening the judge from dedicating herself to the examination of uncontroversial matters, so that she can focus on claims of a contentious nature. Similarly, the examination of the European order for payment request do not have to be carried out by a judge and Member States retain a margin of discretion on this issue.²⁵
- 35 The reduced role of the judge in payment order procedures goes as far as taking the form of an automated procedure.²⁶ In general, the petition or application containing the claim is only submitted to the judge for the examination of its admissibility, which includes formal and material requirements. The judge will not examine the merits of the claim, but only verify 1) the appropriateness of the payment order procedure to the prosecution of the alleged debt and 2) the plausibility of the debt, ie, whether the obligation under discussion authorises the payment order, if that obligation is reflected in the documents presented or indicated by the creditor etc.
- 36 Some legal systems may establish additional requirements for the creditor to meet when applying for a payment order. In China, for example, there is a negative requirement according to which no other debt disputes may exist between the creditor and the

²² Art 701 of the Brazilian Civil Procedure Code, Art 813 of the Spanish Civil Procedure Act, Art 1406 of the French Civil Procedure Code; Art 216 of the Civil Procedure Law of the People's Republic of China.

²³ Art 512 of the Taiwanese Code of Civil Procedure; Art 17*bis*, 17*ter* of the Court Organization Act.

²⁴ Art § 20(1) of the *Rechtspflegengesetz* (German Act on Senior Judicial Officers).

²⁵ Recital 16 of the Reg. 1896/2006 (n. 2).

²⁶ According to the Art 8 of the Regulation (EU) 1896/2006 (n. 2), 'The court seized of an application for a European order for payment shall examine, as soon as possible and on the basis of the application form, whether the requirements set out in Articles 2, 3, 4, 6 and 7 are met and whether the claim appears to be founded. This examination may take the form of an automated procedure.' This possibility has been used in In Germany and Austria (see *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European order for payment Procedure*, COM (2015) 495 final, 7).

debtor.²⁷ In its turn, the Regulation (EC) n 1896/2006 of the European Parliament and of the Council states that the European order for payment shall not apply, among other claims, to those arising from non-contractual obligations, unless (i) they have been the subject of an agreement between the parties or there has been an admission of debt, or (ii) they relate to liquidated debts arising from joint ownership of property.²⁸

- 37 In Spain the judge shall exercise a special *ex officio* control over possible abusive contractual terms in cases where order for payment proceedings is initiated against consumers, even if the consumer does not oppose to the credit invoked by the entrepreneur. The Spanish Civil Procedure Act was amended²⁹ to include this kind of

²⁷ According to the Art 214 of the Civil Procedure Law of the People's Republic of China: 'When a creditor requests payment of a pecuniary debt recovery of negotiable instruments a debtor may, if the following requirements are met, apply to the basic people's court that has jurisdiction for an order of payment:

- (1) no other debt disputes exist between the creditor the debtor;
- (2) the order of payment can be served on the debtor.

The application shall clearly state the requested amount of money of the negotiable instruments the facts evidence on the basis of which the application is made.'

²⁸ Art 2 of the Reg. 1896/2006 (n. 2): '1. This Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. This Regulation shall not apply to:

- (a) rights in property arising out of a matrimonial relationship, wills and succession;
- (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (c) social security;
- (d) claims arising from non-contractual obligations, unless: (i) they have been the subject of an agreement between the parties or there has been an admission of debt, or (ii) they relate to liquidated debts arising from joint ownership of property.

3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark.

²⁹ Art 815 (4) of the Spanish Civil Procedure Act: '4. If the claim for the debt is grounded on a contract between a businessperson or professional and a consumer or user, the Clerk of the Court, prior to making the payment order, will give account to the Judge so that they may assess the possible abusive nature of any clause constituting grounds for the application or which may have determined the enforceable amount. The Judge will review *ex officio* whether any of the clauses constituting grounds for the application or which may have determined the enforceable amount could be classified as abusive. If any clause appears that could be classified as such the parties will be given five days for a hearing. Once they have been heard, the appropriate decision will be made by order within the following five days. Intervention of a lawyer or procurator will not be compulsory for these proceedings. If any of the contractual clauses are deemed to be abusive, the order passed will set out the consequences of such consideration resolving on either the inadmissibility of the claim or continuation of the proceedings without applying the clauses which are considered to be abusive. If the court does not find the existence of abusive clauses, it will declare as such and the Clerk of the Court will proceed to summons the debtor under the terms provided for in paragraph 1. A direct appeal may be lodged against the order passed in all cases'.

control in order to comply with the case-law of the Court of Justice of the European Union (CJEU).³⁰ This control mechanism turns out to be even more important because the intervention of a lawyer or prosecutor is not compulsory for these proceedings.³¹

- 38 Finally, some countries have opted for a centralised court where all applications for payment orders, or in some cases European payment orders³², must be submitted. In France, a law was adopted to centralise national payment order procedures before a single court.³³ However, the law was never implemented because stakeholders feared an automated and distant justice rendered far from the French citizens.³⁴

2.1.3.2 The Existence of a Restriction as to the Value of the Claim

- 39 The great majority of legal systems does not establish limitations to the admissibility of payment order procedure as to the value of the claim. This is the case in Spain, France, Brazil, China, Taiwan, as well as for the European Payment Order and the OHADA payment order.
- 40 Nevertheless, in Germany, the Civil Procedure Code (§ 688) excludes the application of payment order procedures to claims brought by a business person who is a party to a financial consumption contract with an annual percentage rate over 12%, which is considered an abusive clause.³⁵ The legitimate concern underlying this norm is the same that justifies the special *ex officio* control over possible abusive contractual terms in the case of order for payment proceedings against consumers in Spain, mentioned above: the protection of the most vulnerable party against abusive clauses.

³⁰ *Bondora AS v Carlos V.C. and XY*, Cases C-453/18, C-494/18 (CJEU), Decision 19 December 2019 [ECLI:EU:C:2019:1118].

³¹ Art 815 (4) of the Spanish Civil Procedure Act, mentioned above.

³² This is for example the case in Austria, Croatia, Finland, Germany, Malta, the Netherlands, Portugal and Sweden (see *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission* JUST/2014/RCON/PR/CIVI/0082, Strand 1, Mutual Trust and Free Circulation of Judgments 335).

³³ Art 27 of the Law n 2019-222 of 23 March 2019 on the 2018-2022 Programming and Reform of the Justice System (France).

³⁴ P Januel, 'Le gouvernement enterre la juridiction nationale des injonctions de payer' (2021) *Dalloz Actualité*.

³⁵ Sec 688 German Civil Procedure Code (Admissibility):

'(1) Upon corresponding application being made by the claimant regarding a claim concerning the payment of a specific amount of money in Euros, a payment order is to be issued.

(2) No summary proceedings for a payment order may be brought:

1. For claims that an entrepreneur has under an agreement pursuant to sections 491 to 504 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB), if the effective, or initial effective annual rate of interest to be provided for in accordance with sections 492 and 502 of the Civil Code is in excess, by more than twelve percentage points, of the base rate of interest, pursuant to section 247 of the Civil Code, applicable at the time the agreement is concluded; (...)'.

2.1.3.3 The Extent to Which the Claimant Must Present Documents to the Court and the Possibility of the Court to Request Additional Documents

- 41 There are *non-documentary* and *documentary* payment order procedures. The first can be filed by means of a request or a form with sufficient and reasonable information regarding the claimed debt. The second additionally require supporting documents that are minimally able to demonstrate the debts, which may include not only physical but also digital documents.
- 42 In both cases (non-documentary and documentary payment order procedures) the judge's examination of the claim is limited to verifying the plausibility of the debt. The judge shall not analyse and evaluate the documentary evidence as it would issue an award in an ordinary procedure. The request will be dismissed only if it is manifestly groundless or if the information brought by the claimant is not coherent with the alleged debt.
- 43 In South America the Colombian General Procedure Code (Ley n 1.564/2012) adopts a peculiar model of payment order procedure, since it allows the creditor that does not have any documents to produce a sworn statement.³⁶ In other words, the sworn statement is considered a suitable means of evidence for the admissibility of the claim, in lieu of the written documents proving the debt.³⁷ One may argue that the Colombian system is and shall remain one that is halfway between non-documentary and documentary models, as long as the sworn statement does not cease to be a document used as a means of evidence.
- 44 The European order for payment is a compromise between the two types³⁸: the creditor must simply describe the evidence and does not need to produce it. The requirements to be met by an application for a European order for payment includes (in addition to other information): 'd) the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded' and 'e) a description of evidence supporting the claim'.³⁹
- 45 It is interesting to note that the CJEU has ruled that Member States are forbidden from imposing additional national law requirements regarding an application for a European order for payment, other than the ones exhaustively stated in Art 7 of the Regulation

³⁶ According to Art 420.6 of the Colombian General Procedure Code (Ley n 1.564/2012), the claim for an order for payment procedure must contain, among other requirements, '6. The evidence that is intended to be asserted, including those requested in the event that the defendant objects. The claimant must provide with the demand the documents of the contractual obligation owed that are in their possession. When you don't have them, you should point out where they are under oath that it is understood to have been provided with the filing of the claim, that there are no documentary supports'.

³⁷ B Capponi, *Il procedimento d'ingiunzione* (Zanichelli 2009) 25-53.

³⁸ Correa Delcasso. *Le titre exécutoire européen et l'inversion du contentieux*, RIDC, vol. 53 n°1, Jan-Mars 2001, 61.

³⁹ The requirements are indicated in Art 7 of the Reg. 1896/2006 (n. 2).

(EC) n 1896/2006.⁴⁰ The ruling provides that imposing different conditions in the various Member States for such an application would undermine the objective of establishing a uniform instrument for the recovery of such claims (which is aimed at guaranteeing a level playing field for creditors and debtors throughout the EU) and would increase the complexity, duration and costs of the European order for payment procedure.

- 46 Other countries, such as Spain, Brazil, Taiwan, and China, require the creditor to provide written evidence of the debt, based on physical or electronic documents.⁴¹
- 47 Apart from rare exceptions, according to other laws around the world, the cases in which the judge may request additional documents are few. For example, in Taiwan, when the application for the issuance of a payment order does not meet the legal requirements, or when the creditor's claim is deemed meritless, the court shall deny such application in a judgment⁴², without giving the claimant the opportunity to modify the application or to present more documents. The denial may be partial, regarding a specific portion of the claim. Likewise, in China, the judge cannot request additional documents on his/her own initiative. If the application is groundless, the People's Court shall make an order to reject it.⁴³
- 48 In Brazil, if the judge has any doubt about the trustworthiness of the documentary evidence submitted by the claimant, ie, is uncertain whether to issue the payment order or not, he/she may ask the creditor to supplement the complaint, by presenting more documents. However, this will give rise to the conversion of the special procedure into an ordinary procedure.⁴⁴
- 49 In Spain it is possible for the court to request additional documents only in the specific context of an abusive clause. As mentioned above, according to Art 815.4 of the Spanish Civil Procedure Act, the judge must examine *ex officio* whether any of the clauses upon which the petition is based on or upon which the amount is determined can be classified as abusive. If the judge considers qualifying any clause as abusive, he/she will summon the parties to a hearing after which he/she will decide on the continuation of the procedure or its dismissal. In this case, the judge may ask for additional documents.

⁴⁰*Iwona Szyrocka v SiGer Technologie GmbH*, Case C-215/11 (CJEU), Decision 13 December 2012 [ECLI:EU:C:2012:794].

⁴¹ Art 812 of the Spanish Civil Procedure Act; article 700 of the Brazilian Civil Procedure Code; Article 511 (2), 512 of the Taiwanese Code of Civil Procedure; Article 214 of the Civil Procedure Law of the People's Republic of China (2017 Amendment).

⁴² Art 513 of the Taiwanese Code of Civil Procedure.

⁴³ Art 216 of the Civil Procedure Law of the People's Republic of China (2017 Amendment).

⁴⁴ Art 700, §5º, of the Brazilian Civil Procedure Code.

Following the case-law of the CJEU, Spanish judges are also allowed to require additional documents, especially to prove the consumer status of the debtor.⁴⁵

- 50 At the opposite end, concerning the European order for payment, the court may request additional documents if the requirements set by the aforementioned regulation are not met, giving the claimant the opportunity to complete and rectify the application, unless the claim is manifestly unfounded or the application is inadmissible.⁴⁶ The court may also allow the claimant to modify its application within a time limit specified by the court, even if the requirements are met only for part of the claim.⁴⁷ If the application is neither completed, rectified nor modified by the creditor, it will be rejected.⁴⁸
- 51 If the application is rejected, there is no right of appeal against the decision⁴⁹; the creditor must then file an ordinary civil claim.

2.1.3.4 Rules on the Service of Process

- 52 Rules on service of process may be reinforced in payment order procedures in some jurisdictions to ensure a higher probability of reaching the defendant.⁵⁰ The serious consequences of the absence of a defendant warrant a stronger burden on the claimant or on the court responsible for service. In general, there is concern that the communication is effectively received by the defendant⁵¹, even if it is an electronic address.⁵² The aim is to ensure that due process of law is upheld and that the debtor's right to be heard is guaranteed.

⁴⁵ *Froukje Faber v Autobedrijf Hazet Ochten BV*, Case C-497/13 (CJEU), Decision 4 June 2015 [ECLI:EU:C:2015:357] and *Bondora AS v Carlos V.C. and XY*, Cases C-453/18, C-494/18 (CJEU), Decision 19 December 2019 [ECLI:EU:C:2019:1118].

⁴⁶ Art 9 of the Reg. 1896/2006 (n. 2).

⁴⁷ Art 10 of the Reg. 1896/2006 (n. 2).

⁴⁸ Art 11 of the Reg. 1896/2006 (n. 2).

⁴⁹ For example, see Art 11 of the Reg. 1896/2006 (n. 2); and Art 5 of the OHADA Uniform Act organizing Simplified Recovery Procedures and Measures of Enforcement (1998).

⁵⁰ In other countries, as in Brazil, there is no difference in relation to the rules of service in ordinary procedure, as expressed stated in Art 700, §7, of the Brazilian Civil Procedure Code.

⁵¹ The European order for payment provides for several forms of service, by personal service, postal service and service by electronic means, not only 'with proof of receipt by the defendant', but also 'without proof of receipt of the defendant', detailing when it is acceptable in Articles 13 and 14 of the Reg. 1896/2006 (n. 2).

⁵² The Art 13 (d) of the Reg. 1896/2006 (n. 2) states that the service by electronic means, such as fax or e-mail, must be attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant; and the Art 14 admits the electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance.

- 53 In some legal systems, the payment order must be served on the debtor by judicial officers⁵³, with little flexibility in the applicable rules, due to the importance given to reaching the debtor.
- 54 Furthermore, there are countries in which the payment order must be served upon the defendant within a specific period of time, under penalty of nullity of the effects of the service. This period of time is three months for the Taiwanese order of payment⁵⁴ and the OHADA order of payment⁵⁵. In China this time limit is reduced to ensure celerity: a People's Court has five days to accept the application submitted by a creditor, then it shall issue the payment order to the debtor within 15 days from the date of the acceptance of the application.⁵⁶

2.1.3.5 The Requirement of Legal Representation

- 55 In order to simplify access to payment order procedures and in order to render the process of these procedures as simple as possible, some legal systems do not require the creditor to be represented by a legal counsel at the time of filing the procedure or at the time of submitting the claim.
- 56 In Spain, for example, representation by a lawyer is optional for the claimant, although it is mandatory for the defendant, if she contests the claim.⁵⁷ In turn, given that the defendant's opposition triggers the subsequent phase of the ordinary procedure, the claimant will then have to be necessarily assisted by a lawyer. Likewise, the European order for payment does not require the mandatory representation by a lawyer or another legal professional.⁵⁸
- 57 On the other hand, the Brazilian order of payment procedure requires the representation of the creditor by a lawyer.⁵⁹ The case law of Brazilian Courts considers that the payment order procedure is not admissible in small claims courts, where legal assistance is not mandatory, because the special procedure of the payment order cannot be adapted to the special procedure of the small claims courts.⁶⁰

⁵³ Art 1411 of the French Code of Civil Procedure.

⁵⁴ Art 515 of the Taiwanese Code of Civil Procedure.

⁵⁵ Art 7 of the OHADA Uniform Act organising Simplified Recovery Procedures and Measures of Enforcement (1998).

⁵⁶ Art 216 and 217 of the Civil Procedure Law of the People's Republic of China.

⁵⁷ Art 814 (2) of the Spanish Civil Procedure Act.

⁵⁸ Art 24 of the Reg. 1896/2006 (n. 2).

⁵⁹ Art 103 of Brazilian Civil Procedure Code.

⁶⁰ According to the Statement n 8 of the National Forum of Small Claim's Courts (*Forum Nacional dos Juizados Especiais - FONAJE*), none of the special procedural actions is admissible before the small claim's courts.

2.1.3.6 The Use of Digital Technology

- 58 The application for the European order for payment may be submitted in electronic format, by means of a digital form.⁶¹ In Taiwan applications for the issuance of a payment order and its handling may be conducted through computer or other technological equipment⁶², but currently only financial institutions and telecommunication companies are allowed to use the 'automatic platform for payment order'. In Germany the use of automatic processing systems is completely admissible, so that the handwritten signature of the creditor on the application, which is required by law, may be replaced by an electronic signature.⁶³
- 59 Many countries have adopted the full digitalisation of the procedure, which was reinforced as a result of the Covid-19 pandemic. This occurred in Brazil and Spain, for example. The use of digital technology simplifies even more the processing of payment orders and renders the presentation of physical documents dispensable. Interestingly, such a digitalization reform was abandoned in France⁶⁴ and only bailiffs can now apply for payment orders in a dematerialised way. French clerks and judges seemed to have opposed the reform on the ground that dematerialization would weaken the judicial examination of applications for payment orders and thus infringe the parties' rights.

2.1.3.7 The Opposition of the Debtor: Object Boundaries and Time Limits

- 60 After the service of the payment order on the defendant, he/she has four alternatives: (i) to pay the debt, in full or in part; (ii) to remain silent; (iii) to admit the debt; or (iv) to oppose it, in full or in part. If the defendant remains silent or admits the debt, the judge will issue an award constituting the enforceable title. If the defendant presents an opposition raises an objection, the payment order procedure will be terminated and converted into an ordinary procedure, where the disputed claim will be decided.
- 61 The debtor has the burden to contradict the claim; there is no reversal of the burden of proof⁶⁵, but rather the possibility of opposition by the defendant, which may or may not include evidence of the opposition. It is sufficient that the defence is admissible, as is the case when the claim is submitted by the claimant. The regulation of the EOP even establishes that the defendant simply needs to indicate contestation of the claim in the statement of opposition, without having to specify the reasons.⁶⁶

⁶¹ Art 7 (6) of the Reg. 1896/2006 (n. 2).

⁶² Art 508 of Taiwanese Code of Civil Procedure.

⁶³ Art 689, 690 and 692 of the German Civil Procedure Code.

⁶⁴ P Januel, 'Le gouvernement enterre la juridiction nationale des injonctions de payer' (2021), *Dalloz Actualité*.

⁶⁵ In this sense, the Art 13 of the OHADA Uniform Act organizing Simplified Recovery Procedures and Measures of Enforcement (1998) states expressly that 'the burden of proof of the debt shall lie on whosoever petitions for a mandatory injunction to pay'.

⁶⁶ Art 16 (3) of the Reg. 1896/2006 (n. 2).

- 62 All grounds for opposition must be provided in the same act (the opposition) in writing by the defendant. Because of the narrow nature of the payment order procedure, there is no space for counterclaims or previous procedural exceptions.
- 63 The time limit for the defendant to contest the payment order usually varies from 15 to 30 days.
- 64 The opposition to the European order for payment⁶⁷ and to the French order for payment⁶⁸ must be presented within 30 days/ one month from the date of service of the order on the defendant. Following a recent reform⁶⁹, French courts now deliver the enforceable title to the creditor when they accept the payment order application. Enforceability is only suspended as long as opposition is possible. If the service has not been made on a person, the opposition is admissible until the expiry of the period of one month after the first document was served on a person or, failing that, after the first enforcement measure is made, which has the effect of seizing all or part of the debtor's property.⁷⁰
- 65 The opposition for the Spanish order for payment must be submitted within 20 days of service on the defendant.⁷¹ While the opposition to the Brazilian, Chinese⁷² and OHADA payment orders must be filed within 15 days following the service of the order⁷³. In the case of OHADA Payment orders, the time limit may be extended, considering the distance of the parties from the seat of the court.⁷⁴
- 66 The opposition period has the effect of suspending the enforcement of the order. In general, there is no appeal to challenge the payment order; the admissible means of defence is the opposition. The decision of the Court on the opposition substitutes the order of payment. This decision may then be subject to appeal.⁷⁵
- 67 Nevertheless, within the EU, after expiry of the time limit to oppose the order of payment, in exceptional and strictly limited instances the defendant will be entitled to a review. These instances are: (i) if it was served without proof of receipt by the defendant and the service was not made in sufficient time to enable him/her to arrange for his/her defence without any fault on his/her part; (ii) if the defendant was prevented from objecting to the claim by reason of *force majeure* or due to extraordinary circumstances

⁶⁷ Art 16 (2) of the Reg. 1896/2006 (n. 2).

⁶⁸ Art 1416 of the French Civil Procedure Code.

⁶⁹ See Decree n° 2021-1322 of 11 October 2021.

⁷⁰ Ibid.

⁷¹ Art 815 of the Spanish Civil Procedure Act.

⁷² Art 216 of the Civil Procedure Law of the People's Republic of China.

⁷³ Art 701 and 702 of the Brazilian Civil Procedure Code.

⁷⁴ Art 10 of the OHADA Uniform Act organising Simplified Recovery Procedures and Measures of Enforcement (1998).

⁷⁵ For example: Art 1420 of the French Civil Procedure Code; Art 14 of the OHADA Uniform Act organizing Simplified Recovery Procedures and Measures of Enforcement (1998).

without any fault on his/her part; or (iii) if it was clearly wrongly issued, in light of the requirements laid down in this Regulation or due to other exceptional circumstances.⁷⁶

2.1.3.8 Incentives for the Creditor and the Debtor

- 68 Some legal systems provide for positive or negative incentives in their legislations, either to discourage the filing of groundless claims by the creditor, or to prevent the debtor from presenting groundless oppositions.
- 69 In Brazil, for example, there is a financial incentive for the debtor to pay the credit after a payment order is issued: he/she will be exempt from the payment of procedural costs if he/she complies with the order within the deadline.⁷⁷
- 70 In Colombia, the defendant who presents a groundless opposition to the claim is subject to a fine of 10% of the value of the debt in favour of the claimant.⁷⁸ On the other side, if the opposition is considered grounded, the fine will be imposed on the creditor.⁷⁹ The reciprocal financial punishment is a negative incentive, both to discourage the request of ungrounded payment orders by the claimant and to avoid the non-co-operation from the defendant, who when presented with a fine is not likely to oppose the claim just to postpone the procedure and, consequently, the payment.

2.1.3.9 Mandatory Attempt to Conciliate

- 71 The OHADA payment order includes a legal provision which is not found in the other legal systems studied.⁸⁰ It obliges the debtor, in the same act as the opposition, to serve a summons to appear before the competent court on a scheduled date. The date cannot be set beyond 30 days from the date of the opposition.
- 72 On that day, the court attempts to conciliate between the parties; and if the conciliation fails, the court shall immediately rule on the claim, even in the absence of a debtor who filed the opposition. The court's decision, according to the law, will have the effect of a judgment delivered after adversary proceedings. This seems to be a last resort attempt to avoid the conversion of the procedure into an ordinary procedure, where the conciliation hearing would normally occur.

⁷⁶ Art 20 of the Reg. 1896/2006 (n. 2).

⁷⁷ Art 701, §1º, of the Brazilian Civil Procedure Code.

⁷⁸ Art 421 of Colombian General Procedure Code.

⁷⁹ Analogous penalties exist in Brazil, according to the Art 701, §§ 10 and 11 of the Brazilian Civil Procedure Code.

⁸⁰ Art 11 and 12 of the OHADA Uniform Act organizing Simplified Recovery Procedures and Measures of Enforcement (1998).

2.1.4 Interrelation With Other Procedures

- 73 In general, the filing of an order of payment procedure is not mandatory⁸¹, which means that the claimant shall not be prevented from pursuing its claim through other types of procedures. The optional use of this special procedure contributes to the concept of multidoor justice, where creditors can choose, among the available procedures, the one which is most suitable to their claims.
- 74 It is also possible for the creditor to ask for an injunction prior to or during the application for a payment order.⁸² Even though the order of payment is an expedited procedure, there may be danger of delay (*periculum in mora*) which constitutes one of the requirements of provisional measures.
- 75 Conversely, when an opposition is filed, the payment order procedure becomes a normal contradictory procedure where both the claimant and the defendant will be able to file their briefs and their evidence in the course of normal proceedings. The payment order procedure will be transformed into the corresponding national procedure, which may be a typical civil procedure or another special procedure depending on the value of the claim and its subject matter. What started as a payment order procedure may for example, in some legal systems, become a labour procedure or a small claims procedure. On that issue, the EU legislator made an interesting attempt to organise a better coordination between the European Payment Order Procedure and the European Small Claim Procedure by allowing the claimant of the European Payment Order Procedure to decide that, in case of opposition by the debtor, the procedure should be transformed into a European Small Claim Procedure⁸³. This choice requires that not only the case is a European cross-border case (which is a common requirement for both procedures) but also that the amount of money involved is less than EUR 5,000 so that it falls within the scope of the European Small Claim Procedure⁸⁴.

2.2 Default Procedures

- 76 Typically, default procedures apply when the defendant fails to appear after having been summoned. This phenomenon exists in all legal systems, but it may trigger different procedural responses to handle the defendant's absence. The resulting default judgment may also exhibit peculiarities that sets it apart from typical contradictory judgments.

⁸¹ In this sense, for example, the use of European Payment Order 'shall not prevent a claimant from pursuing a claim within the meaning of Article 4 by making use of another procedure available under the law of a Member State or under Community law', according to Article 1 (2) of the Reg. 1896/2006 (n. 2).

⁸² F Virzi, 'Las medidas cautelares en el procedimiento monitorio', *Diario La Ley* 8876 (2016).

⁸³ Art 17 of the Reg. 1896/2006 (n. 2) as modified by Reg. 2015/2421. See also Chapter 4, para ***

⁸⁴ Art 2 Reg. 861/2007 as modified by Reg. 2015/2421.

Before delving into these two questions, it is necessary to distinguish several types of default procedures.

2.2.1 Different Types of Default Procedures

2.2.1.1 Full and Partial Default

- 77 In most cases, a default procedure means a procedure where the defendant does not take any action. In this case, there is a total absence of the defendant, and the default procedure must always strike a balance between the claimant's right to obtain satisfaction and the defendant's right to be heard. Indeed, if there is no action from the defendant, the court can never be sure that the defendant is aware of the ongoing procedure. Thus, it is imperative to offer the defendant the possibility to intervene in the procedure or to challenge the resulting judgment once she become aware of it.
- 78 A second, much less frequent possibility is that the procedure starts with the contribution of the defendant but that she subsequently ceases to participate in the proceedings. The defendant accomplishes some procedural acts, such as designating a lawyer to represent their interest, producing some evidence, or voicing some objections and counterarguments. However, at some point before the final exchange of written submissions or the final hearing, the defendant stops participating in the procedure or stops communicating with her lawyers. It is also possible that the defendant does not completely cease to act but rather fails to act within the timeframe granted to her by the court or by the law.
- 79 These cases, that are sometimes characterised as *partial default*, usually trigger a different reaction from the legal system because there is little reason to preserve the defendant's right to be heard. In these situations, the court is aware of the defendant's knowledge of the proceedings. The French Code of Civil Procedure of 1806 did qualify these situations as default procedures, thus allowing the defendant the opportunity to challenge the subsequent judgment through the special appeal reserved against default judgments. Such rules encouraged dilatory tactics from defendants. They have been largely reformed in the legal systems that have adopted the French Code of Civil Procedure⁸⁵.
- 80 On the contrary, English law considers that 'judgments in default of defence' are a kind of default judgments⁸⁶ that may be set aside under strict conditions⁸⁷. Claimants may apply for this kind of judgments when the defendant had sent an acknowledgment of receipt but did not send a defence within the allocated time limits afterwards. Thus, for

⁸⁵ French Law was reformed on this issue in 1972 (decree 72-788 of 28 August 1972), Luxembourg law in 1996 (Law of 11 August 1996) and Belgian law in 2017 (Law of 6 July 2017 modifying Art 804 Judicial Code).

⁸⁶ See Civil Procedure Rules, rule 12.3(2).

⁸⁷ See Civil Procedure Rules, rule 13.2.(b).

English law, the right to be heard goes as far as protecting a defendant who did not produce a defence, although she was clearly aware of the proceedings whereas most civil law procedures consider that if the defendant is aware of the proceeding, potentially through her lawyer, she is responsible for filing her defence on time. Courts will nevertheless examine the statement of claim according to the *ficta litis contestatio* approach, but the defendant will not benefit from any special challenge proceedings against the resulting judgment.

- 81 Parties in England may also use the ‘money claim online’ (MCOL) procedure, which is an instrument established in 2001⁸⁸ to make justice more affordable and accessible for simple⁸⁹ and domestic monetary claims in county courts. The claim is made via Her Majesty’s Courts and Tribunals Service website, where standard forms can be filed electronically, after paying the appropriate court fees. These fees are overall lower than those charged in other national procedures for the recovery of debts and there is no need to be represented by a lawyer. The procedure can be used for claims under GBP 100.000.
- 82 The MCOL procedure is conducted entirely online. If the defendant ignores or admits the claim, the claimant can request a judgment in default or on admission, as the case may be, and the issue of a warrant of execution. This is the most common outcome. If the defendant opposes the claim, the procedure will be transferred to the County Court hearing centre where the defendant is domiciled, following the default jurisdictional rule *actor sequitur forum rei*. The whole procedure is tied to the Northampton County court. Judgments, warrants and other legal documents are thus formerly delivered by this court. Moreover, professional claimants such as credit card companies or utility providers can apply for a special procedure within Money Claim Online to have their claims handled in bulk. The whole system is designed to fulfil the role that payment order procedures fulfil in other legal systems through the issuance of default judgments. Thus, this procedure can also be regarded as a kind of small claim procedure⁹⁰ because it is designed to handle claims that are considered both simple and uncontested.

⁸⁸ Information available at www.gov.uk/make-money-claim-online, with last view on 14 November 2022. The Practice direction (PD) 7E specifically deals with MCOL, but many other rules and directions within the CPR still apply to claims issued in MCOL (except where they are specifically modified by Practice Direction 7E).

⁸⁹ This procedure is limited to claims for a specific maximum amount of money and can be brought against one or two defendants whose service address is within England. They cannot be used against the Crown or if either of the parties is a child or a protected party, or if the claimant is publicly funded within the meaning of Legal Aid Act 1998. Information available at www.gov.uk/make-money-claim-online, with last view on 14 November 2022.

⁹⁰ See Part 11, Chapter 4, para ***

2.2.1.2 Default as a Sanction

- 83 In common law systems, default judgments may also be used to sanction a party.⁹¹ In English law, a statement of case may for example be stricken out when the party refuses to comply with a court order.⁹² In this case, default is inflicted upon the defendant who is barred from defending himself.
- 84 This role of the default judgments is acknowledged by the ALI/UNIDROIT principles, which state that default judgments may be entered to sanction a party who refuses to comply with an order of the court or raises ‘frivolous or vexatious claims or defenses’.⁹³ This penalty can also be imposed on a party who refuses to disclose evidence and does not provide a justification for such refusal.⁹⁴
- 85 This possibility to use default judgments to sanction the defendant may seem odd to civil law systems.⁹⁵ Within the EU, civil law courts called to recognised English default judgments even questioned whether this kind of judgment is contrary to public policy. When the Court of appeal of Milano addressed a preliminary ruling to the CJEU on this issue, the European court answered that the adopted sanction was ‘the most serious restriction possible on the rights of the defence’.⁹⁶ The Court of Justice then wrote that the referring court could refuse enforcement of the judgment if it considered that ‘following a comprehensive assessment of the proceedings and in the light of all the circumstances’, the sanction constituted a ‘manifest and disproportionate infringement of the defendant’s right to be heard’.⁹⁷ Remarkably, the Court of appeal of Milano ruled that the defendant had deliberately adopted an avoidance strategy and it accepted to recognise the English default judgment.⁹⁸

⁹¹ The Black’s law Dictionary gives two definitions of default judgment. The first one is very similar to that of a civil law dictionary ‘A judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claim’ while the second one states that a default judgment is ‘A judgment entered as a penalty against party who does not comply with an order, esp. an order to comply with a discovery request’, Black’s Law Dictionary, 5th edn (2016).

⁹² See CPR, R. 3.4, 3.5 and 3.7.

⁹³ ALI/UNIDROIT P-11A.

⁹⁴ ALI/UNIDROIT Principle 18.

⁹⁵ In France, a party’s refusal to comply with a procedural delay may be sanctioned through a partial termination of the pre-trial phase, effectively barring that party from raising new pleas or evidence. However, this does not prevent him from defending himself. See Art 800 of the French Code of Civil Procedure.

⁹⁶ *Marco Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, Case C-394/07 (CJEU), Decision 2 April 2009 [ECLI:EU:C:2009:219], para 33.

⁹⁷ *Ibid.* para 48.

⁹⁸ *Marco Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, Case 3404/2010 (Court of Appeal Milano, Italy), Decision 14 December 2010.

2.2.2 Role of the Judge in Default Procedures: *Ficta Confessio* and *Ficta Litis Contestatio*

- 86 When all parties are present, both sides submit arguments and counterarguments. Disputed facts will be examined by the court while the undisputed facts will generally be admitted as such. The judge plays the role of a neutral arbitrator listening to both parties and deciding the dispute according to the applicable law. Because the default of the defendant disturbs this classical description, the role of the judge must be adapted to handle this disturbance.
- 87 However, legal systems do not react in the same way to the absence of the defendant. In broad terms, two different approaches can be distinguished. According to the first one, by remaining silent, the defendant acquiesces in the claim and his silence is therefore tantamount to an admission of his opponent's submissions. That is the case in US law⁹⁹ and to some extent in English law. A less extreme version of this view is that the defendant's absence amounts to an admission but only of the facts as they are presented by the claimant. This is for example the case in German law¹⁰⁰ and Brazilian law to a limited extent. In Brazilian law, allegations of fact made by the claimant are presumed true as long as they do not contradict the evidence found in the records.¹⁰¹ In these two countries, the court has more liberty to control the legal aspects of the claim, but the claimant remains in a very favourable position. In the academic literature, this conception of default was called *ficta confessio* by an Italian author¹⁰² and *contumax confitetur* by a Franco-German author.¹⁰³ Adrian Zuckerman called it the 'forfeiture option'¹⁰⁴ before opting for the 'waiver option'¹⁰⁵ in the latest edition of his book. Each characterisation reflects the idea that default is equivalent to an admission of or a confession regarding the allegations of the claimant.

⁹⁹ Rule 55 (b)(1) of the Federal rules of civil procedure.

¹⁰⁰ Art 331(6) of the German Code of civil procedure (as well in legal system influenced by German Law such as Austrian and Greek law).

¹⁰¹ See Art 344 of the Brazilian Code of Civil Procedure, with some exception listed in Art 345 and 349. According to Art 345, default does not produce the effects mentioned in Art 344 if (i) there are multiple defendants, one of more of them defends the action; (ii) the dispute deals with inalienable rights; (iii) the complaint is not accompanied by an instrument considered by law to be indispensable evidence of the act; and (iv) the allegations of fact formulated by the plaintiff are unlikely or contradict the evidence found in the records.

¹⁰² F P Luiso, *Diritto processuale civile, II, Il processo di cognizione* (Giuffr  Editore 2017) 217.

¹⁰³ E Mezger, 'Commentary on Paris Court of appeal, 16 November 1978', *Revue critique de droit international priv * (1978) 140.

¹⁰⁴ See A Zuckerman, *Zuckerman on Civil Procedure – Principles of practice* (3rd edn, Sweet and Maxwell 2013) 362.

¹⁰⁵ See A Zuckerman, *Zuckerman on Civil Procedure – Principles of practice* (4th edn, Sweet and Maxwell 2021) 396. In both editions, Zuckerman distinguishes this option from the 'process option' which we have call here the *ficta litis contestatio* approach and the 'suspension option' which consist in suspending the proceedings pending the defendant's appearance.

- 88 The second view, on the other hand, is that admission cannot be inferred from silence, and silence must therefore be seen as a method of challenging the claim, in whole or in part, made by the other party. This view can be referred to as *ficta litis contestatio*, *contumax negat*¹⁰⁶, or the process option¹⁰⁷. On this issue, the French Code of Civil Procedure of 1806 provided that if the defendant does not appear, she shall be in default of appearance, and the claimant's submissions shall be met favourably if they are found to be justified and well founded.¹⁰⁸ Thus, the legal provision provides for a thorough judicial control of the claim and this view is widespread in legal systems that are influenced by the Napoleonic codes. For example, the Spanish Civil Procedure Act contains an explicit provision stating that the declaration of default shall not be considered as an admission of the facts of the claim, except in cases where the law expressly provides otherwise¹⁰⁹. On this issue, the ALI/UNIDROIT Principles of Transnational Civil Procedure provide for a comprehensive rule which states that in case of default, the court must verify that it is competent, that the defendant was served with sufficient time to respond, and that the claim is 'reasonably supported by available facts and evidence and is legally sufficient, including the claim for damages and any claim for costs'¹¹⁰. In many other legal systems, like in Taiwan¹¹¹ or in the Netherlands, the court must consider all factual and legal elements available before rendering a default judgment. In these legal systems, the law incites the judge to compensate for the absence of the defendant to a certain extent. The judge concedes a part of her neutrality in order to protect the right of the defence of the absentee. In these legal systems, it may actually be harder to obtain complete satisfaction when the opponent defaults than when she is present.
- 89 Curiously, both views may be found in English law. While some English default judgments are automatically granted to claimants, other default judgments are only issued if 'it appears to the court that the claimant is entitled to on his statement of case'¹¹². English law thus intensifies the judicial control of default proceedings for certain types of defendants (eg, children, states, diplomats) or for certain types of disputes (eg, divorce and defendants served abroad)¹¹³. The same is true in US laws where most default

¹⁰⁶ F P Luiso, *Diritto processuale civile, II, Il processo di cognizione* (Giuffr  Editore 2017) 217 and E. Mezger, 'Commentary on Paris Court of appeal, 16 November 1978', *Revue critique de droit international priv * (1978) 140.

¹⁰⁷ See Zuckerman (n 105) 396.

¹⁰⁸ Art 434 para 2 of the French CPC from 1806 'Si le d fendeur ne compara t pas, il sera donn  d faut, et les conclusions du demandeur seront adjug es si elles se trouvent justes et bien v rifi es'.

¹⁰⁹ Art 496 para 2 of Spanish Civil Procedure Act: 'La declaraci n de rebeld a no ser  considerada como allanamiento ni como admisi n de los hechos de la demanda, salvo los casos en que la ley expresamente disponga lo contrario'.

¹¹⁰ Principle 15 of the ALI/UNIDROIT Principles of Transnational civil Procedure.

¹¹¹ Art 385 Taiwanese Code of Civil Procedure.

¹¹² CPR, r. 12.11 (1).

¹¹³ See the exception of CPR r. 12.11

judgments will be swiftly adjudicated when the claimant seeks a precise sum of money whereas a hearing needs to be scheduled in more complex cases.¹¹⁴

- 90 On this issue of judicial control, Belgian law is interesting to mention because for a long time, Belgian courts had a very extensive interpretation of the Code of Civil Procedure whereby the court had to raise all arguments on admissibility or on the merits that the defendant could have raised if she were present. The Belgian view was that through her absence, the defendant was presumed to dispute every aspect of the claimant's submissions (eg, regularity of the procedure, competence of the court, veracity of the facts etc). This view had important practical consequences because Belgium never had a functioning payment order procedure. Thus, default judgments represent a substantial part of the civil and commercial judgments rendered in Belgium. This approach was criticised for theoretical and practical reasons. It notably undermined the speedy resolution of disputes over claims that are not genuinely disputed and encouraged dilatory defaults. This criticism leads to a reform of the applicable provisions of the Code of Civil Procedure¹¹⁵ to apply the *ficta confessio* view in Belgium. The reforms were in turn criticised and opposed by some judges who considered that they were then unable to protect defaulting defendants and that this was incompatible with the rights of defence or with the protection of weaker parties. Additional reforms were then conducted to clarify the role of the judge in default proceedings and to guarantee that the *ficta confessio* approach (called the minimalist approach in Belgian literature) was applied by the judge.¹¹⁶ The Belgian Constitutional Court also ruled that this approach is compatible with the right of the defence and in particular with Art 6(1) of the European Convention on Human Rights and Art 14(1) of the International Covenant on Civil and Political Rights¹¹⁷. Overall, Belgian law thus changed its approach to the role of the judge in default proceedings in recent years. The approach changed from a very protective to a more balanced stance where the *ficta confessio* approach is applied, but where the court retains the broadly understood right to raise any issue affecting public policy. For example, courts can still reject a claim that is manifestly unfounded.
- 91 Finally, in cases where the defendant is absent, some legal systems appoint a *curator absentis*¹¹⁸ who represents the defendant and disputes, either specifically or generally the allegations of the claimant. In Brazil, this curator is only appointed if the defendant's address is unknown and if the notification of the statement of claim through public notice on the internet is unsuccessful.¹¹⁹ In other legal systems, such as the Czech

¹¹⁴ Rule 55 (b) of the Federal Rules of Civil Procedure. Rule 55 (b)(1) states that default judgment may be entered by the clerk if the claim is for a sum certain whereas in any other case, according to Rule 55 (b)(2), the plaintiff must apply for default judgments to the court.

¹¹⁵ Art 806 Belgian Judicial Code.

¹¹⁶ See G. de Leval (ed.), *Droit judiciaire*, (Larcier 2019) Tome 2, vol. 1, 661 ff.

¹¹⁷ *Yasemin Duran v Nuh Güralp*, Case 72/2018 (Constitutional Court, Belgium) Decision 7 June 2018, para B.7, B.8.1 and B.8.2.

¹¹⁸ Following Rechberger's denomination. See W H Rechberger, *Civil Procedure in Austria*, (Wolter Kluwer 2011) 48.

¹¹⁹ Art 256 and 257 of the Brazilian Civil Procedure Code.

Republic¹²⁰, Austria¹²¹ and Bulgaria¹²², courts can make a broader use of *curator absentis*. The aim of such appointment is to protect the defaulting defendant and reinstate an adversarial debate despite his absence. The case law from the CJEU has however shown that this appointment may sometimes have detrimental effects on the defendant's rights. For example, in the case *Hypoteční banka*¹²³, a Czech court asked whether the appearance of the curator could be considered as an admission of the jurisdiction of the court for the defendant. The Court of Justice answered in the negative.

2.2.3 Procedural Specificities to Default Procedures

2.2.3.1 Service of Documents to the Defendant in Default

- 92 While legal systems have different conceptions of the role of the judge in case of default, virtually all of them put a special emphasis on the service of documents to the defendant. The court, or in some systems the court's clerk, must check whether the defendant was served with the documents introducing the proceedings before issuing a default judgment. This verification can be carried out in different ways depending on the rules and practice regarding service of documents. The court may for example examine whether the documents were sent by the claimant¹²⁴ regularly or it may check whether they were actually received by the defendant. When service of documents must be effectuated by a bailiff, the court must inspect the certificate of service drafted by the bailiff. When documents are sent through a registered letter with acknowledgement of receipt, the court usually requires the submission of this receipt slip.
- 93 This verification of service is crucial for upholding the right to be heard of the defendant in default. The right to a fair trial requires that defendants are given notice of the proceedings so that they can appear and arrange for their defence. However, the claimant's right to obtain compensation also requires that she can obtain a judgment even if the defendant cannot be found for service. Rules on default are often technical on this issue because legal systems aim to protect unaware defendants but at the same time, they aim to offer efficient proceedings to claimants and to deter avoidance tactics by debtors.
- 94 The French legal system addresses this dilemma through a distinction between service of documents on the person of the defendant and service of document at the domicile

¹²⁰ Art 29 para 3 of the Czech Code of Civil Procedure, see *Hypoteční banka a.s. v. Udo Mike Lindner*, Case C-327/10 (CJEU), Decision 17 November 2011 [ECLI:EU:C:2011:745].

¹²¹ Art 116 of the Austrian Code of Civil Procedure, see *A v B and Others*, Case C-112/13 (CJEU), Decision 11 September 2014 [ECLI:EU:C:2014:2195].

¹²² Art 47(6) of the Bulgarian Code of Civil Procedure, see *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*, Case C-215/15 (CJEU), Decision 21 October 2015 [ECLI:EU:C:2015:710].

¹²³ *Hypoteční banka a.s. v. Udo Mike Lindner*, Case C-327/10 (CJEU), Decision 17 November 2011 [ECLI:EU:C:2011:745].

¹²⁴ If defendants file no acknowledgments of service, English claimants must file a certificate of service to the court where they explain what documents they served and how. See CPR 6.17.

of the defendant.¹²⁵ If the claimant is able to prove that the defendant has received the documents personally, either because the defendant signed the acknowledgment of receipt or because the bailiff indicated that she handed the document to the defendant herself, the resulting judgment is not qualified as a default judgment under French law. Consequently, there is no special procedure to challenge this judgment other than a normal appeal when available or an appeal on a point of law.

- 95 In a similar fashion, English law distinguishes between default judgments which can be set aside as of right when the conditions to enter default judgments were not satisfied and default judgments which can be set aside as a matter of discretion when the procedure followed by the claimant, including service, was regular.¹²⁶
- 96 If the first attempt at service is unsuccessful, for example because service was irregular or because it simply did not reach the defendant, many legal systems prescribe that the court may authorise or even order a second service.¹²⁷ In theory, this possibility is only useful if the second service is made at a different address or through a different means of service. Some national laws, such as English law, are particularly flexible regarding methods of service and any method can be used if it is authorised by the court.¹²⁸ This allows English courts to sometimes authorise service of documents through social media when this appears to be the only way to reach the defendant. In other legal system, if service is unsuccessful, the summons must be served through public notice. This old method formerly implied to post the summons on the courthouse building or in a newspaper. Nowadays, this information is often published on the internet, in addition or instead of publication in a newspaper.¹²⁹ In any event, this method of service remains inefficient and very similar to fictitious service where the documents are not served at all.¹³⁰

2.2.3.2 Lapsing of Default Judgments

- 97 The Napoleonic Code of Civil Procedure of 1806 prescribed that default judgments must be enforced within six months after being issued under pain of being considered not to have been made.¹³¹ In French and Luxembourgian law, this rule has evolved to provide

¹²⁵ Art 473 of the French Code of Civil Procedure.

¹²⁶ CPR, rule 13.2 and 13.3. See also Zuckerman (n 105) 404 ff.

¹²⁷ For example, in French law, see Art 471 of the French Code of Civil Procedure.

¹²⁸ See Rule 6.15(1) of the English Civil Procedure Rules stating '6.15 (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place'.

¹²⁹ See for example Art 256 and 257 of the Brazilian Civil Procedure Code which prescribed that if the address of the defendant is unknown, service must be accomplished through public notice on the internet for 20 to 60 days before the case can proceed. If the defendant still does not appear, a curator is appointed.

¹³⁰ On this issue, see A. Anthimos, 'Fictitious Service of Process in the EU', *VIII Czech Yearbook of International Law* (2017) 3.

¹³¹ Art 156 Code of Civil Procedure of 1806.

that default judgments must be notified to the defendant within six months after being issued.¹³² This rule was abolished in Belgian law in 2015¹³³ because the legislator considered it an unnecessary formality now that the time limit to enforce a judgment in Belgium was shortened from 30 to ten years.¹³⁴ The objective of this rule is to protect the defendant, who might still be unaware of the existence of the default proceedings, so that she is quickly informed of the rendered decision. By this rule, the legislator therefore seeks to prevent the claimant from not disclosing the default judgment in order to have it enforced long afterwards, when the defendant is no longer able to gather the relevant elements to defend herself.

2.2.3.3 Challenging Default Judgments

- 98 As a common feature, many jurisdictions have a special procedure to set aside or challenge the default judgment. In Germany and Austria, the defendant in default may lodge a protest (*Widerspruch*) shortly after the default judgment is pronounced to reinstate proceedings to the extent covered by the protest.¹³⁵ In some civil law systems, which are inspired by the French Code of Civil Procedure¹³⁶, the defendant can file an 'opposition' to revoke the default judgment and to replace it with a contradictory first instance decision.
- 99 Similarly, in common law systems, the default judgment can be set aside. A judgment by default is not seen as being as strong as a judgment obtained after a full judicial debate between the parties. So, 'unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power that has been obtained by a failure to follow any of the rules of procedure'.¹³⁷
- 100 Thus, the protest, opposition or set aside procedure often takes place before a court of the same level as the one that issued the judgment or even before the same judge that issued the default judgment. This feature clearly distinguishes opposition or set aside procedures from a typical appeal. In many jurisdictions, if the default judgment is successfully challenged, the resulting contradictory judgment may then be appealed.¹³⁸ The French system is peculiar on this issue because appeal and opposition are mutually exclusive, and opposition is not available if an appeal is possible.

¹³² Art 478 French Code of Civil Procedure; Art 87 Luxembourg New Code of Civil Procedure; the rule was abandoned in Belgium law in 2015 (Law of 19 October 2015).

¹³³ Belgian Law on Civil Procedure from 19 October 2015, 22 October 2015.

¹³⁴ A Decroës, 'Suppression de la péremption du jugement par défaut' in H Boularbah H et J-F van Drooghenbroeck J.-F. (ed.), *Pot-Pourri 1 et autres actualités de droit judiciaire* (Larcier, 2016) 169.

¹³⁵ Section 338 to 343 German Code of Civil Procedure; Section 397a, 442a and 548 Austrian Code of Civil Procedure.

¹³⁶ Such as France, Belgium, Luxembourg or Poland.

¹³⁷ *Evans v Bartlam* (House of Lords, United Kingdom) Decision 30 April 1937 [AC 473, 480] per Lord Atkin.

¹³⁸ This is for example the case in English law when the default judgment is successfully set aside.

101 It is worth noting that not all legal systems provide for such procedures. Default judgments may only be subject to appeal in Brazilian, Italian, Spanish, or Taiwanese laws for example. In these legal systems, it is understood that the possibility to appeal is sufficient to protect the rights of the defaulting defendant. This also guarantees that defendants have little incentives to default because defaulting does not grant them an additional opportunity to oppose (and delay) proceedings. However, the lack of special procedures for defaulting defendants can lead to particularly severe consequences when default is purely accidental, for example when the defendant genuinely overlooks that proceedings have been initiated. In that case, a *bona fide* defendant could be deprived of a first instance decision by having to appear directly before the appellate court. In legal systems where the appellate court does not fully review the facts established by the first instance court, the defendant could have difficulties contesting the facts that have been established in the first instance in his absence before the appellate court. To mitigate these consequences, appellate courts may sometimes refer the case back to the first instance court so that a new first instance decision can be adopted. This is for example the case in Italian law when the service of the summons is considered null and void.¹³⁹

3 THE OBJECTIVES OF SPECIAL PROCEDURES USED FOR DEBT RECOVERY AND THEIR PRACTICAL USE

- 102 Payment order and default procedures are designed to ensure the proper access to justice for creditors, since they enable the recovering of debts through an effective manner, rather than through overly time-consuming mechanisms.
- 103 In this sense, it is possible to ascertain that special forms of procedure are useful for expedited debt recovery, based on a preliminary evidentiary material presented by the claimant. Thus, they foster the economic growth of a country, and they help attracting foreign businesses and capital. Having special procedures designed to recover debts will facilitate investment by foreign investors¹⁴⁰ who can be assured that efficient procedures are available.
- 104 In general, those procedures make it possible to obtain an enforceable title quickly, through simplified proceedings, in which the judge's examination of the claim is limited to verifying the plausibility of the debt, ie, whether it is reasonably supported by the available facts and evidence. Thus, they presume – either absolutely or on the basis of a summary examination of the claimant's evidence – the lack of contestation of the defendant.
- 105 The non-documentary payment order procedure, based on sufficient and reasonable information regarding the claimed debt, allows for greater collection of unpaid credits,

¹³⁹ Art 354 Italian Code of Civil Procedure.

¹⁴⁰ See also Segment 14 on cross-border aspect of civil procedure.

favouring minor creditors. The documentary payment order, although it excludes those creditors who cannot prove the existence of an obligation because they lack the required documentation, discourages the filing of groundless claims.¹⁴¹

- 106 An important scope of default judgments and payment orders procedures is the reinforcement of the economic attractiveness of the state by facilitating access to justice for creditors. The reliability and enforceability of judgments are critical to economies that wish to attract and maintain businesses¹⁴², which is even more crucial in countries with a high payment default rate.¹⁴³
- 107 There are other peculiarities, found in many legal systems, which enhance the access to justice, and therefore favour weaker parties such as small businesses. These include the non-requirement of legal counsel, the reduced costs, and the use of technology.
- 108 These special types of procedures support the power of the judicial system to resolve disputes, by handling uncontested claims and sanctioning a party who refuses to comply with the court's order. In some countries, as seen above, the issuing of the payment order can be delegated to judicial officers and/or take the form of an automated procedure. Therefore, the procedures contribute to reduce the courts' overload, either because they take less time than regular procedures or because they do not require extensive action from the judge.
- 109 It can be said that the US procedural system ensures even faster and effective default judgments. They rely on the afore-mentioned mechanisms of *cognovit* notes. These procedures are premised on the autonomy of individuals, their freedom to contract, their ability to make decisions in their best interests and their access to legal and other resources to protect their interests.
- 110 The effectiveness of the European Payment order to achieve broad access to justice is arguable. Despite the existence of a uniform framework of rules for uncontested and small value claims in cross-border litigation, there is still the need to rely on national

¹⁴¹ 'En términos generales, se podría decir que un modelo "sin prueba documental u otro tipo de prueba" otorga un mayor acceso al cobro de créditos impagos, favorece especialmente a los pequeños acreedores y otorga una tramitación más expedita y eficaz. (...) En contraste, un modelo con prueba documental que exija a priori acreditar la pretensión monitoria puede llegar a excluir un gran número de acreedores que debieran tener acceso al procedimiento monitorio'. A Perez Ragone, 'New and old trends in the order of payment: approach from comparative law experience for an order of payment in Argentina', *Revista de Derecho Privado* (2019) 283, 291-292.

¹⁴² Recital 6 of the European order for payment is explicit in that regards: 'The swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium sized enterprises, and resulting in numerous job losses'.

¹⁴³ In Brazil, for example, approximately 62 million of consumers and 6 million legal entities were registered as being in arrears in 2019.

procedural rules for several aspects such as valid service methods, court fees, appeals and transfer following opposition, and enforcement.

- 111 For example, after the opposition, and unless the claimant has explicitly requested that the proceedings be terminated, the proceedings will continue before the competent court in accordance with the rules of ordinary procedures.¹⁴⁴ The enforcement of an order, which is also governed by national law, will inevitably take time and result in costs for the creditor, although there is no need for recognition of the court decision in another Member State (*exequatur*).
- 112 Therefore, ‘such difficulties, coupled with the diversity of national solutions and arrangements, tend to have a hindering effect on parties’ access to justice rather than actually achieving a simplified and unitary practice across the European Union’.¹⁴⁵

3.1 Practical Use of Special Procedures Used to Recover Debts

- 113 It is possible to state, in view of all the above, that payment orders and default judgments play complementary roles. Where there is no payment order, the default judgment is an important means of accelerating the legal process and prevents the defendant from restricting the claimant’s access to justice by a not responding to the claims; and *vice versa*.
- 114 The order for payment is present in most of the analysed jurisdictions, but with different rates of usage and efficiency.
- 115 For example, a large percentage of the cases filed in the Spanish civil courts are payment order petitions.¹⁴⁶ This procedure makes up more than 50% of the cases filed in Spanish civil courts.¹⁴⁷ These statistics give an insight into the capital importance of this special procedure for civil justice. The statistics also show the considerable success of the procedure, as 6.8% of them end with a payment, 35.3% with the issuance of a payment order and only 7.7% of the cases are transformed into contentious proceedings. Nevertheless, 50.2% of the order for payment proceedings ended ‘in another way’,

¹⁴⁴ Article 17(1) of the Reg. 1896/2006 (n. 2).

¹⁴⁵ E A Onțanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia, 2017).

¹⁴⁶ In 2019, 720,991 petitions for order for payment processes were filed. Data provided by the Consejo General del Poder Judicial. *La Justicia dato a dato. Estadística 2019*. Available at: <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Juzgados-y-Tribunales/Justicia-Dato-a-Dato/>, accessed 8 June 2024.

¹⁴⁷ *Memoria sobre el estado, funcionamiento y actividades del Consejo General del Poder Judicial y de los juzgados y tribunales en el año 2019*, 372. Available at: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Memorias/Memoria-anual-2020--correspondiente-al-ejercicio-2019->, accessed 8 June 2024.

either because the petition did not meet the necessary requirements of admissibility or because it was not possible to locate the debtor.¹⁴⁸

- 116 Likewise, in France, the use of payment orders is impressive.¹⁴⁹ They are especially used for loans, leasing, guarantees or provision of services with low value.¹⁵⁰ The percentage of opposition to the claim is low, being less than 5% of the total of payment orders. The proceedings are also fast, considering that in France, half of the decisions are made in only one month; and in case of opposition half of the procedures last four months.¹⁵¹
- 117 In Taiwan, payment order proceedings constitute 13% of all of the civil cases (including Guardianship, insolvency and mediation cases, etc) that have been closed by the district courts in 2019.¹⁵²
- 118 In China, in 2019, the filing of payment orders was unimpressive, as it corresponded to 0.04% of the claims, although there has been a small increase of its use in the subsequent years.¹⁵³ The rate of opposition to payment orders is limited.¹⁵⁴
- 119 In some countries, the introduction of a payment order procedure has not been successful, and it is an underutilised instrument. This is particularly the case in Brazil¹⁵⁵ and in Belgium¹⁵⁶.
- 120 In the Netherlands, the order for payment procedure was abandoned because of its underutilisation and the default procedure plays an important role, as approximately 80% of the monetary claims are uncontested. These are relatively simple and low value

¹⁴⁸ Data provided by the Consejo General del Poder Judicial. *La Justicia dato a dato. Estadística 2019*. Available in <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Juzgados-y-Tribunales/Justicia-Dato-a-Dato/>

¹⁴⁹ In 2019, 477,000 were filed; and in 2020, 383,000. See *Les chiffres-clés de la Justice 2019*, 13 and *Les chiffres-clés de la Justice 2020*, 9.

¹⁵⁰ The type of debts predominantly involves loans, leasing or guarantees (48%) and provision of services (28%), with an amount under discussion which is less than 1000 euros in one-fourth of the cases, between 1000 and 2000 euros in other one-fourth of the cases, and up to 10 000 euros in 10%. See Z Belmokhtar et C Kissoun-Faujas, 'Les injonctions de payer en 2019 : de la demande à l'opposition', *Infostat Justice* 178 (2020).

¹⁵¹ Z Belmokhtar et C Kissoun-Faujas, 'Les injonctions de payer en 2019 : de la demande à l'opposition', *Infostat Justice* 178 (2020), 7 ff.

¹⁵² Statistics from <https://www.judicial.gov.tw/tw/lp-2093-1-xCat-10-1-20.html> (available only in Chinese).

¹⁵³ In 2019, 8,943 payment order procedures were filed, in a total of 19,197,889 civil proceedings. In 2020, 40,631 payment order procedures were filed, in a total of 19,023,366 civil proceedings. Statistics from <https://law.wkinfo.com.cn>.

¹⁵⁴ In 2019, 0,2795%; in 2020, 0,1378%. Statistics from <https://law.wkinfo.com.cn>.

¹⁵⁵ In Brazil it represents only approximately less than 1% of all civil procedures. Statistics from National Council of Justice: <https://www.cnj.jus.br>.

¹⁵⁶ In 2015, only 621 payment orders were issued by Belgian court. See <https://www.rechtbanken-tribunaux.be>.

contractual claims relating to eg, health insurance, telecom, gas/water/electricity, rent and health care, in which the default judgment is delivered in a few weeks.¹⁵⁷

- 121 Similarly, in the United States, there is no instrument tailored to facilitate the recovery of contested or uncontested monetary claims such as the payment order. The same function is fulfilled by the default judgment procedure, which represents a high rate of civil contracts cases. A survey of state courts in ten urban counties in 2012-2013 reported that 24% of contracts/debt collection cases resulted in default judgments, which can be issued relatively quickly if defendants do not appear and participate.¹⁵⁸
- 122 In England, there is no national payment order procedure available either. Other mechanisms, such as the default judgment and the money claim online, serve to recover debts. In 2011, the default procedure accounted for around 70% of the specified money claims.¹⁵⁹ In 2010, 13% of the claims for a specific amount of money were issued through the MCOL procedure.¹⁶⁰
- 123 In regard to the European Payment Order, its use differs among the Member States. Empirical research from 2017 indicated that in England there used to be a certain awareness of its existence, but practitioners were uncertain as to how it functioned. Hence, there used to be a preference for better known domestic procedures (including the default judgment and money claim online), as they were easier and faster to apply.¹⁶¹
- 124 The same study showed that in Italy a significant percentage of the respondents were not generally aware of the European Payment Order, so that most respondents (76.66%) indicated a preference for the use of national procedures instead (such as the *ingiunzione di pagamento*).¹⁶²

¹⁵⁷ X Kramer, M L Tuil, I Tillema and others, '*Verkrijging van een executoriale titel in incassozaken*' (2012).

¹⁵⁸ P Hannaford-Agor, *Caseload Highlights: The Landscape of Civil Litigation in State Court: Examining Debt Collection, Landlord/Tenant and Small Claims Cases*, National Center for State Courts (2019).

¹⁵⁹ Judicial and Court Statistics 2011, Ministry of Justice, Data available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162459/judicial-court-stats-2011.pdf, item 17.

¹⁶⁰ Judicial and Court Statistics 2010, Ministry of Justice, Data available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/162482/judicial-court-stats.pdf. According to item 18, 138,083 claims out of 1,040,589 specified 'money' claims were issued through Money Claim Online.

¹⁶¹ E A Onțanu, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia, 2017) 94.

¹⁶² Ibid 229.

- 125 Nevertheless, in Spain, the European payment order experienced a spectacular increase by 394.5%, as the 2019 Report of the General Council of the Judicial Power shows.¹⁶³

4 Default Procedures, Payment Order Procedures and the Right to a Fair Trial

4.1 Right to Receive Notice of the Lawsuit

- 126 The right to receive notice of the lawsuit is a crucial part of the right to a fair trial. It allows the defendant to have access to the court and to exercise his right to be heard if she wishes to appear in said court. Thus, the right to a fair trial - enshrined in transnational human rights instruments - implies first and foremost that the defendant is called to appear in court. For the European Court of Human Rights (ECHR) the right to access to court is only effective if individuals 'have a clear, practical opportunity to challenge an act that is an interference with his rights'¹⁶⁴ and this commands a precise examination of the rules governing notice to appear.¹⁶⁵ The French Code of Civil Procedure contains an explicit prohibition in that regard stating that 'A party may not be judged without having been heard or *called* [summoned]'.¹⁶⁶ For payment order procedures, which are designed to operate without the defendant's participation, rules on service are often reinforced to ensure a higher probability of reaching the defendant¹⁶⁷. The swiftness of the procedure warrants a stronger burden on the claimant or on the court responsible for service. Hence, if the first service of documents is unsuccessful, many legal systems prescribe that a second service must be attempted.¹⁶⁸
- 127 For the claimant, it is not only important to maximise the chances of reaching the defendant but also to maximize the chances of receiving proof of receipt. In France, this distinction sometimes determines whether the defendant can challenge the default judgment through a special appeal or through a normal one.¹⁶⁹ With this proof of receipt, the claimant can prove to the court that the defendant did receive the documents and that her default is voluntary. Hence, methods of service with proof of receipt should be favoured because they offer the greatest guarantee of service.¹⁷⁰ Other methods should be used only if they are the only methods available or if the means of service with a proof of receipt is disproportionally costly compared to the amount at stake. This is, for

¹⁶³ C Santaló Goris, 'Bondora: another brick in the proceduralization of the consumers' substantive rights', *Cuadernos de Derecho Transnacional* (2020) 12(2), 1187 ff.

¹⁶⁴ ECHR, 4 Dec. 1995, *Bellet v. France*, n° 23805/94, para 36.

¹⁶⁵ ECHR, 10 April 2003, *Nunes Dias v. Portugal*, n° 69829/01.

¹⁶⁶ Art. 14 French Code of Civil Procedure, emphasis and explanation added.

¹⁶⁷ See above, part 2.1.3.4.

¹⁶⁸ See above, part 2.2.3.1.

¹⁶⁹ See above, para 96.

¹⁷⁰ On this desired hierarchy between service with a proof of receipt and service without proof of receipt, see F. Gascón Inchausti, 'Service of proceedings on the defendant as a safeguard of fairness in civil proceedings: in search of minimum standards from EU legislation and European case-law', *Journal of Private International Law* (2017) 13(3), 475.

example, the case if bailiffs are involved. For small claims, a registered letter with an acknowledgement of receipt should be deemed sufficient. Conversely, a simple letter sent to the last known address of the defendant without any tracking or monitoring should be avoided. In that regard, the relaxed, informal approach in default proceedings in the US may be problematic as courts often allow notice to be sent by mail to the defendant's last known address. Such notice often does not actually reach the defendant. Finally, fictitious service or service through public notice on the door of the court or in a newspaper should be progressively abandoned.¹⁷¹ These methods of service do not uphold the defendant's rights to receive notice and they are not adapted to modern means of communications.

- 128 Another aspect of the right to be heard, which is closely linked to the right to receive notice of the lawsuit, is the time limit granted to the defendant to reply to the statement of claim or to appear in court. Without going into detail as to the number of days granted to the defendant, it is important that this time limit depends on the overall complexity of the procedure and on what is expected from the defendant. In payment order proceedings, the debtor can usually oppose the order by making a simple declaration. Hence, the time limit granted to him to do so can be quite short, from one week to one month depending on the legal system.¹⁷² Conversely, if the defendant needs to mount a full defence or call upon an expert, the legal system should grant him a reasonable time to do so.
- 129 In that regard, problems often arise when service needs to be effected abroad. In that situation, service of documents takes time, and the rights of the defendant may be jeopardised if the time granted to him to answer the claim starts to run before she actually receives the documents. The 1965 Hague Convention on Service is silent on the date of service, but the issue is regulated, albeit in a convoluted way, by the European Service Regulation¹⁷³. The best way to regulate this issue is by applying a 'double date' system whereby the time limit granted to the sender expires when the documents are sent, and the time limit granted to the recipient starts when the documents are received. In that way, the transmission time is not affecting any of the parties. It should also be mentioned that many legal systems extend time limits granted to the defendant when she resides abroad.
- 130 Another reason why rules regulating service of the lawsuit are particularly important in case of default judgments is that the efficacy of the judgment abroad will often depend on how service was effectuated in the state of origin. The two main criteria for states to recognise default judgments are whether the court of origin had jurisdiction over the

¹⁷¹ See *Nunes Dias v. Portugal*, Case 69829/01 (ECtHR), Judgment 10 April 2003 [ECLI:CE:ECHR:2003:0410DEC006982901] stating that service through public notice should only be used as a last resort.

¹⁷² See above, part 2.1.3.7.

¹⁷³ Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 1784/2020 of 25 November 2020.

dispute or the defendant and whether the latter was served with the documents initiating the proceedings. This can be a very formal test verifying whether the foreign rules of service were applied correctly. However, in most jurisdictions it is a more flexible test design to evaluate whether the defendant had a real opportunity to defend itself in the foreign proceedings. Art 7 of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters constitutes a good example for such a rule. It states that ‘the recognition or enforcement may be refused if ‘(...)the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim (...) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence’.¹⁷⁴ The 2019 Hague Convention also allows a state to refuse enforcement if the document which instituted the proceedings ‘was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents’.¹⁷⁵ According to this text, the court where enforcement is conducted must evaluate the method of service used, the address of service and the time granted to the defendant to organise her defence. All these circumstances are case specific, and a more precise rule is not desirable. Nonetheless, it is clear that methods of service without proof of receipt such as simple letter or summon by public notice are unlikely to meet the threshold imposed by the state of enforcement. Likewise, sufficient time must be given to the defendant to organise her defence. One month from the date of the summon to the date of the first defence or the first hearing is usually considered to be a reasonable time, depending on the urgency and complexity of the case.¹⁷⁶

4.1.1 *Waiving the Right to be Heard*

- 131 In civil matters, appearing in court is a choice that the defendant can freely opt not to exercise. There is no sanction for not appearing except the risk of losing the case and being ordered to pay the claim and the related legal costs. Hence, a defendant can always waive his right to be heard. However, common law systems push the logic one step further by allowing parties to an agreement to waive their right to receive notice. Thus, parties can sign cognovit clauses¹⁷⁷ in which they not only admit the future claim but also waive the

¹⁷⁴ Art 7(1)(a)(i) of the Hague Convention of 2 July 2019 on the on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. This part of the article is heavily inspired by the wording of article 45(1)(b) Reg. 1215/2012 without the exception prescribed by the European text according to which the defendant must challenge the decision in the State of origin.

¹⁷⁵ Art 7(1)(a)(ii) of the Hague Convention of 2 July 2019 on the on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

¹⁷⁶ See *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission JUST/2014/RCON/PR/CIVI/0082*, Strand 1, Mutual Trust and Free Circulation of Judgments, 213.

¹⁷⁷ See above, para 13 and R J Effron, ‘The Invisible Circumstances of Notice’ (2021), 99 North Carolina Law Review 1521.

right to be notified of the lawsuit so that a default judgment can be issued swiftly. Conversely, most civil law legislations would consider such clauses to be illegal for being in violation of the right to access to justice. For example, the ECHR strictly controls the conditions under which an individual can renounce his right to access to justice. The court declared for example that ‘an individual cannot be deemed to have waived a right if he or she had no knowledge of the existence of the right or of the related proceeding’.¹⁷⁸ Waiving the right to access to court may be lawful but it must be done in full knowledge of the facts, in an unequivocal manner and, above all, without coercion.¹⁷⁹ The court is quite lenient when renunciation is made to favour another dispute resolution mechanism such as arbitration¹⁸⁰ but a complete renunciation to defend a claim would be seen as excessive.

4.2 Right to Receive Information about the Procedure

- 132 Most legal systems consider that notifying the claim is not enough to adequately protect the rights of litigants. In addition, it is necessary to inform the litigants about the procedure and particularly how they can contest the claim. Hence, most legal systems prescribe that a minimum amount of information is transmitted to the defendant with the notification of the claim to cover issues such as whether representation by a lawyer is mandatory, where the court is situated, where and when the hearing will take place or how to communicate with the court. Depending on how the claim is introduced, the onus to include such information can fall on the claimant, on the court or on the bailiff.
- 133 Legislations tend to regulate this issue specifically for payment order procedures in order to facilitate the debtor’s right to lodge an opposition. In exchange for offering a swift procedure to the creditor, the debtor benefits from an equally quick solution for contesting the claim, which is usually subject to less stringent formal requirements but strict time limits. As an example, the European payment order procedure imposes the transmission of a standard form to the defendant that contains a text box entitled ‘Important Information for the Defendant’¹⁸¹ where they are made aware of the possibility to pay the claim or to oppose it within a period of 30 days. Moreover, the text box specifies that if no opposition is lodged the order will become enforceable or that the proceedings will continue before the competent court. Thus, all this information is made available to the defendant to preserve their right to be heard and to allow them to contest the claim, without the help of a lawyer.

¹⁷⁸ *Schmidt v. Latvia*, Case 22493/05 (ECtHR), Judgment 27 April 2017 [ECLI:CE:ECHR:2017:0427JUD002249305] para 96.

¹⁷⁹ *Deweert v. Belgium*, Case 6903/75 (ECtHR), Judgment 27 February 1980 [ECLI:CE:ECHR:1980:0227JUD000690375].

¹⁸⁰ *Suda v. Czech Republic*, Case 1643/06 (ECtHR), Judgment 28 October 2010 [ECLI:CE:ECHR:2010:1028JUD000164306].

¹⁸¹ Form E, Reg. 1896/2006 (EU) (n. 2).

- 134 Some legal systems go further and demand that the defendant must also be informed of the consequences of not contesting the claim. Under French law, for example, the statement of claim must indicate that the defendant risks having a judgment rendered against solely on the basis of the evidence provided by his or her opponent if they fail to appear.¹⁸² A similar notice is mandatory when the claimant requests the certification of a decision as a European Enforcement Order¹⁸³. Nevertheless, a study by the European Bailiff Association showed that most European legislations do not require that the defendant is informed about the consequences of default.¹⁸⁴
- 135 Finally, some legislations impose that the losing party is informed of the appeal procedure when the judgment served. In criminal matters, the ECHR considered that Art 6 of the Convention on the right to a fair trial imposes that the defendant is informed of the formalities and time limits for lodging an opposition to a default judgment when the judgment is served.¹⁸⁵ No similar decision from the ECHR has been adopted in civil matters but informing the defendant about the procedure for challenging a default judgment is a relatively easy solution to preserve his right to be heard.

4.3 Right to be Heard by a Judge in Payment Order and Default Procedures

- 136 The right to a fair trial includes the right to a court, that is the right to have access to a court so that a judge can hear the dispute. In payment order and default proceedings, this right is often adapted to increase the judicial system's efficiency. Because the defendant does not appear, most system consider a strict control by the judiciary to be superfluous. This movement affects payment order procedures in particular because they are often handled by court clerks.¹⁸⁶ Similarly, specific judges, called *Masters*, handle default procedures in England.¹⁸⁷ In both cases, one can observe that when there is no examination of the merits of the claim, the involvement of a judge is deemed unnecessary. There is therefore a correlation between the authority delivering the judgment and the level of scrutiny that the claim is subject to.
- 137 Moreover, digitalisation largely affects these procedures for the same reasons. Payment order procedures are sometimes centralised, dematerialised or even automatic¹⁸⁸. In the absence of contradiction, there is no need for the claimant to physically go to court especially when she can benefit from a more efficient procedure online.

¹⁸² Art 56, para 3 French Code of Civil Procedure.

¹⁸³ Art 17, Regulation creating a European Enforcement Order for uncontested claims 805/2004 of 21 April 2004 (EC).

¹⁸⁴ See, Institut de droit international judiciaire privé et de droit de l'exécution (IDJPEX), *L'introduction de l'instance : maillon faible de l'espace judiciaire européen* (UIHJ 2009) 42 ff.

¹⁸⁵ *Da Luz Domingues Ferreira v. Belgium*, Case 50049/99 (ECtHR), Judgment 24 May 2007 [ECLI:CE:ECHR:2007:0524JUD005004999].

¹⁸⁶ See above part 2.1.3.1.

¹⁸⁷ See above part 2.2.2.

¹⁸⁸ See above, part 2.1.3.6. and the description on the MCOL procedure above, para 82.

4.4 Challenging the Decision to Safeguard the Right to be Heard

138 Many jurisdictions have a special procedure to set aside or challenge the default judgment¹⁸⁹, which often takes place before a judge of the same level as the one that issued the judgment or even before the same judge that issued the default judgment¹⁹⁰. In some legal systems, such as France, this procedure is only available when appeal is not.¹⁹¹ Payment order procedures function slightly differently because the opposition procedure is not *per se* a way of challenging a decision but rather a process that bridges the gap between the non-adversarial request and a typical contradictory procedure.¹⁹² Payment orders are therefore often not subject to appeal¹⁹³ or only in exceptional circumstances.¹⁹⁴ However, in some jurisdictions, such as Germany¹⁹⁵ or Belgium¹⁹⁶, enforceable payment orders are qualified as default judgments. Hence, the specific procedure available to defendants in default is also available to debtors in payment order procedures.

139 In both cases, impartiality of the court that rules on this challenge may be called into question because the defendant has to present his defence before the court that rendered the decision in the claimant's favour. In the legal systems where this is the case, scholars and courts justify this situation by saying that the court did not know the entirety of the case when it made its first decision. Therefore, the judges are less likely to consider themselves intellectually bound by their previous decision and they are able to reach a different outcome when presented with arguments and evidence from both sides. This justification is convincing when the court barely controls the claimant's submission during the default or the payment order procedure. However, when the first instance judge plays an active role in the default or the payment order proceeding, it is less likely that the decision is modified when opposed by the defendant except if his explanations show very different factual circumstances.

4.5 Right to a Reasoned Judgment

140 As a rule, courts must give reasons for their judgments. By giving reasons, courts show that their decision is not arbitrary and that they have taken arguments from both parties into account. In default judgments and payment order proceedings, the defendant does not raise any arguments and therefore the judicial duty to give reasons may be adapted. For default judgments, this question is strongly linked to the role of the judge in default

¹⁸⁹ But not all, see above part 2.2.3.3.

¹⁹⁰ See above, part 2.2.3.3.

¹⁹¹ See above, para 102.

¹⁹² H Solus et R Perrot, *Droit judiciaire privé* (Sirey, 1991), vol 3, 1210 ff. See above, part 2.1.3.7.

¹⁹³ See above para 67.

¹⁹⁴ For example, in the European Payment order procedure, see above para 68.

¹⁹⁵ Sec 700(1) of the German Code of Civil Procedure.

¹⁹⁶ Art 1343 para 3 of the Belgian Code of Civil Procedure.

proceedings examined above¹⁹⁷. In a *ficta litis contestatio* system, the defaulting defendant is deemed to oppose the claim. Hence, the duty to give reasons is barely affected because the court must show that it rendered the judgment in favour of the claimant only because it considered the claim to be well-founded. This is all the more true when the court accepts only parts of the claim because it must then explain to the claimant, who appeared, why his claim was partially rejected.

- 141 In *ficta confessio* systems, however, the defendant's default is conceived as an acceptance of the claim. Hence, there is nothing more for the judge to do than to take note of the defendant's absence, verify the service of documents and render a judgment granting the claimant's application. In some common law systems, such default judgments can therefore be very concise and state that because of the defendant's absence, the defendant must pay the amount required by the statement of claim. In the UK, such judgments may even be entered by a court Master¹⁹⁸ without a hearing. For English authors, this approach is nothing more than a strict application of the adversarial principle¹⁹⁹. Moreover, European supranational courts have never criticised English default judgments for their lack of reasoning. In *Trade Agency*, the CJEU declared that:

the adoption of such a default judgment is intended to ensure the swift, effective and cost-effective handling of proceedings brought for the recovery of uncontested claims, for the sound administration of justice. It must be acknowledged that such an objective is likely, in itself, to justify a restriction of the right to a fair trial in so far as that right requires that judgments be reasoned.²⁰⁰

- 142 This assessment is in line with the caselaw of the ECHR stating that the duty to give reasons 'may vary according to the nature of the decision'²⁰¹. Similarly, if the ALI/UNIDROIT Principles of Transnational Civil Procedure state that 'the judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision'²⁰², the accompanying comment states that 'the reasoned explanation may be given by reference to other documents such as pleadings in case of a default judgment'²⁰³.
- 143 However, problems may arise when such default judgments, for example English default judgments, must be enforced in another legal system where default judgments follow

¹⁹⁷ See above, part. 2.2.2.

¹⁹⁸ On this specific role with English courts, see L Silberman, 'Masters and Magistrates Part I: The English Model', *New York University Law Review* 50 (1975) 1070.

¹⁹⁹ Zuckerman (n 105) 396.

²⁰⁰ *Trade Agency Ltd v Seramico Investments Ltd*, Case C-619/10 (CJEU), Decision 6 September 2012 [ECLI:EU:C:2012:531].

²⁰¹ *Ruiz Torija v. Spain*, Case 18390/91 (ECtHR), Judgment 9 December 1994 [ECLI:CE:ECHR:1994:1209JUD001839091].

²⁰² Principle 23 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

²⁰³ P-23A of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

the *ficta litis contestatio* model. French courts, for example, sometimes consider that English or US default judgments lack reasoning and are therefore susceptible to infringe French public policy. However, French courts often recognise these judgments if the statement of claim before the court of origin is produced at the recognition stage. French courts consider that this statement of claim constitutes adequate substitute to the lack of reasoning²⁰⁴. Overall, it also reflects the courts' will not to endorse the defendant's avoidance strategy. It is, however, possible to consider that these English default judgments do not lack reasons *per se* but that the reasons are to be found in the defendant's absence. It is because of the defendant's default that a judgment is issued in favour of the plaintiff.

- 144 This last argument is perfectly applicable to payment order proceedings. The order is issued on the sole basis of the claimant's allegations, and it is made enforceable for the sole reason that the defendant had not contested it. Hence, any reasoning is superfluous and payment orders do not contain reasons.

²⁰⁴ See Case 11-23.871, (Supreme Court, 1st civil chamber, France), Decision 7 November 2012 [ECLI:FR:CCASS:2012:C101252], L Usunier, *Revue critique de droit international privé* (2013), 898.

ABBREVIATIONS AND ACRONYMS

ALI	American Law Institute
Art	Article/Articles
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
edn	edition/editions
ed	editor/editors
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
EOP	European order for payment
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GBP	British pound sterling
HKCFA	Hong Kong Court of Final Appeal
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
MCOL	Money Claim Online
n	footnote (internal, ie, within the same chapter)
no	number/numbers
OHADA	Organization for the Harmonisation of Business Law in Africa
para	paragraph/paragraphs
pt	part
Reg	Regulation
Sec	Section/Sections
SSA	Sub-Saharan Africa
trans/tr	translated, translation/translator
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UK	United Kingdom
US	United States of America

USD	United States Dollar
v	versus
vol	volume/volumes
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LEGISLATION

International/Supranational

ALI/UNIDROIT Principles of Transnational Civil Procedure 2004

European Convention on Human Rights 1951

Hague Convention of 2 July 2019 on the on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019

International Covenant on Civil and Political Rights 1966

OHADA Uniform Act organising Simplified Recovery Procedures and Measures of Enforcement adopted on 10 April 1998, at Libreville, Gabon 1988

Regulation creating a European Order for Payment Procedure, 1896/2006 of 12 December 2006 (EU)

Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 1784/2020 of 25 November 2020 (EU) Regulation creating a European Enforcement Order for uncontested claims 805/2004 of 21 April 2004 (EC)

National

Bürgerliches Gesetzbuch (German Civil Code)

Civil Procedure Law of the People's Republic of China

Civil Procedure Rules (UK)

Code de procédure civile (French Code of Civil Procedure)

Code judiciaire (Belgian Judicial Code)

Code of Civil Procedure of Taiwan (1930)

Code of Civil Procedure of Taiwan (1971)

Código Civil y Comercial de la República Argentina (Argentine Code of Civil and Commercial Procedure)

Código de Processo Civil 1973 (Brazilian Code of Civil Procedure 1973)

Código de Processo Civil 2015 (Brazilian Code of Civil Procedure 2015)

Código General del Proceso (Colombian General Procedure Code)

Código General del Proceso (Uruguayan General Procedure Code)

Court Organization Act (Taiwan)

Décret-loi du 25 août 1937 (French Decree-Law of 25 August 1937)

Décret n° 72-788 du 28 août 1972 (French Decree 72-788 of 28 August 1972)

Décret n° 81-500 du 12 mai 1981 (French Decree 81-500 of 12 May 1981)

Décret n° 2021-1322 du 11 octobre 2021 (French Decree n° 2021-1322 of 11 October 2021)

Federal Rules of Civil Procedure (US)

Legal Aid Act 1998 (England)

Ley 8/1999, de 6 de abril (Spanish Law n 8/1999)

Ley de Enjuiciamiento Civil (Spanish Civil Procedure Act)

Loi du 11 août 1996 sur la mise en état en matière de procédure civile contentieuse et portant introduction et modification de certaines dispositions du code de procédure civile (Luxembourg Law of 11 August 1996)

Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (French Law n 2019-222 of 23 March 2019 on the 2018-2022 Programming and Reform of the Justice System)

Loi portant simplification, harmonisation, informatisation et modernisation de dispositions de droit civil et de procédure civile ainsi que du notariat, et portant diverses mesures en matière de justice (Belgian Law of 6 July 2017)

Rechtspflegergesetz (German Act on Senior Judicial Officers)

Zivilprozessordnung (Austrian Code of Civil Procedure)

Zivilprozessordnung (German Civil Procedure Code)

CASES

International/Supranational

Deweere v. Belgium, Case 6903/75 (ECtHR), Judgment 27 February 1980 [ECLI:CE:ECHR:1980:0227JUD000690375].

Ruiz Torija v. Spain, Case 18390/91 (ECtHR), Judgment 9 December 1994 [ECLI:CE:ECHR:1994:1209JUD001839091].

Bellet v. France, Case 23805/94 (ECtHR), Judgment 4 December 1995 [ECLI:CE:ECHR:1995:1204JUD002380594].

Nunes Dias v. Portugal, Case 69829/01 (ECtHR), Judgment 10 April 2003 [ECLI:CE:ECHR:2003:0410DEC006982901].

Da Luz Domingues Ferreira v. Belgium, Case 50049/99 (ECtHR), Judgment 24 May 2007 [ECLI:CE:ECHR:2007:0524JUD005004999].

Marco Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company, Case C-394/07 (CJEU), Decision 2 April 2009 [ECLI:EU:C:2009:219].

Suda v. Czech Republic, Case 1643/06 (ECtHR), Judgment 28 October 2010 [ECLI:CE:ECHR:2010:1028JUD000164306].

Faniel v. Belgique, Case 11892/08 (ECtHR), Judgment 1 March 2011 [ECLI:CE:ECHR:2011:0301JUD001189208].

Hypoteční banka a.s. v. Udo Mike Lindner, Case C-327/10 (CJEU), Decision 17 November 2011 [ECLI:EU:C:2011:745].

Trade Agency Ltd v. Seramico Investments Ltd, Case C-619/10 (CJEU), Decision 6 September 2012 [ECLI:EU:C:2012:531].

Iwona Szyrocka v. SiGer Technologie GmbH, Case C-215/11 (CJEU), Decision 13 December 2012 [ECLI:EU:C:2012:794].

A v B and Others, Case C-112/13 (CJEU), Decision 11 September 2014 [ECLI:EU:C:2014:2195].

Froukje Faber v. Autobedrijf Hazet Ochten BV, Case C-497/13 (CJEU), Decision 4 June 2015 [ECLI:EU:C:2015:357].

Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev, Case C-215/15 (CJEU), Decision 21 October 2015 [ECLI:EU:C:2015:710].

Schmidt v. Latvia, Case 22493/05 (ECtHR), Judgment 27 April 2017 [ECLI:CE:ECHR:2017:0427JUD002249305].

Bondora AS v. Carlos V.C. and XY, Cases C-453/18, C-494/18 (CJEU), Decision 19 December 2019 [ECLI:EU:C:2019:1118].

National

Yasemin Duran v Nuh Günalp, Case 72/2018 (Constitutional Court, Belgium) Decision 7 June 2018.

Evans v Bartlam (House of Lords, United Kingdom) Decision 30 April 1937 [AC 473, 480].

D. H. Overmyer Co., Inc. v. Frick, Case 405 U.S. 174 (Supreme Court, US), Decision 24 February 1972.

The Liquidator of Wing Fai Construction Company Limited (In Compulsory Liquidation) v. Yip Kwong Robert and Others, Case FACV 3/2011, (Court of Final Appeal, Hong Kong), Decision 8 December 2011.

Marco Gambazzi v. DaimlerChrysler Canada Inc., CIBC Mellon Trust Company, Case 3404/2010 (Court of Appeal Milano, Italy), Decision 14 December 2010.

Case 11-23.871, (Supreme Court, 1st civil chamber, France), Decision 7 November 2012 [ECLI:FR:CCASS:2012:C101252].

BIBLIOGRAPHY

Anthimos A, 'Fictitious Service of Process in the EU', *VIII Czech Yearbook of International Law* (2017) 3.

Belmokhtar Z et Kissoun-Faujas C, 'Les injonctions de payer en 2019 : de la demande à l'opposition', *Infostat Justice* 178 (2020).

Black's Law Dictionary, 5th edn (2016).

Calamandrei P, 'Il Procedimento Monitorio nella Legislazione Italiana', *Opere Giuridiche*, vol. IX, Morano, Napoli (1983).

Capponi B, *Il procedimento d'ingiunzione* (Zanichelli 2009).

Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European order for payment Procedure*, COM(2015) 495 final.

—, *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission JUST/2014/RCON/PR/CIVI/0082* (2017).

Correa Delcasso J P, 'Le titre exécutoire européen et l'inversion du contentieux' (2001) 53 (1) *Revue internationale de droit comparé* 61.

De Leval G de (ed.), *Droit judiciaire*, (Larcier 2019).

—, 'Les ressources de l'inversion du contentieux' in M-T Caupain et G De Leval (ed), *L'efficacité de la justice civile et Europe*, (Larcier 2000) 83.

Decroës A, 'Suppression de la péremption du jugement par défaut' in H Boularbah H et J-F van Drooghenbroeck J.-F. (ed.), *Pot-Pourri 1 et autres actualités de droit judiciaire* (Larcier, 2016) 169.

Effron R J, 'The Invisible Circumstances of Notice' (2021), 99 *North Carolina Law Review* 1521.

Hannaford-Agor P, *Caseload Highlights: The Landscape of Civil Litigation in State Court: Examining Debt Collection, Landlord/Tenant and Small Claims Cases*, National Center for State Courts (2019)

Institut de droit international judiciaire privé et de droit de l'exécution (IDJPEX), *L'introduction de l'instance : maillon faible de l'espace judiciaire européen* (UIHJ 2009).

Inchausti F G, 'Service of proceedings on the defendant as a safeguard of fairness in civil proceedings: in search of minimum standards from EU legislation and European case-law', *Journal of Private International Law* (2017) 13(3), 475.

Januel P, 'Le gouvernement enterre la juridiction nationale des injonctions de payer' (2021) *Dalloz Actualité*.

Kramer X, Tuil M L, Tillema I and others, *Verkrijging van een executoriale titel in incassozaken* (Erasmus Universiteit Rotterdam 2012)

Luiso F P, *Diritto processuale civile, II, Il processo di cognizione* (Giuffr  Editore 2017).

Mezger E, 'Commentary on Paris Court of appeal, 16 November 1978', *Revue critique de droit international priv * (1978) 140.

Millar R W, *The Formative Principles of Civil Procedure* (Northwestern University Press 1923).

On anu E A, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia 2017).

Perez Ragone A, 'New and old trends in the order of payment: approach from comparative law experience for an order of payment in Argentina', *Revista de Derecho Privado* (2019) 283.

Rechberger W H, *Civil Procedure in Austria* (Wolter Kluwer 2011).

Santalo Goris C, 'Bondora: another brick in the proceduralization of the consumers' substantive rights', *Cuadernos de Derecho Transnacional* (2020) 12(2), 1187.

Silberman L., 'Masters and Magistrates Part I: The English Model', *New York University Law Review* 50 (1975) 1070.

Solus H et Perrot R, *Droit judiciaire priv * (Sirey 1991).

Usunier L, 'Case note on Case 11-23.871, (Supreme Court, 1st civil chamber, France), Decision 7 November 2012, *Revue critique de droit international priv * (2013) 898.

Virzi F, 'Las medidas cautelares en el procedimiento monitorio', *Diario La Ley* 8876 (2016).

Zuckerman A, *Zuckerman on Civil Procedure – Principles of practice* (3rd edn, Sweet and Maxwell 2013).
