Table ronde - Harmonisation législative - La nécessité de principes équitables de l'exécution : le Code mondial de l'exécution
Round Table – Harmonising Legislation – The Need for Fair Principles for Enforcement: the Global Code of Enforcement

Presentation of the Global Code of Enforcement

Françoise Andrieux,
Judicial Officer (France)
Secretary General of the UIHJ

This presentation could start by quoting two sentences explaining the wide and ambitious work of the UIHJ regarding the Global Code of Enforcement.

First: "There can be no state without law, no law without judge and no judgment without enforcement agent". Jacques Isnard.[1]

Second: "Far from coming to a close, we are at the beginning, in the improvement and in the consolidation of all actions undertaken for many years ". Leo Netten, President of the UIHJ[2].

These two sentences set the scene of our works.

This presentation will be divided in two parts:
- One relating to the Scientific Council of the UIHJ;
- One relating to the explanations about the Global Code of Enforcement.

I. The Scientific council as pillar of the Global Code of Enforcement

The UIHJ is facing a world full of various cultures combining lawyers from all areas of law. This diversity is a source of influence. However an ongoing need for comparative studies and for harmonization remains

To get a clearer picture of these different cultures and procedures, the UIHJ collects information through questionnaires that are regularly sent to its members for updated information.

[1] Former president of the UIHJ during the opening remarks in the nineteenth Congress Washington 2006 (Harmonization of enforcement procedures in an area of justice without borders)
[2] Word of the UIHJ President, UIHJ Newsletter of April 2012.

Through the answers, we set up what we name the Grand Questionnaire of the UIHJ including 26 sets of questions regarding our profession (from general aspects, training, access to and departure from the profession, to bankruptcy procedures, via mediation…)

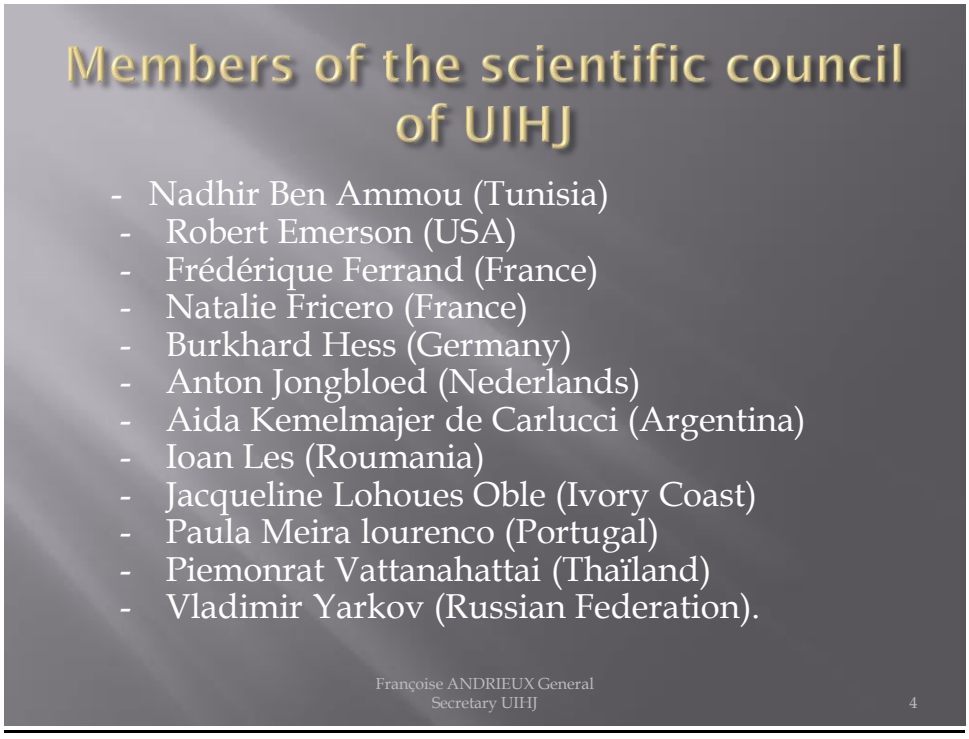
We also collect information through our seminars and meetings all over the world, with our special working groups within the UIHJ such as UIHJ-EuroDanube, UIHJ-EuroMed, or UIHJ-EuroScandinavia (which are regional groups where regional specificities are discussed…).

Of course, the members of the Scientific Council are involved in these works whenever possible. With this in mind, the mission of the Scientific Council of the UIHJ is to lead researches, to provide an analysis on the development of the law in relation to globalization, to join the works of the UIHJ, especially in conferences and to contribute to the publication of articles and legal studies under the auspices of the UIHJ

If you want to find out about the purpose of these publications, please visit the UIHJ website and discover our publications such as Juris-Union (the scientific body of communication), the magazine of UIHJ, positions papers or others articles in our newsletters.

The Scientific Council of the UIHJ is composed of professors of universities, judges of high courts, lawyers, specialists in international law, all with experience in dealing with professionals of enforcement. Its composition is designed to display the geographic expression of the UIHJ.

It is placed under the authority of the President of the UIHJ or its Vice-President and has a secretary (Thierry Guinot, a French enforcement agent).



Aiming at consolidating this Scientific Council, we have already welcomed a Japanese professor while approaching a Canadian one.

II. The Global Code of Enforcement

1st Question - A Global Code: Why?

Preliminary: General information

A few words on terminology are necessary as a start: it is understood that even under the name of "Code" and the work that will result we will deliver guidelines, or standards, on enforcement of civil decisions.

It will be written in French and English, which are the official languages of UIHJ.

The idea of this code results from one of the propositions of the congress of the UIHJ held in Washington in 2006.

And this idea launched at this congress was immediately agreed upon by decision of the board of the UIHJ.

Many questions arise (why, how????) about the opportunity of such a code but there are as many reasons for setting global standards of enforcement.

A) It is a necessity

The reasons for this item:

First: We live in a time of globalization. The internationalization of disputes and the enforcement of judgements is an obviousness that no one discusses.

Enforcement titles circulate around states in the world... So we have to find global rules.

Second: Today, the financial crisis ultimately helps our profession because it places the need for enforcement (in its broad sense including: mediation, debt collection) in the foreground. There is a strong influence of the economic crisis on enforcement and a strong influence of enforcement on the economic crisis. (See Doing Business: The report emphasizes the effectiveness of judicial systems).

Many international statements reaffirm the need to promote the rule of law and all states of the world are concerned.

People, companies will engage in economic relationship only if they can have enough guarantees, enough knowledge of what will happen if the contract fails to effectively install a mutual trust between economic operators. Readability and efficiency are the key words for economic success.

We focused on having rules easily transferable to offer harmonization. If I have to enforce a judgment in the Russian Federation, the rules, the principles should be the same as in my country.

We should propose models, standards.

Natalie Fricero[3], who leads the works about the Global Code of Enforcement within the Scientific Council of the UIHJ, states that "*These standards should define the ideal enforcement procedures. They could be implemented to work with various national systems. For example, we can consider that the debtor must be able to exercise its rights of defence in enforcement proceedings: but then it is up to the State to define the suitable appeal system. Reflection could lead to proposals for the creation of global standards for enforcement*".

An example is set by West Africa with the organization of the OHADA Treaty (Organization for the Harmonization of Business Law in Africa) which harmonizes the rules concerning business between the Member States.

B. The International Union of judicial officers is fully legitimate to carry out this project

- First: The role of judicial officers is important. Reflection could focus on enforcement agents because even in different forms, they exist everywhere. They usually have the monopoly on enforcement, conferred to them by the State. The UIHJ includes 75 member states with enforcement agents representing a wide range of systems: this is a considerable asset for a reflection on "global" principles of enforcement.

- Then, the International Union has always played a leading role in research work on enforcement. Many of them already have been published, and did have a significant impact on legislative developments, including the right of the European Union or of the Council of Europe (e.g. it is clear that the CEPEJ guidelines are based on the solutions suggested by its Working Group on Execution). This is why the International Union is legitimate in promoting democratic standards of enforcement.

2nd Question - A Global Code: How?

What are the methodology and the general content?

Method:

The role of the Scientific Council:

The existing different legal cultures will serve as a basis of a synthesis tool: the Global Code of Enforcement will be for the next two years the culmination of the intellectual work of the Scientific Council of the UIHJ. It has already been presented to various European institutions (the European Commission, the CEPEJ), and global institutions (The Hague Conference on Private International Law), and it was warmly welcomed because it meets a need for these institutions as we already said. When international organizations want harmonization, relations at global level should be identical.

Everyone is aware that if the economy is important, it cannot develop without effective and normalised enforcement.

[3] Professor at Nice Sophia Antipolis University (France)

Work on the Global Code of Enforcement is intended to have a transcontinental normative value.

There should be global standards of procedure and global standards of enforcement, but it is necessary to limit the principles and set minimum standards to be as much as possible close to reality and to ensure that these principles are realistic.

A code that remains at its theoretical state has no interest. It has to embrace the reality of law. The President of the UIHJ, Leo Netten, like his predecessor Jacques Isnard, always insisted that the code should be rooted in life.

This led us to review the reading grid of the code. These standards should be considered in the light of economic development and economic issues. This led us to the conclusion that it was necessary to add new articles in the code for its full integration into the economic field.

Through our work with the Scientific Council, we have also expanded our scope in the direction of the new enforcement activities relating to enforcement such as soft enforcement, or alternative enforcement. This is very new and modern.

This approach should also be supported by the terminology because terminological understanding is a key issue. The less we use terms which are too specific, the more we are likely to reach our goal of harmonization.

This is not an easy task: we have to find the right balance between being not too vague and not too specific.

We have listed a number of words for our glossary, still with the help of the members of the Scientific Council of the UIHJ to whom we asked for its assistance for definitions and to keep us informed of new laws.

General content:

The code will be divided in four parts:
- The 1st part will define the “Guiding Principles”
- The 2nd part will concern “Enforcement agents”
- The 3rd part will concern “Enforcement measures”
- The 4th part will concern "Provisional measures"

We will add mediation, alternative mode of enforcement, and soft enforcement.

Process

In each part, the standards will be written under the form of "articles".
The various articles will be completed: a definition of terms (glossary) and explanatory comments (explanatory memorandum).

Work Plan: an initial list of standards has been developed in consultation with various members of the Scientific Council, representing a large number of different legal systems.

First of all, we are making an inventory of national instruments, standards, through a chronological cutting-up of enforcement: standard in the state and circulation or enforcement of foreign judgments in the states.

The code is divided into chapters. For each chapter a series of recommendations will be made.

To do this, a survey has already been conducted among the members of the Scientific Council with a simple question:

What are the basic principles of enforcement in your country?

Each section will contain the title and will be preceded by an argument presented as follows:
1. The principles of the Council of Europe
2. The principles of the European Union
3. The principles of international institutions
4. The principles of national law including:
- Legal texts
- Case law
- Doctrine

Example article 1:

Article 1 – Law Enforcement
Any creditor holding an enforcement order is entitled to effectively enforce payment by his debtor under the conditions provided by law.

ARGUMENTS

1) Principles of the Council of Europe

Article 6 § 1 of the European Convention on Human Rights and article 1 of the additional Protocol n° 1 to the Convention:

In the judgment Hornsby vs. Greece of 19 March 1997 *(ECHR, 19 March 1997, n° 25701/94, Hornsby vs. Greece : D. 1998, 74, note Fricero ; RTD civ. 1998, 993, obs. Marguénaud; N. Fricero, Le droit européen à l'exécution des jugements, Dr et Procédures 2001, p. 6),* the European Court of Human Rights declares that the **right to effectively enforce judgments within a reasonable delay** is an integral part **of a fair trial** foreseen by **article 6 § 1** of the European Convention based on the following means: Firstly, the concrete and effective character of the right to a fair trial which "*would be illusory if a contracting State's internal legal order were to permit a final and binding judgment to remain inoperative to one of the parties' disadvantage".* Moreover, the non-enforcement of judgments "*would risk creating situations incompatible with the principle of the rule of law which the contracting States committed to respect by ratifying the Convention"*. Accordingly, the Court holds in principle that "*the enforcement of a judgment or court order of any jurisdiction must therefore be considered an integral part of the "proceedings" within the meaning of article 6* of the Convention.

The right to enforcement becomes the cornerstone of a fair trial, requiring the **effectiveness of article 6 § 1 and the rule of law** (*ECHR, 27 June 2000, n° 32842/96*, *Nuutinen vs. Finland*: *see*

dissenting opinion of judge Zupancic shared by judges Pantiru and Türmen stating: "a final judgment which would not be enforced would be purely suggestive; the enforcement of a court decision is in itself at the heart of the rule of law; the rule of law replaces the logic of private force by that of public force; to render justice is to satisfy the party respecting the law, in other words the enforcement of judgments represents an essential and immutable aspect of the rule of law"). Given the stakes at hand, the European Court refuses to consider that the proceedings or the enforcement process are autonomous phases of a "trial": it holds that article 6 "requires that all phases of legal proceedings aimed at settling disputes on rights and obligations of a civilian nature are concluded within a reasonable period of time without the possibility to except subsequent phases of decisions on the substance (*ECHR, 9 June 2009, n° 28142/04, Bendayan Azcantot and Benalal Bendayan vs. Spain; ECHR, 21 April 1998, Estima Jorge vs. Portugal ; ECHR, 1 June 2006, n° 24661/02 , Buj vs. Croatia).*

The European Court in Strasbourg also refers to **article 1 of Protocol nº 1** stating that the non-enforcement of a court order affects the right to peaceful enjoyment of possessions. Indeed, if a claim is judicially established, the Court regards it as a property protected by article 1, considering the economic aspect of the right to enforcement, and hands down a double–condemnation of the State (ECHR, 7 May 2002, Bourdov vs. Russia, 7 May 2002: Droit et procédures 2002, p. 290, obs. Fricero. – and already in ECHR, 9 July. 1997, Akkus vs. Turkey: D. 1997, summary p. 363, obs. Fricero, on the late payment of an expropriation indemnity fixed by a final court order). Thus, when a judgment condemns an administration for failing to provide official accommodation to a civil servant, the non-enforcement of this court order this represents a violation of article 1 of Protocol n° 1 (ECHR, 24 May 2005, Dumbraveanu vs. Moldova, 24 May 2005. – ECHR, 9 June 2009, n° 16861/02, Nicola Silvestri vs. Italy). Likewise, if a final judgment condemns a public educational institution to pay salary, seniority bonuses and health benefits to one of its employees, the public authorities cannot claim lack of funds to refuse payment *(ECHR, 29 June 2004, Piven vs. Ukraine; see also ECHR, 24 February 2005, Poznakhirina vs. Russia).*

2) Principles of the European Union:

Doctrine: *G. Payan, Pour un droit européen de l'exécution en matière civile et commerciale, thèse dactyl., Toulon, 2008. [For a European civil and commercial enforcement legislation]*
The performance of the judicial system plays a vitally important role: Creditors must be able to obtain recognition of their rights and the condemnation of their debtors according to simple, rapid, relatively similar procedures and, above all, should be able to **benefit from free movement and effective enforcement of their enforcement order** in any EU member state.

3) Principles of international institutions

4) Principles of national legislation

(These examples are taken from the answers to questionnaires submitted by the International Union in the context of reflections on the Global Code of Enforcement):

Thailand: The creditor may ask the court to order enforcement (in case of obligatory affirmative action, a third party may be condemned at debtor's expense). The CPC specifies that the creditor is entitled to request enforcement within 10 days as of the date the judgment's pronouncement. It is the court which issues the warrant for attachment remitted to the enforcement officer (who is authorised to carry out the enforcement as if he were a judicial officer).

Russia, Kazakhstan, Ukraine and Belarus: The law affirms the right to enforcement according to the requirements of a fair trial, i.e. notably within a reasonable delay. The department of judicial officers is obliged to carry out the enforcement order.

Romania, Hungary and the Republic of Moldavia: No law *expressis verbis*, but several provisions confirm its existence. Notably, the law confers on the judicial officer an active role in enforcements as he is obliged to exercise "by any lawful means his obligations entirely and rapidly as foreseen in the enforcement order according to the provisions of the law, the rights of the parties and those of other interested persons".

Portugal: Article 20, § 4 and § 5 of the Constitution of the Republic of Portugal concedes the right to a fair trial and the right to defend one's rights by effective protection, which also includes the creditor's right to enforcement, considered a fundamental right. The Portuguese Code of Civil Procedure (Decree-law n° 44-129 of 28 December 1968, as amended) organises enforcement actions and procedures.

In the OHADA zone, the Uniform Act on simplified procedures of recovery of receivables and methods of enforcement (Doctrine: Jacqueline Lohoues-Oble, The Treaty on organising the harmonisation in Africa of business law and uniform law on enforcement procedures, intervention at the 20th UIHJ Conference**)** affirms this right in article 28: The creditor can force his defaulting debtor to carry out his obligations or protective measures to preserve his rights.

In the United States, due to the federal organisation, one can refer to the Uniform Foreign Money-Judgments recognition Act (13 U.L.A.39(1986) adopted by 31 states permitting a plaintiff to request a court to recognise a judgment rendered by another court and to carry it out. The Uniform Enforcement of Foreign Judgments Act of 1948 (revised in 1964) was adopted by 47 of the 50 states (13 U.L.A. 261(1986) permitting to have a judgment rendered by another state's court carried out in the same way as the judgment rendered by the court of the state in question.

In France: Article L. 111-1 of the Code of Civil Enforcement Procedures (statute n° 2011-1895 of 19 December 2011) expressly foresees that "any creditor may, on the conditions foreseen by law, force his debtor to meet his obligations".