UNIVERSITÀ DEGLI STUDI DI MILANO

DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

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Report on National Case Law

France

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I. Pre-selection

This Report provides a summary and a critical assessment of French case law related to the five Regulations covered by the **EFFORTS Project**[1], *i.e.* Regulation (EU) No 1215/2012 of 12 December 2012 (hereinafter the "**BI bis Regulation**" or "**BI bis**"), Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter the "**EEO Regulation**" or "**EEOR**"), Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure (hereinafter the "**EPO Regulation**" or "**EPOR**"), Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (hereinafter the "**ESCP Regulation**" or "**ESCPR**"), and Regulation No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure (hereinafter the "**EAPO Regulation**" or "**EAPOR**").

Overall, the Report covers a total of eighty-three (83) judgments handed down by French courts, including:

- Twenty-four (24) decisions issued by courts of first instance, of which eight (8) issued by civil courts (*tribunal d'instance* and *tribunal de grande instance*, which have been merged in a single *tribunal judiciaire* since 1 January 2020) and sixteen (16) issued by commercial courts (*tribunal de commerce*);

- Fifty-one (50) decisions issued by the *cours d'appel*, *i.e.* by French Courts of Appeal. In France, these courts are in principle competent to hear ordinary appeals filed against decisions issued by a court of first instance (either civil and commercial), provided that the value of the dispute exceeds 5000 euros;

- Nine (9) decisions issued by the French *Cour de cassation*.

Given the absence of a publicly searchable online database including all of the decisions handed down by French civil and commercial courts[2], the judgments included in this Report have been gathered by consulting three of the major commercial legal databases available online[3].

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[1] For more information about the EFFORTS Project, including other research outputs and related events, visit https://efforts.unimi.it/ [last visited 1 September 2021].
[2] For the relevant period, the website www.legifrance.gouv.fr only includes the totality of the decisions issued by the French *Cour de cassation* and a selection of judgments issued by French *cours d'appel*.
[3] *I.e.* Dalloz.fr, Lexis360.fr and Doctrine.fr.

The method of selection employed to gather the relevant decisions varies slightly depending on the relevant Regulation:

- Concerning the BI bis Regulation, the Report includes summaries of all the available judgments issued after the date of applicability of the Regulation[4] and involving the application of the provisions regarding the recognition and enforcement of judgments and extra-judicial titles;

- Concerning the other four Regulations, the Report builds upon the research conducted by Veerle Van Den Eeckhout and Carlos Santaló Goris in the context of the IC2BE Project5. Specifically, the present Report includes a critical assessment of the judgments published in the publicly accessible case law database established as part of IC2BE6. Additionally, the present Report includes summaries of the most relevant decisions that were not covered by the IC2BE database, including – but not limited to – judgments issued since 2019. These judgments have been gathered by consulting the aforementioned commercial legal databases.

[4] *I.e.* since 10 January 2015, according to Article 81 BI bis.
[5] See "Cross-Border Enforcement in Europe: Civil Justice Framework, National Courts and the Court of Justice of the European Union" (JUST-AG-2016-02). On the project, see in particular V. Van Den Eeckhout and C. Santaló Goris, "France", in J. von Hein and T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021).
[6] The case law database is publicly available at https://ic2be.uantwerpen.be/#/search/national [last visited on 1 September 2021]. Where appropriate, existing summaries have been expanded in order to provide a broader overview of the interactions between European and French national procedural law.

II. BI bis Regulation

A. Case Law Summaries

1. Tribunal de grande instance de Grasse, greffier en chef, 03.05.2017, No 17/00005

Following a judgment issued by the *Tribunale di Genova* (Italy) on 29 April 2016, the judgment creditor applied for a declaration of enforceability pursuant to Article 53 *et seq.* of the BI Regulation 2000. The claimant filed its application before the chief clerk of the *tribunal de grande instance* of Grasse, in accordance with Article 509-2 of the French Code of Civil Procedure[7].

The chief clerk correctly rejected the application, noting that the proceedings before the Italian court had been initiated after 10 January 2015, and that pursuant to Article 66(2) BI bis, the new Brussels I bis regime applied to the recognition and enforcement of the Italian judgment in France.

In addition to that, the chief clerk also cited Article 36 of the BI Regulation, stating that: "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required", provided that the claimant complies with the requirements set out in Article 37.

Finally, the chief clerk reminded the claimant that he could appeal the decision before the President of the Regional Court pursuant to Article 509-7 of the French Code of Civil Procedure.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*)

2. Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164

In a dispute opposing an ex-couple regarding the recovery of maintenance obligations, a woman had carried out an attachment of wages in Luxembourg against her ex-partner's employer on the basis of a decision issued by a French court. The attachment was subsequently vacated by a decision of the *Tribunal de Paix d'Esch-sur-Alzette* (Luxembourg) dated 21 November 2014, which also ordered the woman to return the sum of 1,575.78 euros unduly received because of the enforcement measure.

Seeking to recover the sums unduly paid as a result of the attachment, the ex-partner applied for a declaration of enforceability of the Luxembourgish decision before the chief clerk of the *tribunal de grande*

[7] *Code de procédure civile, art. 509-2.*

instance of Thionville. In support of his application, the claimant produced a certificate delivered by the court of origin on 26 April 2016 and a proof of service of the Luxembourgish judgment dated 10 December 2014. Based on these documents, the judgment creditor asked the chief clerk to declare that the Luxembourgish judgment complied "*with the requirements for the recognition of foreign decisions in the European area set out in Article 45 of Regulation 1215/2012*" and consequently that it was "*enforceable on the territory of the French Republic pursuant to Article 38 of this regulation* [sic]". The chief clerk granted the application, noting that the claimant had produced the documents required by Articles 53 and 54 of the Brussels I Regulation 2000, that the Luxembourgish judgment did not violate French public policy, and that it was not irreconcilable with any French decision issued between the same parties.

On appeal, the judgment debtor asked the *cour d'appel* of Metz to quash the declaration made by the chief clerk. In support of her appeal, the appellant argued, firstly, that the provisions of the Brussels I Regulation 2000 did not apply to the recognition and enforcement of the Luxembourgish judgment because the proceedings concerned a dispute regarding the recovery of maintenance obligations covered by the Regulation 4/2009. Subsidiarily, the appellant argued that the judgment creditor should have been represented by a French lawyer and should have established a postal address within the area of jurisdiction of the court, whereas in this case the claimant had been assisted by a Luxembourgish lawyer and had given an address outside of the jurisdiction. Thirdly, she also highlighted that the Luxembourgish judgment did not constitute an "enforceable judgment" within the meaning of the Brussels I Regulation 2000 because the certificate drawn up by the court of origin stated at point 4.4.4 that: "*the judgment does not contain an enforceable obligation*". Fourthly, the appellant criticised the recognition of the Luxembourgish judgment by arguing that the documents of service did not include any information regarding the delay and the procedures of appeal. Finally, she also argued that, in any case, enforcement should at least be stayed given that parallel proceedings were pending in France regarding the maintenance obligations of the parties and that such proceedings would give rise to a national judgment on the same issues.

The judgment creditor contented that Regulation No 4/2009 did not apply to the case because the dispute dealt with the lifting of an enforcement measure and the recovery of indue payments rather than with an action for the recovery of maintenance obligations. Additionally, he also pointed out that, pursuant to Article 509-2 of the French Code of Civil Procedure, the requesting party did not need to be represented by a lawyer when applying for a declaration of enforceability of a judgment issued in another Member State, and that he was not required to have a postal address in the Member State addressed. Finally, he also contended that Luxembourgish law should apply to the service of the judgment issued by the *Tribunal de paix* and that the judgment was not irreconcilable with any existing French decision.

The *cour d'appel* of Metz rejected the appeal and confirmed the declaration of enforceability issued by the chief clerk. In doing so, the court held, erroneously, that Articles 33 and 38 of the BI bis Regulation 2000 had been replaced by Articles 36 to 37 and 39 to 44 of the new BI bis Regulation. On the basis of this assumption, the court held that the judgment creditor could seek a declaration of enforceability under the BI bis Regulation [*sic*] without being represented by a lawyer and without having a postal address in France. Secondly, the court held that the BI bis Regulation applied *ratione materiae*, because the Luxembourgish court had not ruled on the amount of maintenance obligations between the parties, but rather adjudicated a dispute regarding their respective rights over the sums that had been attached pursuant to prior judicial decisions issued by French courts which had fixed the amount of the maintenance obligations and opened insolvency proceedings against the judgment creditor. Thirdly, the court held that the Luxembourgish decision should be regarded as an "enforceable judgment" within the meaning of Article 39 of the BI bis Regulation despite the content of the certificate issued by the court of origin. On this point, the court noted that the enforceability of the obligations resulted from the decision itself because the court of origin had declared its judgment provisionally enforceable. Finally, the *cour d'appel* also held that under Article 45 BI bis the irregularity of service could not lead to a refusal of recognition unless the judgment was given in default of appearance and the defendant was not served in sufficient time and in such a way as to enable him to arrange for his defence, which was not the case here, and that the judgment was not irreconcilable with any existing French decision issued between the parties.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*, *ratione personae*), Definition of "judgment", Enforcement (lack or suspension of enforceability), Grounds for refusal of recognition/enforcement (fair trial, irreconcilable decisions)

3. Cour d'appel de Douai, ch. 8 sect. 3, 06.09.2018, No 17/06847

Following a real estate loan dated 26 September 2007 for a total amount of 84,939.21 euros in principal contained in an authentic instrument signed before a Belgian notary, a bank carried out the attachment of the vehicle and the bank accounts of one of its borrowers by acts dated 26 January and 8 February 2017. On 14 March 2017, the debtor summoned the bank before the enforcement judge of the *tribunal de grande instance* of Lille, seeking the annulment of these attachments. The enforcement judge rejected the claim by a decision dated 6 November 2017, and the debtor filed an appeal on the following 23 November 2017, arguing *inter alia* that the provisions of the BI bis Regulation could not apply to the enforcement of an authentic instrument concluded in 2007.

The *cour d'appel* of Douai granted the application and reversed the decision of the enforcement judge. In particular, the court noted that under Article 66 BI bis, the BI bis Regulation regime only applies to authentic instruments formally drawn up or registered after 10 January 2015. Accordingly, the *cour d'appel*

held that the creditor should have applied for a declaration of enforceability under Article 57 BI Regulation 2000 before initiating enforcement proceedings in France. In the absence of such declaration, the bank did not have any valid enforceable title to pursue any enforcement measures in France.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*)

4. Cour de cassation, Civ. 1, 03.10.2018, No 17-20.296, Bull. civ. I No 908

Acting on a request by a Cypriot company dated 18 December 2015, a French enforcement judge authorised the carrying out of protective measures against three French companies to secure the enforcement of a claim of the amount of 16,947,384 euros in principal. The application was granted even though the same claim had already been the subject of a *Mareva* injunction delivered by the Limassol District Court in Cyprus dated 24 April 1998 against the same defendants, followed by a worldwide discovery order issued by this same court on 16 March 2013.

On appeal, the *cour d'appel* of Paris held that the French courts had jurisdiction to authorise the carrying out of protective measures pursuant to Article 35 BI bis, and ruled that the effects of the Cypriot decisions, which were entitled to recognition in accordance under the provisions of the BI Regulation 2000, did not bar the claimant from seeking protective measures under French domestic law.

The French companies brought the case before the French *Cour de cassation*, arguing that the principle of *res judicata* prevented the claimant from seeking in France a relief which had already been granted by a decision issued in another Member State and that, by allowing the claimant to perform interlocutory attachments over their assets, the French courts had run counter the decision of the Cypriot court allowing the defendants to make use of a monthly amount for their running costs.

The *Cour de cassation* rejected these arguments and confirmed the judgment issued by the *cour d'appel* of Paris. On the one hand, it approved the lower court's reasoning and held that the principle of *res judicata* was not an obstacle to the granting of the application because the orders issued by the Cypriot courts differed from the protective measures available under French domestic law. On this point, the *Cour de cassation* held that while the former enjoined the defendants from dilapidating their assets under the penalty of civil and criminal sanctions, the latter prevented the defendants from alienating their assets by rendering legally void any transfer of property to third parties. On the other hand, the Supreme Court also approved the judgment of the *cour d'appel* in that it held that, absent any actual attachment of their bank accounts, the defendant had not been deprived of the amounts left at their disposal by the Cypriot courts.

Noteworthily, the French *Cour de cassation* also rejected the defendants' request for a preliminary ruling by the CJEU, holding that the case did not give rise to any reasonable doubt as to the interpretation of Articles 36(1) and 41(1) of the BI bis Regulation.

Keywords: Definition of "judgment", Recognition (*res judicata*), Enforcement (protective measures in aid of), Adaptation

5. Cour d'appel de Metz, 1re ch., 23.10.2018, 17/00228

In a dispute first brought before the *tribunal de grande instance* of Thionville on 29 October 2014, the plaintiff claimed the restitution of a vehicle he had lent the defendant and asked the court to order the payment of compensation for various counts of damage, including loss of use. The defendant resisted the claims by arguing, *inter alia*, that the plaintiff had lent her the vehicle to repay a debt of 17,500 euros which he had acknowledged by an act dated 15 February 2012. The court of first instance rejected the claim, and the plaintiff appealed before the *cour d'appel* of Metz, which reversed the judgment.

In the relevant part, the decision issued by the *cour d'appel* ruled out the validity of the acknowledgement of debt dated 15 February 2012. Without discussing the applicability of the BI bis Regulation, the court noted that the act had been declared null and void by a decision of the *Cour d'appel du Grand Duché de Luxembourg* (Luxembourg) dated 9 March 2016, which the appellant had produced. By contrast, the French court of appeal did not mention the certificate provided for by Article 53 BI bis. The court held that the Luxembourgish decision should be recognised in France without any special procedure and thus had *res judicata* between the parties under Article 36 BI bis.

Keywords: Recognition (*res judicata*)

6. Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771

On 12 April 2017, an Italian bank served an order for payment issued by the *Tribunale ordinario di Sondrio* (Italy) for 77,023 euros plus interests on one of its debtors. The order was dated 15 January 2015, and was accompanied by a certificate dated 6 February 2017 issued by the court of origin in accordance with the provisions of the BI bis Regulation. On 12 April 2017, the judgment creditor also carried out a third-party debt order and an attachment of movable property against a French bank. These attachments were notified to the debtor on 18 April 2017. On 18 May 2017, the debtor resisted enforcement by filing a claim before the enforcement judge of the *tribunal de grande instance* of Paris. The judge rejected the claim on 14 November 2017, and the debtor appealed the decision before the *cour d'appel* of Paris.

On appeal, the appellant asked the court to declare that the certificate issued by the Italian court was null and void because the BI bis Regulation did not apply *ratione temporis*, and argued that the order for payment had been irregularly served upon him on 12 April 2017. He also applied for a refusal of recognition and enforcement of the Italian order for payment, which he claimed had lapsed because it had not been regularly served upon him when the Italian court first issued it, and asked the court to annul all the subsequent enforcement measures the creditor had taken in France.

The *cour d'appel* rejected all claims. Firstly, it held that it had no power to annul the certificate issued by the Italian court, stating that: "*It is not for the courts of the State in which enforcement of a decision given by another State is sought to assess the validity of the certificate issued by the authorities of the State of origin*". As a consequence, the French court assessed the regularity of the enforcement procedures in accordance with the BI bis Regulation. In doing so, it held that service of the Italian judgment and the certificate was regular even though the latter stated that the judgment had been issued on 16 January 2015, which was actually the day when the decision had been entered in the register of the court[8].

The court also held that the Italian decision did not violate any grounds for refusing recognition listed by Article 45 BI bis. Specifically, the court rejected the debtor's argument that the Italian courts did not have jurisdiction to issue the order for payment, noting that it did not have the power to review the jurisdiction of the court of origin outside the hypothesis laid out in Article 45(1)(e). The court also held that the order had been regularly served upon him in a way that excluded the application of Article 45(1)(b). As a result, the court rejected the application to annul the enforcement measures taken in France.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*), Grounds for refusal of recognition/enforcement (international public policy, fair trial, lack of jurisdiction)

7. Cour d'appel de Nancy, 1re ch., 05.07.2019, No 18/01365, *SASU Dstorage c/ Sté ChessBase Schachprogramme Schachdatenbank Verlagsgesellschaft mbH*

The plaintiff, a French company offering website hosting services, had been enjoined to delete some illicit content from its servers following *ex parte* proceedings initiated by the defendant, a German software company, before the Hambourg *Landgericht* (Germany). The decision was issued on 8 March 2016, and was communicated by email before being served upon the French company on 12 May 2016. The French

[8] In this regard, the Court of Appeal noted that both dates had actually been mentioned on the order itself and on the document of service, and that the amount reported on the certificate matched the sums ordered by the Italian tribunal. Therefore, there was no doubt as to the identity of the decision which the creditor sought to enforce.

company complied with the injunction but contested the allocation of costs made by the German court. On 15 July 2016, the French company filed an action before the *tribunal de grande instance* of Epinal pursuant to, *inter alia*, Articles 7, 27, 28, and 45 of the BI bis Regulation, asking the French court to refuse the recognition of the German judgment and to order the defendant to bear the costs of the proceedings and pay 5,000 euros for irrecoverable costs pursuant to Article 700 of the French Code of Civil Procedure.

The court of first instance rejected the claims, and the plaintiff appealed the decision before the *cour d'appel* of Nancy. In support of its position, the appellant contended that the German judgment violated French international public policy. Firstly, the appellant argued that the German decision violated procedural international public policy because the German court should have verified its international jurisdiction before issuing an *ex parte* order. Secondly, the appellant argued that the judgment violated substantive international public policy because the German court should have verified whether any breach had occurred in Germany before applying German law. Also, the appellant contented that the injunction to make sure that the content would not reappear in the future violated its freedom of enterprise, its right to freedom of expression and information, and the principle of equality before public charges. In response, the appellee replied that the appellant was not entitled to raise arguments based on Article 45(1)(a) BI bis after failing to appeal the judgment in the country of origin.

The court sided with the appellee. It held that when the request for a refusal of recognition is based on a violation of international public policy under Article 45(1)(a) BI bis, litigants should avail themselves of all the remedies available in the Member State of origin unless particular circumstances make it too difficult or impossible to exercise them. Here, the court noted that the notification included a French translation and a mention of the procedures for review available before German courts. Therefore, the court held that the creditor had regularly served the German default judgment on the debtor, which should have appealed it in the Member State of origin.

Keywords: Definition of "judgment", Recognition (procedure for refusal of recognition), Grounds for refusal of recognition/enforcement (international public policy)

8. Cour d'appel de Versailles, 16e ch., 09.01.2020, No 17/08683, *Sté Bonatti S.P.A. c/ SA GRT Gaz*

On 30 July 2015, the claimant, an Italian company, applied for an order for payment before the *Tribunale di Parma* (Italy) against a French company. On 3 August 2015, the Italian court granted the application and issued an order for payment, which was declared enforceable on 8 January 2016. On 27 April 2016, the creditor served the judgment on the debtor together with a certificate established pursuant to Article 53 BI bis. On 17 May 2016, the creditor sought to enforce the Italian judgment by carrying out a third-party

debt order against a French bank for a total amount of 1,658,276.85 euros. On 20 May 2016, the judgment creditor notified the third-party debt order to the judgment debtor.

On 17 June 2016, the judgment debtor sued the judgment creditor before the enforcement judge of the *tribunal de grande instance* of Nanterre, arguing that the third-party debt order should be vacated because it did not rest upon any valid enforceable title. The enforcement judge upheld the claim based on Articles 45 and 46 BI bis. On 13 December 2017, the judgment creditor appealed before the *cour d'appel* of Versailles. The court upheld the decision of the enforcement judge and refused the enforcement of the Italian order for payment on the basis of Article 45(1)(b) (fair trial) and (c) (irreconcilable judgments).

Firstly, the Court of Appeal held that the enforcement of the Italian judgment should be refused because the judgment debtor had not been given sufficient notice and time to arrange for its defence. On this point, the court found specifically that the Italian order for payment was not regularly served until 27 April 2016. Before this date, the debtor had only received notice of the order by registered letter with acknowledgement of receipt dated 8 October 2015, which the court deemed insufficient because: (i) notification by letter did not allow the debtor to clearly identify the kind of act served upon it (service of judgments in France is usually carried out by bailiffs); (ii) the service document was written in Italian, did not include a translation, and did not mention the remedies available against the order for payment; and (iii) the documents were not accompanied by the form set out in Annex II of Regulation 1393/2007, informing the addressee that he had the right to refuse to accept a document in the absence of a translation. Additionally, the court also noted that after receiving notice of the Italian order for payment together with the certificate on 27 April 2016, the debtor had filed an opposition before the Italian courts on 16 June 2016, *i.e.* within the legal delay set out by Italian law.

Secondly, the court held that enforcement should be refused because the Italian judgment was irreconcilable with another decision of the Versailles Court of Appeal dated 19 November 2015, which had been issued following a summary judgment (*référé-provision*) ordering the judgment debtor to comply with a settlement signed between the parties on 29 April 2014. On this point, the court held that the claims upheld by the Italian order for payment were already covered by the settlement agreement which formed the basis of the summary judgment, and that the two decisions were thus irreconcilable even though it was not materially impossible for the judgment debtor to comply with them simultaneously.

Keywords: Grounds for refusal of recognition/enforcement (fair trial, irreconcilable judgments)

9. Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986

Following a provisionally enforceable *ex parte* judgment issued by a court of first instance in Amsterdam (the Netherlands) on 11 November 2015, the judgment creditor, a Dutch company, sought to enforce a monetary claim against the Republic of Turkmenistan, judgment debtor. On 5 September 2018, the enforcement judge at the *tribunal de grande instance* of Paris authorized the creditor to carry out enforcement measures following an *ex parte* request made pursuant to Article L. 111-1-1 of the French Code of Civil Enforcement Procedures[9]. Following this decision, the debtor was served with a writ of payment in view of the attachment of movable property. On 20 November 2018, the judgment debtor resisted enforcement before the enforcement judge at the *tribunal de grande instance* of Paris, arguing in particular that the writ should be annulled and that any enforcement and protective measures should be suspended in light of an opposition pending before the Dutch courts. The enforcement judge rejected these claims, and the State appealed the decision before the *cour d'appel* of Paris.

On appeal, the court partially reversed the decision issued by the enforcement judge, holding that Article 44(2) BI bis required the French courts to suspend the enforcement of the Dutch judgment. On this point, the court found in particular that a decision issued by the Amsterdam Court of Appeal on 23 July 2019 had suspended the enforceability of the *ex parte* judgment issued against the judgment debtor.

Accordingly, the court decided that the writ served upon the judgment debtor should be set aside, as it was no longer based on an enforceable title. Nevertheless, the court held that Article 44(2) BI bis did not prohibit the creditor from seeking protective measures while the proceedings were still pending in the Netherlands.

Keywords: Applicability of the BI bis Regulation (*ratione materiae*), Enforcement (lack or suspension of enforceability, protective measures in aid of)

10. Cour d'appel de Grenoble, 1re ch., 15.09.2020, No 19/04828

On 1 March 2017, the *Tribunal d'arrondissement du Luxembourg* (Luxembourg) issued a monetary judgment against a French debtor following opposition proceedings initiated by him against a European order for payment. After the court issued the final ruling in the debtor's absence, the decision was first notified by mail and then served by the bailiff on 3 April 2017.

[9] *Code des procédures civiles d'exécution, art. L. 111-1-1.*

Seeking to enforce the judgment in France, the judgment creditor, a Luxembourgish company represented by its liquidator, served the debtor with a writ preparing the seizure of movable property on 28 March 2019. The writ was accompanied by a copy of the judgment and a certificate established on 12 December 2017 pursuant to Article 53 BI bis. On 28 June 2019, the debtor sued the judgment creditor before the enforcement judge of the *tribunal de grande instance* of Valence, arguing that the service documents and the writ should be set aside because they did not mention the remedies available against the judgment issued by the court of origin. The claim was rejected, and the debtor appealed the decision before the *cour d'appel* of Grenoble.

The court upheld the decision, founding that Article 42 BI bis only required the judgment creditor to produce to the enforcement authority: (a) a copy of the decision and (b) the certificate established pursuant to Article 53 BI bis. Accordingly, the court noted that the Luxembourgish judgment had been declared enforceable by the Luxembourgish authorities and dismissed the appeal.

Keywords: Enforcement (Procedure)

11. Tribunal judiciaire de Paris, 17 September 2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion*

By a judgment issued on 27 June 2019 and registered on 12 July 2019, the *Tribunale di Roma* (Italy) issued an injunction ordering a French web-streaming company to delete copyrighted material owned by an Italian broadcasting company from its platform. The decision also ordered the debtor to pay 5,521,420 euros in damages for past infringement and provided for a monetary penalty in case of future non-compliance. On 2 August 2019, a judge of the *Tribunale di Roma* issued a certificate pursuant to Article 53 BI bis. On 6 September 2019, the creditor served the certificate on the judgment debtor. On 8 October 2019, the *Corte d'appello di Roma* confirmed the injunction's enforceability but suspended the judgment regarding the damages award.

Despite this last decision, the judgment creditor filed an *ex parte* request before the enforcement judge at the *tribunal judiciaire* of Paris seeking authorization to carry out protective measures against trademarks and bank accounts owned by the debtor. On 23 January 2020, the enforcement judge granted the request; on 30 January and 7 February 2020, respectively, the creditor carried out the measures and notified the debtor. On 13 March 2020, the debtor applied for reconsideration of the *ex parte* authorization by suing the creditor before the enforcement judge. The debtor asked the judge to vacate the order issued on 23 January 2020, lift or reduce the interlocutory attachments carried out by the creditor, and order him to pay 100,000 euros for abuse of process and 20,000 euros as compensation for procedural costs.

The enforcement judge granted the application in part, vacating the *ex parte* order and lifting the attachments but rejecting the claim for abuse of process. Firstly, the judge held that the decision by the Italian Court of Appeal did not necessarily prevent the creditor from carrying out protective measures in aid of enforcement. Regarding the damages award, the enforcement judge held that the creditor could seek protective measures under French domestic law even though the underlying obligation was no longer enforceable in the country of origin. With respect to the injunction, the judge held that the decision issued by the Italian court of first instance remained enforceable even after the decision of the Italian Court of Appeal[10]. Accordingly, the judge went on to assess whether the portion of the Italian judgment containing the damages award could give rise to protective measures pursuant to the criteria laid out in the French Code of Civil Enforcement Procedures, and whether the portion containing the injunction could give be enforced in accordance with the provisions of the BI bis Regulation.

On the first issue, the enforcement judge held that the judgment creditor could carry out a provisional attachment under French domestic law so long that it had a *prima facie* case against the defendant and that the protective measure was necessary to ensure the effectiveness of a future decision on the merits[11]. However, the judge held that the Rome Court of Appeal decision did not only suspend the enforceability of the damages award but also cast doubt on the judgment issued by the court of first instance. Therefore, the enforcement judge ruled that the creditor failed to prove a *prima facie* right as required by French domestic law.

On the second issue, the judge held that even though the judgment creditor could rely on an enforceable decision issued in its favour, Article R. 131-3 of the French Code of Civil Enforcement Procedures, combined with Article 55 BI bis, only allowed to carry out protective measures on the basis of an injunction backed by a monetary penalty (*astreinte*) insofar as a provisional amount has already been set by the court of origin. In this case, the judge found that this was not the case, and therefore held that no protective measure could be taken on the basis of the injunction issued by the Italian tribunal. The enforcement judge nevertheless did not find any abuse on the part of the judgment creditor, noting in

[10] To reach this conclusion even though the proceedings before the Italian courts had been initiated before 10 January 2015, the enforcement judge noted in particular that the Italian courts had issued a certificate pursuant to Article 53 BI bis, and that it did not have the power to verify the applicability *ratione temporis* of the BI bis Regulation.
[11] See Articles L. 511-1 and L. 511-2 of the French Code of Civil Enforcement Procedures, providing that any judgment which is not yet enforceable but contains a *prima facie* right in favour of the judgment creditor carries with it by operation of law the power to carry out protective measures.

particular that no decision has so far been issued by the French Supreme Court on the interplay between Article R. 131-3 of the French Code of Civil Enforcement Procedures and Article 55 BI bis.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*), Enforcement (lack or suspension of enforceability, protective measures in aid of), Enforcement of penalties

12. Cour d'appel de Versailles, 16e ch., 03.12.2020, No 19/05870

In an attempt to recover an GBP 8,745,464 English judgment initially issued in 2012 against a French businessman, an English pharmaceutical company filed several lawsuits against him and several members of his family before the High Court of England and Wales (United Kingdom) starting late 2017. In the course of these proceedings, the English High Court issued in particular three decisions between 11 January and 1 March 2018, ordering the businessman's wife to pay the total amount of GBP 155,000 in court fees. On the basis of these decisions, the judgment creditor then obtained certificates pursuant to Article 53 BI bis and carried out several enforcement measures against the debtor's assets located in France. On 14 June 2018, the judgment debtor resisted enforcement by suing the creditor before the enforcement judge at the *tribunal de grande instance* of Nanterre, which rejected her claims on 17 July 2019. The judgment debtor appealed this decision before the *cour d'appel* of Versailles, arguing that the provisions of the BI bis Regulation did not apply to the case and that the judgments issued by the English court violated French international public policy.

The *cour d'appel* rejected the claims. Firstly, the court held that even though a first decision had been issued against the debtor's husband in 2012, the enforcement measures at hand had been carried out on the basis of judgments issued following separate proceedings on the merits initiated in 2017, *i.e.* after the date of applicability of the BI bis Regulation. Secondly, the court held that the English judgments ordering the debtor to pay GBP 155,000 in court fees did not violate French international public policy because she failed to demonstrate how these judgments constituted an actual obstacle to her right to access to justice. On this point, the court noted in particular that the issuance of a decision on the merits did not appear to be conditional upon the payment of the fees, and that the debtor had not proven her impecuniosity.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*), Definition of "judgment", Grounds for refusal of recognition/enforcement (international public policy)

13. Cour d'appel de Paris, pôle 1 ch. 10, 04.03.2021, No 20/02881

On 11 October 2018, the first instance tribunal of Milan (Italy) issued a judgment ordering a French company to pay 182,283.92 euros plus interests and costs to an Italian company, which was declared

enforceable in Italy on 27 December 2018. On 24 July 2019, the judgment creditor carried out protective measures against several bank accounts owned by its debtor in France. On 13 August 2019, the judgment creditor also served the debtor with a copy of the Italian judgment and a certificate established by the Italian court pursuant to Article 53 BI bis. Later, on 21 August 2019, the creditor obtained a provisional judicial mortgage on the debtor's business.

On 30 August 2019, the debtor sued the judgment creditor before the enforcement judge of the *tribunal de grande instance* of Créteil. The debtor asked the judge to vacate and lift the protective measures and the provisional mortgage arguing, *inter alia*, that the BI bis Regulation did not apply to the enforcement of the Italian judgment. On 8 October 2019, the judgment creditor then served on the debtor a certificate established by the chief clerk at the *tribunal de grande instance* of Créteil pursuant to the old BI bis Regulation. On 8 November 2019, the enforcement judge rejected the debtor's claims, and the debtor appealed before the *cour d'appel* of Paris.

The court approved the enforcement judge's reasoning but ultimately reversed its judgment and lifted the measures taken by the creditor. Critically, the court applied the rules set out by the old Brussels I Regulation 2000 even though the Italian court had issued a certificate pursuant to Article 53 BI bis. Accordingly, the French court held that Article 47 of the old BI Regulation allowed the creditor to carry out conservative measures (including a provisional judicial mortgage) without prior judicial authorization and even before a declaration of enforceability. It nevertheless allowed the measures to be lifted, noting that both parties acknowledged that the debt had been discharged following the carrying out of enforcement measures in Italy.

Keywords: Applicability of the BI bis Regulation (*ratione temporis*), Enforcement (protective measures in aid of)

B. Critical Assessment

Overall, a total of thirteen (13) decisions have been found concerning the application of Chapters III and IV of the BI bis Regulation in France. The Report also covers judgments that have been issued after 10 January 2015 but still apply Regulation (CE) No 44/2001 of 22 December 2000 (hereinafter, "**Brussels I Regulation 2000**" or "**BI Regulation 2000**"), provided that they include a detailed discussion on the applicability of the BI bis Regulation.

All the decisions included in this Report touch upon the recognition and enforcement of foreign judgments and authentic instruments in France. No relevant decisions have been found regarding the certification of an outgoing French judgment under Article 53 BI bis[12].

Among the decisions included in this report, two (2) have been issued by courts of first instance, ten (10) by French *cours d'appel*, and only one (1) by the French *Cour de cassation*. All of these decisions concern the recognition and enforcement of foreign titles in France. Conversely, no decision has been found concerning the certification procedure of French domestic titles that have to be enforced abroad.

The selected cases provide an overview of the main interpretative hurdles regarding the interaction between the BI bis Regulation and French domestic law. These hurdles concern both the scope of the recognition and enforcement regime set out in the BI bis Regulation (**a** below) and the application of this same regime by French courts (**b** below).

a. Scope of the BI bis Regulation regime

i. Applicability of the BI bis Regulation

– Applicability *ratione materiae*

Pursuant to Article 1(1) BI bis, the Regulation applies in "civil and commercial matters whatever the nature of the court or tribunal" and "shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)". Additionally, Article 1(2) BI bis also provides a list of matters excluded from the material scope of application of the BI bis Regulation. The CJEU has routinely held that these provisions must receive an autonomous and uniform interpretation across the Member States[13].

[12] This result is unsurprising, given that under the French Code of Civil Procedure, the power to issue certificates pursuant to Article 53 BI bis lies with the chief clerk of the court of origin, and that only a decision denying the issuance of the certificate should be motivated (see Article 509-1 and 509-5 of the French Code of Civil Procedure).
[13] See *e.g.* CJEC, 14.10.1976, Case 29-76, *Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, para 3, holding that the notion of "civil and commercial matters" constitutes an independent concept of European law that should not be interpreted by reference to the internal law of the States concerned. The same holds true regarding the exclusions set out by Article 1(2) BI bis.

In the context of the recognition and enforcement of titles, issues regarding the material scope of the BI bis Regulation may arise both in connection with the notion of "civil and commercial matters" under Article 1(1) BI bis and with regards to the exclusions set out in Article 1(2) BI bis.

Concerning the first set of issues, one might wonder, for instance, whether the exclusion regarding *acta iure imperii* should encompass cases where a State or an international organisation relies on its immunity from execution to escape the enforcement of a claim against it. In a recent case decided on 3 September 2020[14], the CJEU ruled that it does not, provided that the action is not pursued under public powers[15]. This outcome is in line with a judgment issued a few months before by the *cour d'appel* of Paris[16], even though the defendant in that case – a foreign State resisting the enforcement of a foreign judgment – had not argued against the application of the BI bis Regulation.

Regarding the second set of issues, some doubts may arise as to whether the enforcement of a foreign title falls within one of the exceptions set out in Article 1(2) BI bis. In a recent case, the *cour d'appel* of Metz[17] had to decide whether the provisions of the BI bis Regulation applied to the enforcement of a Luxembourgish judgment which ordered the defendant to pay back the sums unduly received as a result of an irregular attachment carried out to recover maintenance obligations. The court ruled that this was the case because the claimant did not seek to enforce a decision fixing the amount of maintenance, but rather a judgment ruling on the regularity of an enforcement measure. To reach its conclusion, the court did not rely on the nature of the rights involved in the underlying dispute[18] nor on the certificate delivered by the court of origin according to the provisions of the BI bis Regulation. Instead, the *cour d'appel* focused on the fact that the claimant sought to recover the sums unduly attached in another country. Even though this outcome might finally be consistent with European case law[19], the court could have sought the interpretation of the CJEU in order to get some clarity on this issue.

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[14] CJEU, 03.09.2020, C-186/19, *Supreme Site Services GmbH et al v Supreme Headquarters Allied Powers Europe*.
[15] *Ibid.*, para 69.
[16] Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986 (*supra,* 9).
[17] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra,* 2).
[18] *Contra*, see nevertheless CJEU, 09.09.2015, C-4/14, *Christophe Bohez v Ingrid Wiertz*, para 33, suggesting that, by analogy to what happens in the context of interim measures, the scope of Regulation No 44/2001 with regards to enforcement measures should be determined "by the nature of the rights that [these measures] serve to protect" rather then by their own nature.
[19] Cf CJEU, 11.04.2013, C-645/11, *Land Berlin v Ellen Mirjam Sapir et al.*, para 38, holding that the concept of "civil and commercial matters" laid out in Article 1(1) BI bis encompasses an action for recovery of an amount unduly paid even though the underlying relationship between the parties concerned matters of public law.

– **Applicability *ratione temporis***

According to Article 66 Bi bis, the Regulation applies "only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015", while the old BI Regulation 2000 "shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation". Even though the language of Article 66 seems relatively straightforward, this provision has so far given rise to very inconsistent interpretations by French courts.

Among the reported decisions, some correctly applied the criteria set out in Article 66 to either reject[20] or require[21] applications for a declaration of enforceability according to the old BI Regulation 2000. In some other instances, however, French courts did not seem to pay enough attention to the transitional provisions contained in the BI bis Regulation and simply applied the new Brussels I bis provisions on the erroneous premise that the new instrument had replaced the old BI Regulation 2000[22].

In a third set of cases, French courts were also confronted with the thorny issue of the level of deference that should be paid to certificates erroneously delivered by foreign courts[23]. In some cases, French courts ruled that they did not have the power to annul the certificate issued by the court of origin[24] or independently verify the applicability *ratione temporis* of the BI bis Regulation at the

[20] Tribunal de grande instance de Grasse, greffier en chef, 03.05.2017, No 17/00005 (*supra,* 1), holding that a declaration of enforceability was not required for an Italian judgment because the proceedings had been introduced after 10 January 2015.
[21] Cour d'appel de Douai, ch. 8 sect. 3, 06.09.2018, No 17/06847 (*supra,*, 3), holding that a bank could not pursue the enforcement in France of a claim contained in a Belgian authentic instrument drawn up in 2007 without first obtaining a declaration of enforceability under Article 57 BI 2000.
[22] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra,* 2), which also erroneously applied the provisions of the new BI bis Regulation in the context of an application for a declaration of enforceability.
[23] On this question, see in particular CJEU, 06.06.2019, C-361/18, *Ágnes Weil v Géza Gulácsi*, para 35, stating (albeit arguably *in dicta*) that: "the enforcement procedure, under Regulation No 44/2001, precludes, like enforcement under Regulation No 1215/2012, any subsequent review on the part of a court of the Member State addressed of whether the action giving rise to the judgment for which enforcement is sought falls within the scope of Regulation No 44/2001, the grounds for challenging the declaration that a judgment is enforceable being exhaustively laid down by that regulation".
[24] Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771 (*supra,* 6).

enforcement stage[25]. In at least one other instance, however, the *cour d'appel* of Paris explicitly disregarded a certificate erroneously issued by an Italian court according to the BI bis Regulation and went on to apply the rules of the old BI Regulation 2000 instead[26]. These divergences confirm the importance of providing an adequate remedy in the State of origin if a certificate has been erroneously granted under the BI bis Regulation[27] and the need for clearer guidance regarding the treatment that such certificates should receive in the State of enforcement.

Finally, the *cour d'appel* of Versailles recently interpreted Article 66 BI bis in a case where the date of the institution of the proceedings was disputed between the parties[28]. In that case, the judgment creditor sought to enforce three English judgments ordering the defendant to pay court fees accrued in the course of an ongoing attempt to enforce a judgment first issued in 2012 against the defendant's husband. The court nevertheless held that the order to pay court fees concerned separate proceedings on the merits initiated in 2017 before English courts rather than costs related to the enforcement of the initial judgment and applied the BI bis regime. This decision is a useful reminder of the difficulties that may arise due to the wide variety of national procedures covered by the BI bis Regulation.

ii. Definition of "judgment"

Article 2(a) BI bis provides that the term "judgment" under the Regulation encompasses "any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court". Furthermore, the definition also specifies that, for the purposes of Chapter III, the term "judgment" also includes provisional and protective measures so long as they are ordered by a court having jurisdiction as to the substance of the matter and provided that the defendant has been summoned to appear or the judgment containing the measure is served on the defendant prior to enforcement.

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[25] Tribunal judiciaire de Paris, 17 September 2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion* (*supra,*, 11).
[26] Cour d'appel de Paris, pôle 1 ch. 10, 04.03.2021, No 20/02881 (*supra,* 13).
[27] On this point, see also M. Buzzoni and V. Van Den Eeckhout, *Report on the Collection of French implementing rules*, p. 24, available at https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf [last visited 1 September 2021].
[28] Cour d'appel de Versailles, 16e ch., 03.12.2020, No 19/05870 (*supra*, 12).

The recognition and enforcement regime set up under the BI bis Regulation thus covers a vast array of judicial decisions. Among the reported cases, French courts have ruled that the term "judgment" embraces:

- A Luxembourgish decision that vacated an attachment initially carried out in the State of origin and ordered the defendant to pay back the sums unduly received as a result of such attachment[29];
- A worldwide *Mareva* injunction and discovery order issued by a Cypriot court[30];
- A German injunction first issued *ex parte* but served upon the defendant before pursuing any enforcement measure[31];
- Three English decisions that ordered the defendant to pay court fees arising from civil proceedings brought in the attempt to recover damages awarded by a prior judgment[32].

b. Application of the BI bis Regulation regime

i. Recognition

– ***Res judicata***

Article 36(1) BI bis provides that: "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required". In order to do that, Article 37 BI bis provides that the party wishing to rely on a judgment issued in another Member State should provide a copy of the judgment and the certificate issued pursuant to Article 53 BI bis. Additionally, the court before which the judgment is invoked may require the party to provide a translation of the contents of the certificate or a translation of the judgment if it is unable to proceed without such a translation.

Accordingly, parties may invoke the *res judicata* effect of a judgment issued in another Member State in the course of merits proceedings brought before the French courts[33]. On this point, the CJEU held thata

[29] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra,* 2), cit.
[30] Cour de cassation, Civ. 1, 03.10.2018, No 17-20.296, Bull. civ. I No 908 (*supra*, 4).
[31] Cour d'appel de Nancy, 1re ch., 05.07.2019, No 18/01365, *SASU Dstorage c/ Sté ChessBase Schachprogramme Schachdatenbank Verlagsgesellschaft mbH* (*supra*, 7).
[32] Cour d'appel de Versailles, 16e ch., 03.12.2020, No 19/05870 (*supra*, 12).
[33] For an example, see Cour d'appel de Metz, 1re ch., 23.10.2018, 17/00228 (*supra*, 5), which recognized a *res judicata* effect to a Luxembourgish judgment. Interestingly, the decision issued by *cour d'appel* mentions that the party did produce a copy of the foreign judgment but does not make any reference to the accompanying certificate.

foreign judgment which has become final and has been recognised under Article 33 of the old BI Regulation 2000 (now Article 36 BI bis) must in principle be given the same effects in the State in which recognition is sought as it does in the State of origin[34] and thus prevent the same dispute from being relitigated between the same parties in another Member State.

In a judgment delivered on 3 October 2018[35], the French Supreme Court interpreted this principle restrictively. In that case, the court ruled that the recognition of a worldwide *Mareva* injunction issued abroad did not bar the creditor from seeking a provisional attachment under French domestic law. To reach its conclusion, the court held that the proceedings instituted in France did not pursue the same relief that had already been awarded by the foreign tribunal. Notably, the court considered that the question did not raise any reasonable doubt as to the interpretation of Articles 36(1) and 41(1) BI bis.

– **Application for refusal of recognition**

Pursuant to Article 45 BI bis, any interested party may file an application for refusal of recognition based on one of the grounds set out in this provision. In France, the application must be filed before the *tribunal judiciaire*[36], unless the refusal of recognition is raised as an incidental question in the course of legal proceedings pending before another court[37].

In a case decided by the Court of Appeal of Nancy on 5 July 2019[38], a French company relied on this provision to challenge the recognition of a German injunction which had ordered it to delete illicit online material from its servers and enjoined it from reuploading the same content in the future and render it accessible in Germany. Interestingly, the judgment debtor filed an application for refusal of recognition even though it had already complied with the injunction because it contested the allocation of costs made by the German court.

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[34] CJEU, 15.11.2012, C-456/11, *Gothaer Allgemeine Versicherung AG et al. v Samskip GmbH*, para 34.
[35] Cour de cassation, Civ. 1, 03.10.2018, No 17-20.296, Bull. civ. I No 908 (*supra*, 4).
[36] See declaration made by France under Article 75(a) BI bis and published on the *European E-Justice Portal*, available at: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-fr-en.do?member=1 [last visited 1 September 2021].
[37] See Article 36(3) BI bis.
[38] Cour d'appel de Nancy, 1re ch., 05.07.2019, No 18/01365, *SASU Dstorage c/ Sté ChessBase Schachprogramme Schachdatenbank Verlagsgesellschaft mbH* (*supra*, 7).

The *cour d'appel* rejected the application. It seems doubtful, however, that an application for refusal of recognition under Article 45 BI bis should be allowed for the sole purpose of recovering the costs that the judgment debtor had to sustain because of the foreign proceedings[39].

ii. Enforcement

– Procedure

According to the provisions of Articles 39 to 44 BI bis, an enforceable judgment issued in a Member State may be enforced in the other Member States without the need for a declaration of enforceability. To do that, the judgment creditor must serve the certificate issued pursuant to Article 53 BI bis on the person against whom enforcement is sought prior to the first enforcement measure and in accordance with the requirements set out in Article 43 BI bis. Additionally, the creditor must also provide the competent enforcement authorities with the documents set out in Article 42 BI bis.

Under French domestic law, the notification of an enforceable judgment must also very visibly include, if available, the time limit for filing an opposition, ordinary appeal or appeal to the French Supreme Court, and indicate how the appeal may be exercised[40]. As the *cour d'appel* of Grenoble recently held[41], however, this requirement does not apply to the notification of a foreign judgment under the BI bis regulation. In this respect, therefore, the requirements set out by the BI bis Regulation should be regarded as exclusive. This decision is consistent with the longstanding case law of the French *Cour de cassation* developed under the Brussels Convention[42].

In France, the certificate issued pursuant to Article 53 BI bis is most often served together with a copy of the judgment and a writ preparing the seizure of movable property established according to Article R. 221-1 of the French Code Civil Enforcement Procedures[43].

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[39] It should be noted, however, that in the case at hand the debtor had not explicitly filed a claim to this effect, but rather sought compensation under Article 700 of the French Code of Civil Procedure.
[40] Article 680 French Code of Civil Procedure.
[41] Cour d'appel de Grenoble, 1re ch., 15.09.2020, No 19/04828 (*supra*, 10).
[42] See *e.g.* Cour de cassation, Civ. 1, 06.03.1996, No 94-11.457. *Adde* Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra,* 2), reaching the same outcome albeit from a the perspective of the right to a fair trial (see *infra*).
[43] On this point, see *e.g.* Cour d'appel de Grenoble, 1re ch., 15.09.2020, No 19/04828 (*supra*, 10).

– **Lack or suspension of enforceability**

Under Article 39 BI bis, only a judgment that has become enforceable in the Member State of origin can be enforced in another Member State pursuant to the provisions of the BI bis Regulation[44]. Accordingly, points 4.4.1 *et seq.* of the certificate set out in Annex I ask the court of origin to specify whether the judgment is enforceable in whole or in part in the Member State of origin without any further conditions being met.

By analogy to what has happened regarding the applicability *ratione temporis* of the BI bis Regulation[45], French courts have been asked to decide whether mentions about the enforceability of the underlying obligations included in a foreign certificate should be considered binding in the State of enforcement. In the case decided by the *cour d'appel* of Metz on 20 March 2018[46], the court held this was not the case, as the enforceability of the judgment may result from the decision itself.

When the enforceability of the judgment is suspended in the Member State of origin, Article 44(2) BI bis requires the competent authority in the Member State addressed to suspend enforcement proceedings. If the judgment has already led to an enforcement measure in France, the person resisting enforcement can apply for a suspension to the enforcement judge[47]. In principle, territorial competence lies both with the judge of the place of the debtor's domicile and of the place where the measure has been carried out[48].

– **Protective measures in aid of enforcement**

Under Article 40 BI bis, "An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed". Hence, the BI bis Regulation allows a creditor to carry out protective measures in accordance with the domestic law of the Member State addressed even before the service of the certificate set out in Article 53 BI bis.

On its face, the purpose of Article 40 BI bis is to strike a balance between the creditors' right to enforce claims embodied in an enforceable title and the debtors' right of defence at the enforcement stage.

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[44] See also CJEU, 28.04.2009, C-420/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*.
[45] See *supra*, para II.B.a.i.
[46] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra*, 2).
[47] See Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986 (*supra*, 9).
[48] See Article R. 121-2 of the French Code of Civil Enforcement Procedures.

Nevertheless, the review of French case law shows how such balance may be considerably altered by the interaction between European and domestic procedural law.

On the one hand, French courts have consistently held that Articles L. 511-1 *et seq.* of the French Code of Civil Enforcement Procedures allow a creditor to carry out protective measures without a prior authorization even though the foreign judgment has not yet become enforceable or its enforceability has been suspended in the country of origin[49]. Additionally, the French *Cour de cassation* has ruled that a creditor may seek a protective measure under domestic law even though after similar relief has been granted in the State of origin, provided that this does not conflict with the principle of *res judicata*[50]. In a sense, therefore, the creditors' right to seek post-judgment relief in the form of protective measures is broader under French domestic law than under the BI bis Regulation.

On the other hand, however, French domestic law may sometimes be an obstacle to the application of Article 40 BI bis. According to Article L. 111-1-1 of the French Code of Civil Enforcement Procedures, for instance, creditors must seek an *ex parte* authorization of the enforcement judge before carrying out a protective measure against property belonging to a foreign State[51]. To the extent that the French law extends this requirement to creditors holding an enforceable judgment covered by the BI bis Regulation, the provision might nevertheless be at odds with the letter of Article 40 BI bis[52] and the CJEU case law under the old Brussels Convention[53].

iii. Adaptation

Article 54(1) BI bis provides that: "If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it

[49] See *e.g.* Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986 (*supra*, 9), Tribunal judiciaire de Paris, 17 September 2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion* (*supra*, 11), and Cour d'appel de Paris, pôle 1 ch. 10, 04.03.2021, No 20/02881 (*supra*, 13, applying the old BI Regulation).
[50] Cour de cassation, Civ. 1, 03.10.2018, No 17-20.296, Bull. civ. I No 908 (*supra*, 4).
[51] For an application of this provision, see Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986 (*supra*, 9).
[52] Which provides that the judgment creditor holding an enforceable title has a right to carry out enforcement measures "by operation of law".
[53] See CJEC, 03.10.1985, Case 119/84, *P. Capelloni and F. Aquilini v J. C. J. Pelkmans*, para 26.

and which pursues similar aims and interests", provided that such adaptation does not result in effects going beyond those provided for in the law of the Member State of origin.

The issue of adaptation does not seem to have been explicitly addressed by French courts so far. Nevertheless, the judgment issued by the French *Cour de cassation* on 3 October 2018[54] suggests that a creditor who holds a decision containing a protective measure that is unknown to the French legal system has the option of seeking additional relief under French domestic law rather than pursuing the adaptation of the foreign measure under Article 54(1) BI bis.

iv. Enforcement of penalties

According to Article 55 BI bis, a judgment given in a Member State ordering a payment by way of a penalty shall be enforceable in another Member State only if the court of origin has finally determined the amount of the payment. In France, Article R. 131-3 of the French Code of Civil Enforcement Procedures similarly provides that "no payment by way of a penalty ('*astreinte*') may be enforced before its liquidation", but adds that: "the decision ordering an *astreinte* that has not yet been liquidated allows a conservatory measure to be taken for a sum provisionally assessed by the judge competent for the liquidation".

In a case recently decided by the enforcement judge at the *tribunal judiciaire* of Paris[55], the question thus arose whether, in the absence of a final determination by the court of origin as to the amount of the sums due as a penalty, French courts could nevertheless set a provisional amount pursuant to Article R. 131-3 of the French Code of Civil Enforcement Procedures. The court answered this question in the negative, holding that Article 55 BI bis implicitly confers jurisdiction on the courts of the State of origin to liquidate the amount of the penalty and thus bars the creditor from relying on Article R. 131-3 of the French Code of Civil Enforcement Procedures.

[54] Cour de cassation, Civ. 1, 03.10.2018, No 17-20.296, Bull. civ. I No 908 (*supra*, 4). In this instance, however, the old BI Regulation 2000 applied to the recognition and enforcement of the Cypriot judgment.
[55] Tribunal judiciaire de Paris, 17 September 2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion* (*supra*, 11).

v. Grounds for refusal of recognition/enforcement

– Public policy

According to Article 45(1)(a) BI bis, the recognition or enforcement of a judgment shall be refused "if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed". Since the entry into force of the Brussels Convention, the terms "public policy" have consistently been interpreted as a reference to the fundamental principles of law that are considered essential in the legal order of the State addressed[56]. Conversely, Article 45(3) BI bis explicitly provides that: "The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction"[57].

Even though Article 45(1)(a) is quite often raised by parties seeking to obtain a refusal of recognition or enforcement, the reported cases show French courts construe this provision narrowly. In doing so, French courts follow the guidance of the European case law developed under the BI bis Regulation and its predecessors.

Accordingly, the *cour d'appel* of Nancy recently referenced the CJEU's interpretation of Article 45(1)(a) BI bis delivered in *Diageo Brands BV v Simiramida-04 EOOD*[58] to hold that a claimant should have used the available legal remedies in the Member State of origin before arguing that the recognition of a foreign judgment violated French procedural and substantive public policy[59]. Similarly, the *cour d'appel* of Versailles echoed the decision of the CJEU in *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*[60] when it held that the enforcement of three foreign decisions ordering the defendant to pay a substantial sum for legal costs did not violate French public policy[61]. In this decision, the court noted that the foreign judgment did not constitute a disproportionate violation of the defendant's rights because the

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[56] See *e.g.* CJEC, 28.03.2000, C-7/98, *Dieter Krombach v André Bamberski*, para 37.
[57] On this point, see Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771 (*supra*, 6). *Adde* CJEU, 04.05.2010, C-533/08, *TNT Express Nederland BV v AXA Versicherung AG*, para 55.
[58] See CJEU, 16.07.2015, C-681/13, *Diageo Brands BV v Simiramida-04 EOOD*, para 68, holding that: "When determining whether there is a manifest breach of public policy in the State in which recognition is sought, the court of that State must take account of the fact that, save where specific circumstances make it too difficult, or impossible, to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing such a breach before it occurs".
[59] Cour d'appel de Nancy, 1re ch., 05.07.2019, No 18/01365, *SASU Dstorage c/ Sté ChessBase Schachprogramme Schachdatenbank Verlagsgesellschaft mbH* (*supra*, 7).
[60] CJEU, 02.04.2009, C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*.
[61] Cour d'appel de Versailles, 16e ch., 03.12.2020, No 19/05870 (*supra*, 12).

payment was not a condition to obtain a decision on the merits and the defendant had neither claimed nor demonstrated its inability to pay the sums ordered by the foreign court[62].

– **Fair trial**

Pursuant to Article 45(1)(b) BI bis, recognition or enforcement of a judgment issued in another Member State may also be refused: "where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so". This provision, which retraces the terms of Article 34(2) of the old Brussels Regulation 2000, sets out the demanding standard that an application for refusal of recognition or enforcement must clear to establish a breach of the defendant's right to a fair trial.

First of all, Article 45(1)(b) BI bis only covers foreign decisions issued in default of appearance. Hence, the *cour d'appel* of Metz correctly held that the defendant might not invoke a violation of this provision where the foreign judgment had been issued in the presence of both parties[63]. Similarly, the *cour d'appel* of Paris recently reminded, in the context of the enforcement of an Italian order for payment, that the enforcement of a foreign default judgment may not be refused if the defendant had the opportunity to challenge it before the courts of the State of origin[64].

In another recent case, however, the *cour d'appel* of Versailles ruled that the enforcement of another Italian order of payment should be refused because the service of the initial order on the defendant did not include a translation and did not comply with the requirements set out in the Service Regulation No 1393/2007[65]. Interestingly, the Court of Appeal held that the ground of refusal set out in Article 45(1)(b) could apply even though the defendant had filed an appeal against the foreign judgment in the State of origin following the first enforcement measure carried out in France[66].

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[62] *Id.*; *contra*, see Cour d'appel de Grenoble, 1re ch., 30.06.2020, No 19/01420, holding that, under the Lugano Convention of 2007, the enforcement of a foreign award on costs is contrary to French public policy when the amount to be paid is not proportionate to the damage suffered by the plaintiff. On the same case, see also Cour de cassation, Civ. 1, 30.01.2019, No 17-28.555.
[63] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164 (*supra*, 2).
[64] Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771 (*supra*, 6).
[65] Cour d'appel de Versailles, 16e ch., 09.01.2020, No 17/08683, *Sté Bonatti S.P.A. c/ SA GRT Gaz* (*supra*, 8).
[66] *Contra*, see CJEU, 28.04.2009, C-420/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*.

– **Irreconcilability**

Article 45(1)(c) and (d) BI bis provide that the recognition or enforcement of a foreign judgment must be refused if the judgment is irreconcilable with either: "a judgment given between the same parties in the Member State addressed", or "an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed". Among the reported cases, no decision has been found to deal with Article 45(1)(d) BI bis. On the contrary, Article 45(1)(c) BI bis has given rise to two interesting decisions issued by the *cour d'appel* of Metz and the *cour d'appel* of Versailles, respectively.

In the first decision, the *cour d'appel* of Metz held that the ground set out in Article 45(1)(c) BI bis could not bar the enforcement of a Luxembourgish judgment ordering the restitution of sums unduly paid as a result of enforcement measures that had been carried out in Luxembourg, even though parallel proceedings that could potentially lead to an irreconcilable outcome were pending in France. Hence, this decision correctly holds that the ground set out in Article 45(1)(c) BI bis requires the existence of an actual judgment in the Member State where enforcement is sought.

In the second case, the *cour d'appel* of Versailles held, instead, that the enforcement of an Italian judgment should be refused because it was irreconcilable with a subsequent decision issued by French courts confirming the validity of a settlement concluded between the same parties which covered the same claims but ordered the defendant to pay a different amount of money[67]. To reach its conclusion, the *cour d'appel* of Versailles rightly held, firstly, that two judgments might be considered irreconcilable under Article 45(1)(c) BI bis even though their concurrent execution does not prove to be impossible, so long that they entail legal consequences that are mutually exclusive[68]. Secondly, the court also correctly noted

[67] At first glance, this decision might seem at odds with the CJEC holding in *Solo Kleinmotoren GmbH* (CJEC, 02.06.1994, *Solo Kleinmotoren GmbH v Emilio Boch*), where the European court held that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment" within the meaning of Article 27(3) of the Brussels Convention (now Article 45(1)(c) BI bis). Arguably, however, the judgment at stake before the *cour d'appel* of Versailles could be distinguished because it concerned a claim for the specific performance of the contractual provisions contained in the settlement and could thus be distinguished from the case where a settlement is merely certified as an enforceable title by the court of origin. In the case at hand, however, the meaning of the word "judgment" under Article 45(1)(c) BI bis does not seem to have been debated before the French courts at the enforcement stage.
[68] CJEC, 04.02.1988, Case 145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, para 22.

that the enforcement of a foreign judgment should be refused even though it has been issued before the domestic one.

III. EEO Regulation

A. Case Law Summaries

1. Cour d'appel d'Aix-en-Provence, 20.08.2008, No 07/14921

Proceedings between Parador Gmbh & Co Kg ("Parador"), a German registered company, and SA SO.SA.CA ("SO.SA.CA"), a French registered company, before the *cour d'appel* of Aix-en-Provence. On 11 April 2007, the tribunal of Hagen (Germany) certified as an EEO a German order for payment in favour of Parador that SO.SA.CA had not opposed. The creditor subsequently served the EEO on the debtor. The latter filed an appeal against the EEO before the Court of Appeal of Aix-en-Provence, arguing that the EEO should have been declared enforceable pursuant to the provisions applicable to the BI Regulation.

The Court rejected the argument, holding that under Article 5 EEOR, no special enforcement procedure in France was required if an EEO has been obtained in another Member State. Specifically, the court noted that an enforceable title issued following an unopposed German order for payment should be considered as an uncontested claim within the meaning of the EEO Regulation. Accordingly, the court held that the procedure governing the declaration of enforceability under Regulation No 44/2001 did not apply to the enforcement of foreign EEOs in France.

The court also held that the mere fact that the documents of service of the EEO erroneously mentioned the BI Regulation was not sufficient to set aside the notification of the EEO. Accordingly, the court held that the German certificate could not be questioned in France and declared the debtor's appeal inadmissible.

Keywords: Notion of "uncontested claims", Abolition of exequatur

2. Cour d'appel de Bordeaux, 23.11.2009, No 08/04353

Acting upon an English default judgment certified as an EEO on 21 May 2007, an English company served a French company with a writ and an order to pay a total amount of 161,786.02 euros. The debtor sued the creditor before the enforcement judge of the *tribunal de grande instance* of Angoulême, arguing that the writ should be annulled because of Articles 13, 14, 16, 17, 18 and 20 EEOR.

Before the Court of Appeal, the debtor maintained that its claim was admissible because it concerned the enforceability of the EEO in France. It argued that the French enforcement judge had jurisdiction to hear

the claim because the questions presented pertained to the validity of the enforceable title rather than the substance of the proceedings carried out in the State of origin. The creditor contended that the enforceability of the title could only be contested in England. The *cour d'appel*, referring to Articles 20 and 10 EEOR, held that the merits of the English default judgment and the EEO could not be contested and that only the authenticity of the documents supporting enforcement could be verified. With respect to this last issue, the *cour d'appel* held that the company was wrong to question the authenticity of the English judgment. In particular, the court held that compliance with the requirements set out in Article 20 EEOR could be assessed when the enforcement judge rules on the dispute instead of when the creditor first seeks to enforce the EEO.

Keywords: Enforcement (procedure)

3. Cour d'appel de Besançon, 1re ch., 15.09.2010, No 09/03024

The creditor, an Italian company, carried out a third party debt order against the bank accounts of SA Extructable, a French registered company, based on an Italian judgment certified as an EEO. The debtor resisted enforcement in France, but the enforcement judge rejected its claims. On appeal, the debtor argued that the enforceable title was invalid because the Italian judgment had not been regularly served, and the documents of service did not adequately mention the remedies available against the decision. Before the *cour d'appel*, the creditor responded that the Italian judgement had been correctly served by postal mail and that the documents of service mentioned that the debtor had a right to appeal the decision within 20 days. Hence, the creditor argued that the third party debt order had been carried out pursuant to a valid title and also claimed damages for abusive proceedings.

The *cour d'appel* of Besançon sided with the creditor and dismissed the appeal. The court noted that under Article 5 EEOR, a judgment certified as an EEO in the Member State of origin is enforced in the other Member States without a declaration of enforceability being necessary and without the possibility to contest its recognition. Accordingly, the court held that the debtor's arguments against the Italian judgment were inadmissible. It also held that the debtor should bear the costs of the proceedings but rejected the creditor's claim for damages.

Keywords: Enforcement (service)

4. Cour d'appel de Lyon, 6e ch., 14.10.2010, No 09/04873

Proceedings between Gene Bridges Gmbh, a German registered company, and X Technologies, a French registered company, before the *cour d'appel* of Lyon. On 29 November 2006, the German company

obtained a German order for payment before the tribunal of Hagen (Germany), which was declared enforceable on 6 February 2007. On 17 September 2007, the creditor obtained an EEO, which was later served on the debtor in France accompanied with a writ and an order to pay.

On 10 and 16 March 2009, respectively, the debtor resisted enforcement of the EEO by suing the creditor in France before the enforcement judge of the *tribunal de grande instance* of Lyon and by applying for a withdrawal of the EEO before the German tribunal. On 4 May 2009, the German court rejected the debtor's application and, on 30 June 2009, the French enforcement judge declared the debtor's claims inadmissible. The debtor appealed this decision before the *cour d'appel* of Lyon, arguing that the German order for payment had not been regularly notified to it according to the standards set out in the French Code of Civil Procedure.

The court held that the EEO Regulation prevents the courts of the Member State of enforcement from verifying the procedure applied in the Member State of origin, and that service of the German order should have been contested in Germany. It also held that compliance with the minimum requirements set out in Article 18 EEOR should be contested before the courts of the Member State of origin. The court went on to held that it could not stay or limit the enforcement of the EEO in France once the German court had refused the application for a withdrawal of the EEO pursuant to Article 23 of the EEO Regulation.

Keywords: Enforcement (service, stay or limitation of enforcement)

5. Cour d'appel de Paris, 28.10.2010, No 10/14439

Proceedings between Sarl Sofitrade, a French company, and Cyrano UK Ltd, an English company, before the *cour d'appel* of Paris. Following an English default judgment certified as an EEO, the English company served the French company with a writ and an order to pay in France. The debtor resisted enforcement, arguing in particular that the documents served on the debtor did not comply with the requirements of the EEO Regulation regarding the authenticity of the judgment and the EEO because they were unsigned and undated photocopies rather than originals.

According to the *cour d'appel*, the requirements set out in Article 20 EEOR regarding a copy of the judgment which satisfies the conditions necessary to establish its authenticity as well as a copy of the EEO certificate which satisfies the conditions necessary to establish its authenticity do not concern the debtor, but the competent enforcement authorities of the Member State of enforcement. Thus, according to the court, the creditor must only provide these documents to the bailiff rather than the debtor.

Keywords: Enforcement (procedure)

6. Cour de cassation, Civ. 2, 06.01.2012, No 10-23.518

Following the issuance of an EEO by the tribunal of Stuttgart (Germany) on 24 January 2006, the creditor carried out a third party debt order and registered a judicial mortgage against the debtor's assets in France. The creditor resisted enforcement by appealing the judgment underlying the EEO before the German courts and by filing a suit before the French enforcement judge. On 25 October 2007, the District Court of Konstanz (Germany) granted the debtor's application. This decision was later upheld by the Court of Appeal of Karlsruhe (Germany) on 10 June 2008, which later issued a certificate stating that the judgment initially certified as an EEO was no longer enforceable.

On the basis of these decisions, French courts lifted all the enforcement measures carried out in France, ordered the creditor to reimburse the debtor all the sums received as a result of the enforcement, and dismissed the debtor's claim for damages. The creditor appealed the decision before the *Cour de cassation*, arguing in particular that only the court of origin of the EEO had the power to issue a certificate stating that such order is no longer enforceable or that its enforceability has been suspended or limited.

The French *Cour de Cassation* held that under Article 11 EEOR, the EEO certificate was effective only within the bounds of the enforceability of the underlying judgment, which had been reversed by the subsequent decisions of the German courts. The court also noted that the German Court of Appeal had subsequently withdrawn the EEO certificate. Therefore, the *Cour de cassation* held that the enforcement measures did not have any legal basis and that the *cour d'appel* properly ordered the lifting of these measures.

Keywords: Enforcement (grounds for refusal)

7. Cour d'appel de Paris, pôle 5 ch. 2, 10.02.2012, No 10/25115

In the course of proceedings before the Paris Court of Appeal, the parties reached an agreement to end their dispute and submitted it to the court for approval and registration. The *cour d'appel* qualifies the "*protocole transactionnel*" as a settlement governed by Articles 2044 *et seq.* of the French Civil Code and certified it as an EEO on the basis of Article 24 of the EEO Regulation.

Keywords: Notion of "uncontested claims", Certification of outgoing EEOs

8. **Cour de cassation, Civ. 2, 22.02.2012, No 10-28.379**

Appeal from the judgment issued by the *cour d'appel* of Besançon on 15 September 2010[69] before the French *Cour de cassation*. The debtor argued that the Italian judgment on the basis of which enforcement measures have been carried out in France had not been regularly notified. The French *Cour de Cassation* held that, where an enforcement measure relies on a decision certified as an EEO, the debtor cannot challenge the conditions under which the initial judgment was served upon him before the courts of the State of enforcement. The decision certified as an EEO in the State of origin is recognized and enforced in the other Member States without a declaration of enforceability being necessary and without it being possible to challenge its recognition. Therefore, the court declared the debtor's claim inadmissible.

Keywords: Enforcement (service)

9. **Cour d'appel de Bordeaux 15.05.2013, 12/02578**

In the course of insolvency proceedings initiated against a French company, a Dutch company declared a claim of 77,574.02 euros established by a judgment issued by a court of first instance in Amsterdam (The Netherlands) and certified as an EEO. The liquidator objected to the recognition of the claim, arguing that the creditor had not proven the authenticity of the title because the signatures on the Dutch judgment and the EEO could not be verified. The French judge refused to recognize the the EEO, and the creditor appealed before the *cour d'appel* of Bordeaux.

The *cour d'appel* held that the requirements set out by Article 20 EEOR are satisfied when the creditor is able to establish the authenticity of the judgment and the EEO by providing the authentification of the (Dutch) authorities who signed the documents. The Court held that this authentification could be established by the formality of the apostille set out in the Hague Convention of 5 October 1961. The court noted that the creditor had finally obtained the apostille during the proceedings and granted the appeal.

Keywords: Enforcement (procedure)

10. **Cour de cassation, Civ. 2, 26.09.2013, No 12-22.657**

Proceedings between a creditor domiciled in Italy and a company registered in France. Following a judgment issued by the tribunal of Naples (Italy), certified as an EEO on 15 May 2010 and served on the

[69] *Supra*, 3.

debtor on 10 September 2010, the creditor carried out a third party debt order targeting a bank account held by the debtor in France. The latter resisted enforcement by suing the creditor before the French enforcement judge, arguing that the EEO had been irregularly served. The creditor then appealed this decision before the *cour d'appel* of Paris, which rejected the debtor's claims.

The debtor filed an appeal before the French *Cour de cassation*, arguing that the EEO had been irregularly served because it did not mention the possibility to apply for a withdrawal of the EEO pursuant to Article 10 EEOR, especially where the requirements set out in Article 18(1)(b) EEOR have not been met.

The court rejected the argument, holding that Article 5 EEOR provides that a judgment which has been certified as an EEO in the Member State of origin shall be recognized and enforced in the other Member States, without a declaration of enforceability and without the possibility of opposing its recognition. Under the terms of Article 10 of the same Regulation, the issuance of an EEO certificate is not subject to appeal other than rectification or withdrawal before the court of origin. Hence, the French *Cour de cassation* ruled that the recognition and enforcement of the Italian EEO could not be opposed before French courts.

Keywords: Enforcement (service)

11. Cour d'appel de Pau, 18.11.2013, No 12/02662

Following three default judgments issued by the tribunal of Denia (Spain) and certified as EEOs, the creditors carried out a third party debt order against a debtor domiciled in France. The debtor appealed the Spanish judgments by contesting their constitutionality before the Spanish courts. At the same time, the debtor resisted enforcement by applying for a suspension before the French enforcement judge. The French enforcement judge rejected the claim. The debtor appealed this decision before the *cour d'appel* of Pau.

The court granted the debtor's application, finding that the appeal challenging the constitutionality of the Spanish judgment amounted to a challenge to the Spanish judgments and constituted exceptional circumstances within the meaning of Article 23 EEOR. Accordingly, the *cour d'appel* suspended the enforcement of the EEO.

Keywords: Enforcement (stay or limitation of enforcement)

12. Cour d'appel de Nancy, 12.12.2013, No 13/02188

In the course of proceedings before the *cour d'appel* of Nancy, the plaintiff asked the court to certify its upcoming decision as an EEO. The court rejected the request, holding that Article 509-1 of the French

Code of Civil Procedure then required applications under the EEO Regulation to be submitted to the chief clerk of the court that issued the decision.

Keywords: Certification of outgoing EEOs

13. Cour d'appel d'Aix-en-Provence 20.11.2014, No 13/21240

A German company initiated enforcement proceedings in France based on a German payment order accompanied by a translation and an EEO issued by the same German court. The judge of first instance denied recognition of the judgment, holding that the claim did not appear to be certain because of the lack of *exequatur*. The French *cour d'appel* reversed this decision, holding that the EEO Regulation provides for the enforceability of an EEO without any need for a declaration of enforceability.

Keywords: Abolition of exequatur

14. Cour d'appel de Colmar, 24.11.2014, No 14/01787

On the basis of three judgments issued by the Regional Tribunal of Lublin-Wschod (Poland) and certified as EEOs, a creditor carried out a third party debt order against a bank account held by the debtor in a French bank. In support of the enforcement, the creditor produced an EEO both in Polish and in French.

The debtor resisted enforcement before the French courts, arguing that the translation of the documents was inaccurate and insufficient and that the creditor had not established the authenticity of the judgments and EEO. The *cour d'appel* of Colmar rejected these claims. According to the *cour d'appel*, the translation of the EEO was sufficient to ensure the validity and meaning of the certificate even though, as a consequence of an error, it did not include points 10.2 and 13.3 of the original document. Furthermore, the court also held that a certified copy delivered by the issuing authorities is sufficient to meet the requirements set out by Article 20 of the EEO, and the creditor does not need to provide the original of the documents. According to the *cour d'appel*, the creditor had met the requirements for enforcing the EEO. The court declared that the debtor's arguments were inadmissible.

Keywords: Enforcement (procedure)

15. Cour d'appel de Nancy, 30.03.2015, No 14/00839

Following the issuance of a Italian order for payment dated 7 August 2007 and certified as an EEO on 25 August 2008, the creditor – an Italian company represented by its liquidator – initiated enforcement proceedings in France against the debtor – a French registered company. The debtor resisted enforcement,

arguing that the court of origin should not have issued the EEO certificate because the notification of the initial order for payment did not indicate the competent authority and the delay for opposing the order. The enforcement judge granted the debtor's claim, and the creditor appealed this decision before the *cour d'appel* of Nancy.

The court upheld the decision issued by the enforcement judge, holding that the minimum requirements set out in Article 17 EEOR had not been met because the initial notification of the Italian order did not adequately indicate the competent authority and the procedural requirements regarding the filing of opposition proceedings. Thus, the court held that the conditions to issue an EEO had not been fulfilled and refused the enforcement of the EEO in France.

Keywords: Enforcement (service)

16. Cour d'appel d'Aix-en-Provence, 29.05.2015, No 13/18557

Following the issuance of three EEOs in Spain, the creditor notified a writ and an order to pay to the debtor, a French registered company, with a view to carry out enforcement measures in France. The debtor resisted enforcement by suing the creditor before the enforcement judge of the *tribunal de grande instance* of Aix-en-Provence, where it asked the court to suspend the enforcement of the EEO. On 12 September 2013, the enforcement judge rejected the debtor's claim. A few days before, on 3 September 2013, the debtor had obtained three decisions before the Spanish courts annulling the procedural acts that had led to the issuance of the EEOs.

On the basis of these decisions, the debtor filed an appeal before the *cour d'appel* of Aix-en-Provence, asking for the suspension of the enforcement proceedings. The court granted the application, holding that the debtor had shown that the conditions set out in Article 23 EEOR had been met. Thus, the *cour d'appel* ordered the suspension of the enforcement in France.

Keywords: Enforcement (stay or limitation of enforcement)

17. Cour de cassation, Civ. 2, 25.06.2015, No 14-18.270

Following the provisions of Article 509-1 of the French Code of Civil Procedure that were in force at the time, the creditor applied to the chief clerk of the *cour d'appel* of Lyon for the certification of a judgment issued by the same court on 22 June 2010. The chief clerk rejected the request, and the creditor appealed this decision before the President of the *tribunal de grande instance* of Saint-Etienne pursuant to the old Article 509-7 of the French Code of Civil Procedure. The President granted the application and issued the

EEO. Subsequently, the debtor filed a request for rectification of the EEO certificate before the chief clerk of the *tribunal de grand instance* of Saint-Etienne pursuant to Article 10 EEOR. However, the President of the *tribunal de grande instance* (and not the chief clerk) rejected the application.

The debtor appealed this last decision before the French *Cour de cassation*, arguing that the President of the *tribunal de grande instance* had exceeded its powers because the application for rectification should have been dealt with by the chief clerk. The *Cour de Cassation* sided with the debtor, holding that pursuant to Articles 6 and 10 EEOR, the application for rectification or withdrawal of the EEO should have been addressed, like the application for the issuance of the EEO itself, to the chief clerk of the court of origin. The *Cour de Cassation* consequently held that under Article 509-1 of the French Code of Civil Procedure, this request has to be made to the chief clerk of the court which rendered the decision.

Keywords: Certification of outgoing EEOs

18. Cour d'appel de Nancy 12.10.2015, No 15/00338

On 22 May 2013, a Belgian bank initiated enforcement proceedings against the debtor's immovable assets situated in France. Enforcement was based upon a loan agreement concluded by an authentic instrument established by a Belgian notary and later certified as an EEO by the same notary. The debtor resisted enforcement, arguing *inter alia* that, under French law, authentic instruments should be certified as EEOs by the President of the Chamber of Notaries rather than by the notary itself. The enforcement judge rejected the claim, and the debtor appealed before the *cour d'appel* of Nancy.

The *cour d'appel* upheld the decision of the enforcement judge. It held that Belgian rules of procedure should govern whether a Belgian notary is competent to issue an EEO and noted that, according to Belgian law, an authentic instrument might be certified as an EEO by the notary who drafted it. Thus, according to the *cour d'appel*, the creditor could recover its debt through enforcement in France.

Keywords: Notion of "uncontested claims", Enforcement (procedure)

19. Cour d'appel de Paris, Pôle 1, 13.12.2016, No 16/16923

Proceedings between a debtor domiciled in France and a company registered in England. Following a default judgment issued by the High Court of Justice (Queen's Bench Division) on 19 June 2014 and certified as an EEO on 2 October 2014, the creditor initiated enforcement proceedings in France against the debtor's shareholder rights in a French company. The debtor resisted enforcement by suing the creditor in Paris before the enforcement judge at the *tribunal de grande instance*. The judge rejected the

debtor's claims and allowed the enforcement to go forward. The debtor appealed this decision before the *cour d'appel* of Paris and concurrently applied for a stay before the first President of the *cour d'appel* of Paris pursuant to Article R.121-22 of the French Code of Civil Enforcement Procedures.

Before the first President, the debtor argued that enforcement of the first instance decision should be stayed because of the existence of serious grounds for setting aside or reversal. In particular, the debtor argued that the enforcement should have been refused because the English judgement violated French international public policy as well as his fundamental rights of defence, because the document instituting the proceedings had not been regularly served upon him and because the English judge could not issue a judgment against a consumer domiciled in France. Finally, the debtor contended that the documents served upon him by the French bailiff concerning the French enforcement measures did not include all the mentions required under French law regarding the distinction between amounts due in principal and interests.

The first President rejected the debtor's claims and refused to stay the enforcement of the first instance decision. In its decision, the first President held that French international public policy is not an exception to the enforcement of an EEO, and that to hold the opposite would be to disregard the provisions of Article 21(2) of the EEO Regulation. Regarding the plea that the enforcement measures violated the fundamental rights of the debtor, the first President referred to Articles 14 and 3(1) EEOR and rejected the claims. As to the service of the documents at the moment of the enforcement measures, the first President considered that the EEO certificate itself did not require to distinguish between the sums due in principal and interests. Therefore, the judge held that the debtor could not challenge the regularity of the notification pursuant to Article R. 121-22 of the French Code of Civil Enforcement Procedures.

Keywords: Enforcement (grounds for refusal)

20. <u>Cour de cassation, Civ. 2, 28.09.2017, 15-26.640</u>

Following a judgment issued by the *tribunal de commerce* of Grenoble on 7 December 2007 and rectified on 1 August 2008, the creditor obtained an EEO certificate in France. On 29 December 2009, the debtor, a German company, filed a lawsuit before a French enforcement judge. Before the judge, the debtor argued that the judgment should be considered void pursuant to Article 478 of the French Code of Civil Procedure because it had been issued in default of appearance without the defendant being regularly summoned, and the judgment itself had not been served upon the debtor within six months after being issued as required by French law.

The enforcement judge rejected this application, and the debtor appealed before the Court of Appeal of Grenoble, which upheld the decision on 20 December 2011. On 17 October 2013, however, the French *Cour de cassation* reversed this judgment and remanded the case before the *cour d'appel* of Chambéry. On 8 September 2015, the *cour d'appel* of Chambéry granted the debtor's claim, holding that the initial judgment issued in default of appearance had not been notified within six months as required by law. Acting on this basis, the court annulled the judgment of the *tribunal de commerce*.

The creditor appealed the judgment before the *Cour de cassation*, arguing that the *cour d'appel* of Chambéry did not have the power to annul the initial decision and had acted *ultra petita*. The *Cour de cassation* upheld the creditor's claim, holding that the *cour d'appel* of Chambéry did not have the power to annul the decision, but only to state that the judgment should be considered void pursuant to Article 478 of the French Code of Civil Procedure. The *cour d'appel* should have simply disregarded it instead of annulling the judgment then.

Keywords: Certification of outgoing EEOs

21. <u>Cour d'appel de Versailles, 1re ch. 1re sect., 02.02.2018, No 16/01881</u>

On 18 April 2012, the tribunal of Bologna (Italy) issued an Italian order for payment against several debtors on the basis of a loan agreement signed before an Argentinian notary. In the absence of any opposition, the Italian court declared the order enforceable on 9 May 2012 and certified it as an EEO on 13 March 2013. On 17 March 2015, the creditor obtained a judicial mortgage in France against one of the debtors.

On 15 May 2015, the debtor applied for withdrawal of the EEO in Italy following Article 10 EEOR. On 17 August 2015, the court of origin granted the application; the judgment was later upheld by the Court of Appeal of Bologna on 13 January 2016.

On 3 February 2016, however, the creditor filed a new application before the tribunal of Bologna and obtained a certificate under Article 53 of the BI Regulation No 44/2001. Subsequently, the creditor sought and obtained a declaration of enforceability of the Italian order for payment before the chief clerk of the *tribunal de grande instance* of Nanterre. The debtor appealed this decision before the *cour d'appel* of Versailles, arguing, in substance, that the accompanying certificate issued in Italy under the BI Regulation had been obtained by fraud and was irreconcilable with the withdrawal of the certificate issued under the EEO Regulation.

Noting that Article 27 EEOR provides that the EEO Regulation should not affect the possibility of seeking recognition and enforcement of a foreign title in accordance with the BI Regulation, the *cour d'appel* dismissed the debtor's claim and upheld the declaration of enforceability issued by the chief clerk.

Keywords: Abolition of exequatur

22. Tribunal de grande instance de Paris, 10.04.2018, No 18/80317

On 18 July 2017, a company provisionally attached the sums held in a French bank account on the basis of an English judgment dated 16 June 2017, certified as an EEO on 10 July 2017. On 15 November 2017, the measure was then converted into a final third party debt order. The debtor sued the company before the enforcement judge at the *tribunal de grande instance* of Paris.

Before the judge, the debtor argued in particular that the enforcement of the EEO should be refused pursuant to Article 21 EEOR because of the existence of a prior judgment issued by the Dakar Court of Appeal (Senegal), which met the requirements for recognition and enforcement in France. The judge, however, did not reach the question, because it held that the objection had not been raised within the time limit set out in Article R. 523-9 of the French Code of Civil Enforcement Procedures. Consequently, the court declared the debtor's claim inadmissible.

Keywords: Enforcement (grounds for refusal)

23. Cour d'appel de Saint-Denis de la Réunion, ch. civile tgi, 27.10.2020, No 19/00368

On 11 April 2018, the creditor, an Italian company, served the debtor, a French company, with a writ and an order to pay based on an Italian order of payment dated 11 July 2017 and certified as an EEO on 9 March 2018. On 29 May 2018, the creditor also carried out a third party debt order against a bank account owned by the debtor in France. The debtor resisted enforcement before French courts. On 14 February 2019, the enforcement judge suspended the enforcement proceedings.

The creditor appealed this decision before the *cour d'appel* of Saint-Denis de la Réunion, arguing that it had carried out enforcement measures pursuant to a valid EEO and that the enforcement court lacked jurisdiction to assess the regularity of the procedure followed in the State of origin. The *cour d'appel* granted the appeal, holding in particular that the French enforcement judge did not have the power to verify whether the Italian courts lacked jurisdiction to issue the initial order for payment and the EEO, nor to check whether the service of the initial decision complied with the EEO Regulation. On the question of the suspension of the enforcement proceedings, the *cour d'appel* noted that the court of the State of origin

had rejected the debtor's application for a withdrawal made under Article 10 EEOR and that the debtor's arguments did not amount to "exceptional circumstances" under Article 23 EEOR. Accordingly, the court reversed the decision below and allowed enforcement proceedings to go forward.

Keywords: Enforcement (grounds for refusal, stay or limitation of enforcement)

B. Critical Assessment

A total of twenty-three (23) decisions have been selected to illustrate French case law relating to the EEO Regulation. Among them, nineteen (19) concern the recognition and enforcement in France of EEOs issued in another Member State (**a**), while four (4) apply the provisions set out in the French Code of Civil Procedure relating to the certification of outgoing EEOs (**b**).

a. Recognition and enforcement of incoming EEOs

i. Notion of "uncontested claims"

According to Article 3 EEOR, the Regulation applies to "judgments, court settlements and authentic instruments on uncontested claims". Furthermore, the same provision also lays out the categories of claims that must be regarded as uncontested for the purposes of the EEO Regulation.

Unsurprisingly, most of the reported decisions handed down by French courts deal with the hypothesis set out in Article 3(1)(b) EEOR, *i.e.* with court decisions that have been certified as EEOs because: "the debtor has never objected to [them], in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings". More specifically, French courts have consistently held that the EEO Regulation applies to the recognition and enforcement of claims resulting from foreign default judgments, including foreign orders for payment that have been declared enforceable and certified as EEOs due to a lack of opposition from the defendant[70].

Claims falling under Article 3(1)(b) EEOR are naturally more prone to litigation, because debtors who did not participate in the foreign proceedings may be tempted to resist enforcement of the foreign judgment

[70] For an example, see Cour d'appel d'Aix-en-Provence, 20.08.2008, No 07/14921 (*supra*, 1).

certified as an EEO in France. Nevertheless, French courts have also applied the EEO Regulation to other enforceable titles such as judicial settlements[71] and foreign authentic instruments[72].

ii. Abolition of exequatur

The abolition of exequatur is one of the key features of the EEO Regulation. Pursuant to Article 5 EEOR, in fact: "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition".

Accordingly, French courts have rightly held that the recognition and enforcement of foreign EEOs are not subject to any prior declaration of enforceability[73] and that foreign titles certified as EEOs must produce the same effect as valid enforceable titles established under French law[74].

Conversely, French courts have also correctly noted that the application of the EEO Regulation does not prevent a creditor holding an enforceable title issued in another Member State from seeking a declaration of enforceability under the BI Regulation. This result stems from Article 27 EEOR, which provides that the applicability of the EEO Regulation does not affect the possibility of seeking recognition and enforcement, in accordance with Regulation (EC) No 44/2001, of a judgment, a court settlement, or an authentic instrument on an uncontested claim. Accordingly, the *cour d'appel* of Versailles recently held that a creditor had the right to seek the enforcement of an Italian judgment under the BI Regulation provisions even though the court of origin had initially issued an EEO that it later withdrew[75]. The abolition of the exequatur procedure under the BI bis Regulation should not impair the application of the principle set out in Article 27 EEOR.

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[71] See Cour d'appel de Paris, pôle 5 ch. 2, 10.02.2012, No 10/25115 (*supra*, 7) (dealing with the certification of a French court settlement).
[72] Cour d'appel de Nancy 12.10.2015, No 15/00338 (*supra*, 18).
[73] Cour d'appel d'Aix-en-Provence, 20.08.2008, No 07/14921 (*supra*, 1).
[74] Cour d'appel d'Aix-en-Provence 20.11.2014, No 13/21240 (*supra*, 13). See also Article 20(1) EEOR.
[75] Cour d'appel de Versailles, 1re ch. 1re sect., 02.02.2018, No 16/01881 (*supra*, 21).

iii. Enforcement

– Procedure

Under Article 20 EEOR, the law of the Member State of enforcement should govern the execution of foreign EEOs, subject to the provisions laid out by the Regulation itself. In particular, Article 20(2) EEOR sets out the documents that a creditor must provide to the competent authorities of the Member State of enforcement when seeking to enforce the EEO in another Member State.

The application of this provision has given rise to some litigation in France, particularly with respect to the documents that the creditor must provide under Article 20(2) EEOR to establish the authenticity of the title and the EEO certificate that form the basis for the enforcement. As the reported cases show, French courts have generally adopted a pro-enforcement stance by interpreting these requirements rather liberally. In a case decided in 2010, the *cour d'appel* of Paris held, for instance, that this provision does not concern the service of the EEO on the debtor, but merely enumerates the documents that the creditor must provide to the French enforcement authorities[76]. Therefore, the court held that the debtor could not rely on Article 20(2) EEOR in a case where the documents accompanying the writ and summon to pay did not fulfil the conditions set out in this provision. In the same way, French courts have also held that a creditor who does not provide the enforcement authorities with all the documents laid out in Article 20(2) EEOR before the first enforcement measure may nevertheless cure this defect in the course of the enforcement proceedings[77].

The same liberal approach seems to apply regarding the translation of a foreign EEO. As an example, the *cour d'appel* of Colmar[78] allowed the enforcement of three Polish default judgments to go ahead even though one of the translations accompanying the EEOs did not include the whole certificate due to an error.

– Service

Another recurring issue regarding the enforcement of foreign EEOs in France concerns the possibility for debtors to raise a violation of the minimum standards set out in Chapter III of the EEO Regulation before

[76] Cour d'appel de Paris, 28.10.2010, No 10/14439 (*supra*, 5).
[77] Cour d'appel de Bordeaux, 23.11.2009, No 08/04353 (*supra*, 2); see also Cour d'appel de Bordeaux 15.05.2013, 12/02578 (*supra*, 9) (requiring an apostille).
[78] Cour d'appel de Colmar, 24.11.2014, No 14/01787 (*supra*, 14).

the courts of the Member State of enforcement. In particular, these standards apply to the service of the underlying title prior to its certification as an EEO. On this point, the French *Cour de cassation* has held that debtors who wish to raise a violation of the minimum standards set out in Chapter III of the Regulation should apply for rectification or withdrawal of the certification of the EEO in the State of origin rather than resist its enforcement in France[79]. Similarly, a debtor may not resist enforcement in France of a foreign judgment certified as an EEO by arguing that the initial decision should have been notified in accordance with the rules set out by the French Code of Civil Procedure[80].

The French *Cour de cassation* adopted the same solution in a case where the debtor's objections related to the service of the EEO certificate itself rather than the notification of the underlying decision[81]. According to the court, debtors may not resist enforcement of a foreign EEO in France by arguing that the documents of service accompanying the EEO did not mention the possibility of applying for rectification or withdrawal of the certificate pursuant to Article 10 EEOR.

– **Grounds for refusal**

According to Article 21(1) EEOR, the enforcement of a foreign EEO may only be refused where the foreign judgment is irreconcilable with an earlier judgment given in any Member State or in a third country[82]. Hence, French courts correctly rejected claims that the enforcement of an EEO should be refused because it violated French public policy[83] or because the courts of the State of origin lacked jurisdiction to issue the underlying judgment[84].

Furthermore, the ground set out in Article 21(1) EEOR only applies to foreign judgments certified as EEOs. With respect to authentic instruments, Article 25 EEOR simply provides instead that: "An authentic instrument which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability

[79] Cour de cassation, Civ. 2, 22.02.2012, No 10-28.379 (*supra*, 8); see also the decision below, Cour d'appel de Besançon, 1re ch., 15.09.2010, No 09/03024 (*supra*, 3). *Contra*, see Cour d'appel de Nancy, 30.03.2015, No 14/00839 (*supra*, 15).
[80] Cour d'appel de Lyon, 6e ch., 14.10.2010, No 09/04873 (*supra*, 4).
[81] Cour de cassation, Civ. 2, 26.09.2013, No 12-22.657 (*supra*, 10).
[82] Still, the objection has to be raised in accordance with the procedural rules set out by the French Code of Civil Enforcement Procedures. See Tribunal de grande instance de Paris, 10.04.2018, No 18/80317 (*supra*, 22).
[83] Cour d'appel de Paris, Pôle 1, 13.12.2016, No 16/16923 (*supra*, 19).
[84] Cour d'appel de Saint-Denis de la Réunion, ch. civile tgi, 27.10.2020, No 19/00368 (*supra*, 23).

and without any possibility of opposing its enforceability"[85]. Hence, the *cour d'appel* of Nancy correctly held, in a case involving the enforcement of a Belgian authentic instrument, that the provisions of the French Code of Civil Procedure regarding the certification of domestic titles could not apply to foreign EEOs[86].

In addition to these principles, however, Article 11 EEOR also provides that: "The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment". In a judgment issued on 6 January 2012, the French *Cour de cassation* correctly held, therefore, that a foreign EEO could not be enforced in France in a case where the underlying judgment had subsequently been annulled in the State of origin by decisions having acquired *res judicata* effect[87].

- **Stay or limitation of enforcement**

According to Article 23 EEOR, the courts of the Member State of enforcement may also stay or limit the enforcement of a foreign EEO where the debtor has challenged the judgment certified as an EEO (including an application for review within the meaning of Article 19 EEOR) or has applied for the rectification or withdrawal of an EEO certificate in accordance with Article 10 EEOR. In these cases, however, enforcement proceedings may only be suspended under exceptional circumstances.

Under this provision, a French *cour d'appel* has granted an application for a stay in a case where the constitutionality of the underlying judgment was being challenged in the State of origin[88]. Similarly, another court granted a stay where the court of origin had annulled all the procedural acts leading to the issuance of the EEO[89]. Conversely, applications for a stay are generally refused if the challenges against the EEO have been rejected in the State of origin[90].

[85] The same principle also applies to court settlements as per Article 24(2) EEOR.
[86] Cour d'appel de Nancy 12.10.2015, No 15/00338 (*supra*, 18).
[87] Cour de cassation, Civ. 2, 06.01.2012, No 10-23.518 (*supra*, 6).
[88] Cour d'appel de Pau, 18.11.2013, No 12/02662 (*supra*, 11).
[89] Cour d'appel d'Aix-en-Provence, 29.05.2015, No 13/18557 (*supra*, 16).
[90] See Cour d'appel de Lyon, 6e ch., 14.10.2010, No 09/04873 (*supra*, 4); Cour d'appel de Saint-Denis de la Réunion, ch. civile tgi, 27.10.2020, No 19/00368 (*supra*, 23).

b. Certification of outgoing EEOs

Today, Article 509-1 of the French Code of Civil Procedure provides that the power to certify a French judgment as an EEO lies with the court which rendered the decision or approved the court settlement. This provision, however, was only amended in 2017, following the CJEU's decision in the case *Imtech Marine*[91]. Before that, the power to issue an EEO in France lied with the chief clerk of the court of origin.

As the reported cases show, the current drafting of Article 509-1 of the French Code of Civil Procedures may probably help overcome some interpretative issues that had arisen under the old certification regime. According to the new version of this provision, in fact, a party may probably ask for the certification of the upcoming judgment as an EEO even in the course of the proceedings[92]. Similarly, applications for the rectification or withdrawal of the EEO should now be addressed to the judge who issued the decision rather than to the chief clerk[93].

In addition to the rules concerning the certification of outgoing EEOs, it should also be noted that according to Article 478 of the French Code of Civil Procedure, French default judgments must be notified to the defendant within six months. In the absence of such notification, the debtor may apply to the French enforcement judge and seek a declaration that the underlying judgment should be considered void. In this case, the judgment is treated as if it had never been issued[94]. This provision also applies to default judgments that have been certified as an EEO. It provides a useful remedy for debtors who wish to challenge the judgment underlying an EEO because of the violation of the minimum standards set out in Chapter III.

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[91] CJEU, 17.12.2015, C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*. For more information about Article 509-1 of the French Code of Civil Procedure, see M. Buzzoni and V. Van Den Eeckhout, *Report on the Collection of French implementing rules*, p. 26, available at https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf [last visited 1 September 2021].

[92] Under the old version of Article 509-1, see *contra* Cour d'appel de Nancy, 12.12.2013, No 13/02188 (*supra*, 12); cf Cour d'appel de Paris, pôle 5 ch. 2, 10.02.2012, No 10/25115 (*supra*, 7), in which the court erroneously held that it had the power to certify a court settlement.

[93] Cf Cour de cassation, Civ. 2, 25.06.2015, No 14-18.270 (*supra*, 17).

[94] See Cour de cassation, Civ. 2, 28.09.2017, 15-26.640 (*supra*, 20).

IV. EPO Regulation

A. Case Law Summaries

1. Cour d'appel de Grenoble, ch. commerciale, 30.06.2011, No 11/01943

Proceedings between SA Manufacture des drapeaux unic ("Drapeaux Unic"), a French registered company, and Monetti, an Italian registered company, before the *cour d'appel* of Grenoble. Drapeaux Unic had entered into a sale purchase agreement with Monetti. After Drapeaux Unic failed to pay several invoices, Monetti obtained an EPO against SA Manufacture des Drapeaux Unic before the court of Grosseto (Italy). Drapeaux Unic opposed the EPO, arguing that the Italian court lacked jurisdiction to issue the EPO. Meanwhile, the buyer initiated summary proceedings (*procedure de référé*) before French courts, asking to appoint an expert to review the seller's goods and obtain interim relief in the form of provisional payment order (*référé-provision*). Monetti opposed the Drapeaux Unic's application, arguing that proceedings involving the same cause of action were pending before the Italian courts. The French court stayed the proceedings, noting that parallel litigation might lead in irreconcilable decisions. SA Manufacture appealed the decision before the *cour d'appel* of Grenoble. The *cour d'appel* found that although the actions before the different courts were not identical, they were related in a manner that there was a risk of having two irreconcilable decisions. Consequently, the Court did not grant the appeal.

Keywords: Interactions with other procedures (parallel litigation)

2. Tribunal de commerce de Nanterre, 09.11.2011, No 2011F00195

Proceedings between Actif-communication international, a French registered company, and Tanghe Printing, a Belgian registered company. On 12 October 2010, the *tribunal de commerce de Nanterre* granted an EPO against Actif-communication internationale, upon the request of Tanghe Printing. On 27 October 2010, the EPO was served on the defendant. On 25 November 2010, Actif-communication internationale lodged a statement of opposition to the EPO before *tribunal de commerce* of Nanterre.

Tanghe Printing then initiated ordinary civil proceedings against Actif-communication internationale before the *tribunal de commerce* of Nanterre. After noting that the defendant was not present at the hearing, had not appointed a lawyer, and had not filed any defense, the court declared that the opposition was admissible since it was lodged in the period established on article 1416 of the French Code of Civil

Procedure; nonetheless, it concluded that the opposition was not well founded and confirmed the decision granted by the EPO.

Keywords: Opposition

3. Cour d'appel de Nîmes, Chambre ccommerciale 2 b, 10.05.2012, No 11/01267

Proceedings between SA PGO Automobiles, a French registered company, and Studio Legale Contessa et Associati, an Italian registered company. On 31 May 2005, judicial reorganisation proceedings ("*redressement judiciaire*") were initiated concerning SA PGO Automobiles before the *tribunal de commerce d'Alès*. The court established a 10-year continuation plan. On 1 August 2008, the *tribunale ordinario* of Brescia (Italy), granted an EPO against SA PGO Automobiles upon the request of Studio Legale Contessa et Associati. On 19 December 2008, the Italian bailiff sent the EPO to the defendant by ordinary mail.

On 1 January 2009, SA PGO Automobiles requested the suspension of the payment of the EPO before the *juge commissaire* of the *tribunal de commerce* of Nîmes. The *juge commissaire* of *tribunal de commerce* of Nîmes condemned SA PGO Automobiles to the payment of the EPO. SA PGO Automobiles opposed this decision before the *tribunal de commerce* of Nîmes, which rejected it. SA PGO Automobiles appealed this decision, requesting its nullity, before the *tribunal de commerce* of Nîmes. The court did not grant the appeal.

SA PGO Automobiles then appealed the decision before the *cour d'appel* of Nîmes, which found that the *juge commissaire* was not competent to review the enforcement of the EPO given that the creditor had not declared its claim nor tried to enforce it in the course of the reorganization proceedings. The court noted that all questions concerning the enforceability of the EPO should have been addressed before the court of origin, in this case the *tribunale ordinario* of Brescia. Consequently, the *cour d'appel* of Nîmes did not grant the appeal.

Keywords: Interactions with other procedures (insolvency)

4. Tribunal de commerce de Nanterre, 19.12.2012, No 2010F03902

Proceedings between Maître Legras de Grandcourt, liquidator of Valparaiso, a French registered company; and STE GRP International LTD, an English registered company. Caracas, a French registered company, had a contractual relation with STE GRP International LTD. STE GRP International LTD left several unpaid invoices. Afterwards, Caracas was absorbed by Valparaiso. On 18 January 2010, Valparaiso filed a request for an EPO before the *tribunal de commerce* of Nanterre. This request was received by the tribunal on 20 January 2010. On the same day, the same tribunal issued a judgment opening insolvency proceedings

against Valparaiso. On 1 June 2010, the tribunal issued an EPO against STE GRP International LTD upon the request of Valparaiso, based on the unpaid invoices issued by Caracas. The EPO was served to STE GRP International LTD on 23 June 2010. On 12 July 2010, STE GRP International LTD lodged the statement of opposition to the EPO. Ordinary civil proceedings were initiated before the *tribunal de commerce* of Nanterre.

During the proceeding, STE GRP International LTD argued that Valparaiso lacked the capacity to apply for an EPO because of the insolvency proceedings opened against it and that only its liquidator, acting on its behalf, could have filed the request. The tribunal rejected the argument, holding that Valparaiso had sent its request for an EPO on 18 January 2010, and that insolvency proceedings had begun only on 20 January 2010. Therefore, at the time the EPO was requested, Valparaiso had legal capacity to file legal proceedings. Consequently, the *tribunal de commerce* of Nanterre ordered the defendant to pay the amount awarded by the EPO.

Keywords: Scope of the EPO Regulation (exclusions)

5. Tribunal de commerce de Creteil, 1re ch., 28.01.2013, No 2012F00683

Proceedings between S+S Signs and Services Gbr, a German registered company, and SA Technique à vue, a French registered company, before the *tribunal de commerce* of Créteil. On 22 May 2012, the *tribunal de commerce* of Créteil issued an EPO against SA Technique à vue, upon request of S+S Signs and Services Gbr. On 23 May 2012, the EPO was served on the defendant. On 12 June 2012, Technique à vue lodged a statement of opposition against the EPO.

Ordinary civil proceedings were initiated before the *tribunal de commerce* of Créteil. The defendant did not appear during the oral hearings. The *tribunal de commerce* of Créteil ordered it to pay the amount granted by the EPO plus the accrued interests and granted the provisional enforcement of the judgement.

Keywords: Opposition

6. Cour d'appel de Douai, 14.03.2013, No 12/02210

Proceedings between S.A. X, a company registered in France, and Yakumo GmbH, a company registered in Germany, before the *cour d'appel* of Douai. On 10 June 2009, the *tribunal de commerce* of Lille issued an EPO against Yakumo GmbH, upon the request of S.A. X. On 11 February 2010, the EPO was served to the defendant. On 18 February 2010, the defendant lodged a statement of opposition against the EPO.

Due to a mistake of the clerk of the court, however, the opposition was not taken into account, and the EPO was declared enforceable on 16 April 2010.

On 1 February 2011, the clerk finally registered the opposition and summoned the parties to appear before the *tribunal de commerce* of Lille, where the defendant asked for a review of the EPO. By a judgment issued on 23 February, the tribunal rejected the claim, holding that once the EPO had been declared enforceable, it is was longer possible to review it. Consequently, the tribunal declared the statement of opposition inadmissible.

Yakumo GmbH appealed against this decision before the *cour d'appel* of Douai. The court reversed the judgment, holding that since the defendant had properly lodged an opposition within the 30 days period prescribed by Article 16 of the EPO Regulation, it should be considered admissible.

Keywords: Opposition (time limits), Review

7. Cour d'appel de Douai, 14.05.2013, No 12/02093

Proceedings between SA X, a French registered company, and SA ZAY, a Belgian registered company, before the *cour d'appel* of Douai. On 21 October 2009, the *tribunal de commerce* of Lille granted an EPO, against SA ZAY, upon de request of SA X. SA ZAY contested the EPO on the basis of Article 16 EPOR. The statement of opposition was found admissible, and ordinary civil proceedings were initiated before the *tribunal de commerce* of Lille. On the merits the *tribunal de commerce* of Lille condemned SA ZAY, who decided to appeal the decision before the *cour d'appel* of Douai. The *cour d'appel* did not grant the appeal, confirming the decision of the lower court.

Keywords: Opposition

8. Cour d'appel de Besançon, 06.11.2013, No 13/01655

Proceedings between Multiplast N.V., a Belgian registered company; and Mr Z X, domiciled in France. Multiplast N.V. and Mr Z X entered into a contractual relationship. On 22 November 2012, the *tribunal de Dendermonde* (Belgium) issued an EPO against Mr Z X. On 12 December 2012, the EPO was served to Mr Z X. On 21 May 2013, the *Président du tribunal de grande instance* of Vesoul granted protective measures consisting of the expertise of the products sold by Multiplast N.V.

Multiplast N.V. decided to appeal against the decision before *cour d'appel* of Besançon, arguing that French courts lacked jurisdiction to issue the protective measure. Conversely, the *cour d'appel* of Besançon held that the French *juge de référé* had jurisdiction to grant urgent or necessary protective measures within its

territorial jurisdiction, as was reiterated by the case-law of the *Cour de cassation* (Cass. Civ. 2, 17.06.1998). Consequently, the court rejected the appeal.

Keywords: Interactions with other procedures (parallel litigation)

9. Cour d'appel de Colmar, 16.12.2013, No 12/00029

Proceedings between Set U Hydraulik und Machinenbau Gmbh, German registered company; and Mr A-B Z, domiciled in France, before the *cour d'appel* of Colmar. The company applied for an EPO before the Court of Berlin-Wedding (Germany). On 22 July 2009, the German Court notified the EPO (in German) to Mr A-B Z by registered letter with acknowledgement of receipt. The defendant did not lodge any statement of opposition, and the Court of Berlin-Wedding declared the EPO enforceable. On 3 June 2010, the enforceable EPO in German was again served by a French bailiff to the defendant. The creditor then carried out enforcement of the EPO through the attachment of the bank accounts held by Mr A-B Z in France.

Mr A-B Z successfully resisted enforcement before the French enforcement judge, which lifted the enforcement measures. The creditor appealed against the decision before the *cour d'appel* of Colmar. Concerning the EPO, this court found that no exequatur was needed for the EPO to be enforced in the state where enforcement is sought (neither can recognition be contested there), and held that the EPO had regularly been notified to the debtor in accordance with the EPO Regulation. On this last point, the court noted that the debtor was fluent in German, and added that French enforcement authorities accept to enforce EPOs written in German.

Nevertheless, the *cour d'appel* declined to enforce the EPO because winding up proceedings had been opened against Mr A-B Z after the first judge had lifted the enforcement measures and before the claimant had filed its appeal. Therefore, the *cour d'appel* found that the appeal was admissible, but held that it was not possible to seize the bank account again and that the creditor should rather collect its debt in the context of the insolvency proceedings.

Keywords: Enforcement (service), Interactions with other procedures (insolvency)

10. Cour d'appel de Riom, 07.04.2014, No 13/01233

Proceedings between SAS Institut Clinident ("Clinident"), a company registered in France, and Greiner Bio-One ("Bio-One"), a company registered in Germany, before the *cour d'appel* of Riom. On 8 May 2012, Bio-One obtained an EPO before a German court against Clinident. On 2 July 2012, the EPO was notified

to Clinident. On 9 August 2012, the court declared the EPO enforceable. The creditor carried out an attachment of a French bank account held by Clinident on 25 October 2012.

On 26 November 2012, the debtor contested the attachment before the French enforcement judge, arguing that the court of origin did not have jurisdiction to issue the underlying EPO. The *cour d'appel* of Riom refused to examine the validity of the EPO, holding that under Articles 16 and 20 EPOR only the courts of the State of origin are entitled to make this determination. Conversely, the court held that the courts of the State of enforcement should only review the enforcement measures based on the EPO. In this respect, the court found that Article L. 213-6 of the French Code of Judicial Organisation only envisages the possibility of contesting the enforcement measures before the enforcement judge.

Keywords: Enforcement (jurisdiction of the court of origin)

11. Cour d'appel de Versailles, 12e ch., 09.12.2014, No 13/01145

Proceedings between Société GRP International Limited, an English registered company, and Société Valparaiso, a French registered company before the *cour d'appel* of Versailles. On 18 January 2010, Valparaiso requested an EPO against GRP International before the *tribunal de commerce* of Nanterre, on the basis of several unpaid invoices. On 1 June 2010, the *tribunal de commerce* of Nanterre granted the EPO, which was served on GRP International on 23 June 2010. GRP International opposed the EPO. The *tribunal de commerce* of Nanterre rejected the opposition. GRP International appealed before the *cour d'appel* of Versailles, which stated that since Société Valparaiso was undergoing insolvency proceedings, it had no longer the capacity to participate in legal proceedings. Only its liquidator, acting on the behalf of the company, could have requested the EPO. Consequently, the proceeding for obtaining the EPO was null. The *cour d'appel* granted the appeal and declared the EPO null.

Keywords: Scope of the EPO Regulation (exclusions)

12. Tribunal de commerce de Nevers, 25.02.2015, No 2014005632

Proceedings between Arco Fleurs B.V., a company registered in the Netherlands, and Les jardins de Chloé et Clémentine (SARL), a company registered in France, before the *tribunal de commerce* of Nevers. On 15 July 2014, Arco Fleurs B.V. applied for an EPO before the *tribunal de commerce* of Nevers (France) against Les jardins de Chloé et Clémentine. On 2 September 2014, the EPO was served on the defendant. On 3 October 2014, Les jardins de Chloé et Clémentine lodged a statement of opposition against the EPO, based on Article 16 of the EPO Regulation.

In the court's view, the period of 30 days established by Article 16 the Regulation for the lodging of the opposition had expired. The court relied on para 4.2 of the DACS (*Direction des affaires civiles et du sceau*) circular C3 06-09 of 26 May 2010 on the implementation of the EPO Regulation, according to which the period of 30 days of Article 16, includes Saturdays, Sundays and public holidays. Therefore, the statement of opposition was declared inadmissible and the EPO was declared enforceable.

Keywords: Opposition (time limits)

13. Cour d'appel de Douai, 08.04.2015, No 14/02546

Proceedings between Volmary Gmbh ("Volmary"), a company registered in Germany, and Mr X, domiciled in France, before the *cour d'appel* of Douai. On 28 March 2014, the *juge-commissaire* in charge of the liquidation proceedings concerning Mr X's estate refused to recognize Volmary as a creditor. The company appealed against the decision arguing that it had obtained an EPO before the German courts that it had served on the defendant on 2 January 2012 pursuant to the conditions set out in Article 14 EPOR. The liquidator of Mr X' assets contended that the appeal was inadmissible because the company had not directed it against the main debtor. Subsidiarily, it also argued that the company had not provided any evidence of compliance with the minimum requirements set out in this provision. The court upheld the liquidator's procedural objection and declared the appeal inadmissible.

Keywords: Interactions with other procedures (insolvency)

14. Tribunal de grande instance de Marseille, juge de l'exécution, 9e ch. civ., 21.04.2015, No 14/03155

Proceedings between LG Européenne SARL ("LG"), a company registered in France, and S.A.S. EFFEBI "EFFEBI"), a company registered in Italy, before the judge of enforcement of the *tribunal de grande instance* of Marseille. EFFEBI applied for an EPO against LG before the Court of Livorno (Italy). On 26 October 2011, the EPO was served on the defendant. On 14 May 2012, the Court of Livorno declared the EPO enforceable, considering that no opposition had been lodged. On 31 January 2014, LG was served with the enforceable EPO and a writ of payment.

The debtor resisted the enforcement of this decision before the French enforcement judge, arguing that neither the initial EPO nor the enforceable EPO had been duly served. Concerning the first issue, the enforcement judge ruled that according to Articles 16 and 20 EPOR only the courts of the State of origin had jurisdiction to review the initial EPO. Accordingly, the enforcement judge was not entitled to assess whether or not the initial EPO had been served correctly. Regarding the service of the enforceable EPO, the judge noted that even though the notification made by the bailiff did not mention the legal representative of the claimant as required by Article 648 of the French Civil Procedural Code, this absence was immaterial because previous notifications included such information.

Keywords: Enforcement (service)

15. Tribunal de commerce de Villefranche-Tarare, 08.06.2015, No 2013J00187

Proceedings between Krona Koblenz SPA, an Italian registered company; and Mr AY, a person domiciled in France, before the *tribunal de commerce* of Villefranche-Tarare. On 9 May 2012, Krona Koblenz SPA applied for an EPO against DPS, a French registered company, before the Commercial Court of Rimini (Italy) based on several unpaid invoices. On 19 May 2012, the court issued the EPO. On 16 June 2012, the Italian court notified the EPO by mail to the legal representative of DPS. On 25 June 2012, DSP made a payment to the Italian company. DPS initiated a voluntary liquidation on 31 July 2012 and Mr AY was appointed as liquidator. On 15 November 2012, the Court of Rimini declared the EPO enforceable. On 18 December 2012, DPS was liquidated and withdrew from the French Register of Companies. On 27 May 2013, a French bailiff served DPS with the enforceable EPO and a writ of payment.

After several failed attempts to enforce the EPO, Krona Koblenz SPA decided to sue Mr AY for his liability as liquidator of DPS. The *tribunal de commerce* of Villefranche-Tarare considered that the initial EPO had not been served in accordance with French domestic law as required by Article 13 of the EPO Regulation. In the case at hand, the court held that a bailiff should have served the EPO within six months of its issuance following the then Article 1411 of the French Code of Civil Procedure. Since these conditions were not satisfied, the Court found that Krona Koblenz SPA had not proven the existence of a monetary claim that had fallen due.

Keywords: Enforcement (service)

16. Cour d'appel de Dijon, 09.06.2015, No 14/01155

Proceedings between Gerpol Joint Venture SP ZOO, a company registered in Poland; and SAS Danfoss Socla, a company registered in France, before the *cour d'appel* of Colmar. On 13 December 2011, the

District Court of Wroclaw (Poland) issued an EPO against SAS Danfoss Socla upon an application filed by Gerpol Joint Venture SP. ZOO. On 19 July 2012, the EPO was served by a French bailiff to SAS Danfoss Socla. Since no opposition was lodged, the bailiff served the enforceable EPO on the debtor on 13 July 2013, together with a writ of payment.

SAS Danfoss Socla resisted enforcement, arguing that the service of the initial EPO was irregular and, therefore, the EPO should be declared void together with any subsequent enforcement measure. In support of its argument, the debtor contended that the service of the initial EPO did not include sufficient information regarding its right to file a statement of opposition and was not accompanied by the relevant form as required by Article 1424-5 of the French Code of Civil Procedure. In the first instance, the enforcement judge upheld the debtor's argument, holding that SAS Danfoss Socla had not notified of his right to lodge an opposition against the EPO. The enforcement judge relied on Article 1424-5 of the French Code of Civil Procedure, which establishes the duty of the bailiff to inform the debtor about the courts where the opposition can be lodged.

The claimant appealed against this decision before the *cour d'appel* of Dijon. The court reversed the first instance judgment, noting that there is no possibility of contesting the EPO in the State of enforcement once it has been declared enforceable in the State of origin. Hence, the court held that the debtor could not object to the service of the initial EPO before the enforcement court.

Keywords: Enforcement (service)

17. Tribunal de commerce de Brest, 20.11.2015, No 201400236

Proceedings between Montfort et Fils (SARL) ("Montfort et Fils"), a company registered in France; and Frutas Mabe, S.I, a company registered in Spain, before the tribunal de commerce of Brest. Monfort et Fils, a fruit dealer, entered into a supply contract with Frutas Mabe. On 8 January 2013, Frutas Mabe addressed an invoice to Monfort et Fils, which allegedly paid it twice on 11 January and 19 February 2013. Seeking the repetition of the undue payment, Monfort et Fils then applied to the *tribunal de commerce* of Brest seeking an EPO. On 20 November 2013, the *tribunal de commerce* of Brest granted the request and issued an EPO against Frutas Mabe, upon the request Monfort et Fils. The order was served on Frutas Mabe on 21 February 2014.

Frutas Mabe lodged a statement of opposition claiming that the issuing court lacked international jurisdiction on the basis of the BI Regulation. Furthermore, it contested the application of EPO Regulation since the claim derived from a non-contractual relation and there was not an agreement between the parties. The court rejected the arguments of Frutas Mabe and confirmed its international jurisdiction on

the basis of Article 5(1)(b) of the BI Regulation. Ordinary civil proceedings were initiated before the *tribunal de commerce* of Brest; the EPO was replaced by a decision on the merits whereby Frutas Mabe was ordered to pay the amount granted by the EPO.

Keywords: Scope of the EPO Regulation (exclusions), Jurisdiction

18. Tribunal de commerce de Niort, Contentieux, 24.02.2016, No 2015F00075

Proceedings between SA Millet Portes et Fenetres ("Millet"), a company registered in France; and Centro Macchine Legno S.R.L. ("Centro Macchine"), a company registered in Italy, before the *tribunal de commerce* of Niort. Millet concluded a contract with Centro Macchine for the provision of a conveyor belt for joinery. Once the conveyor belt was installed, several technical problems arose. Millet decided to seek an indemnity against Centro Macchine for breach of contract. On 11 February 2015, the *tribunal de commerce* of Niort granted an EPO against Centro Macchine upon the request of SA Millet.

On 7 May 2015, Centro Macchine lodged a statement of opposition arguing the lack of jurisdiction of the *tribunal de commerce* of Niort. The court found that, according to the BI bis Regulation, in matters relating to a contract of the sale of goods jurisdiction is determined on the basis of the place where the goods were delivered or should have been delivered. In the instant case, following the terms of the contract the goods had to be delivered in France. Accordingly, the court upheld its jurisdiction.

Keywords: Jurisdiction

19. Tribunal de commerce de Lille, Contentieux, 25.05.2016, No 2015005134

Proceedings between Sas Mondial Relay ("Monday Relay"), a company registered in France; and Select Sales Corp Ltd ("Select Sales"), a company registered in England, before the *tribunal de commerce* of Lille. On 14 May 2013, Mondial Relay, a package delivery company, entered into a service contract with Select Sales. After several formal notices of delay on the payments to Select Sales, Mondial Relay applied for an EPO to the *tribunal de commerce* of Lille. On 14 August 2014, the *tribunal de commerce* of Lille granted the EPO, which was served on Select Sales on 12 January 2015.

On 25 February 2015, Select Sales lodged a statement of opposition and challenged the jurisdiction of the *tribunal de commerce* of Lille. The court found that the contract between the parties contained a choice-of-court clause conferring jurisdiction upon the *tribunal de commerce* of Lille. Consequently, the Court declared

itself competent to grant the EPO. Concerning the statement of opposition, the Court considered it inadmissible since it had been lodged after the time limit laid down in Article 16(2) of the EPO Regulation.

Keywords: Jurisdiction

20. Cour d'appel de Pau, 26.05.2016, No 16/02172

Proceedings between SIBA, a French registered company, and Société Rusticopiso Pavimentos Industriais Lda ("Rusticopiso"), a Portuguese registered company, before the cour d'appel of Pau. On 30 May 2013, the *tribunal de commerce* of Pau granted an EPO against SIBA upon the request of Rusticopiso. On 11 July 2013, the EPO was served to SIBA.

On 15 July 2013, SIBA decided to make a statement of opposition against the EPO. The *tribunal de commerce* of Pau considered the opposition admissible and opened ordinary civil proceedings. The *tribunal de commerce* of PAU condemned SIBA to pay the amount granted by the EPO plus the accrued interests; and granted the provisional enforcement of the judgement.

Keywords: Opposition

21. Tribunal de commerce de Paris, 4e ch., 01.06.2017, No 2016079810

Proceedings between SAS City Zen Sciences, a company registered in France; and Lufthansa Airplus Servicekarten GmbH, a company registered in Germany, before the *tribunal de commerce* of Paris. On 14 October 2016, the President of the *tribunal de commerce* of Paris granted an EPO against SAS City Zen Sciences based on several unpaid invoices upon the request of Lufthansa Airplus Servicekarten GmbH.

On 24 October 2016, the EPO was served to SAS City Zen Sciences, who lodged a statement of opposition against the EPO on 22 November 2016. The grounds for their opposition were that SOCIETE LUFTHANSA's claim was unfounded and that the sum claimed was not payable. The *tribunal de commerce* of Paris dismissed all the grounds of the statement of opposition, and condemned SAS City Zen Sciences to the payment of the amount granted by the EPO, among others, to Lufthansa Airplus Servicekarten GmbH.

Keywords: Opposition

22. Tribunal de grande instance de Marseille, Juge de l'exécution, 9e ch. civ., 01.06.2017, No 16/14074

Proceedings between Asia Recycling Europe ("Asia"), a company registered in France; and Ecohelp, a company registered in Romania, before the *tribunal de grande instance* of Marseille. On 27 April 2015, the Civil Court of Targo Mures (Romania) granted an EPO against Asia, upon the request of Ecohelp. On 19 October 2015, the EPO was served to the defendant. Since no opposition was lodged, the Civil Court of Targo Mures declared the EPO enforceable on 15 April 2016. On 2 November 2016, the EPO was enforced by attaching a bank account held by the defendant in France.

Asia contested the attachment before the French enforcement judge, claiming that the Romanian courts lacked jurisdiction to issue the EPO and that the underlying claim was ill-grounded. In particular, the debtor argued that the Romanian courts had established their jurisdiction by relying on false documents presented by the claimant and that the EPO had been procured by fraud. On application of Article 22 of EPO Regulation, the enforcement judge recalled that the EPO could not be reviewed in the State of enforcement; he added that EPO Regulation provides for specific mechanisms of review (Articles 16 and 20) before the court of origin. Consequently, he refused to review the EPO and confirmed the attachment of the bank account.

Keywords: Enforcement (Jurisdiction of the court of origin)

23. Cour d'appel de Montpellier, 2e ch., 20.06.2017, No 16/08379

Proceedings between V Gallent, a company registered in Spain; and SARL Gérard Macari, a company registered in France, before the *cour d'appel* of Montpellier. On 16 December 2015, the *tribunal de commerce* of Fréjus granted an EPO against SARL Gérard Macari upon the application of V Gallent.

On 8 March 2016, the defendant lodged a statement of opposition against the EPO before the *tribunal de commerce* of Fréjus. The court clerk referred the opposition to the *tribunal de commerce* of Perpignan. SARL Gérard Macari contested the jurisdiction, arguing that under Article 16 EPOR, the opposition should be handled by the court that issued the EPO. However, the *tribunal de commerce* of Perpignan found itself competent based on Article 1408 of the French Code of Civil Procedure, a provision allowing the claimant to give its prior consent to a transfer of venue in the context of the domestic order for payment procedure. SARL Gérard Macari appealed the decision before the *cour d'appel* of Montpellier. On the basis of Article 1424-8 of the French Code of Civil Procedure, the cour d'appel ruled that the statement of opposition can be referred only to the court that issued the EPO. Consequently, the *tribunal de commerce* of

Perpignan had no jurisdiction. The court granted the appeal, and referred the statement of opposition back to the *tribunal de commerce* of Fréjus.

Keywords: Opposition

24. Cour d'appel de Montpellier, 1re ch. d, 12.10.2017, No 16/08078

Proceedings between International Transports Services, a French registered company; and Gausch-Lkw-Service GmbH ("Gausch-Lkw-Service"), a German registered company. On 17 February 2015, Gausch-Lkw-Service obtained an EPO against International Transports Services before a tribunal of Wedding (Germany). On 17 July 2015, the German court notified the EPO by mail to International Transports Services. Later, the tribunal of Wedding declared it enforceable by a decision dated 15 September 2015. On 26 April 2016, Gausch-Lkw-Service GmbH initiated the enforcement proceedings by attaching a French bank account held by International Transports Services.

The debtor decided to contest this measure before the enforcement judge of the *tribunal de grande instance* of Montpellier. The judge confirmed the attachment of the bank account. International Transports Services appealed the decision before the *cour d'appel* of Montpellier. Concerning the EPO, International Transports Services argued that the EPO was not valid; that it had not been duly served; and that the enforceable EPO was not duly served either.

Concerning the first two questions, the *cour d'appel* of Montpellier found that it was not competent to assess them because Article 19 EPOR grants jurisdiction to the courts of the State of origin. Concerning the last point, however, the court noted that according to Article 21 EPOR enforcement of the EPO follows the national legislation of the Member State of enforcement. Therefore, the court held that the claimant must serve a copy of the enforceable EPO on the person against whom enforcement is sought. Additionally, the court also noted that service must include a translation of the EPO into one of the languages accepted by the State of enforcement, and that the Circular of the DACS of 26 May 2009[95] allowed to serve documents in German.

[95] See Circular of the DACS (*Direction des affaires civiles et du Sceau*) C3 06-09 of 26 May 2009, concerning the implementation of EPO Regulation.

In the present case, the court noted that the enforceable EPO was served in French accompanied by a declaration of enforceability in German. Consequently, the *cour d'appel* held that these documents complied with the requirements set out in French law and rejected the appeal.

Keywords: Enforcement (service)

25. Cour d'appel de Rennes, 2e ch., 08.12.2017, No 16/07782

Proceedings between SAS Bretagne Hydraulique ("Bretagne Hydraulique"), a French registered company, and BOA Recycling Equipment BV ("BOA Recycling"), a Dutch registered company, before the *cour d'appel* of Rennes. On 23 September 2015, the tribunal of first instance of The Hague (The Netherlands) issued an EPO against Bretagne Hydraulique upon de request of BOA Recycling. On 28 December 2015, the EPO was served on the defendant. On 17 February 2016, the EPO was declared enforceable. Subsequently, the creditor carried out several enforcement measures in France against Bretagne Hydraulique.

The debtor contested the enforcement measures before the enforcement judge of the *tribunal de grande instance* de Quimper. The enforcement judge confirmed the enforcement. The debtor appealed the decision arguing that service of the initial EPO, which had taken place on 27 October 2017, had been irregular. The *cour d'appel* found that, according to Article 17 EPOR, only the courts of the State of origin are entitled to undertake such a review. Therefore, the *cour d'appel* declared itself incompetent to review the EPO and did not grant the appeal against the decision.

Keywords: Enforcement (service)

26. Cour d'appel de Lyon, 3e ch. a, 11.01.2018, No 15/07534

Proceedings between Krona Koblenz SPA, an Italian registered company; and Mr X, a person domiciled in France, before the *cour d'appel* of Lyon. On 9 May 2012, Krona Koblenz SPA applied for an EPO against DPS, a French registered company, before the Commercial Court of Rimini (Italy) based on several unpaid invoices. On 19 May 2012, the Court issued the EPO. On 16 July 2012, the EPO was served by ordinary mail to the legal representative of DPS. On 12 June 2012, DSP made a payment of the amount of the EPO. On 31 July 2012, DPS initiated voluntary liquidation and Mr X was appointed as liquidator. On 15 November 2012, the Court of Rimini declared the EPO enforceable. On 18 December 2012, DPS was liquidated and withdrew from the French Register of Companies. On 27 May 2013, the bailiff served DPS with the enforceable EPO and a writ of payment.

After several failed attempts to enforce the EPO, Krona Koblenz SPA decided to sue Mr AY for his liability as liquidator of DPS[96]. The *tribunal de commerce* of Villefranche-Tarare considered that service of the initial EPO did not comply with French domestic law as required by Article 13 of the EPO Regulation. In the case at hand, the court held that a bailiff should have served the EPO within six months of its issuance following the then Article 1411 of the French Code of Civil Procedure. Since these conditions were not satisfied, the court found that Krona Koblenz SPA had not proven the existence of a monetary claim that had fallen due.

On 1 October 2015, Krona Koblenz SPA appealed the decision before the *cour d'appel* of Lyon. The *cour d'appel* stated that according to Article 27 EPOR, the application of the EPO Regulation does not affect the application of Regulation No 1393/2007. Hence, the *cour d'appel* verified whether service of the EPO complied with the requirements set out in this Regulation and found that service had been regularly carried out under Articles 7 and 14. Accordingly, the *cour d'appel* held that service of the EPO was valid, and consequently, the creditor held an enforceable title against the main debtor. Additionally, the *cour d'appel* also found Mr X liable as a liquidator of DPS. Accordingly, the court granted the appeal and reversed the decision rendered by *tribunal de commerce* of Villefranche.

Keywords: Enforcement (service)

27. Cour d'appel de Poitiers, 2e ch., 05.06.2018, No 17/03626

Proceedings between Sintel Italia Spa, an Italian registered company, and Société Sphinx Connect Italia, an Italian registered company, before the *cour d'appel* of Poitiers. On 28 June 2016, Sintel Italia Spa requested an EPO, before the *tribunal de commerce* of La Roche sur Yon, against Sphinx Connect Italia, on the basis of several unpaid invoices. On 16 November 2016, Sphinx Connect Italia opposed to the EPO within the period prescribed on Article 16 of EPO Regulation.

Sphinx Connect Italia stated that the French court had no jurisdiction to grant the EPO and that only Italian courts were competent. The *tribunal de commerce* of La Roche declared itself competent. Sphinx Connect Italia decided to appeal the decision. The *cour d'appel* of Poitiers found that, although the contract between the parties contained a choice of court clause in favour of French courts, the case lacked the cross-border element that cases involving an EPO must have based on Article 3(1) of EPO Regulation. In the present case, both parties had their registered offices in Italy, the communications between them

[96] See *supra*,, 15.

were in the Italian language, and the place of performance of the contract was in Italy. Consequently, the *cour d'appel* of Poitiers found that only Italian courts had jurisdiction to decide on the substance of the claim.

Keywords: Scope of the EPO Regulation, Jurisdiction

28. Cour d'appel de Douai, ch. 2 section 2, 17.01.2019, No 16/03957

Proceedings between Société Select-Sales Corporation Ltd ("Select-Sales"), an English registered company, and SAS B C ("B C"), a French registered company, before the *cour d'appel* of Douai. On 19 August 2014, the President of the *tribunal de commerce* of Lille issued an EPO at the request of B C. On 12 January 2015, the EPO was notified to Select-Sales by mail. On 25 February 2015, Select-Saled filed opposition proceedings before the *tribunal de commerce* of Lille, which in a judgment dated 25 May 2016 declared itself competent to hear the claim, but declared the opposition inadmissible because it had been filed after the expiration of the time-limit set out in Article 16 of the EPO Regulation. Accordingly, it confirmed the EPO, but also ordered Select-Sales to pay additional sums of money to B C.

Select-Sales appealed this judgment before the *cour d'appel* of Douai, arguing that the creditor did not prove that the service of the EPO had been regularly carried out on 12 January 2015, and that Select-Sales had not been given enough time to prepare its defense. It therefore asked the court to declare the opposition admissible, or to review the EPO in accordance with Article 20 of the EPO Regulation (Exceptional cases).

The court rejected Select-Sales's claims, holding that service had been carried out in accordance with Article 14(1)(c) of the EPO Regulation (deposit of the order in the defendant's mailbox), and was attested by a document signed by the competent person who affected the service pursuant to Article 14(3)(a). Furthermore, the court also held that the mere fact that service had been carried out pursuant to Article 14 could not, in itself, constitute an exceptional circumstance allowing for the review of the EPO under Article 20 of the EPO Regulation. The court thus declared the opposition inadmissible and confirmed the EPO, but held that the *tribunal de commerce* of Lille had exceeded its powers in that it ordered Select-Sales to pay an amount of money beyond the sums contained in the original EPO.

Keywords: Opposition, Review in exceptional cases

29. Cour de cassation, Civ. 2, 27.06.2019, No 18-14.198

Following an appeal lodged by SAS Bretagne Hydraulique, a French registered company, against a judgment of the *cour d'appel* de Rennes on 8 December 2017[97], the French *Cour de cassation* confirmed that the enforcement judge in the Member State of enforcement has no jurisdiction to annul an enforceable EPO. The Court held that it lacked the power to halt enforcement proceedings where the defendant has not filed any statement of opposition under the conditions provided for in the EPO Regulation.

Keywords: Enforcement

30. Tribunal judiciaire de Paris, 27.02.2020, No 20/80041

Proceedings between S.A.S. ABC Accessoires ("ABC"), a Paris-based company, and DGL Confecçâo Têxtil ("DGL"), a company registered in Portugal, before the enforcement judge at the *tribunal judiciaire* of Paris. On 29 March 2017, DGL applied before the Portuguese courts and obtained an EPO against ABC, which was later declared enforceable on 10 November 2017. On 7 November 2019, the creditor carried out a third-party debt order against the debtor's bank account in France. The debtor received notice of this measure on 12 November 2019.

On 11 December 2019, the debtor resisted enforcement by filing a suit before the enforcement judge at the *tribunal judiciaire* of Paris. Before the judge, the debtor argued that that the notification of initial EPO had been sent to an old address, that the Portuguese judge did not have jurisdiction to issue the EPO in the first place, and that the creditor had not served the enforceable EPO before carrying out the first enforcement measure.

The enforcement judge rejected the first two arguments but upheld the third one. He held, specifically, that even though under Articles 18 and 20 of the EPO Regulation he did not have the power to review the notification of the initial EPO nor the jurisdiction of the court of origin, Article 21 of the EPO Regulation required the creditor to carry out the enforcement of the EPO in accordance with French law. Accordingly, the court held that the creditor should have notified the enforceable EPO to the debtor

[97] *Supra,*, No 25.

following the provisions of Articles 503 and 675 of the French Code of Civil Procedure before carrying out the third-party debt order.

Keywords: Enforcement (service)

31. Cour d'appel de Lyon, 6e ch., 22.10.2020, No 19/06323

Proceedings between Mr X, a person domiciled in France, and Mr Y and Ms Z, a couple domiciled in Italy, before the *cour d'appel* of Lyon. After the divorce between Mr X and their daughter, Mr Y and Ms Z requested an EPO before the tribunal of Biella (Italy). On 20 May 2013, the Italian tribunal issued the EPO. On 30 May 2013, the EPO was notified to Mr X by registered letter with acknowledgement of receipt. The letter was returned to the Italian bailiff on 1 July 2013 with the mention "unclaimed". Nevertheless, the Italian tribunal declared the EPO enforceable on 6 August 2013. On 4 January 2019, the creditors served the enforceable EPO to the debtor in France and then carried out enforcement measures against the debtor's French bank accounts.

On 14 February 2019, the debtor resisted enforcement by suing the creditors before the enforcement judge at Lyon's *tribunal de grande* instance. On 27 August 2019, the judge rejected the debtor's objections. The debtor then appealed this decision before the *cour d'appel* of Lyon.

Before the court, the debtor argued that the decision of the enforcement judge should be reversed. It contended that the enforcement of the EPO should be refused because the initial EPO was not regularly notified to him as the documents served did not mention the remedies available against this decision. He also argued that the EPO had not become enforceable until 4 January 2019, when the enforceable EPO was first served upon him by a French bailiff. The court rejected all these claims, holding that the EPO had been declared enforceable by the Italian judge and that the French courts lacked jurisdiction to assess the regularity of the notification of the initial EPO. Notably, the *cour d'appel* also refused to suspend the French enforcement proceedings even though the debtor had filed a request for review under Article 20 of the EPO Regulation before the Italian court. On this point, the *cour d'appel* held that the request for a stay was inadmissible because the Italian court had not suspended the enforceability of the EPO.

Keywords: Refusal of enforcement (service), Stay or limitation of enforcement in exceptional circumstances

32. Cour d'appel de Lyon, 6e ch., 20.05.2021, No 20/05172

Proceedings between Bracciani & Co ("Bracciani"), a company registered in France, and Harmont & Blaine S.P.A. ("Harmont"), a company registered in Italy, before the *cour d'appel* of Lyon. On 5 November

2018, the tribunal of North Naples (Italy) issued an EPO in favour of Harmont. The EPO was then notified by registered mail with acknowledgement of receipt, which was returned with the mention "unclaimed". On 13 March 2019, in the absence of any opposition filed by Bracciani, the Italian tribunal declared the EPO enforceable. On 7 June 2019, Harmont served the enforceable EPO to Bracciani and summoned it to pay the total sum of 60,374.62 euros in principal, interest and costs.

On 1 July 2019, Bracciani resisted the enforcement and sued Harmont before the enforcement judge at the *tribunal de grande instance* of Lyon, arguing in particular that the notification of the initial EPO was invalid and that, therefore, the claimant could not carry out any enforcement measure in France. The enforcement judge declared these claims inadmissible. The debtor appealed the decision before the *cour d'appel* of Lyon.

The *cour d'appel* upheld the decision issued by the enforcement judge. Specifically, the court referred to the case-law of the ECJ and ruled that when the irregularity of the notification of the initial EPO is exposed only after such EPO has been declared enforceable, the debtor should have a right to raise such an irregularity even beyond the provisions of Articles 16 to 20 EPOR. Nevertheless, the court held, by analogy to the remedies set out in Articles 16 and 20 of the EPO Regulation, that the debtor should exercise such right before the courts of the State of origin. Accordingly, the court declared the debtor's claim inadmissible. It also rejected the debtor's request for a stay of the enforcement or the granting of deferred payments as it considered that the debtor had not met the requirements set out by Article 23 EPOR and French domestic law.

Keywords: Enforcement (service), Stay or limitation of enforcement in exceptional circumstances

B. Critical Assessment

Thirty-two (32) decisions have been selected to illustrate the application of the EPO Regulation in France. Among those, twelve (12) decisions have been issued by courts of first instance – nine (9) by commercial courts and three (3) by civil courts – nineteen (19) by French *cours d'appel*, and only one (1) by the French *Cour de cassation*.

These cases split almost evenly between outgoing and incoming EPOs, with fourteen (14) decisions concerning proceedings related to the issuance of EPOs by French courts (**a** below) and eighteen (18) decisions regarding the recognition and enforcement of foreign EPOs in France (**b** below).

a. Outgoing EPOs

i. Scope of the EPO Regulation

– Applicability of the EPO Regulation

Pursuant to Article 2(1) EPOR, the Regulation applies to "civil and commercial matters in cross-border cases […]. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ('*acta iure imperii*')". In essence, this provision mirrors Article 1(1) of the BI bis Regulation, which sets out the scope of application *ratione materiae* of that regulation. Additionally however, Article 2(1) EPOR explicitly states that the Regulation only applies to "cross-border cases", which are defined by Article 3(1) EPOR as cases where "at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised"[98].

This provision does not seem to have given rise to particular difficulties of interpretation before French courts. Among the decisions in this Report in fact, only one judgment by the *cour d'appel* of Poitiers dated 5 June 2018 refused to issue an EPO based on this provision. In this case, the court held that the EPO Regulation did not apply to a dispute between two companies registered in Italy even though the contract included a choice-of-court provision in favour of French courts.

[98] See also CJEU, 14.06.2012, C-618/10, *Banco Español de Crédito SA v Joaquín Caldéron Camino*, para 79, recalling that the EPO Regulation only applies to cross-border cases.

On its face, this decision constitutes a straightforward application of Article 3 EPOR. As a general matter, it should nevertheless be kept in mind that according to Article 3(2) EPOR: "Domicile shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters"[99]. Under Article 60(1) of this Regulation, a company's domicile can be defined alternatively as the place of its statutory seat, central administration, or principal place of business[100]. Therefore, the solution reached by the *cour d'appel* of Poitiers might potentially have been different if the claimant had alleged that at least one of the parties' had its central administration or principal place of business in a Member State other than Italy.

– **Exclusions**

In addition to being limited to civil and commercial matters in cross-border cases, the EPO Regulation does not apply whenever a claim falls within one of the exclusions listed in Article 2(2) EPOR. These exclusions encompass rights in property arising out of a matrimonial relationship, wills and succession[101]; insolvency proceedings[102]; social security[103]; and – at least in principle – non-contractual obligations[104].

Even though these exclusions have already raised some interpretative issues before the CJEU[105], Article 2(2) seems to have been very rarely discussed before French courts. Among the cases reported, however, three decisions (issued in the context of two different cases), leave at least some doubts regarding the scope of the exclusions set out in Article 2(2) EPOR.

In a first case, which was initially decided by the *tribunal de commerce* of Nanterre[106] and then by the *cour d'appel* of Versailles[107], the debtor did not question the applicability of the EPO Regulation although insolvency proceedings were initiated against the claimant on the day the court of first instance received

[99] Today, these provisions have become Articles 62 and 63 of the BI bis Regulation.
[100] See Article 60(1) BI 2000, which became Article 63 BI bis.
[101] Article 2(2)(a) EPOR.
[102] Article 2(2)(b) EPOR.
[103] Article 2(2)(c) EPOR.
[104] Article 2(2)(d) EPOR.
[105] See CJEU, 09.09.2014, C-488/13, *Parva Investitsionna Banka et al.*, order, which raised the issue of interpretation of Article 2(2)(b) EPOR, even though the CJEU finally did not reach the question.
[106] Tribunal de commerce de Nanterre, 19.12.2012, No 2010F03902 (*supra,* 4).
[107] Cour d'appel de Versailles, 12e ch., 09.12.2014, No 13/01145 (*supra,* 11).

the initial request for an EPO. Instead of focusing on the exclusion set out in Article 2(2)(b) EPOR[108], the debtor argued (successfully on appeal) that the claimant did not have the legal capacity to sue and should have been represented by its liquidator.

In a second a case decided by the *tribunal de commerce* of Brest on 20 November 2015[109], the debtor argued that the EPO Regulation could not apply to a claim arising from a non-contractual obligation resulting in unjust enrichment. In this case, the claimant had requested the restitution of the sums he allegedly paid twice under the same invoice. Instead of focusing on the exclusion set out in Article 2(2)(d) EPOR, however, the court cursorily noted that the dispute concerned "an obligation or at least the performance of it arising out of the regular commercial relationship between the parties".

ii. Jurisdiction

Pursuant to Article 6 EPOR, jurisdiction to issue an EPO should in principle be determined "in accordance with the relevant rules of Community law". At the time of the entry into force of the EPO Regulation, these rules were in essence embodied by the provisions of the BI Regulation 2000. Today, the new BI bis Regulation sets out the relevant principles governing the issuance of an EPO. Despite the reference to the rules set out in the BI Regulation, the CJEU has nevertheless made clear that the debtor who files a statement of opposition without immediately challenging the jurisdiction of the court that first issued the EPO cannot be regarded as having tacitly accepted its jurisdiction pursuant to Article 24 BI 2000 (today Article 26 BI bis)[110].

For the most part, these principles seem to have been faithfully applied by French courts in the context of EPO proceedings. In addition to the general rule according to which jurisdiction lies with the courts of the State where the defendant has her domicile[111], French courts have therefore based their jurisdiction to

[108] "This Regulation shall not apply to: […] bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings".
[109] Tribunal de commerce de Brest, 20.11.2015, No 201400236 (*supra,* 17).
[110] See CJEU, 13.06.2013, C-144/12, *Goldbet Sportwetten GmbH v Massimo Sperindeo*.
[111] See Article 4 BI bis.

issue an EPO on the place of performance of the contractual obligation in question[112] or a choice-of-court agreement concluded between the parties[113].

iii. Opposition

Among the reported decisions on outgoing EPOs, nine (9) directly deal with the opposition procedure set out in Articles 16 *et seq.* EPOR. Under Article 16 EPOR, the defendant may lodge a statement of opposition before the court of origin within thirty days of service of the initial EPO. When this is the case, Article 17 EPOR then provides that the proceedings shall continue before the "competent courts of the Member State of origin" unless the claimant has explicitly requested to put an end to the procedure.

In France, these provisions have been implemented by Articles 1424-8 to 1424-13 of the Code of Civil Procedure. In particular, Article 1424-8 provides that "The opposition shall be brought before the court that issued the European order for payment"[114].

Unsurprisingly, the analysis of French case law reveals that the lodging of a statement of opposition does not usually lead to the overturning of the initial EPO[115]. Indeed, the decision to initiate opposition proceedings may even amount to a dilatory tactic where the defendant decides not to appear at the subsequent hearing[116].

Sometimes, however, lodging a statement of opposition may raise some interesting issues regarding the interplay between the EPO Regulation and French domestic law. In a judgment issued by the *cour d'appel* of Montpellier on 20 June 2017[117], the court had to decide whether the court clerk who received the opposition might automatically transfer the case to another court if the claimant had filed the initial request with a court with improper venue to rule on the merits. This situation may arise in domestic order for

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[112] See Tribunal de commerce de Brest, 20.11.2015, *cit.*, *supra,* 17, and Tribunal de commerce de Niort, Contentieux, 24.02.2016, No 2015F00075 (*supra,* 18), applying Article 5(1) BI 2000 (which became Article 7(1) BI bis).
[113] Tribunal de commerce de Lille, Contentieux, 25.05.2016, No 2,015,005,134 (*supra,* 19), applying see Article 23 BI 2000 (today Article 25 BI bis); this solution does only apply, however, to the extent that the dispute concerns a cross-border case within the meaning of the EPO Regulation (otherwise, see Cour d'appel de Poitiers, 2e ch., 05.06.2018, *cit.*, *supra,* 27).
[114] Article 1424-8 of the French Code of Civil Procedure.
[115] See, for three examples where the statement of opposition had been timely lodged but nevertheless led to the confirmation of the initial EPO: Cour d'appel de Douai, 14.05.2013, No 12/02093 (*supra,*, 7); Cour d'appel de Pau, 26.05.2016, No 16/02172 (*supra,* 20); Tribunal de commerce de Paris, 4e ch., 01.06.2017, No 2016079810 (*supra,* 21).
[116] See, *e.g.* Tribunal de commerce de Nanterre, 09.11.2011, No 2011F00195 (*supra,* 2); Tribunal de commerce de Creteil, 1re ch., 28.01.2013, No 2012F00683 (*supra,* 5).
[117] Cour d'appel de Montpellier, 2e ch., 20.06.2017, No 16/08379 (*supra,* 23).

payment procedures, where the claimant has a duty to file the initial request before the court of the debtor's domicile even though this court is not always competent to rule on the merits[118]. In this case, Article 1408 of the French Code of Civil Procedure allows the claimant to give its prior consent to an automatic transfer of venue in the event the defendant files a statement of opposition.

By contrast, however, the claimant initiating EPO proceedings must always file its initial request with the court that has jurisdiction to rule on the merits of the case[119] and the defendant has to lodge the opposition with the court that issued the EPO[120]. Under these circumstances, the *cour d'appel* of Montpellier held that the automatic transfer of venue provided for Article 1408 of the French Code did not extend to a case where the claimant had applied for an EPO before a court with improper venue. In this hypothesis, the issuing court should have handled the opposition itself and explicitly rule on its competence before deciding the case on the merits.

– **Time limits**

Another important issue concerns the computation of the time limits within which the defendant must file a statement of opposition against the initial EPO. Pursuant to Article 16(2) EPOR, in fact: "The statement of opposition shall be sent within 30 days of service of the order on the defendant"[121]. In a judgment dated 25 February 2015[122], the *tribunal de commerce* of Nevers clarified that the time limit to file a statement of opposition includes Saturdays, Sundays and public holidays. To reach this conclusion, the tribunal explicitly mentioned the DACS circular dated 26 May 2010 on the EPO, which itself referenced Regulation No 1182/71 determining the rules applicable to periods, dates and time limits.

In another interesting case, the *cour d'appel* of Douai[123] had to rule on the admissibility of a regularly filed opposition that the court clerk had not timely registered due to a mistake on his part. Logically, the court declared the opposition admissible even though the EPO had in the meantime been erroneously certified

[118] See Article 1406 of the French Code of Civil Procedure. This may be the case, for instance, when the claim is based on a contract including a choice-of-court agreement in favour of another court.
[119] See Article 6 EPOR and Article 1424-1 of the French Code of Civil Procedure.
[120] See Article 16 EPOR and 1424-8 of the French Code of Civil Procedure.
[121] See also Article 1424-5 of the French Code of Civil Procedure, providing that the time limit is calculated "in accordance with Council Regulation (EEC, EURATOM) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits".
[122] Tribunal de commerce de Nevers, 25.02.2015, No 2014005632 (*supra,* 12).
[123] Cour d'appel de Douai, 14.03.2013, No 12/02210 (*supra,* 6).

as an enforcement title. Interestingly, the court reached this conclusion without mentioning Article 20 EPOR, which governs the review in exceptional cases where the time limit set out in Article 16(2) has expired.

iv. Review in exceptional cases

If the time limit set out in Article 16 EPOR has expired, Article 20 EPOR still provides for a specific review mechanism in exceptional cases. In France, Article 1424-15 of the Code of Civil Procedure implemented this provision by submitting the review procedure to the same rules applicable to opposition proceedings[124]. Therefore, in France, review applications must be submitted to the same court that would have been competent if the opposition had been timely filed.

The application of these provisions gave rise to a remarkable judgment issued by the *cour d'appel* of Douai on 17 January 2019[125]. In this case, the defendant argued that the initial EPO had been served upon it without any proof of receipt and in a way that did not give it sufficient time to arrange for its defence. In response, the claimant argued that service had been made pursuant to the provisions of Article 14 EPOR, that the ordinary time limit to file a statement of opposition had expired, and that the defendant had not provided any evidence as to the existence of extraordinary circumstances under Article 20 EPOR.

The court sided with the claimant. Firstly, it held that the service of the EPO complied with the requirements of Article 14 EPOR, and that the thirty-day time limit to file an ordinary opposition had indeed expired. Secondly, it held that the defendant had been given sufficient time to arrange for its defence and that the review in exceptional cases under Article 20 EPOR should not be construed to provide the defendant with a second opportunity to oppose the claim. On this particular point, the court held that compliance with the requirements set out in Article 14 ensured a very high degree of likelihood that the document served had reached its addressee and that the defendant had not provided any evidence as to the existence of force majeure or other extraordinary circumstances[126].

Accordingly, the court rejected the defendant's application for review under Article 20. As this decision demonstrates, defendants who want to avail themselves of the review mechanism under Article 20 EPOR

[124] *I.e.*, by Articles 1424-8 to 1424-13 of the French Code of Civil Procedure.
[125] Cour d'appel de Douai, ch. 2 section 2, 17.01.2019, No 16/03957 (*supra,*, 28).
[126] *Id.*. To support this assertion, the court cited Recitals No 20 and 25 of the EPO Regulation.

must therefore overcome the presumption that compliance with the requirements set out in Article 14 of the Regulation sufficiently protects their right of defence.

b. Incoming EPOs

i. Refusal of enforcement

With regard to enforcement of EPOs issued abroad, Article 19 EPOR provides that: "A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition". As a matter of principle, an enforceable EPO may therefore be directly enforced in France under the same conditions applicable to domestic titles[127]. Furthermore, the enforcement of foreign EPOs in France may only be refused under the conditions set out in Article 21 EPOR, which specifies that courts in the Member State of enforcement may not review the substance of an EPO issued abroad[128].

In a judgment issued on 27 June 2019[129], the French *Cour de cassation* accordingly held that Article 19 EPOR excludes the jurisdiction of French courts to hear any objections as to the validity of an EPO once the courts of the State of origin have declared it enforceable under Article 18 EPOR.

Despite this principle, however, a total of thirteen (13) decisions have been found where the debtor resisted enforcement of an EPO in France either because the court of origin allegedly lacked jurisdiction or because service was irregular. In both instances, French courts have generally rejected these arguments, holding that the claimant should have raised them before the courts of the State of origin.

– **Jurisdiction of the court of origin**

Similar to what happens under the other targeted Regulations, jurisdiction to issue an EPO may not, in principle, be reviewed by the courts in the Member State of enforcement. In a case decided by the *cour*

[127] See Article 21 EPOR: "A European order for payment which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement".
[128] See Article 22(3) EPOR: "Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement".
[129] Cour de cassation, Civ. 2, 27.06.2019, No 18-14.198 (*supra*,, 29); for the decision below, *adde* Cour d'appel de Rennes, 2e ch., 08.12.2017, No 16/07782 (*supra,* 25).

d'appel of Riom on 7 April 2014[130], the court rightly rejected the debtor's argument that enforcement of a German EPO should be refused because French courts had jurisdiction to rule on the underlying claim. In its decision, the court noted that the debtor should have raised this objection before the German courts by taking advantage of the procedures set out in Articles 16 and 20 EPOR. It also held that this principle did not bar French courts to rule on the validity of the enforcement measures carried out on the basis of the EPO.

Perhaps more interestingly, the *juge de l'exécution* of Marseille followed the same approach in a case where the court of origin had allegedly based its jurisdiction on false documents filed by the claimant in support of its application[131]. In a decision dated 1 June 2017, the judge held that Article 22 EPOR and R. 121-1 of the French Code of Civil Enforcement Procedures prevented the court of enforcement from ruling on any objections related to the initial claim. This outcome seems consistent with Article 7(3) EPOR, which requires the claimant to acknowledge that any deliberate false statement made in support of its application is subject to: "appropriate penalties under the law of the Member State of origin"[132].

– **Service**

The reported cases show that two main categories of issues regarding the service of an incoming EPO are likely to arise at the enforcement stage. Firstly, debtors may try to argue that an EPO issued in another Member State cannot be considered a valid enforceable title because the notification of the initial order violated French domestic rules or did not comply with the minimum standards set out in Articles 13 to 15 EPOR. Secondly, debtors may try to resist enforcement by arguing that an EPO which has already been declared enforceable in the State of origin was not served in a way allowing the creditor to carry out enforcement procedures in France.

In the first set of cases, some debtors have argued, in particular, that the service in France of an initial EPO issued abroad should comply with the conditions laid out by the French Code of Civil Procedure[133].

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[130] Cour d'appel de Riom, 07.04.2014, No 13/01233 (*supra,*, 10).
[131] Tribunal de grande instance de Marseille, Juge de l'exécution, 9e ch. civ., 01.06.2017, No 16/14074 (*supra,*, 22).
[132] See Article 7(3) EPOR, setting out the requirements applicable to the EPO application.
[133] Specifically, Article 1424-5 of the French Code of Civil Procedure provides that: "A certified copy of the claim form and the decision shall be served, at the initiative of the claimant, on each of the defendants. The European order for payment opposition form shall be annexed to the service.

This argument was based on Article 13 EPOR, which provides that: "The European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected".

In a case decided by the *tribunal de commerce* of Villefranche-Tarare[134], the debtor argued that the service by mail of an initial EPO issued in Italy was irregular because French domestic law requires service of both national and European orders for payment to be made by a bailiff. The court of first instance upheld this argument, declaring that under Article 13 EPOR service of an initial EPO in France should comply with French domestic rules. On appeal, however, the *cour d'appel* of Lyon reversed this decision[135], noting that the documents had been served in accordance with Article 7 and 14 of the Service Regulation[136], whose application was not affected by the application of the EPO Regulation[137].

In another case decided by the *cour d'appel* of Dijon on 9 June 2015[138], the debtor contested the enforcement of a Polish EPO based on the fact that service of the initial decision did not comply with the requirements set out in Article 1424-5 of the French Code of Civil Procedure[139]. The first instance judge was sympathetic to the debtor and upheld the objection. Still, the court of appeal reversed the decision holding that once the EPO has been declared enforceable in the State of origin, French courts lacked jurisdiction to review the regularity of the service of the initial EPO[140].

Service shall be declared null and void when it does not contain, in addition to the requirements prescribed for any bailiff's notification, an indication of the court before which the opposition must be brought, the applicable time limit and the forms in which it must be made.
Under the same sanction, the document of service:
- warns the defendant that if he fails to lodge a statement of opposition within the time limit specified, calculated in accordance with Council Regulation (EEC, EURATOM) no 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, he may be required, by any legal means, to pay the sums claimed;
- inform the defendant of his right to apply for a review of the European order for payment before the issuing court after the expiry of the opposition period in the exceptional cases provided for in Article 20 of Regulation (EC) no 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure".

[134] Tribunal de commerce de Villefranche-Tarare, 08.06.2015, No 2013J00187 (*supra,*, 15).
[135] Cour d'appel de Lyon, 3e ch. a, 11.01.2018, No 15/07534 (*supra,* 26).
[136] The decision of the court was based on Articles 7 and 14 of Regulation No 1393/2007. Today, see Regulation No 2020/1784, which will become applicable on 1 July 2022.
[137] See Article 27 EPOR.
[138] Cour d'appel de Dijon, 09.06.2015, No 14/01155 (*supra,*, 16).
[139] See *supra,*, note 45.
[140] See also Cour d'appel de Lyon, 6e ch., 22.10.2020, No 19/06323 (*supra,*, 31) and Cour d'appel de Lyon, 6e ch., 20.05.2021, No 20/05172 (*supra,*, 32), reaching the same result with regards to Article 1424-5 of the French Code of Civil Procedure.

Since then, the *Cour de cassation*[141] has followed the same approach and held that debtors should challenge the service of the initial EPO using the remedies available to them under Articles 16 and 20 EPOR[142]. In this decision, the French Supreme Court confirmed that the requirements set out by French domestic law regarding French EPOs do not apply to EPOs issued abroad. Additionally, the Supreme Court also made clear that only the courts of the Member State of origin have jurisdiction to review the service of the initial EPO. This outcome appears to be in line with Article 22(3) EPOR and with the overall structure of the EPO Regulation.

In the second set of cases, debtors have tried to halt enforcement of a foreign EPO that has already been declared enforceable in the State of origin by arguing that the claimant did not comply with the general rules governing the enforcement of judgments under French domestic law. These rules include, *inter alia*, Article 503 of the French Code of Civil Procedure, which provides that in principle the creditor can enforce a judgment only after serving it on the person against whom enforcement is sought, and Article 675 of the same Code, which requires service by a bailiff unless otherwise provided by law.

The interaction between these requirements and the EPO Regulation has recently given rise to an interesting decision issued by the enforcement judge of the *tribunal judiciaire* of Paris on 27 February 2020[143]. In this case, the claimant had obtained an initial EPO before Portuguese courts, which was then declared enforceable in that country under Article 18 EPOR. Later, the claimant sought to enforce the EPO against one of the debtor's French bank accounts. To do so, the claimant served a third-party debt order against a French bank and then gave notice of the attachment to the debtor. The judge, however, noted that the claimant had not served a copy of the enforceable EPO to the debtor before carrying out the enforcement measure as required by Article 503 of the Code of Civil Procedure and hence vacated the attachment[144].

The approach followed by the enforcement judge of the *tribunal judiciaire* of Paris relied on Article 21(1) EPOR, which provides that: "enforcement procedures shall be governed by the law of the Member State of enforcement". Under this rule, therefore, a creditor wanting to enforce an incoming EPO in France has to abide by the service requirements applicable to the enforcement of domestic

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[141] Cour de cassation, Civ. 2, 27.06.2019, No 18-14.198 (*supra,*, 29).
[142] See *supra,*, note 41 and the accompanying text.
[143] Tribunal judiciaire de Paris, 27.02.2020, No 20/80041 (*supra,*, 30)
[144] For another example showing that service in France of an enforceable EPO on the person against whom the enforcement is sought is required under Article 503 of the French Code of Civil Procedure, see also the full decision issued by the Cour d'appel de Lyon, 6e ch., 22.10.2020, No 19/06323 (*supra,*, 31).

decisions. In this case, however, debtors bear the burden of proving that the irregularity of the notification was so serious that it affected their procedural rights[145].

In addition to that, however, the creditor must also fulfil the specific conditions set out by the Regulation, particularly the translation requirements set out in Article 21(2)(b) EPOR. Under this provision, the claimant shall provide the enforcement authorities with a translation of the EPO in one of the languages accepted by the Member State of enforcement. In France, the Circular of the Ministry of Justice dated 26 May 2009[146] indicated that French enforcement authorities may accept declarations of enforceability issued through standard form G in French, English, German, Spanish, and Italian[147]. However, it has to be noted that this provision does not concern the enforceable EPO itself, which is established using standard form E. Also, the rule should not affect the debtor's right to refuse to accept a document under Article 8 of the Service Regulation[148].

ii. Stay or limitation of enforcement

Among the reported decisions, only 2 (two) of them directly deal with applications for a stay or limitation of enforcement of incoming EPOs in France. In this regard, Article 23 EPOR provides that where the defendant has filed a review application under Article 20 EPOR before the courts of the State of origin, the competent court in the Member State of enforcement may, upon application: (i) limit the enforcement to protective measures; (ii) make enforcement conditional on the provision of a security, or (iii) stay the enforcement proceedings under exceptional circumstances.

In a judgment dated 22 October 2020[149], the *cour d'appel* of Lyon interpreted this provision restrictively and declared the defendant's application for a stay inadmissible because the title was still enforceable in the country of origin despite a pending application made under Article 20 EPOR. On its face, however, the EPO Regulation should allow for a stay even in cases where the EPO remains enforceable in the country

[145] Tribunal de grande instance de Marseille, juge de l'exécution, 9e ch. civ., 21.04.2015, No 14/03155 (*supra,*, 14).
[146] Circular of the DACS (*Direction des affaires civiles et du Sceau*) C3 06-09 of 26 May 2009, concerning the implementation of EPO Regulation.
[147] On this point, see Cour d'appel de Colmar, 16.12.2013, No 12/00029 (*supra,*, 9) and Cour d'appel de Montpellier, 1re ch. d, 12.10.2017, No 16/08078 (*supra,*, 24).
[148] In this respect, see again Article 27 EPOR.
[149] Cour d'appel de Lyon, 6e ch., 22.10.2020, No 19/06323 (*supra,*, 31).

of origin, provided that the defendant is able to establish the existence of exceptional circumstances under Article 23.

Furthermore, in another very recent case[150], the *cour d'appel* of Lyon also had to decide whether an application for a stay or limitation of enforcement could be granted when an EPO has been declared enforceable in the State of origin despite a complete lack of service of the initial order. In such instances, the CJEU has held[151] that the review procedure set out in Article 20 EPOR does not apply, even though the defendant may challenge the enforceability of the EPO in the State of origin under domestic procedural law. Hence, the question arises whether the remedy set out in Article 23 EPOR, which itself presupposes the existence of a review under Article 20, may nevertheless apply by analogy. The *cour d'appel* of Lyon held that it does, but that the defendant had not established the existence of exceptional circumstances required to stay the proceedings under Article 23(c).

Finally, in the same decision, the court also considered that the defendant might file a request for deferred payment of the EPO according to Article 1343-5 of the French Civil Code, even though this hypothesis is not explicitly addressed in the EPO Regulation. It nevertheless rejected it, noting that the defendant had not provided evidence of its current situation and the prospects for payment of the amount ordered by the EPO.

iii. Interactions with other procedures

The last category of issues regarding the effects of incoming EPOs before French courts concerns the interplay between the provisions applicable to the European order for payment procedure and the rules governing specific proceedings conducted under French domestic law. Among the reported cases, 3 (three) of them address the interaction between the EPO Regulation and French insolvency proceedings, while 2 (two) others deal with the more general question of parallel litigation.

- **Insolvency**

As the reported cases show, the general principles of French insolvency law also apply to claims stemming from incoming EPOs. First of all, incoming EPOs are valid enforceable titles that may be recognized in

[150] Cour d'appel de Lyon, 6e ch., 20.05.2021, No 20/05172 (*supra,*, 32).
[151] CJEU, 04.09.2014, C-119/13 and C-120/13, *eco cosmetics GmbH & Co. KG v Dupuy, and Raiffeisenbank St. Georgen reg. Gen. mbH v Bonchyk*.

the course of ongoing insolvency proceedings in France[152], provided that the creditors who rely on them comply with the requirements of French procedural law[153]. Secondly, the creditor who holds an EPO which became enforceable before the opening of insolvency proceedings may not carry out individual enforcement measures while the former are ongoing[154]. Finally, creditors remain free not to participate in French insolvency proceedings; in this case, debtors may not use these proceedings to pre-emptively file a request for refusal of enforcement of an incoming EPO[155].

– **Parallel litigation**

Even though the EPO Regulation itself does not explicitly address the questions of parallel litigation, two provisions nevertheless provide the necessary guidance to deal with this issue in the context of the European order for payment procedure. On the one hand, Article 6 EPOR provides that: "For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001"[156], a reference that may be interpreted to include the rules on *lis pendens* and related actions. On the other hand, Article 22(1) EPOR provides that the enforcement of an incoming EPO may be refused if the order is irreconcilable with an earlier decision or order previously issued in any Member State or in a third country on the same cause of action between the same parties. Hence, reducing the number of cases that may lead to irreconcilable decisions undoubtedly contributes to the smooth circulation of EPOs among Member States.

In a case decided on 30 June 2011[157], the *cour d'appel* of Grenoble applied these principles in a dispute opposing an Italian seller to a French buyer where the seller had initially obtained an EPO for the payment of contested invoices before Italian courts and the buyer had subsequently filed suit in France to obtain the appointment of an expert and an interim payment for damages he allegedly suffered as a result of the non-conformity of the goods. The *cour d'appel* noted that the two actions involved the same parties and

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152 This result stems directly from Article 19 EPOR, which provides that EPOs which have become enforceable in the Member State of origin shall be recognised in the other Member States without the need for a declaration of enforceability and without any possibility of opposing their recognition.
153 For a case where the creditor's claim was considered inadmissible because it had not been directed against the debtor himself, but only against its liquidator, see Cour d'appel de Douai, 08.04.2015, No 14/02546 (*supra,*, 13).
154 On this point, see for instance Cour d'appel de Colmar, 16.12.2013, No 12/00029 (*supra,*, 9), which deals with a case where the claimant had first carried out individual enforcement measures before the opening of insolvency proceedings, but these measures had been set aside by a court of first instance and could not be reinstated on appeal.
155 See Cour d'appel de Nîmes, Chambre ccommerciale 2 b, 10.05.2012, No 11/01267 (*supra,*, 3).
156 Today, see the BI bis Regulation (Regulation No 1215/2012)
157 Cour d'appel de Grenoble, ch. commerciale, 30.06.2011, No 11/01943 (*supra,*, 1).

were so closely related that they might give rise to two irreconcilable decisions. Accordingly, the court referenced Article 28 of the BI Regulation and held that the French proceedings should be stayed pending the determination of the opposition before the Italian courts.

As this decision shows, transposing the principles applicable to *lis pendens* and related actions to European order for payment procedures may help avoid inextricable situations at the enforcement stage. Nevertheless, some issues may still arise concerning the adaptation of these rules in the context of the EPO Regulation. In the case decided by the *cour d'appel* of Grenoble, for instance, the buyer could have challenged the applicability of Article 28 of the BI Regulation by arguing that French summary proceedings constituted a provisional and protective measure rather than an action on the merits[158].

[158] On this question, cf. Cour d'appel de Besançon, 06.11.2013, No 13/01655 (*supra*,, 8), where the Court held that the issuance of a foreign EPO did not prevent the defendant to apply for urgent provisional and protective measures before French courts (appointment of an expert). *Adde* also CJEU, 04.05.2017, C-29/16, *HanseYachts AG v Port D'Hiver Yachting SARL et al.*, which held that the initiation of a procedure for a measure of inquiry *ante causam* cannot constitute the relevant date for purpose of *lis pendens*.

V. ESCP Regulation

A. Case Law Summaries

1. Tribunal d'instance d'Angers, 06.12.2010, No 91 10-438

On 24 September 2010, a man domiciled in France initiated an ESCP against a German company by filing a request using standard form A annexed to the ESCP Regulation. In his request, the claimant asked the court to annul a contract for the sale of a bicycle he had entered into with the defendant. The claim was communicated to the defendant together with standard form C, but the defendant did not file any response. Without holding a hearing, the court held that it had jurisdiction to hear the claim because the dispute related to a cross-border consumer contract and the claimant had his domicile within its jurisdiction. It then proceeded to annul the sale and ordered the reimbursement price.

Keywords: Jurisdiction

2. Tribunal de commerce de Besançon, 08.09.2014, No 2014004553

On 10 July 2014, an English company initiated an ESCP against a French company by filing standard form A before the *tribunal de commerce* of Besançon. On 25 July 2014, the clerk informed the claimant by letter with acknowledgement of receipt that the claim did not fall within the scope of the ESCP Regulation. Specifically, the court indicated that the defendant's domicile was outside the tribunal's jurisdiction and was instead located within the jurisdiction of the *tribunal de commerce* of Vienne. On 5 August 2014, the claimant's attorney informed the tribunal that their client wished to withdraw its claim. Accordingly, the court accepted the withdrawal and ordered the claimant to support the costs of the proceedings.

Keywords: Scope of the ESCP

3. Tribunal de commerce de Versailles, 1re chambre, 28.10.2015, No 2015F00132

On 8 December 2014, a French company initiated ESCP proceedings against an English company by filing standard form A before the *tribunal de commerce* of Versailles. On 10 February 2015, the clerk sent a letter with acknowledgement of receipt to the defendant following Article 5 ESCPR. However, the postal service informed the court that it had lost track of the letter and could not deliver it to the address indicated by the claimant. The court's clerk then sent a new letter with acknowledgement of receipt, which also did not reach the recipient. The tribunal then held a hearing – even though the claimant had not requested one – and went on to decide the case without the defendant.

The court held that the claim fell within the scope of the ESCP Regulation and that the claimant had regularly filed suit by using standard form A. However, it noted that the service of the claim could not be carried out because the defendant's address was "manifestly imprecise". On this point, the court held that under Article 3 of the claim form, the claimant had the duty to communicate the defendant's exact address, which it had not done, and that the notification could not reach the defendant because of it. Hence, the court declared the claim inadmissible and ordered the claimant to bear the costs of the proceedings.

Keywords: Means of communication, Costs

4. Tribunal de commerce de Chalon-sur-Saône, 30.05.2016, No 2016002318

On 11 April 2016, a Belgian company initiated an ESCP against a French company by filing standard form A before the *tribunal de commerce* of Chalon-sur-Saône. On 21 April 2016, the form was notified to the defendant by the court's clerk. On 2 May 2016, the claimant informed the court by email that the parties had settled the case. The court held that this email should be characterized as a withdrawal of the claim as per Articles 394 *et seq.* of the French Code of Civil Procedure. Noting that the defendant had not replied nor filed any counterclaims within 30 days, the court declared the withdrawal valid. The court closed the proceedings and ordered the defendant to pay the costs.

Keywords: Means of communication, Costs

5. Tribunal de commerce de Rennes, 1re chambre, 12.07.2016, No 2016F00232

On 18 May 2016, a Swedish company filed an ESCP against a French company using standard form A annexed to the ESCP Regulation. The claim was then notified to the defendant according to Article 5 ESCPR, but the defendant did not file any response. Noting that the conditions of the ESCP were met and that it had jurisdiction to hear the claim, the court ordered the defendant to pay the debt, increased with legal interests. In doing so, however, the court rejected the claimant's request to apply the higher interest rate which had been contractually agreed upon by the parties, holding that the claimant's request was not supported by the information the claimant had provided. The court ordered the debtor to bear the costs of the proceedings.

Keywords: Costs

6. Tribunal de commerce de Bobigny, Chambre 08, 04.04.2017 - 2016F01559

On 18 October 2016, a company filed an ESCP before the *tribunal de commerce* of Bobigny and asked the court to order the payment of an unpaid invoice. On 7 November 2016, the clerk sent the claim form to

the defendant by registered mail with acknowledgement of receipt, but the letter returned with the mention "unknown recipient". On 9 December 2016, the court sent an email to the claimant inviting him to submit more documents than the invoice. The claimant did not respond. The court subsequently rejected the claim.

Keywords: Means of communication

7. Tribunal de commerce de Bobigny, Chambre 8, 12.12.2017, No 2017F00805

On 26 May 2017, an Irish company filed proceedings under the ESCP Regulation against a French company before the *tribunal de commerce* of Bobigny, claiming compensation for the cancellation of a flight. The claimant did not ask for an oral hearing, but the court nevertheless held one. At the hearing, only the claimant was present. In the judgment, the court held that the request was inadmissible because the defendant had transferred its seat to the jurisdiction of another *tribunal de commerce*.

Keywords: Jurisdiction, Procedure

8. Tribunal de commerce d'Evry, 06.02.2018, No 2017F00709

On 26 October 2017, an Irish company filed proceedings under the ESCP against a French company, claiming compensation for the cancellation of a flight. On 27 October 2017, the clerk sent a first notification to the defendant by registered letter with acknowledgement of receipt. Following the post's inability to provide adequate proof of receipt, the clerk sent a new letter dated 29 November 2017, which was received on 4 December 2017. The defendant did not reply using form C and did not submit any evidence supporting its defence. Without holding any hearing, the court upheld the claims. The court also ordered the defendant to bear the costs, quoting Recital 10 as well as Articles 2 and 16 ESCPR.

Keywords: Means of communication, Costs

9. Cour de cassation, Civ. 1, 10.04.2019, No 17-13.307

In a dispute opposing a Spanish car rental company to one of its clients, the latter filed a suit based on the ESCP Regulation before the District Court of Le Havre, claiming that he had unnecessarily been forced to enter into a complementary insurance contract at the time of the delivery of a vehicle. Before the court, the plaintiff asked for a refund and claimed additional compensation for the costs of the proceedings. The court upheld his claims, holding that the defendant's contractual terms provided an option between the payment of a security deposit and the subscription of complementary insurance were not sufficiently clear and constituted an unfair commercial practice within the meaning of the directive No 2005/29/CE.

Therefore, the court granted the refund and awarded additional damages compensating the plaintiff for the hassle and expenses of the proceedings.

The defendant appealed the decision before the French Supreme Court. Firstly, he argued that the lower court had violated its right to be heard set out in article 16 of the French Code of Civil Procedure by upholding a claim raised for the first time in response to one of its counterclaims. Secondly, he argued that the lower court's finding that its contractual terms constituted an unfair commercial practice was insufficiently reasoned. Finally, he argued that the inconvenience and costs of the procedure could only be compensated according to Article 700 of the French Code of Civil Procedure and could not lead to a damages award under Article 1240 of the French Civil Code[159]. The Supreme Court upheld all the defendant's claims, vacated the judgment and remanded the case to the Rouen District Court.

Keywords: Procedure, Costs

10. Tribunal de grande instance de Nîmes, 02.08.2019, No 19/03433

Following a judgment issued in his favour by the *Amtsgericht Baden-Baden* (Germany) based on the ESCP Regulation, a man domiciled in Germany carried out enforcement measures against a man domiciled in France. The judgment debtor resisted enforcement before the enforcement judge at the *tribunal de grande instance* of Nîmes, arguing that the enforcement measures were null and void because the creditor had not duly notified the judgment of the German court as required by the provisions of French domestic law.

The enforcement judge upheld the debtor's claim, holding that the enforcement of judgments issued under the ESCP Regulation should be governed by the law of the Member State where enforcement is sought, and that the judgment creditor had failed to notify the German judgment to the debtor as required by Article 503 of the French Code of Civil Procedure. Accordingly, the enforcement judge annulled the enforcement measures and ordered the creditor to pay damages to the debtor.

Keywords: ESCP conducted abroad

11. Cour de cassation, Civ. 1, 27.11.2019, No 18-14.985

After entering an assignment of rights agreement with a person domiciled in France, an Irish company sued the French national railway company before the Bobigny commercial court following the ESCP

[159] *Code civil, art. 1240*.

Regulation. The court declared the claims inadmissible, holding that the assignment of rights agreement between the plaintiff and the French domiciliary should be construed as an agency contract and that the plaintiff should be regarded as a representative of the assignor. Accordingly, the dispute between the parties could not be considered as a cross-border case within the meaning of Article 2 of the ESCP Regulation.

The Irish company lodged an appeal before the French Supreme Court, which reversed the judgment. The Supreme Court held that the court of first instance had violated the plaintiff's right to be heard endowed by Article 16 of the French Code of Civil Procedure by changing the characterization of the contract *ex officio* without first inviting the parties to make their observations on this point.

Keywords: Scope of the ESCP

12. Cour d'appel de Nîmes, 4e ch. commerciale, 03.09.2020, No 19/03387

Following a judgment issued by the *Amtsgericht Baden-Baden* (Germany) based on the ESCP Regulation, the defendant filed a request for review under Article 18 ESCPR. On 13 August 2019, the German court annulled the judgment. Nevertheless, it ordered the original defendant to pay the plaintiff a certain amount of money. The decision was later upheld by a subsequent decision dated 31 March 2020.

Based on this decision, the judgment creditor carried out several enforcement measures in France. The judgment debtor resisted enforcement before the Nîmes enforcement judge, which granted his claims and set aside all the enforcement measures taken by the creditor[160]. The creditor appealed this decision before the Nîmes Court of Appeal, arguing in particular that the judgment issued by the German court on 13 August 2019 constituted an enforceable title subject to the ESCP Regulation. The Court of Appeal rejected the claim, finding that the initial judgment given in the course of the ESCP procedure had been declared null and void and that, therefore, the creditor should have followed the rules set out by the BI bis Regulation.

Keywords: ESCP conducted abroad

[160] See Tribunal de grande instance de Nîmes, 02.08.2019, No 19/03433 (*supra*, 10)

B. Critical Assessment

In order to provide an overview of the relevant case law regarding the application of the ESCP Regulation in France, a total of twelve (12) decisions have been selected from both civil and commercial courts. Among these, ten (10) judgments – including two (2) decisions by the French *Cour de cassation* – concern ESCPs conducted in France (**a**), while only two (2) related to the enforcement of judgment resulting from a ESCP conducted abroad (**b**).

a. ESCPs conducted in France

i. Scope of the ESCP Regulation

According to Articles 2 ESCPR, the ESCP apply to cross-border cases in civil and commercial cases when the value of the claim does not exceed EUR 5,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements, unless the dispute falls under one of the exceptions listed in Article 2(2) ESCPR.

Article 3 ESCPR defines "cross-border cases" as cases where: "at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised". The same provision also specifies that the term "domicile" must be interpreted according to the provisions of the BI bis Regulation, and that the cross-border nature of the case should be assessed at the date on which the claim form is received the court or tribunal with jurisdiction.

Finally, Article 4(3) ESCPR provides that where a claim is outside the scope of this Regulation, the court seised shall inform the claimant at the outset of the procedure so that unless the claimant withdraws the application, the procedure may then proceed following the relevant ordinary rules of civil procedure applicable in the Member State of the court seised. This provision is implemented in Article 1384 of the French Code of Civil Procedure.

These provisions have given rise to interesting interpretative issues before French courts. In a case decided by the *tribunal de commerce* of Besançon in 2014[161], for instance, the claimant withdrew its application after the clerk indicated that the action did not fall within the scope of the ESCP Regulation because the defendant's domicile was located within the jurisdiction of another French court. Arguably, however, this question concerns the venue of the court rather than the applicability of the ESCP Regulation.

[161] Tribunal de commerce de Besançon, 08.09.2014, No 2014004553 (*supra*, 2).

Accordingly, the issue should be resolved following the French rules of territorial competence rather than Article 1384 of the French Code of Civil Procedure.

Furthermore, in a recent case decided on 27 November 2019, the French *Cour de cassation* held that a court of first instance could not change the characterization of the substantive relationship between the parties *ex officio* and decide that a dispute did not fall within the scope of the ESCP Regulation without first allowing the parties to raise their objections[162].

ii. Jurisdiction

In general, the jurisdiction of French courts under the ESCP Regulation does not seem to have raised any specific difficulties in the context of the ESCP Regulation. As a general matter, the jurisdiction of French courts to conduct an ESCP is determined in accordance with the rules set out in the BI bis Regulation and its predecessor, the BI bis Regulation. Notably, consumers domiciled in France may therefore be able to sue before the courts of their domicile[163].

Furthermore, Article 1382 of the French Code of Civil Procedure provides that: "Where Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters designates the courts of a Member State without further specification, the court with territorial jurisdiction shall be that of the place of residence of the or one of the defendants". Hence, if the defendant's domicile has changed before the commencement of the proceedings, the claim must be dismissed[164].

iii. Means of communication

As the reported case show, the means of communication applicable to the notification of the initial claim to the defendant and the subsequent exchanges between the court and the parties must be distinguished.

In France, the court clerk is in principle responsible for sending the notification of the initial claim to the defendant by registered letter with acknowledgement of receipt. In the cases where the letter does not

[162] Cour de cassation, Civ. 1, 27.11.2019, No 18-14.985 (*supra*, 11).
[163] For an example, see Tribunal d'instance d'Angers, 06.12.2010, No 91 10-438 (*supra*, 1).
[164] See Tribunal de commerce de Bobigny, Chambre 8, 12.12.2017, No 2017F00805 (*supra*, 7).

reach the defendant, the court clerk will generally make a second attempt through the mail[165]. If this second letter does not reach the defendant either, Article 1387 of the Code of Civil Procedure provides that a bailiff should carry out the service of documents. However, a judgment issued by the *tribunal de commerce* of Versailles[166] suggests that French courts have some discretion to decide whether Article 1387 of the French Court of Civil Procedure should apply. In that case, in fact, the court held that the address given by the claimant was "manifestly imprecise" and therefore dismissed the case.

Concerning other communications, the reported cases show that exchanges between the parties and the court in the context of the ESCP may occur by email, at least when the proceedings are pending before French commercial courts[167].

iv. Procedure

In a very interesting judgment issued on 10 April 2019[168], the French *Cour de cassation* reminded that the general principles of French civil procedure also apply to the conduct of ESCP in France[169]. In that case, the court held that a tribunal violated the defendant's right to be heard endowed in Article 16 of the French Code of Civil Procedure by upholding a claim that the plaintiff had raised for the first time in response to the defendant's counterclaims without allowing the latter to object to the plaintiff's arguments.

It is also noteworthy that, even though the ESCP is generally conducted in writing, French courts do sometimes hold a hearing even where none of the parties requested it[170]. In that respect, it will be

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[165] See Tribunal de commerce de Versailles, 1re chambre, 28.10.2015, No 2015F00132 (*supra*, 3); Tribunal de commerce d'Evry, 06.02.2018, No 2017F00709 (*supra*, 8).
[166] Tribunal de commerce de Versailles, 1re chambre, 28.10.2015, No 2015F00132 (*supra*, 3).
[167] See Tribunal de commerce de Chalon-sur-Saône, 30.05.2016, No 2016002318 (*supra*, 4) (declaration of withdrawal of the claim); Tribunal de commerce de Bobigny, Chambre 08, 04.04.2017 - 2016F01559 (*supra*, 6) (court inviting the claimant to provide additional information regarding the claim). On this issue, see nevertheless M. Buzzoni and V. Van Den Eeckhout, *Report on the Collection of French implementing rules*, p. 53-54, available at https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf [last visited 1 September 2021].
[168] Cour de cassation, Civ. 1, 10.04.2019, No 17-13.307 (*supra*, 9). Cf Cour de cassation, Civ. 1, 27.11.2019, No 18-14.985 (*supra*, 11), holding that that the court below violated the claimant's right to be heard by declaring that the dispute did not fall within the scope of the ESCP Regulation based on an argument that it raised *ex officio* and without allowing the parties to file any observations.
[169] See also Article 19 ESCPR: "Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted".
[170] See Tribunal de commerce de Bobigny, Chambre 8, 12.12.2017, No 2017F00805 (*supra*, 7). *Adde* Tribunal de commerce de Versailles, 1re chambre, 28.10.2015, No 2015F00132 (*supra*, 3).

interesting to see whether the new provision of Article 5(1a) ESCPR resulting from Regulation No 2015/2421 of 16 December 2015 will have a greater impact in the future[171].

v. Costs

According to Article 16 ESCPR: "The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim".

Based on this provision, French courts have therefore consistently held that the defendant should bear the costs of the proceedings if the claim has been upheld[172]. The same solution seems to apply in a slightly different context, where the court has granted the claim concerning the principal amount but rejected the claimant's request to apply the higher interest rate that had been contractually agreed upon by the parties instead of the legal interest rate[173]. Conversely, the claimant should bear the costs of the procedure if the claim has been dismissed[174]. This solution, however, has not been applied to a dispute where the claimant withdrew its claim following an out-of-court payment by the defendant[175].

Finally, the French *Cour de cassation* has also specified, in its judgment dated 10 April 2019[176], that a successful claimant may only recover costs under Article 700 of the French Codee of Civil Procedure and may not seek additional damages related to the hassle and expenses of the procedure based on the provisions of extra-contractual liability.

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[171] Article 5(1a) ESCPR now provides: "The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests. The court or tribunal may refuse such a request if it considers that, with regard to the circumstances of the case, an oral hearing is not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately from a challenge to the judgment itself".
[172] See *e.g.*, Tribunal de commerce d'Evry, 06.02.2018, No 2017F00709 (*supra*, 8).
[173] Tribunal de commerce de Rennes, 1re chambre, 12.07.2016, No 2016F00232 (*supra*, 5).
[174] See Tribunal de commerce de Versailles, 1re chambre, 28.10.2015, No 2015F00132 (*supra*, 3).
[175] Tribunal de commerce de Chalon-sur-Saône, 30.05.2016, No 2016002318 (*supra*, 4).
[176] Cour de cassation, Civ. 1, 10.04.2019, No 17-13.307 (*supra*, 9).

b. ESCPs Conducted Abroad

Among the reported cases, only two judgments have been found concerning the enforcement in France of an ESCP conducted abroad. These judgments have been issued in the same dispute by the enforcement judge of the *tribunal de grande instance* (first instance)[177] and the *cour d'appel* (appeal) of Nîmes[178], respectively.

The case concerned the enforcement in France of a German judgment. The claimant had first filed a claim under the ESCP in that State and obtained a judgment on 18 February 2019. Subsequently, the defendant filed an application for review under Article 18 ESCPR, which was deemed justified by the German court but led to a new judgment in the claimant's favour dated 13 August 2019, later upheld by a German court of appeal. The creditor later sought to enforce the judgment dated 18 February 2019 in France following the provisions of the ESCP Regulation.

On appeal, the *cour d'appel* of Nîmes nevertheless held that the judgment dated 18 February 2019 could not be enforced in France because Article 18(2) ESCPR provides that: "If the court decides that a review is justified on any of the grounds set out in [Article 18] paragraph 1, the judgment given in the European Small Claims Procedure shall be null and void". Therefore, the court held that the creditor should have sought to enforce the subsequent judgment of 13 August 2019 following the provisions of the BI bis Regulation.

[177] Tribunal de grande instance de Nîmes, 02.08.2019, No 19/03433 (*supra*, 10).
[178] Cour d'appel de Nîmes, 4e ch. commerciale, 03.09.2020, No 19/03387 (*supra*, 12).

VI. EAPO Regulation

A. Case Law Summaries

1. Cour d'appel de Versailles, 4e ch., 13.07.2020, No 18/05040

Alleging a breach of an introducer agreement, a French corporation initiated EPO proceedings against a Polish contractor before the President of the *tribunal de commerce* of Versailles to obtain the full payment of its contractual commissions. On 25 July 2017, the President of the *tribunal de commerce* issued an EPO in favour of the claimant. On 9 October 2017, the defendant filed a statement of opposition against the EPO. At an *ex parte* hearing, the claimant asked the court to confirm the initial EPO and applied for an EAPO. On 21 March 2018, the President of the *tribunal de commerce* of Versailles confirmed the EPO and granted the claimant's request for an EAPO. On 16 July 2018, the defendant appealed this decision before the *cour d'appel* of Versailles.

The court confirmed the EPO but rejected the creditor's request for an EAPO after noticing that the creditor did not provide any evidence regarding the existence of a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult as required by Article 7 EAPOR. The court also noted that the creditor had not filed its request using the form indicated in Article 8 EAPOR. For these reasons, the court rejected the creditor's request for an EAPO.

Keywords: Conditions for issuing an EAPO

2. Cour d'appel de Paris, pôle 1 ch. 10, 28.01.2021, No 19/21727

Alleging a breach of a contract for the sale of goods, the seller, a Swiss company, sought authorization to carry out a provisional attachment under French law ("*saisie conservatoire*") against multiple bank accounts held in France by the financial institutions which funded the sale. On 18 June 2018, the President of the *tribunal de commerce* of Paris granted the creditor's *ex parte* request. It also allowed the French bailiff to consult the "*Ficoba,*" *i.e.* the national electronic registry holding information on bank accounts open in France to retrieve relevant information about the debtors' assets. Following this decision, the bailiff carried out several provisional attachments against the debtors' bank accounts. On 18 July 2018, the creditor filed a lawsuit in France seeking damages against one of the debtors. On 3 February 2020, it filed an additional lawsuit before the commercial court of Abidjan (Ivory Coast).

Meanwhile, the debtors applied to the President of the *tribunal de commerce* of Paris for reconsideration of the order dated 18 June 2018. On 15 November 2019, the President granted their request in part, and deleted any mention to the *Ficoba* from the initial order. The debtors appealed this decision before the *cour d'appel* of Paris, asking the court to annul the order in full, lift all provisional attachments and order the creditor to pay damages. The creditor cross-appealed, asking the court to reinstate the power of the bailiff to consult the *Ficoba*. The court reversed in full the decision of the court of first instance, upholding both the debtors' arguments and the creditor's cross-appeal.

Firstly, the court sided with the creditor and upheld its request to allow the bailiff to seek information on the debtors' bank accounts. In this part of the decision, the *cour d'appel* acknowledged that in disputes brought under French domestic law, the power to consult the *Ficoba* is limited to cases where the creditor is already in possession of an enforceable title. By contrast, the court noticed however that the new Article L. 151-A of the French Tax Procedures Book grants a right to seek information even before the issuance of an enforceable title within the context of the EAPO Regulation. The court held that this difference between attachments carried out under French domestic law and proceedings brought under the EAPO Regulation established unjustified and unlawful discrimination between creditors. According to the court, creditors who may take advantage of the EAPO Regulation are in a more favourable position than those who seek a domestic attachment targeting a bank account located in France. Therefore, the court held that creditors acting under French domestic law should enjoy the same right to obtain information as creditors seeking an EAPO.

Secondly, however, the court held that the creditor had not satisfied the requirements set out by domestic law to obtain a provisional attachment. It held, in particular, that the creditor did not offer sufficient evidence that the absence of a provisional attachment would have put at risk the recovery of the debt. It also held that the carrying out of the provisional attachments had damaged the debtors' reputation and granted them 10,000 euros in damages each.

Keywords: Account information

3. Cour d'appel de Metz, 3e ch., 18.03.2021, No 20/00397

A woman lost her husband in a work-related car accident for which he was responsible. As her husband worked in Germany, the widow could claim a pension from the German social security authority, which could in turn recover the sums from her husband's French insurer. On 7 April 2000, however, the widow entered into a settlement agreement with the French insurer and obtained further compensation for her husband's death. The *cour d'appel* of Nancy later annulled the settlement and ordered the woman to reimburse 178,722.67 euros plus interest to the insurance company.

Years later, the German authority sought to recover the sums it had been paying to the widow by suing the insurance company in French courts. At this point, the insurer applied for an EAPO against the widow targeting a bank account located in Germany. The claimant filed its request before the enforcement judge of the *tribunal judiciaire* of Metz, which rejected it by a decision issued on 20 January 2020. The insurance company then electronically filed an appeal before the *cour d'appel* of Metz.

Before the court, the claimant argued that the EAPO was not based on the 2005 judgment of the *cour d'appel* of Nancy, but rather sought to anticipate any future financial loss arising from the action brought by the German authority. Consequently, the insurer argued that an EAPO should be issued for an amount equivalent to the sums that the German authority sought to recover against it. In response, the widow argued that the claimant was in reality trying to enforce the 2005 judgment, and that the 10-year time limit to recover enforceable titles had already expired. The court sided with the widow, noting that the insurance company had previously served a writ referencing the 2005 judgment, whose enforcement was now time-barred. Additionally, the court held that the creditor did not provide any proof regarding any other right against the defendant and therefore did not satisfy the requirement of Article 7(2) EAPOR.

Keywords: Conditions for issuing an EAPO

B. Critical Assessment

In the course of our research, only three (3) judgments have been found concerning the application of the EAPO Regulation in France. Among these, two (2) concern the conditions for issuing an EAPO in cases where the creditor does not yet hold a title (**a**), while the other addresses the question of the right to obtain information about the debtor's bank account (**b**).

a. Conditions for issuing an EAPO

Under Article 7 EAPOR, a creditor who has not yet obtained a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim has to prove both the existence of a real risk regarding the subsequent enforcement of the claim (*periculum in mora*) and a likelihood of success on the merits (*fumus boni iuris*). By comparison, Article L. 511-1 of the French Code of Civil Enforcement Procedures provides that: "Any person whose claim appears to be well-founded in principle may apply to the judge for authorization to take conservatory measures against the debtor's property, without a prior summons, if he can prove that there are circumstances likely to jeopardize the recovery of the claim".

So far, French courts seem to have faithfully applied this provision by requiring a precise showing by the claimant that the issuance of an EAPO is necessary to prevent subsequent difficulties at the enforcement stage[179] and that the claim is sufficiently substantiated[180].

b. Account information

Pursuant to the new drafting of Article L. 151-A of the French Tax Procedures Book, a court granting an EAPO before the creditor has obtained an enforceable title may also allow the bailiff to access the debtor's account information following Article 14 EAPOR. By contrast, a creditor who seeks a provisional attachment under French domestic law may only obtain the debtor's account information if it already holds an enforceable title or a judgment against the debtor[181].

In a very interesting judgment issued on 28 January 2021[182], the *cour d'appel* of Paris nevertheless extended the right provided for by Article 14 EAPOR to a creditor who had obtained a domestic attachment targeting the debtor's bank accounts located in France, holding that the rule set out in Article L. 151-A of the French Tax Procedures Book instituted illegal discrimination between creditors[183].

[179] Cour d'appel de Versailles, 4e ch., 13.07.2020, No 18/05040 (*supra*, 1).
[180] Cour d'appel de Metz, 3e ch., 18.03.2021, No 20/00397 (*supra*, 3).
[181] See Article L. 151-A of the French Tax Procedures Book.
[182] Cour d'appel de Paris, pôle 1 ch. 10, 28.01.2021, No 19/21727 (*supra*, 2).
[183] For a more detailed commentary of the decision, see C. Santaló Goris, "The EAPO Regulation: An unexpected interpretative tool of the French civil procedural system", available at: https://conflictoflaws.net/2021/the-eapo-regulation-an-unexpected-interpretative-tool-of-the-french-civil-procedural-system/ [last visited 1 September 2021].

VII. Recurring Issues

Even though the most relevant questions regarding the application in France of the Regulations covered by the EFFORTS Project tend to vary from one instrument to another, two critical issues frequently arise across the case law covered by this Report.

The first recurring issue touches upon the circulation of default judgments across the EU Member States and concerns disputes where the debtors resist enforcement in the Member State addressed by arguing that they did not receive the document instituting the proceedings or an equivalent document within sufficient time or in such a way to arrange for their defence. As the reported judgments show, these cases account for a considerable amount of litigation before French courts, even though the debtor's objection is almost invariably unsuccessful. This situation might, at least partly, be the result of the complexity regarding the remedies applicable to these kinds of cases.

Indeed, situations leading to a default judgment in the State of origin despite the lack of proper service on the defendant may stem both from the certification of domestic judgments under the EEO and BI bis Regulations and from uniform European procedure under the EPO or the ESCP. Nevertheless, the remedies available to the debtor in such circumstances slightly differ from one instrument to another. Hence, while the BI bis Regulation explicitly allows the debtor to resist enforcement before the courts of the Member State addressed[184], the EEO Regulation provides that the only remedy available to the debtor where the EEO results from a domestic default judgment that has been certified despite the lack of proper service of the claim[185] is to apply for a withdrawal before the court of origin under Article 10 EEOR[186]. By contrast, however, the CJEU held in the case *eco cosmetics*[187] that the uniform review procedure set out in Article 20 EPOR does not apply where an EPO has been declared enforceable despite the lack of notification of the initial order to the defendant. In this case, the debtor should be allowed to challenge the enforceability of the EPO before the court of origin under domestic procedural law. Hence, the same violation of the defendant's right of defence may be challenged before different courts and be subject to

[184] Albeit within the narrow limits of Article 45(1)(b) BI bis.
[185] This may be the case if non-compliance with the minimum standards set out in the Regulation has been cured pursuant to Article 18 EEOR.
[186] The same solution might probably apply, *mutatis mutandis*, to Article 18 ESCPR.
[187] CJEU, 04.09.2014, C-119/13 and C-120/13, *eco cosmetics GmbH & Co. KG v Dupuy*.

different rules depending on the applicable Regulation[188]. These differences inevitably lead to a fragmentation of the law and may reasonably give rise to some confusion for debtors and practitioners alike.

The second recurring issue that French courts have faced in the context of the recognition and enforcement of foreign titles concerns the authority that should be assigned to a foreign title where the accompanying certificate has been erroneously issued in the State of origin. Under the EEO and EPO Regulations, French courts have consistently held that the party who wishes to avoid enforcement should, in principle, apply for a withdrawal of the certificate[189] or a review of the EPO in the State of origin[190]. The situation, however, is much less clear under the BI bis Regulation because Article 53 BI bis does not provide any guidance regarding the remedies that may be available in the case where the court of origin erroneously granted the certificate. Unfortunately, this situation has already given rise to some inconsistent treatment before French courts[191].

[188] The situation becomes even more complex if one considers that the same judgment may sometimes give rise to subsequent enforcement attempts under different Regulations. See Cour d'appel de Versailles, 1re ch. 1re sect., 02.02.2018, No 16/01881 (*supra*, III.A.21).
[189] See Article 10 EEOR.
[190] See Article 20 EPOR.
[191] See *supra*, II.B.

VII. Summary and Overall Assessment

Overall, the reported cases show that French courts have a good knowledge and understanding of European law and that the application of the targeted Regulations in France has, in general, been faithful to the texts and the interpretation of the CJEU. On this last point, one might nevertheless advocate for a more explicit reference to European case law where its content may be relevant to the outcome of the case.

Noteworthily, very few cases have been found regarding the certification of outgoing titles by French courts. Undoubtedly, this situation depends at least partly on the fact that the power to issue the certificate is often left to the court clerk[192], and that Article 509-5 of the French Code of Civil Procedure only requires French authorities to give reasons where an application to issue a certificate is denied under the EEO or the BI bis Regulation. Given the critical importance of the certificates under the targeted Regulations, however, one could have expected to find a few more cases concerning this stage of the procedure.

As to foreign titles, the reported cases also show that French courts seem, in general, very reluctant to refuse, suspend or limit the enforcement of judgment and other extrajudicial titles issued in another Member State. This conclusion holds true both with respect to the grounds for refusal, suspension or limitation of enforcement set out in the Regulations themselves – which are usually narrowly interpreted and have very rarely led to successful challenges – and with regards to objections grounded in domestic law[193].

[192] The only exception being certificates issued under the EEO Regulation (cf Article 509-1 of the French Code of Civil Procedure).
[193] For instance, French courts have almost invariably held that the requirements applicable to the service of a judgment under French domestic law do not apply to the notification of foreign titles covered by the targeted Regulations.