



## **“The Judicial Officer: Link between Law and Economy, a New Approach to Enforcement”**

### **Summary Report**

**Jos Uitdehaag**

*Judicial Officer (The Netherlands)*

*1<sup>st</sup> Secretary of the UIHJ*

*General Reporter of the Congress*

Distinguished guests from all international organizations,  
Distinguished professors and members of the Scientific Council of the UIHJ,  
Distinguished heads of delegations of the member countries of the UIHJ,  
Dear colleagues,  
Ladies and gentlemen,

Dear friends of the UIHJ Family,

After three days of intense and very productive work and culminating more than two years of preparations we have now come to the final session of our Congress.

On behalf of the host, UIHJ, I should like to thank you all for participating and the speakers in particular for their valuable insights and contributions.

I would like to extend my gratitude to everyone involved in the organization of the Congress:

Thank you also to Juan Carlos Estevez Fernandez Novoa, Luis Ortega Alcubierre and all other employees of the Procuradores of Spain.

Thank you also to my close friends within UIHJ and especially: Leo Netten, Bernard Menut, Françoise Andrieux, Mathieu Chardon and last but not least Luisa Lozano without whom the organisation of this Congress would never have been possible.

I am sure that Bernard from somewhere still is keeping an eye on our Congress.

Many thanks to you all.

The 22<sup>nd</sup> UIHJ Congress aimed to focus on **“The Judicial Officer: Link between Law and economy, a New Approach to Enforcement”**.



Over the past three days we have had the honour and privilege of having heard valuable presentations and discussions from some of the world's foremost experts in the field of economy, international development and civil enforcement.

A mixture of practitioners, science and our (international) cooperation partners.

We have reflected on:

- Fair and efficient justice, meaning an equitable global economic development as a fundamental right, a human right, for every justiciable;
- The role of enforcement agent within economic development;
- The new approach towards civil enforcement and
- The role of UIHJ in the field of law and economics.

The title of the 22<sup>nd</sup> Congress is **the Judicial officer; a link between law and economy**

Development of markets is not just economic development. For markets to develop, a legal infrastructure is necessary. Markets exchange property rights and contracts. A clear legal framework is necessary: transparency of legislation, publicly declared, certainty and equality of law and legal procedures and recognition of individual rights and freedom, i.e. the *Rule of law* principles.

Professor *Peter Gruss*, the director of the Max Planck Society, one of the organisations with whom UIHJ is cooperating, on occasion of the opening of the Institute in Luxemburg<sup>1</sup> quoted a German cabaret artist Dieter Hildebrandt:

*Having the law on your side is not enough. You also have to take justice into account.*

What does this mean? To have the law on your side is irrelevant if you are unable to enforce such law either through courts or in out-of-court proceedings and at last via enforcement.

So: *fair justice*.

Such fair justice also includes enforcement.

*Unfair* enforcement relates to private justice, to pressure tactics and intimidation. This should never be allowed in a country that respects the principles of the Rule of Law. As we have seen in the first workshop “unfair” means that there is a breach in the balance of the rights of parties. Indeed both the debtor and the creditor have certain rights and obligations. In that respect different speakers referred to the *principle of proportionality*.

The sale of a house and after that the eviction of a debtor and his family for a small claim only was considered disproportionate by the ECtHR<sup>2</sup>. The same court considered it disproportionate to refuse the issuance of a passport and a valid identity card for abroad to a person not paying maintenance

---

<sup>1</sup> Speech by Prof. Dr. Peter Gruss President of the Max Planck Society Opening of MPI Luxembourg for International, European and Regulatory Procedural Law, 8 May 2013

<sup>2</sup> Rourke v. Sweden



from her children.<sup>3</sup> The same court considered it proportional to place a debtor in detention when this debtor refused to inform the enforcement authority on the whereabouts of attached goods.<sup>4</sup>

Fair and efficient justice may imply that alternative solutions are considered.

From experience we know that most debtors will have more than one pending enforcement procedure against them. We heard the example of Estonia where approximately 38% of debtors have two to five pending enforcement cases and *ca* 10% have 21 or more pending proceedings. The enforcement cases of *ca* 35% of debtors are processed by three to five bailiffs at the same time. Such debtors do not have any assets.

In that respect alternative tools such as debt rescheduling should be considered. Some countries, e.g. Lithuania, already combined enforcement with bankruptcy administration services. It is without doubt that both professions have a lot in common.

Financial crisis in Greece resulted in the adoption of a new law (Act 3869/2010) to protect financial vulnerable debtors. Court may suspend the enforcement procedure and may exempt the premises of the debtor from enforcement.

Other countries also have good experiences with *post judicial or judicial mediation*, or palaver as it is called in Africa. From the UIHJ Grande Questionnaire it became clear that already in 32% of the countries that filled in the questionnaire, such mediation can be carried out. More countries are obliging (an attempt to) mediation prior to going to court. Thailand reported on the high positive results achieved through mediation.

One of the speakers in that respect used the words *participatory justice*: the aim is to ensure accessibility, quality and promptness of civil justice through the recognition of the efficiency of voluntary private modes in a spirit of cooperation along with a fairness balance between parties, as a tool for dispute resolution. It seems logic that here the enforcement agent with its professional status bounded by ethics and high moral standards, confidentiality, neutrality, impartiality plays an active role.

Fair and efficient justice may fit within the principles of Rule of Law, nowadays the *economic background* should not be underestimated. Due to economic developments, governments are reducing their budgets also in the legal system. Access to justice may seriously be hampered by increasing costs of court proceedings (e.g. raise of court fees). In several countries the costs of enforcement are a point of public discussion and governments are considering reducing the enforcement fees as a method to protect debtor's rights (*or are some political reasons?*)

It may lead to a strengthening position of the State, also in enforcement proceedings. Even though the State already has a preferred position in the enforcement proceedings. For example the Greek legislator is given a first lien on their claims. Because of this privilege the claims of the State and

---

<sup>3</sup> Battista v. Italy

<sup>4</sup> Gothlin v. Sweden. The European court noted that there was a possibility for the debtor to be released immediately at any time if he had chosen to inform us about where the assets were hidden, and that there was court proceeding at least every 14 day to decide if the debtor should be released or continue to be in detention.



social funds are collected as a preferred claim. Such privilege may exclude other creditors from satisfaction.

There is a trend towards digitalization in both in court and enforcement proceedings. This may refer to the communication between lawyers and courts (as is the case e.g. in Portugal through the Citius Project) and, also in Portugal the PEPEX software for as an extra judicial procedure in the pre-enforcement phase.

Within our profession countries are developing registers, either publicly available or with a limited access (e.g. Bulgaria with the development of the The Central Debtors' Registry and the Central Registry of Auctioned property and in Quebec the likewise Soquij database or in Poland the Enforcement Procedure Monitor) or, in Thailand the LED Property mobile application regarding information on assets to be publicly sold, the e-service of documents and e-payments). From a European perspective E-Codex and E-sense are important developments. Within these applications different EU regulations are transferred into the E justice platform (e.g. European Payment Order and small claim procedure and the new European attachment on bank accounts). UIHJ was involved in the development of CEPT, a cross border enforcement proceedings tool aiming at the strengthening of communication among EU member states; a project coordinated by the Estonian Chamber of Bailiffs and Trustees in Bankruptcy in co-operation and the Ministry of Justice in Estonia. Other project partners were the Lithuanian Chamber of Bailiffs and Council of Latvian Judicial Officers.

Human and economic relationships often have a *cross-border nature*. Consequently *cross border legal instruments* are of vital importance. During the past two days several examples of harmonized legal systems have been mentioned: European Union, South America, Asean and Ohada. Different judicial systems, with a different aim.

Preamble Ohada Treaty :

*« ce droit soit appliqué avec diligence, dans les conditions propres à garantir la sécurité juridique des activités économiques, afin de favoriser l'essor de celles-ci et d'encourager l'investissement »*<sup>5</sup>.  
*"this law is applied diligently, in conditions which ensure legal certainty of economic activities, to promote the development of these and encourage investment. "*

For example Ohada is created as an independent jurisdiction whose aim it is to act supranational and to unify law in the member states. The tasks entrusted to the enforcement agent in both legal systems are essential to ensure a sustainable economic and social development and to allow the circulation of judgments. Such tasks refer to enforcement, but also to e.g. the service of documents through the enforcement agent rather than by post.

Talking about the cross border nature it is just one step towards globalization and harmonization. A nice reference was made to the publication of Friedman, *the world is flat*.

Indeed the world is flat. Globalization and harmonization are a main focus of UIHJ. In the cooperation with the international organization we emphasize on the importance of such harmonization, through the definition of common, international, principles; through the work within CEPEJ, Ohada, the Hague Conference (e.g. the future Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters) and other organizations.

---

<sup>5</sup> Préambule du Traité du 17 octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique, signé à Port-Louis (Ile Maurice)



The law on paper and the law in practice.

Although in theory certain issues, such as cross border enforcement might be well regulated, practice sometimes is differently. We heard the example of a Belgium colleague pointing at the difference in performance among the different EU member countries. Formalism, administrative delays, other authorities involved in the initiating of a cross border procedure rather than the enforcement agent (e.g. court) all cause delays and frustrate the efficient use of cross border enforcement tools. Other problems that were identified relate e.g. to the use of different language.

Another subject of importance is training. One of the speakers quoted Nelson Mandela "*Education is the most powerful weapon which you can use to change the world*". As we have seen one of the problems in the use of cross border tools is the lack of training on European procedures. International organizations focus on the promotion of training. European Commission plans to have 700,000 (including 15,000 out of 30,000 enforcement agents) trained during the coming years.

It was rightfully mentioned by the new president of CEPEJ: *time is changing ; time for a new approach*. Countries are already concentrating on the new tasks and functions of the enforcement agent. Quebec has adopted a new Civil Procedure Code with a strong focus on communication with creditor and debtor and the use of IT. A new approach may include the enforcement agent as a solution seeker for vulnerable debtors. The enforcement agent has a monopoly on the use of force to execute a judgment. The enforcement agent is confronted with an increasing number of obligations. Towards the creditor, but also towards the debtor.

Debtors do not have a choice between different enforcement agents. However it is in the communication with the debtor that the law on paper becomes a law in practice.

In such «a forced relationship » the debtor will need to inform the debtor, communicate with the debtor, need to balance the interests of the debtor versus the interests of the creditor, mediate between the creditor and debtor, take into consideration the morality towards the profession, to look for solutions for vulnerable debtors meaning limit over indebtedness, take into consideration human rights...

Another approach may introduce debt collection as an activity to be performed by the enforcement agent. More countries are promoting the implementation of debt recovery as a key activity of enforcement agents. Some countries even enable the enforcement agent to directly enforce uncontested claims.

Such approach may also include the representation in court as is the case e.g. in the Netherlands and as it is mentioned in CEPEJ 2009 Guideline 34.

Another approach. Does this entail unification? No not presently. We have seen the role of CEPEJ in the defining of international standards on enforcement and the attempts within the Ohada sphere aiming to unify the various acts on enforcement agents. So far this is not succeeded; however the enforcement agent is the only one qualified to carry out enforcement.

Another tool to be used by us is the acting as a trusted third party, enabling the enforcement agent to act in the digital world, e.g. guaranteeing electronic communication in a secure way.



Another approach may not just focus on the enforcement agents, but also the court and enforcement procedures. For example the use of the summary proceedings, a speedy procedure to obtain an enforceable document in uncontested claims or the use of the statement of assets in enforcement procedure. Either as a compulsory method (like in some European countries) or a non-compulsory method as is the case in African countries.

Another example that was mentioned was (e.g. in maintenance claims) is the limit the rights of debtors, e.g. the right of a court to suspend the debtor's hunting right, the right to drive a motor vehicle (Estonia, United States, Canada, the Czech Republic and Slovakia) or to operate a small ship or jet ski, and their fishing card, weapons permit and the permit to acquire a weapon in cases that the debtor fails to pay maintenance without good reason.

Mrs Viviane Reding, Commissioner and Vice-President for Justice, put it as follows, *“The attractiveness of a country as a place to invest and do business is undoubtedly boosted by having an independent and efficient judicial system. That is why predictable, timely and enforceable legal decisions are important and why national judicial reforms became an important structural component of the EU's economic strategy”*. If economic operators are convinced that there is rule of law in a State, they will not hesitate to invest in its economy. There can be no doubt that the ineffectiveness of enforceable titles in a national system undermines the operation of the single European market.

Against this background UIHJ developed the Global Court of Enforcement, a set of fair principles for enforcement. I will not go too much into detail since we just finished the round table on this topic and it would be different for me to replace the eminent speakers in this forum.

Summarizing our Congress it are exactly the particularities of the Global Code that in a few sentences give an overview:

### **1° A new balance between the rights of the creditor and the protection of the fundamental rights of the debtor**

**Enforcement law must not be inhumane:** its structuring principles must be able to guarantee the payment of the creditor while still protecting the fundamental rights of the debtor. The Code defines the rights and duties of each of the parties.

**Rights of the creditor:** a right of general security on all of the goods, the ability to invoke measures appropriate to the nature of the goods, the freedom to choose enforcement measures, the right to receive the assistance of the State to enforce judgments, the award of compensation and interest in the event of unjustified resistance by the debtor.

**Rights of the debtor:** the protection of privacy and the family, the protection of certain goods that cannot be seized, the granting of procedural rights (rights of defence, recourse to the courts in the event of difficulty), the ability to benefit from a period of grace, the right to compensation in the event of incorrect enforcement, the right to participate in the definition of enforcement procedures (participatory enforcement, amicable enforcement procedures), and where applicable the possibility of expunging the debt with a view to reestablishment of his solvency.



We recommend:

1. To strengthen the role of the EA with a view to fair justice among parties. Such a fair justice includes a balance between the rights of the creditor and the protection of human rights of the debtor;

**2° The Code introduces modern concepts** such as “amicable” enforcement, “participatory” enforcement, and “soft” enforcement, that is to say the participation of the debtor in the procedures of the enforcement.

The Code applies to all forms of enforcement, including collective enforcement with the effects related to class action suits.

We recommend:

2. To institutionalize post judicial mediation as an element of participatory enforcement, a concept enlightened by the international organizations;

**3° The Code anticipates the recourse to new technologies for modernizing enforcement methods.**

We recommend:

3. With a view to efficient and effective enforcement to introduce secured use of new technology in the activities of the enforcement agent;

**4° The Code responds to new economic factors:** the right to the effective enforcement of enforceable titles is a factor in the development of a socially responsible economy in the world.

We recommend:

4. To international organizations and our members, with a view on the principles of the Rule of Law, to use the World Code on Enforcement as a tool of good governance

The world Code in that respect indicates:

The absolute necessity of finding solutions in this time of economic crisis give a particular urgency to the process of reflection embarked upon by the UIHJ and the Institute Jacques Isnard on worldwide enforcement standards. In effect the right to effectively enforce enforceable titles is a key tool for economic development. All international organizations concerned with sustainable development strategies stress the need of granting a right to enforce to both private individuals and companies.

We started last Wednesday with a quotation of Smith. Let us also finish with a quotation as it was also mentioned in one of the presentations:

*Les espèces qui survivent ne sont pas les plus forts, les plus rapides, ni le plus intelligent ; ils sont ceux qui s'adaptent plus facilement au changement*

*The species which survive are not the strongest, the fastest, nor the most intelligent; they are those who adapt more easily to change*

(Charles Darwin)



### **Taking into consideration**

**In view of the economic developments, the enforcement agent is an inevitable chain between law and economy.**

**Society demands a review of the tasks of the enforcement agent. Its primary task is to balance the economic rights of the creditor and the protection of the fundamental rights of the debtor.**

### **We recommend:**

- 1. To strengthen the role of the EA with a view to fair justice among parties. Such a fair justice includes a balance between the rights of the creditor and the protection of human rights of the debtor;**
- 2. To institutionalize post judicial mediation as an element of participatory enforcement, a concept enlightened by the international organizations;**
- 3. With a view to efficient and effective enforcement to introduce secured use of new technology in the activities of the enforcement agent;**
- 4. To international organizations and our members, with a view on the principles of the Rule of Law, to use the World Code on Enforcement as a tool of good governance**