

Comparative Studies on Enforcement and Provisional Measures

Edited by
ROLF STÜRNER and
MASANORI KAWANO

Mohr Siebeck

Comparative Studies on Enforcement and Provisional Measures

Edited by

Rolf Stürner and Masanori Kawano



Mohr Siebeck

ISBN 978-3-16-150870-7

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>.

© 2011 by Mohr Siebeck, Tübingen.

This book may not be reproduced, in whole or in part, in any form (beyond that permitted by copyright law) without the publisher's written permission. This applies particularly to reproductions, translations, microfilms and storage and processing in electronic systems.

The book was typeset, printed on non-aging paper and bound by Gulde-Druck in Tübingen.

Printed in Germany.

Preface

Civil enforcement and provisional measures are two intensively discussed topics in the field of international civil procedure. Civil judgments would be worthless if means of enforcement did not exist or work properly. By the same token private rights would be worthless if there were no timely means to protect and defend them against immediate threats. Establishing instruments which secure efficient enforcement and efficient means of timely protection is a difficult task on a national level. Even more so this holds true in an international context. Part one of the present book is therefore providing an introduction to different national systems of civil enforcement as well as to their textual background in Europe, i.e., the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. It also covers various current issues in the field of enforcement, the enforcement of non-judgment titles and the enforcement of security interests in insolvency procedures. Effective relief is also at stake regarding provisional measures which will be dealt with in the second part of this volume. After a number of different comparative studies, this second part will discuss problems of jurisdiction and enforcement of provisional remedies, provisional matters and proceedings on the merits as well as special problems.

Like the previous three volumes, covering “Current Topics of International Litigation”, “International Contract Litigation, Arbitration and Judicial Responsibility in Transnational Disputes” and “Comparative Studies on Business Tort Litigation”, this volume is part of a book series based on the results of international symposia. The symposia entitled “Civil Enforcement” held on March 1–2, 2008 in Nagoya, Japan and “Comparative Study of Provisional Measures”, held on October 10–11, 2008 in Padova, Italy laid the foundation for the present volume. Both conferences were part of an international research program sponsored by the Japanese Society for the Promotion of Science from 2005 to 2010 aiming at facilitating the establishment and common research of a global network of experts. Other results of the working group can be found in joint international as well as national book projects on various topics of international civil procedure. A list of the results is published on the homepage of the working group at <http://www.law.nagoya-u.ac.jp/ncli/en>.

Once more we would like to express our gratitude to all participating members who contributed actively to the symposia and the book projects, and who invested a great amount of time and energy traveling to Japan or Europe.

Again, the Institute for Business Litigation of Nagoya University at Freiburg University, Germany prepared the edition of this volume. The Institute was established to promote and run the research project in collaboration with the Institute for Civil Procedure and Comparative Civil Procedure at Freiburg University. We would like to thank Dr. Natalie Konomi, who organized to a remarkable part the editing work for this volume together with Ms. Tohko Hayakawa, for the assistance, and the Japanese Society for the Promotion of Science as well as the Law Faculty at Nagoya University for their generous financial support. Dr. Jan Malte von Bargen, LL.M. (University of Michigan) and Victoria Marini, Institute for Civil Procedure and Comparative Civil Procedure at the University of Freiburg, contributed intensively to the final editorial work.

Rolf Stürner, Freiburg, Germany

Masanori Kawano, Fukuoka, Japan

Freiburg / Fukuoka, March 2011

Table of Contents

Preface	V
-------------------	---

Part 1

Enforcement in Civil Matters

Chapter 1: Systems of Civil Enforcement

Masanori Kawano

Civil Enforcement as a Fundamental of Effective Justice – Introductory Remarks on Comparative Study of Civil Enforcement –	3
---	---

Neil Andrews

The System of Enforcement of Civil Judgments in England	13
---	----

Nicolò Trocker

The Right to Effective Enforcement of Civil Judgments and Orders: Lessons from the Case Law of the European Court of Human Rights	21
--	----

Burkhard Hess

Different Enforcement Structures	49
--	----

Dimitris N. Maniotis

The Greek Law of Execution According to the Code of Civil Procedure – An Introduction	68
--	----

Laura Ervo

Enforcement in Finland – Some Special Views	74
---	----

Miklós Kengyel

System of Civil Enforcement in Hungary	82
--	----

Michele Angelo Lupoi

Civil Enforcement in Italy: A Comparative Perspective	90
---	----

*Chapter 2: Current Special Topics**Kayo Nishikawa*

Problems of Public Sale in Japan	103
--	-----

Neil Andrews

Obtaining Information in Support of Enforcement Proceedings under English Law	112
---	-----

*Chapter 3: Enforcement of Non-Judgment Titles**Astrid Stadler*

Civil Enforcement of Non-Judgment Titles – European Law	121
---	-----

Carlos Esplugues-Mota

Enforcement of Non-judicial Instruments in Spain.	134
---	-----

Viktória Harsági

Civil Enforcement of Non-Judgment Titles in Hungary	150
---	-----

*Chapter 4: Enforcement of Security Interests in Insolvency Procedures**Georges Cavalier*

French Bankruptcy Law and Enforcement Procedures.	163
---	-----

Masanori Kawano

Debtors' Insolvency and Security Interest	172
---	-----

Rolf Stürner

Enforcement of Security Interests in U.S.-American and German Insolvency Procedures	176
---	-----

Part 2

Provisional Measures

*Chapter 1: Comparative Studies**Alexander Bruns*

Provisional Measures in European Civil Procedural Laws – Preservation of Variety or Need for Harmonisation?.	183
--	-----

Masanori Kawano

Provisional Measures as a Necessary Instrument for Effective Justice . . . 192

Spyros Tsantinis

Provisional measures: Protective and Interim Relief in Greek Law . . . 200

Carlos Esplugues-Mota

Provisional Measures in Spanish Civil Procedure 207

Yasunori Honma

Current Problems of Provisional Measures in Japan 219

Masaaki Haga

Comment on International Provisional Measures –
A Japanese Perspective 223

Peter L. Murray

Provisional Measures in U.S. Civil Justice. 229

Viktória Harsági

Provisional Measures in the Hungarian Civil Procedure Law 241

Miklós Kengyel

Provisional Measures in Hungarian Judicial Practice. 247

Laura Ervo

The Finnish System of Provisional Measures – A Forest of Norms . . . 256

Chapter 2: Problems of Jurisdiction and Enforcement

Nicolò Trocker

Provisional Remedies in Transnational Litigation: A Comparative
Outline of Forms of Judicial Cooperation 271

Michele Angelo Lupoi

Provisional Remedies in the European Space of Justice: Issues
of Transnational Jurisdiction and Enforcement 308

Chapter 3: Provisional Matters and Proceedings on the Merits

Neil Andrews

Injunctions in Support of Civil Proceedings and Arbitration 319

Marco De Cristofaro

Provisional and Protective Measures in Globalized Transnational
Litigation and their Relationship with Proceedings on the Merits . . . 345

Masanori Kawano

Provisional Measures Relating to Procedural Matters	357
---	-----

Chapter 4: Special Problems

Dimitris N. Maniotis

Oversimplified Proceedings as “Alternatives” to the Ordinary Proceedings of First Instance	365
---	-----

Domenico Dalfino

In the Matter of “Arrest of Ships”.	369
---	-----

Chiara Besso Marcheis

Provisional Measures and Taking of Evidence: A European Perspective	390
---	-----

Speakers’ Profile	399
-----------------------------	-----

Part 1

Enforcement in Civil Matters

Chapter 1: Systems of Civil Enforcement

Civil Enforcement as a Fundamental of Effective Justice – Introductory Remarks on Comparative Study of Civil Enforcement –

Masanori Kawano

Contents

I. Introduction	3
II. Need for Comparative Study of Civil Enforcement	4
III. Fundamentals of Civil Enforcement	6
IV. Hybrid System of Civil Enforcement in Japan	9
V. Japanese Struggle for Seeking Effectiveness of Civil Enforcement	11
VI. Prospect	12

I. Introduction

In every judicial system, civil enforcement is provided as a fundamental legal equipment by which a claimant can resort to coercive performances of his/her claim against his/her debtor. Normally the debtor will realize obligations voluntarily. Only in exceptional cases they may be contested or refused by the default debtor. In such cases the obligations should be resorted to a state court that will approve and decide by a judgment; this judgment should then be eventually realized by the system of civil enforcement.

On one hand, there may be an optimistic idea that justice could be realized or performed voluntarily by debtors questioning the social necessity of the coercive equipments. But this idea is unrealistic; possibilities of default of justice remain. Coercive mechanisms to realize such default obligations must be established and allow satisfaction of the donor; these mechanisms are regarded as a necessary part of an effective legal system in a modern society¹. As a fundamental part of social justice, not only a system of finding justice by state courts, but also a system of effective realization of their judgments must exist: The mechanisms of civil enforcement have a technical feature, but they are deeply con-

¹ Discussions regarding legal coercion can be seen recently, see *Gaul*, *Rechtsverwirklichung und Zwangsvollstreckung*, ZZP 112 (1999), S. 135, 136.

cerned with the social justice of a society. A working system of civil enforcement is the keystone of justice in a society that is willing to properly realize the rights of their member citizens; without such an effective system of civil enforcement, judgments of state courts and the final rules declared by it, may be easily ignored. In the end only rules of the naked power, abandonment or deep sorrow for helpless destiny of injustice would remain. The effectiveness of civil enforcement depends on the actual social relationships in which the obligation has to be realized. Supporting the written legal regulations many social and actual premises have to exist, which have profound influences on the functions of civil enforcement.

II. Need for Comparative Study of Civil Enforcement

1. Civil enforcement as a system run by the state to realize default obligations used to be considered mainly, due to its technical and coercive nature, in the context of domestic relationships. But our globally integrated society asks for solutions not only considering domestic cases. In our internationally integrated legal society, systems of executing final judicial decisions in a country are an interesting subject not only for the people within the jurisdiction, but also for foreign people. Additionally those systems must be nowadays operated in the context of international legal cooperation. Most of our discussions of transnational judicial cooperation are devoted to problems on admission and enforceability of foreign judgments, foreign arbitration awards or other foreign public documents. Only exceptionally topics of civil enforcement were discussed. In the European countries the Brussels I regulation provides a new epoch of the establishment of cooperation in the field of civil enforcement. But if you broaden the perspective to countries outside European Member States only a few intensive discussions or interests in the comparative study of legal framework and reality of active civil enforcement are known². For the establishment of a cooperative and harmonized system of international civil justice, it is necessary to study different legal frameworks and systems of civil enforcement and their actual functions in a society.

2. Globally integrated business activities ask for dispute resolution and the realization or enforcement of claims by well organized and effectively functioning legal systems. They should be open and accessible to the people who need to

² One of the exceptional work with comparative survey of civil enforcement is a German textbook by *Baur/ Stürner/ Bruns*, *Zwangsvollstreckung*; Excellent comprehensive comparative studies of civil enforcement are, *Kerameus*, *Enforcement in the International Context*, *Recueil des Cours*, Vol. 264, 1997, p. 197–410; *Kerameus*, *Enforcement Proceedings*, in *Cappeletti* ed., *International Encyclopedia of Comparative Law*, Volume XVI, *Civil Procedure*, Chapter 10, 2002.

resort to the judicial organizations. As the civil enforcement system is an instrument which realizes a claim by the coercive power of a state organization based on its sobering authority, a special sort of “counter power” can be observed: Sometimes unpredictable or unexpected obstacles occur, which intervene with and weaken the function of the civil enforcement system; Default debtors e.g. usually try to escape from the civil enforcement against them. This relationship of the theoretical system of civil enforcement and the reality of its social function seems to be an interesting subject of comparative studies of civil enforcement. Foreign litigants, especially business entities who are willing to expand their business, rely on the information to know how the justice system will work in the country where they want to invest their capital. Only the reality of features of civil enforcement systems can display the actual status of civil justice in a society.

Comparative studies of civil enforcement can promote the quality of civil justice. Civil enforcement is a framework for realizing claims against default debtors. In many cases debtors who aren't paying his/her obligation are facing insolvency. Collective actions of claimants sometimes lead to social disturbance related to the default of debt payments; therefore civil enforcement has close relationships with insolvency regulations. Creditors who want to secure their credit try to establish security on the debtors' collaterals to ensure eventual profitable payment before other creditors. But the imperfectness of such a system of debt collection will favor the moral decline of a society; if the claim can't be realized effectively, the claimants would not rely upon the provided official framework of civil enforcement and debtors' would find easy ways to escape civil enforcement.

3. One of the cardinal subjects of comparative studies in the field of civil enforcement should focus on the clarification of some relationships between the theoretical legal framework and its real function. Compared to the civil procedures leading to a judgment by the state court, the study of civil enforcement has so far been mostly confined within domestic discussions. Reasons of such traditional “negative” tendencies of comparative study in civil enforcement might be seen for example in the following: First, in most of the countries civil enforcement has been generally considered to be only a technical system to realize already finally verified demands. Due to its deep involvement into the “real world” there could exist some prejudices that the civil enforcement system lacks of fundamentals of legal consideration or theoretical doctrines. Furthermore, in some jurisdictions the civil enforcement is not in the main focus of lawyers or of dominant academic interests. Secondly, the systems of civil enforcement in each country differ so extremely that it might be considered too challenging for discussing it in comparative aspects.

III. Fundamentals of Civil Enforcement

1. Civil enforcement is a procedure or a mechanism by which creditors can try to realize their private rights against debtors. Sometimes the systems of civil enforcement have been said to have only a technical or formal character and therefore should be pursued more or less only from aspects of their effectiveness. It is true that the civil enforcement systems have such formal nature. But if the argument shall further implicate that the civil enforcement systems do not consist of fundamental or substantial legal elements of detailed consideration or of procedural structures such an assumption does not reflect the real roles and functions of civil enforcement systems in a society. Rather the procedure of civil enforcement engages widely affected functions for realizing social justice in a society. Instruments of civil enforcement by which "justice" ascertained by a state court can be realized are one of the key elements to secure, to realize and to keep social justice.

First of all, the mechanisms and instruments of a civil enforcement system should be reasonably formed from the perspective of its main users, creditors; the system of civil enforcement should be satisfactory, effective, prompt and reasonably regarding the costs to realize claims against default debtors. If the system does not meet these requirements or demands of creditors, assertions within the system provided by the state will be abandoned and claimants will revert to other methods, e.g. unreasonable or eventually unlawful methods to collect their money. The fundamental aspects to realize an effective and attractive system of civil enforcement have to focus on the establishment of an accurate, cost efficient and working system that can guarantee the satisfaction of the creditors. It should always be designed to fulfill the requirements needed by its main users. On the other hand, civil enforcement is by its nature a coercive machinery aiming to realize the obligations of a debtor involuntarily. Most systems therefore allow the coercive execution only by legitimate enforcement authorities engaged by state power, as a state monopoly³. Debtors are objectives of attack of civil enforcement systems and are compelled to obey the enforcement power used by the executing agency. Their property will be seized and deprived. In our modern society such activities of civil enforcement are mostly administered by state agencies. Fundamental rights or human rights of debtors can sometimes be endangered by the use of coercive power. The activities of such state agencies should therefore be legitimate and the position of a debtor should be legally guaranteed: Their rights have to be protected from illegitimate and unlawful activities. Policy considerations for securing debtors positions depend on the situation of each country. Today many countries demand of creditors

³ State monopolies of civil enforcement have been a traditional feature in most countries. But privatization of civil enforcement is about to change this traditional situation.

that civil enforcement activities are proven within reasonably established procedures. Regulations that guarantee a minimum level of protection against civil enforcement actions are seen to be necessary for the protection of fundamental rights of debtors; authorities of civil enforcement systems should be organized rationally; and the debtors' right as a human being to keep at least a minimum standard should be guaranteed as a constitutional or a human right.

2. Civil enforcement in general, is in many countries seen as a branch of judicature of state organs in which justice is realized⁴. These procedures of civil enforcement should be constituted on principles that justify the coercive procedure and its result performed by state agencies aiming to intervene into private shares of a debtor; compared to procedures for judgment before a state courts, no detailed discussions or considerations on fundamental principles of civil enforcement could be found in a long time. Within the last twenty years some discussions about the needs for principal considerations started⁵. Namely in Germany considerations exist whether such procedural principles can be found, defined, and useful⁶. Nowadays such considerations are actively discussed.⁷

The area of civil enforcement allows construing different types of procedure; different characteristics of mechanism of civil enforcement are mainly related to a legal tradition of a country⁸. Even so, most of them have been built on common principles.

Party initiative to commence the procedure is everywhere a dominant characteristic; civil enforcement is a procedure, which will most of the times be commenced by private persons as creditors try to realize their private rights against other persons as debtors⁹, an authoritative or *ex officio* commencement of the procedure is not known. Therefore party or private control of procedure can be seen as one of the common fundamentals of civil enforcement. On the other hand, agencies of enforcement can be differently organized. Agencies of civil enforcement are in many countries organized as a part of state authorities of judiciary. They can be established as a uniformed and centralized or as decentralized organs, Bailiff or court for civil enforcement.

⁴ There are countries in which civil enforcement is seen to be a mechanism belonging to the administrative agencies, especially in some former socialist countries.

⁵ The conscious discussion was opened by the presentation of *Stürner* at a conference in Regensburg in 1986; see *Stürner*, Prinzipien der Einzelzwangsvollstreckung, ZZP 99 (1986), p. 291.

⁶ *Gaul*, Rechtsverwirklichung durch Zwangsvollstreckung, ZZP 112 (1999), p. 135.

⁷ *Stamm*, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, 2007, p. 61.

⁸ In Germany, *Stürner*, op cit., p. 298.

⁹ In some countries state authorities use the civil enforcement systems for collecting tax.

In Japan the system of civil enforcement was based on the German model and is established as decentralized enforcement system¹⁰. Civil enforcement that seeks to convert movables of a debtor into cash can be enforced by a Bailiff, an executive officer (*Gerichtsvollzieher* in Germany and *shikkoukan* in Japan). But enforcement seeking to convert real estates or the debtors' claims against some other third person will have to be brought in front of the court of enforcement. This divergent treatment has been explained by the different relationships of authorities and objectives of civil enforcement. The movables of debtors should be seized at their actual location. The place can be presented to a Bailiff and he can operate flexibly at the place where the aimed movables are located. The court is thought to operate not as easy compared to the flexibility of the operations of a Bailiff. On the other hand, the enforcement trying to convert real estate will mainly be operated through the registration books of the estate. To do this it is not necessary for the agent to be at the place where the estate is located. In these cases the procedure can be conducted mainly with the instrument of a court order for registration. The same also is true for the cases of enforcement trying to convert a debtors' claim against a third party, e.g. against the bank account of a debtor.

3. The logic of civil enforcement allows concurrent creditors to claim credit against the same collateral of a debtor, which was already seized by another creditor. The treatment of such concurrent creditors in civil enforcement has been regulated differently in each country. In Germany the *priority principle* is provided; the first creditor who seized the property of a debtor in question has the priority and can expect to be repayed first with the benefits realized in the civil enforcement. On the other hand, e.g. Japan, provides the *equal rank principle* based on the French legal system. The difference can be typically seen in civil enforcement procedures against debtor's real estate; a creditor who seized a real estate of debtor will be usually joined by the involvement of other creditors. He is forced to admit repayment on the principle of *par conditio creditorum*, if the value of the asset is not enough to satisfy the full payment of all claims. There were discussions of *pros* and *cons* of that principle but in the discussion about a Japanese amendment the principle was finally not changed. This maybe interpreted as a consequence of traditional Japanese practice with its co-operative of civil enforcement and bankruptcy procedure.

4. In addition to the legal considerations of procedural principles in civil enforcement, other aspects or circumstances of civil enforcement should be considered: In civil enforcement the obligation of a money payment is usually realized by selling the debtor's seized property. The payment to the creditor can be

¹⁰ See, Stürmer, op cit., p.311.