

# Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial

Monique Hazelhorst

# Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial



ASSER PRESS



Springer

Monique Hazelhorst  
Judicial Assistant at the Supreme Court  
of the Netherlands  
The Hague  
The Netherlands

This research was made possible with the support of the Netherlands Organisation for Scientific Research (NWO). It is part of the project ‘Securing Quality in Cross-Border Enforcement: Towards European Principles of Civil Procedure?’ (2011–2016) led by Prof. X.E. Kramer at Erasmus University Rotterdam.

ISBN 978-94-6265-161-6      ISBN 978-94-6265-162-3 (eBook)  
DOI 10.1007/978-94-6265-162-3

Library of Congress Control Number: 2016956173

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2017

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This Springer imprint is published by Springer Nature  
The registered company is Springer Science+Business Media B.V.  
The registered company address is: Van Godewijkstraat 30, 3311 GX Dordrecht, The Netherlands

# Acknowledgments

First and foremost, I thank my supervisors, Prof. Xandra Kramer and Prof. Kristin Henrard, at Erasmus School of Law, for their support and comments on earlier versions of the chapters for this book. This book is part of the research project ‘Securing Quality in Cross-Border Enforcement: Towards European Principles of Civil Procedure?’, based on a VIDI grant by the Dutch Organization for Scientific Research, and led by Prof. Kramer. I am very grateful to Prof. Kramer for introducing me to the rich field of European civil procedure.

Next, I would like to thank for their invaluable comments Prof. Fabian Amtenbrink at Erasmus School of Law; Prof. Rick Lawson at Leiden University; and Prof. Marta Requejo Isidro, professor at the University of Santiago de Compostela and senior research Fellow at the Max Planck Institute for Procedural Law in Luxembourg.

In Luxembourg, I would like to thank Prof. Hess for the opportunity to spend two months as a guest researcher at the Max Planck Institute for Procedural Law. The institute provided an inspiring work environment. Its research fellows made me feel very welcome: I would like to name Katharina Raffelsieper in particular, though all became good friends in the short time I was there. I also thank International Officer Christiane Göbel for her practical help in getting settled. During my time in Luxembourg, Prof. Gilles Cuniberti at the University of Luxembourg agreed to meet me and discuss my work, for which I am thankful.

In Rotterdam, I would like to thank Prof. Wibren van der Burg, Prof. Sanne Taekema and Prof. Elaine Mak for valuable help and comments on earlier versions of some of the chapters of this book. Dr. Karin van Wingerde provided essential practical advice during the final stages of this research. My fellow Ph.D. candidates not only provided support but were also prepared to discuss my ideas with me; I mention in particular Stefan Philipsen, Thomas Riesthuis and Anna Sting. I am also grateful to Prof. Roel de Lange and Prof. Janneke Gerards (at Utrecht University) for letting me participate in their reading group on fundamental rights, where I had the opportunity to explore this rich and ever-changing topic in more depth.

I also wish to thank my fellow (ex-)PhDs from the department of private international law, Laura, Alina, Ekaterina, Piotr, Erlis, and Marta: the latter two deserve special thanks for putting up with me as their office-mate in the stressful final months.

Ryan Gauthier took on the tremendous task of correcting the manuscript, which he did superbly, despite being on a different continent.

In Utrecht, I would like to thank those who gave me the opportunity to start, and complete, the Master's Programme in Legal Research, which proved an invaluable springboard: Prof. Leonard Besselink, Prof. Ewoud Hondius and Dr. Ton van den Brink, my tutor during the Programme, who was always good at making me put things into perspective. I would also very much like to thank Dr. Tony Marguery for being prepared to review earlier versions of my work.

My friends from the LRM Programme also deserve thanks for being there for me. Melissa, Frank, Marja-Liisa, Eduardo, Jurriën: I could not have done it without you. A special word of thanks goes out to Nik de Boer, who not only reviewed some of my work, but also organized highly inspiring reading groups on EU law and political philosophy.

I am grateful to my colleagues at Denkkraft Utrecht; participating in its activities gave me the opportunity to use my legal knowledge for different purposes than my research every once in a while, which proved very refreshing. In particular, I would like to thank Marije Louisse for always being prepared to listen to my lectures on my topic: I hope to be able to do the same for you.

Last but not least, my family and friends gave me the confidence I needed to start the project in the first place. So I thank my mother Francisca, my father Willem-Otto, and my sister Leonie, and especially my grandmother, Mariëtte Louise Hoogendijk-van Holst Pellekaan, who practiced law in the 50s and from whom I inherited the 'legal gene'. I thank my parents-, brothers- and sisters-in-law for welcoming me into their family and for always being interested. My friends Sophie and Sjoerd were always there when I needed them, even if they were not geographically close. Finally, dear Wouter, you helped me immensely, not just by being there for me, but also by understanding so well why I wanted to do this. The fact that it is now finished to me proves we can do anything as long as we are together.

# Contents

<b>1</b>	<b>Introduction . . . . .</b>	<b>1</b>
1.1	Introduction: The Case of <i>Maronier v. Larmer</i> . . . . .	2
1.2	Background: Free Movement of Judgments in the European Union . . . . .	3
1.3	Relevance . . . . .	6
1.4	Aims of This Book . . . . .	8
1.5	Structure . . . . .	9
1.6	Case Law . . . . .	10
	References . . . . .	10
 <b>Part I Evolution of Free Movement of Civil Judgments in Europe and the Role of Fair Trial</b>		
<b>2</b>	<b>The Evolution of Free Movement of Civil Judgments in the European Union . . . . .</b>	<b>15</b>
2.1	Introduction . . . . .	16
2.2	Free Movement of Civil Judgments in the EU: Historical and Political Background . . . . .	17
2.2.1	Free Movement of Judgments and the Internal Market . . . . .	17
2.2.2	The Introduction of Mutual Recognition . . . . .	21
2.2.3	The Role of Mutual Recognition and Mutual Trust . . . . .	27
2.2.4	Practical Arguments for Increased Free Movement . . . . .	31
2.2.5	Concluding Remarks . . . . .	36
2.3	Recognition and Enforcement Under Current EU Legislation . . . . .	36
2.3.1	Features of Recognition and Enforcement in EU Civil Justice Cooperation . . . . .	36
2.3.2	Grounds for Refusal . . . . .	44
2.3.3	The Brussels I bis Regulation . . . . .	48
2.3.4	Complete Free Movement of Judgments: The Maintenance Regulation . . . . .	51

2.3.5	Automatic Enforcement with Minimum Standards Under the Brussels II bis Regulation .....	52
2.3.6	Automatic Enforcement with Minimum Standards Under the European Enforcement Order .....	55
2.3.7	Automatic Enforcement on the Basis of Common Rules in the Uniform Procedures .....	56
2.3.8	Interim Conclusion: The Significance of the Reforms for Fundamental Rights Protection .....	58
2.4	Conclusion .....	59
	References .....	59
<b>3</b>	<b>Protection of Fundamental Rights by EU Instruments on Free Movement of Civil Judgments .....</b>	<b>63</b>
3.1	Introduction .....	64
3.2	The Role of the Public Policy Exception in the Protection of Fundamental Rights .....	65
3.2.1	The Concept of Public Policy .....	66
3.2.2	Public Policy and the European Convention on Human Rights .....	68
3.2.3	The Inclusion of a Public Policy Exception in Instruments of EU Civil Procedure .....	70
3.2.4	Substantive and Procedural Public Policy .....	71
3.2.5	Interpretation by the Court of Justice of the European Union .....	73
3.2.6	Application of the Public Policy Exception in European Union Instruments by Member State Courts ..	79
3.2.7	Conclusion: The Value of the Public Policy Exception ..	87
3.3	The Role of Other Grounds for Refusal in the Protection of Fundamental Rights .....	90
3.3.1	The Protection of the Defendant in Default Proceedings....	90
3.3.2	Special Jurisdiction (Article 35 Brussels I, 45(1)(e) Brussels I bis).....	93
3.3.3	Hearing of the Child (23(b) Brussels II bis) or Other Interested Person (23(d) Brussels II bis) .....	95
3.4	The Protective Function of Control by the Member State Addressed .....	96
3.4.1	The Value of a Cross-Border Check.....	96
3.4.2	Replacement of Refusal Grounds with Minimum Standards .....	98
3.4.3	Alternative Remedies: Appeal to the European Court of Human Rights .....	101
3.4.4	Interim Conclusion.....	102
3.5	Fundamental Rights Protection in the Absence of Refusal Grounds: The <i>Zarraga</i> Case .....	103
3.6	Conclusion .....	110
	References .....	111

## Conclusion to Part I

### Part II The Framework for the Protection of the Right to a Fair Trial in Europe

<b>4 The Right to a Fair Trial in Civil Cases . . . . .</b>	123
4.1 Introduction . . . . .	124
4.2 The Right to a Fair Civil Trial in the European Treaties . . . . .	126
4.2.1 Article 6(1) of the European Convention on Human Rights . . . . .	126
4.2.2 EU Law and Article 47 of the EU Charter on Fundamental Rights. . . . .	129
4.2.3 Relationship and Interplay . . . . .	130
4.2.4 Structure, Internal Connections, and Interpretation . . . . .	131
4.3 The Right to a Fair Civil Trial in the Case Law of the European Courts. . . . .	133
4.3.1 Elements of the Right to a Fair Civil Trial . . . . .	133
4.3.2 The Right to a Fair Hearing . . . . .	136
4.3.3 Right to a Public Trial and Public Pronouncement of the Judgment . . . . .	153
4.3.4 The Right to Adjudication by an Impartial and Independent Tribunal. . . . .	155
4.3.5 The Right to a Trial Within a Reasonable Time . . . . .	157
4.3.6 The Right to Enforcement . . . . .	159
4.3.7 Consequences of a Failure to Observe the Right to a Fair Trial . . . . .	161
4.4 Theoretical Foundations for the Right to a Fair Trial in Civil Cases . . . . .	165
4.4.1 Introduction: The Need to Delve Further into the Right to a Fair Trial . . . . .	165
4.4.2 The Fair Civil Trial as a Means to an End . . . . .	166
4.4.3 The Fair Civil Trial as an End in Itself . . . . .	169
4.4.4 Is It Possible to Distinguish a ‘Core’ and a ‘Periphery’ Within Article 6(1)? . . . . .	172
4.5 Conclusion . . . . .	173
References . . . . .	173
<b>5 Free Movement of Judgments and the European Convention on Human Rights. . . . .</b>	177
5.1 Introduction . . . . .	178
5.2 The Scope of Application of <i>Pellegrini</i> . . . . .	179
5.2.1 Application of <i>Pellegrini</i> to Situations Where Both States are Party to the ECHR. . . . .	179
5.2.2 Application of <i>Pellegrini</i> to Situations Governed by EU Law . . . . .	182
5.3 A Different Frame of Reference for Intra-European Union Situations: The <i>Bosphorus</i> Test . . . . .	183

5.3.1	Review by the ECtHR of Matters Relating to EU Law Prior to <i>Bosphorus</i> . . . . .	183
5.3.2	<i>Bosphorus</i> : Facts and Procedure . . . . .	185
5.3.3	<i>Bosphorus</i> : Impact and Open Questions . . . . .	188
5.4	Applying <i>Bosphorus</i> to Free Movement of Civil Judgments: The <i>Povse</i> Decision . . . . .	191
5.4.1	<i>Povse</i> : Background to the Decision . . . . .	192
5.4.2	General Comments . . . . .	196
5.4.3	The Presumption of Equivalent Protection: Abstract or Concrete? . . . . .	200
5.4.4	Equivalent Protection: The Importance of the Preliminary Ruling Mechanism . . . . .	202
5.4.5	The Matter of Discretion and the Applicability of <i>Povse</i> to Regulations Which Contain Grounds for Refusal . . . . .	208
5.4.6	A Manifest Deficiency? . . . . .	215
5.5	The <i>Bosphorus</i> Doctrine After European Union Accession to the European Convention on Human Rights . . . . .	221
5.6	Conclusion . . . . .	223
5.6.1	Conclusions for Legislation . . . . .	223
5.6.2	Conclusions for Enforcing Courts or Authorities . . . . .	225
5.6.3	Final Remarks . . . . .	226
	References . . . . .	227
<b>6</b>	<b>Free Movement of Civil Judgments and European Union Fundamental Rights Law</b> . . . . .	231
6.1	Introduction . . . . .	232
6.2	Protection of Fundamental Rights in the European Union Legal Order . . . . .	233
6.2.1	The Position of Fundamental Rights in EU Law . . . . .	233
6.2.2	The Member States Courts' Task in the Protection of EU CFR Rights . . . . .	236
6.2.3	The Role of the CJEU in the Protection of EU Fundamental Rights . . . . .	239
6.2.4	Conclusion: The System of Fundamental Rights Protection in the EU . . . . .	241
6.3	'Systemic Deficiencies' in Fundamental Rights Protection: <i>N.S. and M.E. and Others</i> . . . . .	242
6.3.1	The Rule: Mutual Recognition Entails a Presumption that Fundamental Rights Are Protected . . . . .	242
6.3.2	The Exception: Presumption Can Be Rebutted in Case of <i>Systemic Deficiencies</i> . . . . .	244
6.3.3	Can This Exception Be Applied in the Field of Civil Procedure? . . . . .	248

6.4	The Court of Justice of the European Union's <i>Melloni</i> Judgment: Member State Fundamental Rights and Mutual Recognition .....	253
6.4.1	The CJEU's Judgment in <i>Melloni</i> .....	254
6.4.2	Application of the <i>Melloni</i> Doctrine to EU Civil Procedure Law.....	258
6.5	Conclusion .....	266
	References .....	267

## Conclusion to Part II

### Part III How to Effectively Protect Fair Trial in the Context of Free Movement of Civil Judgments

7	Towards an 'Emergency Brake' in EU Instruments on Free Movement of Civil Judgments .....	279
7.1	Introduction: The Need for an Emergency Brake .....	280
7.2	The Nature of the Emergency Brake: Procedural Public Policy or Fair Trial .....	283
7.2.1	Introduction .....	283
7.2.2	The Right to a Fair Trial as a Fundamental Principle.....	285
7.2.3	The Suitability of the Right to a Fair Trial as a Yardstick for Refusing Enforcement.....	287
7.2.4	Are Procedural Public Policy and Fair Trial Identical in Scope?.....	294
7.2.5	Substantive Public Policy and Fundamental Rights Other Than Fair Trial .....	302
7.2.6	Interim Conclusion.....	304
7.3	The Conflict Between Debtor's and Creditor's Rights.....	307
7.3.1	Guidance of the ECtHR for Solving Conflicts.....	308
7.3.2	Methods for Resolving Conflicts Between Fundamental Rights .....	309
7.3.3	Whether the Exercise of the Right Is Made Utterly Impossible .....	314
7.3.4	Whether Other Rights Are Also Implicated.....	316
7.3.5	Cumulative Effect.....	316
7.3.6	Other Factors to Consider.....	317
7.3.7	Application to Conflicts Between Specific Elements of Fair Trial.....	319
7.3.8	Conclusion: The Threshold for Refusing Recognition or Enforcement.....	333
7.4	Protection of the Defaulting Defendant and the Special Jurisdiction Grounds .....	334
7.5	The Need for an 'Emergency Brake' for Return and Access Orders .....	336

7.5.1	Refusal of Enforcement of Return Orders . . . . .	336
7.5.2	Automatic Enforcement of Judgments Granting Rights of Access . . . . .	339
7.6	Conclusion . . . . .	340
	References . . . . .	341
<b>8</b>	<b>Facilitating Enforcement of Civil Judgments Across European Union Member States . . . . .</b>	<b>345</b>
8.1	Introduction . . . . .	346
8.2	How to Organize Judgment Import in European Union Regulations . . . . .	348
8.2.1	Requirements That Can Be Derived from ECtHR Case Law . . . . .	349
8.2.2	Implications for the Design of the Procedure for Obtaining Permission for Enforcement . . . . .	352
8.2.3	Other Recommendations for the Design of an Effective Enforcement Procedure . . . . .	353
8.2.4	Assessment: How Should Judgment Import or Export Be Organized? . . . . .	355
8.2.5	Conclusion on Judgment Export in Brussels I bis . . . . .	360
8.3	The Maintenance Regulation . . . . .	360
8.4	The European Enforcement Order . . . . .	361
8.4.1	Service of the Document Instituting the Proceedings . . . . .	362
8.4.2	Impartiality of the Judge Who Issues the EEO Certificate . . . . .	368
8.4.3	Right to a Fair Hearing Before a Judgment Is Declared Enforceable . . . . .	374
8.4.4	The Right to Appeal (Non-)Certification . . . . .	375
8.4.5	Conclusion on the European Enforcement Order . . . . .	378
8.5	The Uniform European Procedures . . . . .	378
8.5.1	The European Order for Payment Procedure . . . . .	379
8.5.2	The European Small Claims Procedure . . . . .	383
8.5.3	The Uniform Procedures and the Need for Grounds for Refusal . . . . .	394
8.6	Enforcement of Return Orders and Access Rights Under Brussels II bis . . . . .	397
8.6.1	Introduction: The 1980 Hague Convention . . . . .	398
8.6.2	Reforms Achieved by the Brussels II bis Regulation and Controversy . . . . .	401
8.6.3	How Should Enforcement of Return Orders Be Organized? . . . . .	403
8.6.4	Conclusion: Cross-Border Enforcement of Return Order and Access Rights . . . . .	407
8.7	Conclusion . . . . .	408
	References . . . . .	409

Contents	xiii
<b>9 Conclusion</b> .....	413
9.1 Introduction .....	414
9.2 The Research .....	415
9.2.1 Summary of the Findings .....	415
9.2.2 Limitations of the Research .....	418
9.3 Implications of the Findings and Recommendations .....	419
9.3.1 Implications for Academic and Political Debate .....	419
9.3.2 Implications for Legislation .....	420
9.4 Avenues for Further Research .....	422
9.4.1 Convergence of Civil Procedure .....	422
9.4.2 Best Practices in the Application of EU Civil Procedure Law .....	425
9.5 Final Remarks .....	426
References .....	426
<b>List of Cases</b> .....	429
<b>Index</b> .....	445

# Abbreviations

A-G	Advocate General
BGH	Bundesgerichtshof
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Dec.	Decision on admissibility
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EEC	European Economic Community
EEO	European Enforcement Order for uncontested claims
EFTA	European Free Trade Association
EOP	European Order for Payment
ESCP	European Small Claims Procedure
EU	European Union
EU CFR	European Union Charter of Fundamental Rights
EUR	European Euro
FD EAW	Framework Decision on the European Arrest Warrant
FRF	French Francs
GC	Grand Chamber
OGH	Oberlandesgericht
OJ	Official Journal of the European Union
PPU	Procédure préjudicelle d'urgence
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees