

**PART XIII**

**ENFORCEMENT**

**CHAPTER 6**

**PROTECTION OF THE DEBTORART**

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## 1 INTRODUCTION

- 1 Enforcement procedures, by definition, involve the implementation of an order or otherwise a claim against a debtor and in favour of a creditor. Such procedures, therefore, have an inherent unidirectional nature aimed at the satisfaction of the claim of the party instituting them with the consequent (necessary) invasion of the legal-patrimonial sphere of the party subjected to them.
- 2 As noted in Chapter 1, on the other hand, enforcement activities, regardless of whether they are carried out under the control or supervision of a judge or entrusted to private entities, must always ensure compliance with the fundamental principles enshrined in international charters and national constitutions to protect the dignity and fundamental freedoms of the individual.
- 3 In this chapter, we will not return (except indirectly) to this primary form of debtor protection, to which Pt XIII Ch 1 was dedicated.
- 4 Nor will we deal here with other forms of debtor protection that concern the formal regularity of the enforcement or the merits of the claim asserted by the creditor against the debtor. As concerns the first form of protection, the remedies that the debtor can use to complain about non-compliance with the rules of enforcement come into focus. With the second type of remedy, on the other hand, a debtor may challenge the inexistence of the claim of the creditor or the ineffectiveness of the enforcement title.
- 5 Instead, this chapter is devoted to the institutions and rules that, irrespective of any defects in the enforcement procedure or challenges to the merits of the creditor's claim, aim to protect the debtor from enforcement activity as such, implementing and articulating the fundamental rights of the debtor discussed in Chapter 1.
- 6 These forms of protection are not to be understood as tools for circumventing the enforcement claim as such, but as an expression of the necessary balance between the conflicting interests of the creditor and the debtor in order to ensure that enforcement complies with the principles of procedural fairness.<sup>1</sup>
- 7 Not all jurisdictions are equally sensitive to this issue. Indeed, it can be said that, in many ways, the movement in recent years (with the related economic crises) has been towards improving the tools available to the creditor with a view to making enforcement more effective and efficient: and this, inevitably, leads to a compression of the debtor's position.

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<sup>1</sup> See also A Perez-Ragone, 'Constitutional rights in enforcement proceedings' CPLJ Part XIII Ch 1, 25, '3.4.2 From Perspective of the Judgment Debtor'.

- 8 From Chile, for example, emerges a tendency to favour the satisfaction of the creditor's claim while keeping the debtor's position in the background.<sup>2</sup> An emblematic position in this regard appears to be that of China. In this respect, it is stated that:

the enforcement organ in China, even in this case the court as a public organ, has to prove its own value in realizing the substantive rights determined in the enforcement title. If legal enforcement proceedings are in most cases unsuccessful, the creditor may have to consider the possibility of employing illegal methods to collect its debt. Then the underworld, if any, would activate the law of the jungle. This could further jeopardize the authority of the judiciary and make the enforcement work even harder. Especially, as to be introduced later, the Chinese enforcement court is deemed to play an all-inclusive role to facilitate the creditor<sup>3</sup>

- 9 Apart from some of the more extreme positions, current enforcement regulations attempt to strike a balance between the opposing positions of the parties: on the one hand, by facilitating the search for the debtor's assets, streamlining the procedures for their sale and reducing the timeframe of the proceedings; on the other hand, by attempting to mitigate the impact of the procedure on the debtor, to prevent the latter from being unduly pressured into a situation where his or her fundamental rights are being violated.
- 10 The prerequisite for enforcement is that a creditor demands performance from a debtor that the latter is unwilling or unable to provide. The distinction between debtors who do not want to pay and debtors who cannot pay takes on some significance in this context. As a matter of fact, some forms of protection cover any type of debtor; others are available only to the debtor who is willing to satisfy the claim while having difficulty doing so.
- 11 Measures that, in a broad sense, *protect* the debtor in the course of enforcement implement principles that have become generally applicable in civil proceedings. Reference is made, in particular, to proportionality, flexibility, participation, awareness, transparency, and respect for privacy.

## 2 IMMUNITY FROM ENFORCEMENT

- 12 Before going into the analysis of how these principles can be interpreted in this context, it is necessary to deal with a form of protection that, in effect, excludes *ex se* the possibility of attacking (in whole or in part) the debtor's assets or person, making him exempt from execution itself.

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<sup>2</sup> M Vargas Pavez and O Silva Álvarez, 'Chile' in *Enforcement Proceeding in Latinamerica* (unpublished 2022).

<sup>3</sup> Z Cao, 'Enforcement Mechanism for Civil Matters' CPLJ Pt XIII Ch 3, 28.

- 13 Reference is made to the immunity a foreign State and its agents may enjoy with respect to the possibility that their properties or claims may be subject to enforcement in another state. This is a *variant* of the immunity from jurisdiction granted to foreign States with respect to activities carried out in the exercise of their sovereign prerogatives. In this context, immunity from jurisdiction translates into immunity from enforcement.
- 14 The subject matter falls under public international law and is grounded in customary international law and mutual respect for the sovereignty of other States.
- 15 Also in this context, a distinction is made between acts that are an expression of a State's sovereign powers (*acta iure imperii*) and those that concern State activities not characterized by the exercise of sovereign functions (*iure gestionis*). The former are as a rule deemed immune from interference by other States, the latter are not. Commercial relations, in particular, are normally not covered by jurisdictional immunity.
- 16 This distinction is the basis for some international conventions that are regional or global in nature.
- 17 For example, Art 23 of the European Convention on State immunity of 16 May 1972 establishes the following general rule:
- No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.
- 18 An exception to this rule is, however, to be found in Art 26. According to this provision, a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity in which the State is engaged in the same manner as a private person may be enforced in the State of the forum against property of the State against which the judgment has been given, used exclusively in connection with such an activity under the conditions given therein.<sup>4</sup>
- 19 Also in the European sphere, mention may be made of the Vienna Convention on Diplomatic Relations of 18 April 1961 and of the Vienna Convention on Consular Relations of 24 April 1963,<sup>5</sup> which reiterate the principle that for acts done *iura imperii*

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<sup>4</sup> Ie, if: a) both the State of the forum and the State against which the judgment has been given have made declarations under Art 24; b) the proceedings which resulted in the judgment fell within Art 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Art 24; and c) the judgment satisfies the requirements laid down in paragraph 1.b of Art 20.

<sup>5</sup> M Berklund, *Cross-border enforcement of claims in the EU. History, present time and future* (Wolters Kluwer 2009) 121 ff.

against the property of a Contracting State cannot be the subject of measures of execution or preventive measures.

- 20 The Vienna Convention on Diplomatic Relations, in particular, Art 22, protects from enforcement the premises of the mission, their furnishings, and other property thereon and the means of transport of the mission. This immunity is extended by Art 31 to diplomatic agents (and, under certain conditions, to their family members), with the exceptions set out in the provision itself, including, in particular, actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. Art 31 (4), on the other hand, provides that the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him or her from the jurisdiction of the sending State, while Art 32 specifies that the immunity of diplomatic agents may be waived by the sending State. Para 4, however, clarifies that a waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply a waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.
- 21 The Vienna Convention on Consular Relations, on the other hand, while stipulating the extent of the inviolability of the Consular premises, does not include provisions of immunity against civil enforcement.<sup>6</sup>

### 3 THE IMPLEMENTATION OF THE PRINCIPLE OF PROPORTIONALITY: UNSEIZABILITY

- 22 If enforcement must ensure respect for the debtor's fundamental rights and balance the opposing interests of the parties, a key role is played by the principle of proportionality. While on the one hand the creditor's claim must be satisfied, on the other hand enforcement must be prevented from imposing intolerable sacrifices on the debtor: in other words, the exercise of coercion must be adapted to the characteristics of the case in a flexible and, indeed, proportional manner.
- 23 From this point of view, the rule generally applied is that enforcement cannot, in any case, indiscriminately affect all of the debtor's assets, leaving him with no resources. Some assets therefore are removed from attachment: this is referred to, in effect, as unseizability or, in some cases, *beneficium*.
- 24 In a broad sense, the notion of unseizability refers to what cannot be seized. It is thus frequent that it is confused with that of unavailability, immunity or with the consequences of certain patrimonial divisions. A French author has recently proposed to limit the notion of unseizability to the cases where the non-seizability was motivated by a social function. In this perspective, 'l'insaisissabilité concourt au respect de la dignité

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<sup>6</sup> Ibid 122.

appréciée subjectivement du débiteur - la dignité subjective - par la conservation de ses biens qui tendent à lui assurer sa subsistance ainsi que celle de sa famille'.<sup>7</sup>

- 25 The consecration of unquenchable goods is a 'constance de l'histoire'<sup>8</sup> in all countries of the world. However, it must be noted that the scope of these assets is progressively widening with the passing of legislation and court decisions. The growing concern for the protection of the fundamental rights of debtors is not unrelated to this.
- 26 From a technical point of view, and even if some subtleties exist, the national regimes of unseizability all work as follows. In principle, all of the debtor's assets are seizable. As an exception, the enforcement agent is formally prohibited from seizing assets directly declared unseizable by the law.
- 27 This principle was incorporated in Art 25 of the Global Code of Enforcement of the International Union of Judicial Officers,<sup>9</sup> dealing with goods that cannot be seized, which states that all goods can be seized subject to the exclusion of those goods considered immune from seizure by national law.
- 28 As a rule, the unseizability of an asset must be taken into consideration *ex officio* by the enforcement agent, who therefore should refrain from executing the attachment on an asset that *prima facie* falls within the exclusions provided for by the legislation. For example, this is the case in Finland, where the right to *beneficium* has to be taken into consideration *ex officio*.<sup>10</sup> In the Republic of North Macedonia, the provisions governing the institute of exemption from enforcement are cogent in nature, which means that, even if the debtor wishes, he cannot waive the application of these provisions.<sup>11</sup>
- 29 If the enforcement agent does not respect this prohibition, the debtor will be able to ask the judge for the release of the seizure and to obtain a compensation or, in certain countries, a disciplinary sanction against the enforcement agent.

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<sup>7</sup> 'The non-seizability contributes to the respect of the subjectively assessed dignity of the debtor - the subjective dignity - by the conservation of his property which tends to ensure his subsistence as well as that of his family': L Lauvergnot, '*L'insaisissabilité*' (2020) Université Paris Nanterre (PhD), 536.

<sup>8</sup> 'Constant of history': J-P Lévy and A Castaldo, *Histoire du droit civil* (2nd edn, Dalloz 2010) 1034, para 694.

<sup>9</sup> Officially presented on 5 June 2015 during the 22nd International Congress of Judicial Officers in Madrid.

<sup>10</sup> L Ervo, 'Enforcement in Finland-some special views' in R Stürner and M Kawano (ed), *Comparative studies on enforcement and provisional measure* (Mohr Siebeck 2011) 74, 80.

<sup>11</sup> B Etemi-Ademi and E Zendeli, 'Protection of the rights of parties, participants and third parties during enforcement in Republic of North Macedonia' (2021) 16(1) SEEU Review (The Journal of South East European University) 108.

- 30 There are, moreover, exceptions to the exception: in certain cases, the creditor may request the special authorization of the judge in order to be able to seize an asset that has been declared unseizable.
- 31 Most of the time, national laws treat the unseizable corporeal movable goods and the unseizable intangible movable goods (certain claims, most often) in different provisions.
- 32 In the legal literature, we can talk about foreclosure from three different perspectives. The first is the absolute impossibility of carrying out enforcement on certain items, regardless of the purpose, function, and quantity of the item. The second meaning represents the relative impossibility of carrying out enforcement on items which have a certain purpose, function, or quantity, while the third perspective is the absolute-relative meaning, which implies that the way in which a certain thing is used makes it impossible for it to be the object of enforcement.<sup>12</sup>
- 33 It is also possible to speak of absolute unseizability (ie, affecting specific assets without reference to their value or use) and relative seizability (due to considerations of time, use, value, and the particular relationship between asset and debtor). For example, in Quebec, a motor vehicle may not be seized if it is necessary for the employment, job search, health or education of the debtor or his family.
- 34 The type of assets that cannot be attached (either absolutely or only relatively) changes from nation to nation depending on the specifics of each jurisdiction.
- 35 In the Republic of North Macedonia, for example, items that are out of circulation such as mines and other natural assets (Art 206 Law on Enforcement 2016), weapons and equipment intended for protection, State and public security and facilities necessary for the enforcement of criminal sanctions (Art 207 Law on Enforcement) are not seizable.
- 36 In Switzerland, Art 92 No 6 of the Swiss Federal Law on Debt Collection and Bankruptcy lists, among the non-seizable assets, the effects of clothing, equipment and armament, the service horse and soldier's penny, the daily amount for petty expenses paid to a person performing civil service, and the effects of clothing and equipment and the allowance of a person required to perform civil defence service.
- 37 In France, moreover, property that the law declares unseizable and property that the law makes untransferable, unless otherwise provided, cannot be seized. Buildings by destination cannot be seized independently of the building, except for payment of their price or for the realization of the pledge on them.<sup>13</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> Art L. 112-3 *Code des Procédures Civiles d'Exécution* (CPCE, Law on civil enforcement proceedings).

- 38 In the United States of America, the rules relating to unseizable goods depend on each Federal State. In California, for example, they are numerous and relatively complex. They are found in Sec 740.010 to 704.230 of the California Code of Civile Procedure (CCCP). The protection is sometimes more important than in Europe on certain points. Business licenses, eg, are exempt, except an alcoholic beverage license.
- 39 While there is variability in the considerations that determine the non-seizability of an asset in different national disciplines, the reasons that make certain assets non-seizable are, on the other hand, common to the various jurisdictions.
- 40 First, an attempt is made to ensure the debtor's dignified existence by protecting from enforcement some basic assets necessary for daily living as well as what is necessary for the debtor and his or her family's livelihood for a period of time after execution.
- 41 In France, for example, objects indispensable to disabled persons or intended for the care of sick persons are unseizable. A non-exhaustive list of unseizable goods is given by Art R. 112-2 of the *Code des procédures civiles d'exécution* (Code of civil enforcement procedures, CPCE): clothing, bedding, lingerie, foodstuffs, children's objects, etc.
- 42 In Belgium, a list of unseizable movable property is given by Art 1408 of the *Code judiciaire* (Judicial Code). It is shorter than in French law, but the exceptions that make the property unseizable are less numerous.<sup>14</sup> The sums of money for food purposes are also unseizable.
- 43 In Switzerland, Art 92 of the *Loi fédérale sur la poursuite pour dettes et la faillite* (Federal Law on Debt Collection and Bankruptcy) lists the assets that cannot be seized by the debt collection office. These are, in particular: objects reserved for the personal use of the debtor or his family, such as clothing, personal effects, household utensils, furniture or other movable objects, insofar as they are indispensable, foodstuffs and fuel necessary for the debtor and his family for the two months following the seizure.
- 44 In Quebec, despite a rather creditor-friendly legislation, there are no less than seven articles that deal with the *bénéfice d'insaisissabilité* ('benefit of unseizability').<sup>15</sup> The following are, *inter alia*, absolutely exempt from seizure: food, fuel, linen and clothing necessary for the life of the debtor and his family; goods necessary to alleviate a handicap or to care for the illness of the debtor or a member of his family.
- 45 In the Republic of North Macedonia, according to Art 94 of the Law on Enforcement (2016) items that are exempt from enforcement are food and heating for the needs of the debtor and family members for up to three months; items for personal use, items

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<sup>14</sup> This is essentially the case if it is located in a place other than the one where the seized person usually lives or works.

<sup>15</sup> Art 694-701 *Code de Procédure Civile du Québec* (CPCQ, Code of Civil Procedure of Quebec).



for basic household needs, furniture, which are necessary for the debtor and members of the debtor's family; food and heating supplies for the debtor and his family members for the next three months; cash advance of the debtor in the monthly amount.

- 46 In England, Sec 4 of the Taking Control of Goods Regulations (2013) provides a relatively detailed list of absolutely exempt furniture: a cooker or microwave; a refrigerator; a washing machine; a dining table large enough, and sufficient dining chairs, to seat the debtor and every member of the debtor's household.
- 47 In Germany, assets that are necessary for the debtor or his partner to lead a modest life and household are exempt from seizure.
- 48 Shifting the perspective beyond the European dimension, in Argentina the daily bed of the debtor, of his wife and children, the clothes and furniture of his indispensable use may not be seized by a creditor.<sup>16</sup> Also in South America, the seizure of certain assets to guard the minimum living conditions of the debtor and his family is provided, for example, by Art 445 of the Chilean Code of Civil Procedure.
- 49 In China, Art 254 Sec 1, sentence 2 and Art 255 Sec 1, sentence 2 of the Civil Procedure Law (CNCPL) emphasize that the enforcement court shall ensure that necessary living expenses for the debtor and its dependent family members are exempted from being executed.<sup>17</sup> Moreover, in accordance with Art 5 item 1 and 2 of the Provisions of the Supreme People's Court on the Seizure, Impoundment and Freezing of Properties in Civil Enforcement by People's Courts of 2004, clothes, furniture, kitchenware, tableware and other necessities for family life, together with the living expenses necessary for the debtor and its dependent family members are excluded from the enforceable assets of the debtor as well.<sup>18</sup>
- 50 Also, in the US, tangible goods are exempt if they are ordinarily and reasonably necessary to and personally used or procured for use by the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence.
- 51 In the same vein, instruments indispensable to the work activity of a natural person are protected from execution, in particular with reference to the debtor's agricultural and artisanal work, so as not to deprive him of what is necessary for the continuation of his activity and, therefore, to procure the necessities of life.

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<sup>16</sup> Art 219 *Código Procesal Civil y Comercial de la Nación* (CPCCN, Civil and Commercial Procedural Code of Argentina); M V Mosmann, 'Argentina' in *Enforcement Proceeding in Latinamerica* (unpublished 2022).

<sup>17</sup> Cao (n 3).

<sup>18</sup> *Ibid.*

- 52 From the perspective of proportionality, the *beneficium* in question should, as a rule, be guaranteed only to natural person in respect of small-scale (and, therefore, non-industrial) activities.
- 53 In France, with this in mind, movable property necessary for the life and work of the debtor and his family is unattachable, except for the payment of their price.<sup>19</sup>
- 54 In Switzerland, according to Art 92 of the Federal Law on Debt Collection and Bankruptcy, tools, appliances, instruments and books are not attachable insofar as they are necessary to the debtor and his family for the exercise of their profession.
- 55 In England, Sec 4 (1) (a) of the Taking Control of Goods Regulations 2013 also provides a rule for property whose applicable regime depends on the use made of it: items or equipment (for example, tools, books, telephones, computer equipment and vehicles) are exempt from seizure if they are necessary for use personally by the debtor in the debtor's employment, business, trade, profession, study or education, except that in any case the aggregate value of the items or equipment to which this exemption is applied shall not exceed GBP 1,350.
- 56 In Germany, assets that are necessary for the exercise of a professional activity or for training or further education in connection with this activity may not be seized. The following are also not seizable: documents whose conservation is a legal obligation or which are kept for accounting or documentation purposes; private records whose exploitation infringes on the rights of the personality; public documents necessary for the provision of the rights of the debtor or his family<sup>20</sup>.
- 57 In Argentina, the instruments necessary for the profession, art or trade that the debtor exercises may never be seized according to Art 219 Code of Civil Procedure (CPCCN).<sup>21</sup>
- 58 In Brazilian law, Art 833 of the Code of Civil Procedure (BRCCP) excludes the attachment of 'books, machines, tools, utensils, instruments or other personal properties necessary or useful for the professional practice of the debtor'.
- 59 In the Republic of North Macedonia, Art 5 of the Law on Enforcement includes with special emphasis certain debtor's items which serve the debtor for carrying out agricultural or craft activity, subject to the condition that this activity is the main source of livelihood for him and his family. In the Republic of North Macedonia, moreover, according to Art 84 of the Law on Enforcement, livestock and agricultural equipment cannot be attached.

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<sup>19</sup> Art L. 112-2 CPCE.

<sup>20</sup> § 811 German Code of Civil Procedure (GCCP).

<sup>21</sup> Mosmann (n 16).

- 60 It is interesting to note that some of the benefits recognized by the various regulations are a reflection of the socio-economic characteristics of the relevant system: protection of agricultural implements or livestock is found, for example, in States with predominantly agricultural economies.
- 61 Art 92 No 4 of the Swiss Federal Law Switzerland on Debt Collection and Bankruptcy, in this regard, is very specific in declaring unseizable two dairy cows, two heifers, four goats or sheep, in addition to the small livestock, with the fodder and straw necessary for four months, at the debtor's option, when said animals are indispensable for the support of the debtor and his family or for the maintenance of his business.
- 62 In the case of Italy, by contrast, some of the relevant provisions of the Code of Civil Procedure (ITCCP) are still those of 1940 and therefore refer to situations that were relevant at the time but are no longer relevant today. Such is the case, eg, with the reference to the 'edibles and fuels necessary for one month for the maintenance of the debtor and the other persons indicated in the preceding number' contained in Art 514(3) ITCCP or the rule that silkworms may only be attached when they are for the most part on the branches to form the cocoon (Art 516(2) ITCCP).
- 63 As a rule, however, high-value goods or those that are not located at the debtor's home escape this *beneficium*. In France, for example, movable goods necessary for the life and work of the debtor and his family become seizable again if they are located in a place other than the one where the debtor usually lives or works, if they are valuable goods, in particular because of their importance, their material, their rarity, their age or their luxurious character, if they lose their character of necessity because of their quantity or if they constitute tangible elements of a business.
- 64 Similar provisions exist, for example, in Italy<sup>22</sup> and Switzerland (Art 92 of the Swiss Federal Law on Debt Collection and Bankruptcy).
- 65 Germany (among other countries) also has a very original mechanism: *Austauschpfändung* (the exchange seizure).<sup>23</sup> It offers the creditor the possibility of being authorized by the court to seize certain unseizable goods if he hands over to the debtor, before the removal of the goods, a replacement good corresponding to the protected use or the sum of money necessary to obtain such a replacement good.
- 66 In the US, unusually valuable items may be determined to be seizable by the judge. Jewellery, heirlooms, and works of art are exempt to the extent that the aggregate equity therein does not exceed six thousand seventy-five dollars (USD 8,725).

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<sup>22</sup> Pursuant to Art 514(2) Italian Code of Civil Procedure (ITCCP), 'furniture, other than beds, of significant economic value, including for established artistic or antique value' may be attached without limit.

<sup>23</sup> § 811b GCCP.

- 67 In Quebec, exempt from seizure, but only up to a market value of USD 7,000 as determined by the bailiff, are the debtor's furniture that furnishes or decorates the debtor's principal residence, serves the family's use and is necessary for the family's life and, if applicable, to reach this amount, personal items that the debtor chooses to keep.
- 68 With a view to the protection of fundamental rights, in the light of the principle of proportionality, goods of high personal or moral value, such as wedding rings, medical articles necessary for physical disabilities and articles of honour and commendation, are also protected from enforcement: see eg, in China, Art 5, item 3-6, of the Provisions Seizure 2004.<sup>24</sup> Foreclosure of sepulchres is prohibited in Argentina, unless the credit corresponds to the price of sale, construction or supply of materials.<sup>25</sup> For Europe, reference can be made to the German or Italian legislation.<sup>26</sup>
- 69 Sacred objects are also, as a rule, exempt from attachment (in Italy, in implementation of agreements with the Holy See: Art 514, no 1 ITCCP). In Argentina, Art 744 of the ACCP excludes from attachment goods belonging to any religion recognized by the State. Art 92, No 2 of the Swiss Federal Law on Debt Collection and Bankruptcy, for its part, prohibits the attachment of religious objects and books. A similar provision is found in Quebec. In Germany, assets that are necessary for the exercise of a religion or belief or as an object of religious or philosophical worship by the debtor or his partner are exempt from seizure if their value does not exceed EUR 500.
- 70 Less commonly exempt are the so-called 'exempt properties', recognized as serving as housing for the debtor's family unit: this is the case, eg, in Brazil, where authors believe that the law enables, in fact, the protection of the luxurious lifestyle of the debtor, or in Cuba.<sup>27</sup>
- 71 In a variation of the theme, in Quebec, if a person owes less than USD 20,000, the creditor cannot generally seize the debtor's main residence.<sup>28</sup>
- 72 In some jurisdictions, however, the 'protected' properties are not those in which the debtor lives but those in which a productive activity is carried out. In the Republic of North Macedonia, eg, Art 163 of the Law on Enforcement states that a farmer's

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<sup>24</sup> Cao (n 3).

<sup>25</sup> Art 219 CPCCN, Mosmann (n 16).

<sup>26</sup> Under Art 514 of the Italian Code of Civile Procedure (ITCCP) no 2, the wedding ring may not be attached and, no 6, decorations for valour, letters, registers and in general family writings, as well as manuscripts, unless they form part of a collection.

<sup>27</sup> Art 63 of the Civil, Administrative and Labour Procedural Law (Brazil) (LPCALE) declares the property that constitutes the debtor's permanent residence and the land of the small farmer to be unseizable: B Marcheco Acuña, 'La ejecución de las sentencias contencioso-administrativas en Cuba' (2012) 1 *Revista Internacional de Estudios de Derecho Procesal y Arbitraje* 1, 30.

<sup>28</sup> Government of Quebec, 'Unseizable property and income' available at <https://www.quebec.ca/en/finance-income-and-other-taxes/manage-debts/seizure/unseizable-property-income> accessed 30 June 2024.

agricultural land and business buildings, to the extent that they are essentially necessary for the support of the farmer and the members of his immediate family, are not normally seizable.

- 73 In more recent legislation, moreover, adapting to new social sensitivities, the limitation of seizure has been extended to pets or assistance animals that do not have agricultural functions: see, for example, Quebec<sup>29</sup>, Switzerland (Art 92 No 1a of the Swiss Federal Law on Debt Collection and Bankruptcy, which limits *beneficium* to pets not kept for patrimonial or lucrative purposes), England (Sec 4 of The Taking Control of Goods Regulations 2013), Italy (Art 514, No 6*bis* and 6*ter* ITCCP). Also in Germany, animals owned by the debtor or his partner cannot be attached if they are not held for profit or if they are necessary for the exercise of a lucrative activity.<sup>30</sup>

#### 4 THE LIMITS TO FORECLOSURE OF CERTAIN CLAIMS.

- 74 The fact that enforcement is governed by the principle of proportionality, which means that there must be an appropriate limit to the debtor's attachable assets, is timely reflected in the attachment of the debtor's credits and claims.
- 75 On the one hand, these are intangible assets that can be readily liquidated and on which, therefore, the creditor can more easily and quickly obtain satisfaction; on the other hand, debtor's protection necessarily limits the attachability (absolute or at least relative) of certain claims. Again, the aim is not to leave the debtor (and his family) (indefinitely) without the resources to lead a decent life.
- 76 Some debts may be deemed totally unattachable: this is usually the case with a debtor's maintenance claims, which by definition are necessary for the debtor's daily sustenance: see Art 545(1) of the Italian CCP.
- 77 More often, some credits are attachable only in part, while the other part must remain at the debtor's free disposal.
- 78 This is the case with the debtor's salary, of which either a fixed amount (often linked to a subsistence minimum, as in Art 92 of the Swiss Federal Law on Debt Collection and Bankruptcy) or a portion can be exempt from attachment.
- 79 In Finland, eg, the debtor is guaranteed 'a certain minimum income' protected against garnishment.<sup>31</sup> In France, provisions, sums and pensions of a maintenance nature (even if paid into a bank account) are not attachable, except for the payment of maintenance already made by the creditor to the seized party. In Germany, Sections 850a and 850b

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<sup>29</sup> Ibid.

<sup>30</sup> Sec 811 GCCP.

<sup>31</sup> Ervo (n 10) 80.

of the *Zivilprozessordnung* (Code of Civil Procedure, GCCP) also list unseizable debts (pensions, part of overtime earnings, special event compensation, bonuses, etc).

- 80 The common element is that these claims are aimed at securing the livelihood needs of the debtor and his family.<sup>32</sup>
- 81 In Italy, the portion of the salary that cannot be seized is fixed by law at its maximum (one-fifth) (Art 545, para 4 ITCCP). In Hungary, on the other hand, Art 61 (1) of Act LIII of 1994 on the Judicial Execution Procedure stipulates that, during execution, the amount to be deducted from the salary shall be based on the net amount remaining after deduction of taxes (advance tax), social security contributions, private pension fund contributions, and any other contributions imposed on the salary by separate laws. In para 2, it is specified that, from the amount reduced according to subsection (1), generally up to 33% and exceptionally up to 50% may be deducted according to the rules established by law. Art 62 (1) specifies that during the deduction according to Art 61 the part of the monthly salary not exceeding HUF 60,000 is exempt from enforcement (the exemption in question does not apply, however, in the case of enforcement of child support and childbirth expenses).
- 82 In the US, in addition to the total or partial unseizability of various pensions and social benefits, disposable wages (wages paid out after deduction of taxes) are 75% exempt (only 50% exempt if enforcement is of a child support order).
- 83 In some cases, the portion of the wage that can be seized increases as the wage itself increases (again applying the principle of proportionality). In France and Belgium, eg, so far as the seizure of wages is concerned, there is a scale that makes part of the wages unseizable depending on the amount of the wages and the number of dependent children.<sup>33</sup>

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<sup>32</sup> On the limits to wage garnishment in Brazil, S C Arenhart and G Osna, 'Brasil' in *Enforcement Proceeding in Latinamerica* (unpublished 2022). On the Chilean position, M Vargas Pavez and O Silva Álvarez, 'Chile' in *Enforcement Proceeding in Latinamerica* (unpublished 2022), with reference to Art 445 Code of Civil Procedure of Chile. In Colombia, the Constitutional Court has ruled on the issue. According to L D Pabón Giraldo and A G Mazuera Zuluaga, 'Colombia' in *Enforcement Proceeding in Latinamerica* (unpublished 2022): 'it is not uncommon to find in Colombian case-law judgments that seek to protect debtor's fundamental rights even after a civil judge has already ruled upon the enforcement of an obligation. In that regard, the debtor's minimum living conditions are constantly looked after by constitutional judges. The Constitutional Court has stated that where the measures adopted in an enforcement proceeding deprive the debtor's ability to subsist and places him in a condition of profound vulnerability, the intervention of the constitutional judge is mandatory in order to avoid unnecessary harm and burden to the debtor. Under this rationale, constitutional judges have reduced the amount of income to be seized in enforcement proceedings'. As M Kawano notes, in 'Civil enforcement as a fundamental of effective justice - Introductory remarks on comparative study of civil enforcement' in R Stürner and M Kawano (ed), *Comparative studies on enforcement and provisional measures* (Mohr Siebeck 2011) 3, 7: 'the debtors' right as a human being to keep at least a minimum standard should be guaranteed as a constitutional or a human right'.

<sup>33</sup> Art R. 3252-2 *Code du travail de la France* (CT, French Labour Code).

- 84 In Quebec, there is a table listing the limits to the attachable portion<sup>34</sup> based on the number of the debtor's dependents and the frequency at which the debtor's work income is paid (the table is also applicable, with some adjustments, to self-employed workers).
- 85 Similar limitations apply to pensions and other public benefits for the disenfranchised.
- 86 In England, on the other hand, there is no mention of unseizable debts. However, certain rules seem to exempt specific debts from the scope of a civil enforcement procedure. They are, as in Germany, related to the procedure of seizure of earnings<sup>35</sup> but they appear to be less restrictive. The following are unseizable: money received from a Northern Ireland or foreign government service; pay or allowances received as a member of Her Majesty's Forces; certain tax credits; certain pensions.
- 87 In recent times, attention has been paid to the attachability of sums deposited in a bank account. Indeed, a pension or salary, once it has been paid into a checking account, becomes fungible money. It is therefore inconsistent to set a limit on the attachability of a claim before it has been paid, but to provide no limit on the ability to attach that money once it has been deposited in a bank account.
- 88 The issue is addressed by Art 25 of the Global Code of Enforcement, under which, in the event of a seizure of bank assets, the debtor must be left with a sum sufficient to ensure his and his family's subsistence, the amount whereof is determined by law.
- 89 Indeed, many legislations now place a limit (even) on the attachability of sums deposited in a bank account (eg, in Italy, Art 645, para 7 ITCCP).<sup>36</sup> In France, there is the rule of *solde bancaire insaisissable* (the unavailable bank balance), which obliges the seized bank to leave at the disposal of the debtor an amount equivalent to the revenue of active solidarity (approximately EUR 575).<sup>37</sup> If the amount in the bank account is less than this amount, it is therefore totally unseizable.

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<sup>34</sup> The table on exemptions (for the period 1 April 2024 to 31 March 2025) can be found at the website of the Government of Quebec, <https://www.quebec.ca/en/finance-income-and-other-taxes/manage-debts/seizure/seizure-third-person/table-exemptions> accessed 19 October 2024.

<sup>35</sup> Attachment of earnings Act (1974) (Germany).

<sup>36</sup> Providing that: 'Amounts due by way of salary, wages, other compensation for work or employment, including those due on account of dismissal, as well as pensions, allowances in lieu of pensions, or retirement benefits, if credited to a bank or postal account in the debtor's name, may be attached for an amount exceeding three times the social allowance, when the crediting takes place on or after the attachment date; when the crediting takes place on or after the attachment date, the aforementioned sums may be attached within the limits provided for in the third, fourth, fifth and seventh paragraphs, as well as in the special provisions of the law'.

<sup>37</sup> Art R. 162-1 CPCE.



- 90 In Germany, the natural person debtor has the possibility of opening a protected bank account, a part of which will in principle be unseizable.<sup>38</sup> The judge can even pronounce the complete unseizability of the *P-Konto* for a certain period of time.
- 91 In England, there are no unseizable bank accounts. Only the hardship procedure allows the individual debtor to ask the judge for authorization to access a portion of the seized bank accounts after a hearing to verify the conditions for application.
- 92 Also, in general, when garnishing sums deposited in a current account, the lien is limited to the amount of the claim (perhaps with a percentage increase to cover the costs of the proceedings for the creditor: see Art 546 ITCCP).<sup>39</sup> Excess amounts remain available to the debtor.<sup>40</sup>
- 93 It is interesting to note that in some jurisdictions, a different approach is taken with respect to the attachment of claims: that is, the portion of the claim that can be attached depends on the nature of the creditor's claim. In the Republic of North Macedonia, for example, the enforcement legislation categorizes the restrictions on the debtor's income according to the type of creditor's claim that must be enforced. In the first place, priority is given to the creditor's claim in cases of compensation for damage as a result of damage to health, ie, loss of ability to work and compensation for damage as a result of loss of sustenance due to the death of the sustenance provider (para 1, Art 117, Law on Enforcement 2016). Given the sensitivity and necessity for the enforcement of these requests, the bailiff can implement the enforcement up to half of salary, pension, and compensations instead of the full salary. The second case of claims are all other claims that do not belong to the first group, to which the bailiff can apply enforcement up to one-third of the income that is realized from salary, pension, and compensations instead of salary.<sup>41</sup>
- 94 It is rarer to find limits on the attachability of claims of a different nature than those examined so far.
- 95 In some jurisdictions, however, sums received as compensation for certain personal injuries are non seizable. In Switzerland, for example, Art 92, No 9 of the Swiss Federal Law on Debt Collection and Bankruptcy, considers annuities, lump-sum allowances and other benefits paid to the victim or his or her relatives for bodily injury, damage to health or death of a human being to be nonattachable, insofar as they constitute compensation

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<sup>38</sup> Sec 850k GCCP.

<sup>39</sup> Recently reformed in 2024 and now providing: 'From the day on which the document provided for in Art 543 is served on her, the third party is subject to the obligations imposed by law on the custodian with respect to the objects and sums owed by him, within the limits of the amount of the claim subpoenaed increased by 1,000.00 euros for claims up to 1,100.00 euros, by EUR 1,600.00 euros for claims from 1,100.01 euros up to 3,200.00 euros and by half for claims exceeding 3,200.00 euros'.

<sup>40</sup> For the Chinese position, see Cao (n 3).

<sup>41</sup> Etemi-Ademi and Zendeli (n 11).



by way of moral reparation, or compensation for the costs of treatment or the purchase of auxiliary means. A similar provision exists in Quebec, with reference to amounts received as compensation for costs and losses incurred as the result of physical or moral injury, paid following a judgment or under a public compensation scheme.

96 Also, in Quebec, support payments declared by the donor to be exempt from seizure are also exempt from seizure. A similar limit exists in France, where assets declared unseizable by the testator or donor may not be seized, unless the creditor is authorized by the judge, and, for the portion the latter determines, subsequent to the deed of gift or the opening of the legacy.

## 5 OTHER COROLLARIES OF THE PRINCIPLE OF PROPORTIONALITY

97 As mentioned above, an (implicit or explicit) reference to proportionality between the need for credit protection and the protection of the debtor's fundamental rights<sup>42</sup> is now widespread in contemporary enforcement legislation.

98 This trend has been reflected in Art 27 of the Global Code of Enforcement ('Proportionality of the enforcement measure'), which requires the enforcement measure to be proportional to the amount of the claim. In the event of abuse, the creditor may be directed to make reparations.

99 Proportionality is also mentioned with respect to the use of digital systems in enforcement. Art 4 of the Global Code of Digital Enforcement<sup>43</sup>, for example, states that a digital measure should remain proportional to the amount of the claim.

100 A corollary of proportionality is the flexibility of procedures.

101 In this regard, Art 29 of the Global Code of Enforcement provides that States must organize their enforcement systems by adapting them to the interests of the creditor and the economic and social situation of the debtor. For this reason, they must diversify the enforcement measures so that the judicial officer or enforcement agent may choose among them in keeping with the circumstances. The concept is reiterated in Art 30, where it is stated: 'States shall adapt the measures of execution to the legal status of the seized assets'.

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<sup>42</sup> For a Chinese perspective, see Cao (n 3), who notes that the principle of proportionality leads to the protection of the debtor to the maximum extent and the avoidance of excessive enforcement, while the prevailing party still should have its rights realized as determined.

<sup>43</sup> *Union Internationale de Huissiers de Justice* (UIHJ, International Union of Judicial Officers), 'Global Code of Digital Enforcement' November 2021 (1st edn).

- 102 In this content, a proportion must exist between the amount of the claim being pursued and the amount of enforcement activity performed and/or the debtor's property attached.
- 103 The need to ensure the creditor's recovery of his or her claim cannot imply the unwarranted freezing of the debtor's entire assets or the initiation of a multiplicity of enforcement proceedings (resulting in increased costs for the debtor).
- 104 In this view, enforcement activity also lends itself to being a form of abuse of process. In contrast, proportionality can be seen as a form of application of a general fairness principle.
- 105 The awarding of executive activities to private individuals, sometimes in a competitive regime, becomes widespread. Privatization of debt collection may, in fact, sacrifice the interest of the debtor.
- 106 The choice between the State monopoly of enforcement activity and the enhancement of the free market may imply an imbalance between the position of the creditor and that of the debtor, to the detriment of the latter. In systems where Enforcement Agents are organized as professionals, as a matter of fact, considerations for the debtor's position are likely to become secondary. For example, with respect to the Dutch experience, where competition among court bailiffs is valued, it is stated that 'Market forces compel court bailiffs to satisfy clients but are hardly an impetus to keep a careful eye on the debtor's interest'.<sup>44</sup>
- 107 In the preceding paragraph, we saw precisely one of the typical ways of implementing this principle, namely, the imposition of limits on the possibility of garnishing certain credits that guarantee the debtor's essential needs: in this way, on the one hand, the creditor is guaranteed the recovery (over time) of his or her credit, and on the other hand, the working or retired debtor is allowed to dispose of a periodic sum to provide for his or her own and the family's support.
- 108 Some national legislations are also concerned with taking a position in this context in different respects. An implementation of the principle of proportionality may be represented, for example, by the possibility of limiting excessive enforcement activities or requiring, as a priority, the attachment of certain assets and only subordinately that of other assets. This is done, in particular, to protect the debtor's principal residence, which, in some jurisdictions, can be attached only after attempting to satisfy itself on other assets.

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<sup>44</sup> A W Jongbloed, 'The Dutch Court Bailiffs Act eight years after its introduction' in C H van Rhee and A Uzelac (ed), *Enforcement and enforceability. Tradition and reform* (Intersentia 2010) 179, 197-198, who observes: 'court bailiffs [...] feel the tension between being entrepreneurs and officials at the same time'.

- 109 A very specific rule on this point is Art 801 of the Polish Code of Civil Procedure (PLCCP), pursuant to which (para 2), if there are any doubts whether a request to take specific enforcement actions or a request to provide explanations or information under Art 761 are necessary to ensure the proper course of enforcement, or there are reasonable grounds for assuming that they were submitted solely for the purpose of harassing the debtor, the court enforcement officer may oblige the creditor to justify its application under pain of charging the creditor with the costs of ineffective actions taken as a result of it - regardless of the outcome of the case. Under para 3, moreover, the court enforcement officer will dismiss the application referred to in para 2 if, in the light of the circumstances of the case or other enforcement proceedings conducted against the same debtor, it is highly probable that the application will not contribute to ensuring the proper course of enforcement or there are reasonable grounds for assuming that it was submitted solely for the purpose of harassing the debtor.
- 110 In Hungary, moreover, Section 7 of the Enforcement Act provides that money claims are to be collected, in the first place, from the funds on the debtor's account administered by the payment services, in the second place, from the debtor wages. Only if, by this route, full recovery of the sum is likely to be delayed in time, can the other assets of the debtor be attacked. However, the seized real property may be sold only if the claim is not fully covered by other assets of the debtor, or it could be satisfied in a disproportionately long period of time.<sup>45</sup>
- 111 In the same vein, the law may require that the claim be enforced in the least intrusive way against the debtor.
- 112 In Brazil, for example, Art 805 BRCCP requires the creditor to implement the least onerous means of enforcement, stating that, when the judgment creditor can bring about the execution by several means, the judge shall order that it be done in the least burdensome manner for the judgment debtor. It is for the judgment debtor who alleges that the manner of execution is the most burdensome to indicate other more effective and less burdensome means, under penalty of maintaining the execution measures already determined. In this regard, it is stated that even if the Brazilian civil procedure adopts (in regard to induction and subrogation measures) the *atypicality of the methods*, the idea of *less costs for the debtor* serves as a parameter of constant guidance for execution. Thus, if there is a possibility of fulfilling the obligation by more than one method, the one who is least harmful to the debtor should always be elected.<sup>46</sup>
- 113 Art 5, para 2 of the Law on Enforcement of the Republic of North Macedonia says that during the implementation of the enforcement, the bailiff has the obligation to take into account the dignity and personality of the parties participating in the enforcement

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<sup>45</sup> M Kengyel, 'System of civil enforcement in Hungary' in R Stürner and M Kawano (ed), *Comparative studies on enforcement and provisional measures* (Mohr Siebeck 2011) 82, 84.

<sup>46</sup> Arenhart and Osna (n 32).

procedure and their families, as well as for the enforcement to be more favourable for the debtor.<sup>47</sup>

- 114 In China, excessive or inconsiderate seizure are prohibited: in case of a number of properties to be enforced, the enforcement court shall select the property which has less impact on the work and living of the debtor and is easier to be enforced. If appropriate, the debtor could suggest the order of enforcement among different properties, while without justifiable reason, the court shall accept the suggestion (Art 3, Opinions Enforcement Goodwill 2019).<sup>48</sup>
- 115 What we have just mentioned are just some of the ways to implement the limitation of enforcement activities against the same debtor. To achieve this result, one can also give exclusive jurisdiction in the State to the Enforcement Agent of the debtor's place of residence (if resident in the State): in this way, the fragmentation of simultaneous and uncoordinated initiatives of enforcement agents from different places is avoided.<sup>49</sup> In the Finnish experience, for example, the identification of a single District Bailiff responsible for a debtor's situation is functional to take the debtor's situation as a whole into consideration at all times.<sup>50</sup>
- 116 A limitation of simultaneous proceedings against the same debtor may also be the consequence of a centralized information system (hypothetically, also accessible from other States), which collects all pending proceedings against a given individual.
- 117 As highlighted by the Good Practice Guide on enforcement of judicial decisions adopted by the European Commission for the efficiency of justice (CEPEJ), at the 26th Plenary Session, December 10-11, 2015<sup>51</sup> at point 43, this type of information is very useful for Enforcement Agents - and hence creditors - to help them decide whether it is worth proceeding with a (further) enforcement procedure: 'By reducing the number of measures which will not give creditors satisfaction but entail a cost for debtors, such mechanisms would make enforcement procedures more efficient'.
- 118 Information systems of this kind obviously pose problems of privacy and misuse of the information collected. The Good Practice Guide addresses the problem by stating: 'To

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<sup>47</sup> Etemi-Ademi and Zendeli (n 11) who also cite Art 9 of the Law on Enforcement of Kosovo, which refers to the protection of the debtor: 'During the implementation of the enforcement, attention should be paid to the protection of the debtor's dignity and the enforcement should be as harmless as possible for the debtor'.

<sup>48</sup> Cao (n 3).

<sup>49</sup> As also stated by Jongbloed (n 44) 199: 'A senseless piling up of attachments should be avoided'.

<sup>50</sup> Ervo (n 10) 80.

<sup>51</sup> Edited by G Payan, <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf> accessed 30 June 2024.

avoid undue disclosure, access to the information held in such computer databases should be strictly controlled’.

- 119 It may also be provided that only one type of enforcement action may be brought against the same debtor at the same time. And even where this limitation is not placed, it may be possible for the debtor to ask the court to revoke enforcement activities that are superabundant with respect to the number or value of the attached property in relation to the value of the claim. In Italy, eg, Art 496 ITCCP provides for this.<sup>52</sup>
- 120 It is also conceivable to provide for different enforcement activities depending on the type of debtor.
- 121 A variant of this theme is represented by the possibility for the debtor to avoid the sale of an attached asset by replacing it, in the course of the enforcement, with a sum of money (in Italy, this is called ‘conversion’ of the attachment: Art 495 ITCCP). In this context, it is recognized, as a rule, that the payment of the replacement sum can be made in instalments.
- 122 A provision similar to the Italian one is found in Art 847 of the BRCCP, whereby a judgment debtor may, within ten days, as from the notification of the levy of execution, request (under certain conditions) the substitution of the levied asset, provided that he or she proves that it will be less burdensome for him or her and that it will not cause any losses to the judgment creditor.
- 123 National rules that determine the striking out of the enforcement proceedings when the sale of the attached property should take place at an unfairly low price<sup>53</sup> may also be considered a form of debtor protection, in the light of the principle of proportionality.

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<sup>52</sup> ‘At the request of the judgment debtor or even ex officio, when the value of the attached assets exceeds the amount of the costs and claims referred to in the previous article, the judge, having heard the main creditor and the intervening creditors, may order the reduction of the attachment’. With specific reference to the attachment of the debtor’s claims, Art 546 last paragraph ITCCP provides: ‘In the case of an attachment enforced against several third parties, the debtor may request the proportional reduction of the individual attachments pursuant to Art 496 or the declaration of ineffectiveness of any of them; the enforcement judge, having summoned the parties, will make an order no later than twenty days after the application’.

<sup>53</sup> G E Kodek, ‘The Impact of the European Convention on Human Rights and Fundamental Liberties on Enforcement Practices’ (2006) 17(3) *European Business Law Review* 799, recalling Case 1 BvR 15/75 (Federal Constitutional Court (BVerfG), Germany), Order 25 October 1977, BVerfGE 46, 325 (332) and NJW 1978, 368.

- 124 Similarly, a proportional use of enforcement is guaranteed by the possibility for the debtor, who is required by law to make a disclosure of his assets, to mention only those that are suitable to secure the payment of the debt and not all others.<sup>54</sup>
- 125 Similar considerations can be made with respect to the debtor's recognized ability to continue to use the seized property for his or her daily life or work and even to live in a seized property if this does not interfere with the smooth conduct of the enforcement proceedings and until the property is sold. For example, in China, Art 5 of the Opinions Enforcement Goodwill 2019 states that if the workshops, machinery equipment, and other production materials of an enterprise are seized and the continuous use of them has no significant impact on the value of the property, the enforcement court shall approve such kind of use.<sup>55</sup>

## 6 THE DEBTOR'S INFORMATION AND PARTICIPATION

- 126 Rules that value information (and, therefore, awareness) and the debtor's participation in the enforcement proceedings as a form of implementing procedural fairness are increasingly common. Even in the context of enforcement, in other words, it is considered necessary to implement a principle of procedural transparency.<sup>56</sup>
- 127 Art 10 of the Global Code of Enforcement ('Alternative or participatory enforcement'), in this regard, states that, in order to adapt the enforcement to the situation of the creditor and the debtor, States must allow the active participation of the parties to the enforcement.
- 128 On the subject, the Good Practice Guide on enforcement of judicial decisions of the CEPEJ first highlights the need for informing the parties about the applicable legislation, in particular, bringing together the main rules in a single document. According to the Good Practice Guide, 'Full information about the applicable legislation is the first step toward understanding and controlling the enforcement process. Such information must be easily accessible', for example, by preparing codes and laws specifically dedicated to

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<sup>54</sup> See Commission of the European Communities, 'Green Paper - Effective enforcement of judgments in the European Union: the transparency of debtors' assets' Brussels, 6 March 2008 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52008DC0128> accessed 30 June 2024: 'From a comparative perspective, there are two different kinds of techniques providing access to information. The first is a system of declaration of the entire patrimony by the debtor. In some Member States, there is a similar system under which the debtor is also obliged to disclose his assets, but only to the extent necessary for the satisfaction of the claim'.

<sup>55</sup> Cao (n 3).

<sup>56</sup> One of the most important principles in enforcement is transparency. The executive officer has a duty to inform the debtor and to protect him/her *ex officio*. The duty to inform the party is broader if he/she is without legal counsel or an attorney. When informing the parties, the executive officer has, however, to keep in mind that he is to remain impartial: the parties also have to be treated equally: Á Pérez Ragone, 'Session 4: Constitution, Fundamental Rights and Law of Enforcement – 4.2. The Conflicts between the Fundamental Rights of the Creditor and the Debtor' (October 2014) International Association of Procedural Law Seoul Conference 2014, Conference Paper, 107.

enforcement (such as France's Code of Civil Enforcement Procedures or Spain's *Ley de enjuiciamiento civil*). The Guide also emphasizes the need to disseminate information about national legislation, such as through practical, concise fact sheets on the various enforcement procedures and the professional organization and tasks of enforcement agents. Descriptions of real cases may help the public to understand the rules that apply.

- 129 Being intended for the general public, to achieve their goal, such sheets should be drawn up in a language that everyone can understand.
- 130 According to the CEPEJ, also the standardization of procedural documents may be instrumental to the debtor's information and participation. The steps in an enforcement procedure generally take the form of a series of documents (such as orders to pay, attachment orders and formal written notices). For greater legal certainty in the European area of justice and in order to make it easier to check the regularity of the documents drawn up in any given enforcement procedure, the Member States, therefore, could formally standardize such documents and, for instance, set up document libraries, to which all Enforcement Agents would have access.
- 131 In this context, the debtor must be put in a position to know that enforcement proceedings are being taken against him or her: in this regard, the Good Practice Guide on enforcement of judicial decisions reminds EU Member States of the need to ensure that the parties, whether creditors or debtors, are able to understand the enforcement process in which they are involved and be made aware of the various options open to them and the legal consequences thereof. For that purpose, notifications to the debtors of the enforcement measures to be taken against them, as they are implemented, so as to enable the defendant to comply with or, where applicable, challenge each measure, are prescribed.<sup>57</sup>
- 132 Within the European Union, from this point of view, the effort is to go beyond the traditional guarantees of the right of defence understood in a static sense, providing the debtor with the main information about the procedure in which he is involved, the prerogatives he has and the possible remedies and remedies available to him. Such information may be either in writing, intervening in the content of procedural documents (stipulating that otherwise, the procedure will be void), to ensure that all notices served on debtors or third parties during enforcement procedures describe the potential consequences if they do not comply and any possibility that they may have of entering an objection. This description may also outline the time limits before which objections must be entered and state which court has jurisdiction to rule on them. To be suited, all information of this sort should appear in very visible characters and be drafted in a language that can be easily understood by everyone. Written information, on the

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<sup>57</sup> T Zoroska Kamilovska, 'Strengthening the legal framework for enforcement and its implementation in North Macedonia' in *Project: Strengthening Enforcement in the Western Balkans (BESP) (Project number 4000003842)* (2021) Center for International Legal Cooperation.



other hand, is not considered sufficient to ensure the debtor's full awareness. It is therefore envisaged, to be sure of the good understanding of this document by its recipient, that where an enforcement agent hands a procedural document directly to the recipient, he or she could be required to repeat the main information set out in this document orally. For more legal certainty, it might equally be stipulated that the document handed over must specify that this formality is to be completed.

- 133 In accordance with these directions, for example, Art 480, para 2 of the ITCCP provides that, on penalty of nullity, the *atto di precetto* (ie, the formal notice of payment by the creditor) must contain, *inter alia*, the warning that the debtor may, with the assistance of a crisis resolution institution or a professional appointed by the court, remedy the situation of over-indebtedness by concluding a crisis resolution agreement with the creditors or proposing a consumer plan to them. Moreover, under Art 492 ITCCP, the writ of attachment must contain, *inter alia*, the warning that the debtor, pursuant to Art 495, may request to substitute the attached property or claims with a sum of money equal to the amount owed to the main creditor and the intervening creditors (*conversione del pignoramento*, see above), providing all the related information. Moreover, the writ of attachment must also contain a warning in relation to the time limits to the possibility to bring an opposition to the enforcement under Art 615 ITCCP.
- 134 The debtor must also be given precise indications as to why enforcement proceedings are being taken against him (in order to be able, if necessary, to bring appropriate substantive challenges to the claim). From this point of view, the fact that, as a rule, an enforcement action is possible only when an enforcement title exists constitutes in itself a form of protection of the debtor against the enforcement of claims merely asserted by the creditor but lacking any even formal ascertainment. The title also enunciates the amount of the claim and ensures that enforcement does not take place for additional amounts.<sup>58</sup>
- 135 Also, for debtor information purposes, Art 8 of the Global Code of Enforcement ('Service of the enforceable title and acts of enforcement') requires that every measure of enforcement must, on pain of nullity, be preceded by the service or notification of the enforceable title on the debtor in accordance with the procedures provided for by national law. Every act of enforcement, moreover, must be brought to the attention of the debtor.
- 136 In addition, in some jurisdictions, such as China<sup>59</sup>, a court order is needed to proceed with site inspection in the search for property to be attached.

<sup>58</sup> Etemi-Ademi and Zendeli (n 11).

<sup>59</sup> Cao (n 3) 36, 43, with reference to Art 259 of the Civil Procedure Law (Mainland China) (CNCPL).



- 137 Likewise, it is a guarantee for the debtor that most systems allow the coercive execution only by legitimate enforcement authorities engaged by State power as a state monopoly.<sup>60</sup>
- 138 From this point of view, Finland's position, in which the enforcement authorities have to protect the interests of both creditors and debtors, is interesting. The latter normally do not need lawyers, because the enforcement authorities will take their rights into consideration *ex officio*.<sup>61</sup>
- 139 More generally, in implementing the fundamental principles analysed in Chapter 1, the debtor must be guaranteed the opportunity to participate in the enforcement proceedings and to receive communications on its development from the court or enforcement agent, even if only to follow the various steps and verify its formal regularity.
- 140 It can be argued that the debtor's cooperation also includes the rules of some jurisdictions that place an obligation on the debtor to provide the creditor with indications of the assets to be attached. This may translate into a form of protection for the debtor in cases where the creditor is obliged to attach, as a priority, precisely the assets indicated by the debtor (who, therefore, can avoid the attachment and sale of assets he particularly cares about such as his home). However, it should be considered that, as a rule, there are very strict formal arrangements for the debtor's declarations (often under oath) as well as heavy penalties for incomplete or untruthful declarations.<sup>62</sup> With this in mind, the rules offer the debtor the hard choice between full disclosure (and thus the potential loss of all his assets) and penalties for non-compliance with the legal obligation. If one considers that the debtor's right not to self-incriminate applies in this area as well, one may prefer to entrust third parties with the search for assets to be attached (see in this regard Chapter 2), thus taking liability away from the debtor regarding the outcome of this search. In other words, we are faced here with an 'indirect' form of protection of the debtor.
- 141 Looking forward, Art 5 of the Global code of digital enforcement provides that judicial officers / Enforcement Agents should provide clear and intelligible information on the use of a digital system to carry out enforcement measures.
- 142 Art 25 of the Global code of digital enforcement affirms another important principle in the context that concerns us here, namely the debtor's right to establish physical contact with judicial officers / Enforcement Agents as part of any enforcement process, including a digital process.

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<sup>60</sup> Kawano (n 32) 3, 6.

<sup>61</sup> Ervo (n 10) 78.

<sup>62</sup> B Hess, 'Different enforcement structures' in C H van Rhee and A Uzelac (ed), *Enforcement and Enforceability. Tradition and Reform* (Intersentia 2010) 41, 51.

## 7 THE CONSENSUAL SOLUTION OF ENFORCEMENT

- 143 The debtor's involvement in the enforcement proceedings, on the other hand, may also serve the purpose of more efficient and effective satisfaction of the claim.
- 144 Judicial sales of foreclosed property, for example, often take a very long time, have large costs and an uncertain outcome. Normally, moreover, the property is sold at less than market value.
- 145 It is therefore also in the creditor's interest that opportunities be provided to enable the debtor to pay his debt *in extremis*, without suffering the sale of his assets or otherwise to actively participate in liquidation activities, so as to streamline and make the procedure more effective. With this in mind, allowing the debtor to proceed directly with the sale of the asset, under the supervision of the Court or otherwise in agreement with the creditor or Enforcement Agent, may help to reduce the time of the procedure and to a better realization, also in the interest of the creditor. Such a 'direct sale' has recently been introduced in the Italian system by the new Art 568*bis* ITCCP.
- 146 Art 10 of the Global code of Enforcement ('Alternative or participatory enforcement'), in this regard, provides that States must ensure that the professional instructed with the enforcement has the option of adopting a consensual enforcement procedure at the request of the debtor.
- 147 With this in mind, at the initial stage of enforcement, giving adequate information to the debtor may be instrumental in obtaining a payment that avoids attachment, in the interest of both the creditor and the debtor.
- 148 The involvement of the debtor in order to avoid enforcement and satisfy the claim in a peaceful manner may also involve the use of mediation in the initial stages of enforcement. It is noted in this regard that 'modern systems consider enforcement agents as "balance wheels" between the creditors and the debtors, also responsible for amicable settlements between the parties which might be negotiated by the enforcement agents'.<sup>63</sup>
- 149 The use of mediation in this area avoids the social exclusion of the debtor. It is referred to as *participatory enforcement*, which is certainly more effective with debtors who *cannot* pay than with those who *will not* do so.
- 150 Indeed, in some jurisdictions, the enforcement agent is supposed to favour the mediated solution of debt recovery by encouraging spontaneous payment, perhaps in instalments, by the debtor.

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<sup>63</sup> Ibid 41, 53.

- 151 Thus, for example, Sec 802b, para 1 of the GCCP ('Stay of execution in case of payment agreement') provides that the bailiff should ensure that the proceedings are settled amicably in every situation. Under para 2, then, if the creditor has not ruled out a payment agreement, the bailiff may grant the debtor a payment term or allow repayment by partial payments (payment in instalments), provided that the debtor credibly demonstrates that he or she is able to make the payments to be determined in terms of quantity and time. If a payment plan is established according to para 1, enforcement is postponed. Repayment should be completed within 12 months. In accordance with para 3, the bailiff shall also immediately inform the creditor of the payment plan determined in accordance with para 2 and of the stay of execution. If the creditor immediately objects, the payment plan loses its validity once the debtor is informed; simultaneously, the stay of execution ends. The same effects occur if the debtor is in default with the agreed payment in whole or in part for more than two weeks. Similar provisions exist, eg, in Austria<sup>64</sup>, Spain, and Finland<sup>65</sup>.
- 152 In Switzerland, too, there is a 'composition procedure' in the context of enforcement (Federal Act of 16 December 1994, in force since 1 January 1997), with a 'provisional moratorium', governed by Art 293 of the Swiss Debt Enforcement and Bankruptcy Act. Such composition proceedings can be opened (as far as we are concerned here) with the debtor's petition, to which documents relating to the debtor's financial situation as well as a provisional reorganization plan must be attached.
- 153 In France<sup>66</sup>, the wage garnishment procedure must be preceded by a conciliation phase, during which the judge attempts to bring the employee into agreement with the creditor. In this regard, the debtor must be notified at least 15 days before the date of the conciliation hearing by registered letter with acknowledgement of receipt.
- 154 Also in England, High Court Enforcement Officers will try their best 'to negotiate a sensible arrangement which allows the debtor to raise the money or to trade himself out of the debt'.<sup>67</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Ervo (n 10) 74, 79.

<sup>66</sup> *Ministère de la Justice* [Ministry of Justice], 'Notice – Requête au juge d'instance aux fins de saisie des rémunérations' [Application to the district court judge for attachment of earnings] <https://www.justice.fr/sites/default/files/NReq.%20saisie%20des%20r%C3%A9mun%C3%A9rations.pdf> accessed 30 June 2024.

<sup>67</sup> R Turner, 'A model for an enforcement regime. The High Court Enforcement Officers of the Supreme Court of England and Wales' in C H van Rhee and A Uzelac (ed), *Enforcement and Enforceability. Tradition and Reform* (Intersentia 2010) 137, 144.

## 8 THE TRANSPARENCY OF THE PROCEDURE AND RESPECT FOR PRIVACY

- 155 Transparency and privacy protection are principles of absolute relevance in any procedural context, and even more so in the enforcement context, where they may however be subject to limitations due to the very purpose of enforcement.
- 156 The transparency of the enforcement procedure comes primarily through the participation of the debtor as seen in Part VI.
- 157 Respect of formal requirements and the possibility of challenging their violation is itself an expression of the necessary transparency.
- 158 It is not irrelevant from this point of view that regulations may predetermine the hours during which acts of enforcement may be carried out. Art 7 of the Global Code of Enforcement, in this regard, significantly states that enforcement may not take place outside the legal hours determined in accordance with the national law of the State of enforcement.
- 159 Similar considerations apply to the costs of enforcement, which must be predictable (and reasonable) not only for the creditor but also for the debtor himself.
- 160 States must ensure that these enforcement costs are fixed, predictable, transparent and reasonable, as provided in Art 5 of the Global Code of Enforcement.
- 161 Arguably, the use of information technology, such as in the collection of information about the debtor's assets or in the service of documents on interested parties, can help reduce the costs of the procedure.<sup>68</sup>
- 162 As for the debtor's right to privacy, it must undoubtedly be protected, on the one hand, by, for example, excluding the disclosure of information about executions brought against a particular individual and avoiding the use of lists of debtors, as is the case in China.<sup>69</sup> On the other hand, enforcement activity *per se* implies a violation of the debtor's legal sphere and the acquisition of sensitive information about him.
- 163 Indeed, Art 9 of the Global Code of Enforcement ('Access to information') provides that States must ensure that all relevant bodies, both public and private, disclose as quickly as possible to the professionals instructed with enforcement all the information in their possession concerning the debtor's domicile, registered office or principal place of

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<sup>68</sup> CEPEJ, 'Good practice guide on enforcement of judicial decisions' December 2015, 26th CEPEJ Plenary Session <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf> accessed 30 June 2024.

<sup>69</sup> Cao (n 3).

business of the debtor, as well as about the elements constituting the debtor's assets. These bodies may not withhold information by invoking professional confidentiality.

- 164 Similarly, the Good Practice Guide on enforcement of judicial decisions of the CEPEJ states at point 42 that bodies holding information that is legally accessible by enforcement agents (namely, public bodies or corporate bodies of public law and third parties having a debt toward the person concerned by the execution process) should not be able to refuse their requests on grounds of professional confidentiality.
- 165 In this regard, it is stated that it is true that access to the information has to be strictly monitored and controlled but it has to be noted that the right of the creditor to collect his claim is stronger than personal data protection regulations.<sup>70</sup>
- 166 The possibility of collecting information on the debtor's assets, as a matter of fact, implies an obvious invasion of the debtor's privacy. Such an invasion is justified in the relevant context, all the more so at a time in history when much of the wealth is intangible.
- 167 From this point of view, the fact that enforcement activity is entrusted to the court or to a single Enforcement Agent indirectly protects the debtor against the unsupervised dissemination of data and information about him or her.
- 168 On the other hand, even if, as we have seen, the creditor's reasons prevail over the debtor's privacy, also in application of the principle of proportionality (see above Section 3), it is proper to place some limits on the collection of sensitive information and on the possibility of giving it out.
- 169 First, there must be limits as to who can request information not available on public records by requiring that there is a 'legitimate interest' in the information. Such a legitimate interest arises in particular from proof of having a claim against a person. In Italy, for example, in order to request information about a debtor's assets, the creditor must attach a writ of execution served within the preceding 90 days, in accordance with Art 492*bis* ITCCP.
- 170 Limits must also be placed on the subjects who can collect the information and the scope of their research.
- 171 The Good Practice Guide on enforcement of judicial decisions states in paragraph 41 ('Persons authorized to receive information resulting from investigations into assets') that whether it is collected by consulting registers - not public - or requested from debtors themselves, legally accessible information on assets (such as debtors' home

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<sup>70</sup> M Omanovic, 'Procédures civiles d'exécution en France et en Bosnie Herzégovine : étude comparative et propositions de réforme' (2022) Université Côte d'Azur (Doctoral thesis) 5, 140, available at <https://theses.hal.science/tel-03564981> accessed 2 April 2025.

addresses, the identity and contact details of their employers or the establishments in which bank accounts are open in their name) should not be communicated directly to creditors. Only Enforcement Agents, who have a duty of confidentiality, should have access to such information.

172 It is possible to provide that the enforcement agent may stop his search after identifying a quantity of assets apparently sufficient to satisfy the claim or that he may not communicate the outcome of his search to the creditor, proceeding with the enforcement activity without disclosing sensitive information to the creditor.

173 An example of this is Art L152-3 of the French *Code des procédures civiles d'exécution*, whereby

les renseignements obtenus ne peuvent être utilisés que dans la seule mesure nécessaire à l'exécution du ou des titres pour lesquels ils ont été demandés. Ils ne peuvent, en aucun cas, être communiqués à des tiers ni faire l'objet d'un traitement de données à caractère personnel. Toute violation de ces dispositions est passible des peines encourues pour le délit prévu à l'article 226-21 du code pénal, sans préjudice, le cas échéant, de poursuites disciplinaires et de condamnation à dommages-intérêts.<sup>71</sup>

174 The issue of respecting privacy in enforcement proceedings is even more keenly felt today with the increasing use of information technology and artificial intelligence.

175 An interesting initiative, in this regard, is the recent Global code of digital enforcement, published by the UIHJ in November 2021, defining the principles that should govern enforcement of the future.

176 It is worth mentioning here some of the articles of this code.

177 Art 1, para 2 begins by stating that national law which provides for the use of a digital system for enforcement should guarantee respect for fundamental rights.

178 According to Art 2, the principles to be respected include: human dignity, solidarity, equity, transparency, predictability, respect for personal data and privacy.

179 In compliance with Art 19, judicial officers/enforcement agents should respect the confidentiality of personal data obtained during enforcement proceedings.

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<sup>71</sup> 'The information obtained may only be used to the extent necessary for the execution of the title or titles for which it was requested. It may not, under any circumstances, be communicated to third parties or be the subject of personal data processing. Any breach of these provisions is punishable by the penalties incurred for the offence provided for in Art 226-21 of the French Criminal Code, without prejudice, where appropriate, to disciplinary proceedings and an award of damages'.

180 Art 20, moreover, allows the reuse of information relating to a debtor's assets subject to a clear and precise legal framework.

181 It will be interesting to see how these principles will be received and implemented by national legislations.

**ABBREVIATIONS AND ACRONYMS**

ACCP	Code of Civil Procedure (Argentina)
ADR	Alternative Dispute Resolution
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BRCCP	Code of Civil Procedure (Brazil)
BVerfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
CCCP	California Code of Civil Procedure (USA)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
CNCPL	The Civil Procedure Law (Mainland China)
CPCE	<i>Code des Procédures Civiles d'Exécution</i> (France)
CPCQ	<i>Code de Procédure Civile du Québec</i> (Canada)
CT	<i>Code du Travail</i> (France)
CPCCN	<i>Código Procesal Civil y Comercial de la Nación</i> (Argentina)
ECLI	European Case Law Identifier
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GBP	British Pound
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
HUF	Hungarian Forint
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)



ITCCP	Code of Civil Procedure (Italy)
JCCP	Code of Civil Procedure (Japan)
LPCALE	Civil, Administrative and Labour Procedural Law (Brazil)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PLCCP	Code of Civil Procedure (Poland)
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UIHJ	<i>Union Internationale de Huissiers de Justice</i>
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes

## LEGISLATION

### International/Supranational

European Convention on State immunity of 16 May 1972

Vienna Convention on diplomatic relations of 18 April 1961

Vienna Convention on consular relations of 24 April 1963

### National

Act LIII of 1994 on the Judicial Execution Procedure (Hungary)

Civil, Administrative and Labour Procedural Law (Cuba)

Code of Civil Enforcement Procedures (France)

Code of Civil Procedure (Brazil, California, Italy, Germany, Poland, Quebec)

Code of Procedural Law (China)

Federal Law on Debt Collection and Bankruptcy (Switzerland)

Judicial Code (Belgium)

Law on Enforcement 2016 (North Macedonia)

Opinions Enforcement Goodwill 2019 (China)

Provisions Seizure 2004 (China)

Taking Control of Goods Regulations (2013) (England)

### Model laws

Global Code of Digital Enforcement

Global Code of Enforcement

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