THE RECOGNITION OF FOREIGN JUDGMENTS LACKING REASONS IN EUROPE: ACCESS TO JUSTICE, FOREIGN COURT AVOIDANCE, AND EFFICIENCY

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Abstract The recognition of foreign judgments lacking reasons raises several policy issues. Reason-giving is perceived by the European Court of Human Rights as critical to ensure an effective access to justice. Yet, foreign judgments often lack reasons because the defendant failed to appear before the foreign court, and it may be right to sanction this strategy of foreign court avoidance. Finally, the European Union has begun to implement its policy of efficiency of cross-border enforcement, which commands states to recognize such judgments irrespective of any other consideration. This article explores whether these conflicting issues can be reconciled.

I. INTRODUCTION

How open are lawyers about foreign practices and institutions? Do their habits and training make them irremediably biased? Does their legal culture prevent them from appreciating fairly essentially different practices?

In recent years, the European Court of Justice (ECJ) has made decisions in the field of jurisdiction which may have led common lawyers to think that civil lawyers are culturally biased and will make no effort to appreciate fairly institutions of the English conflict of laws which are unknown to them. It will not be necessary to remind the readers of ICLQ of the decisions in *Owusu* and *Turner*.[1] It is the opinion of many that, in these decisions, the ECJ failed to discuss seriously whether the goals of the European law of jurisdiction and judgment could be achieved through the use of English institutions, namely *forum non conveniens* or anti-suit injunctions. Instead, the ECJ merely asserted that these goals would be jeopardized if the English institutions under scrutiny were tolerated. As the ECJ is dominated by civil lawyers, these cases could be perceived as evidence of a general bias of civil lawyers against the common law. In many respects, the common law and the civil law are indeed critically different, and there is maybe no better evidence of the critical

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[1] See generally T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813.

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differences between these cultures than civil procedure, both domestic and international.

If this bias exists, in particular at the European level, it is not general. In recent years, the French judiciary has shown remarkable signs of openness to English judicial practices. In 2004, the French supreme court for private matters, the *Cour de Cassation*, declared enforceable in France an English *Mareva* injunction (now freezing order),[2] even though extra-territorial conservative measures had long been perceived in France as infringing the sovereignty of foreign states. In 2002, the same court imported in France the equitable institution of the in personam injunction,[3] which has traditionally been unknown to the civil law tradition in general and French law in particular, in the absence of contempt power. These examples are remarkable, but they should not hide the fact that, in other instances, the *Cour de Cassation* has rejected English judicial practices which were perceived as being unacceptable.[4]

This article would like to offer yet another example of the openness of the French judiciary. For more than 30 years, French courts have regularly enforced English default judgments. The practice of making judgments without trial and which do not give reasons, is unknown to French civil procedure. Although the judgments of the *Cour de Cassation* are notoriously short and concise,[5] French judges are under a duty to identify the applicable rule and the findings of fact on which they ground their decision,[6] be it rendered in default.[7] But the mere fact that English and French civil procedure is different in this respect is not in itself a good reason for French courts to deny recognition to English default judgments. Yet, the reaction of French courts is truly remarkable, because established case law from both the *Cour de Cassation* and the European Court of Human Rights (ECtHR) seems clearly hostile to the English practice. The *Cour de Cassation* has traditionally held that judgments lacking reasons are contrary to French public policy. The ECtHR has held for

[2] *Stolzenberg v CIBC Mellon Trust*, Civ 1ère, 30 June 2004 (2004) Rev Crit DIP 815, (2005) Clunet 112.

[3] *SA Banque Worms v Epoux Brachot*, Civ 1ère, 19 Nov 2002 (2003) Rev Crit DIP 631. In English, see Muir Watt, (2003) CLJ 573.

[4] In 1999, the Cour de Cassation held that a security for costs was a breach of the right to a fair trial because it jeopardised access to justice (see *Pordea v Times Newspaper Ltd*, Civ 1ère, 16 March 1999 (2000) Rev Crit DIP 223). In 2004, it held that anti-suit injunctions were an unacceptable breach of the sovereignty of the foreign state (see *Stolzenberg*, n 2).

[5] See eg K Zweigert and H Kotz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1998) 122.

[6] French New Code of Civil Procedure, Art 455. French courts must be satisfied that the facts and the rules stated in the judgment are accurate. Thus, mere reference to the pleadings of the parties without verifying and actually endorsing their conclusions would not meet this requirement: see, eg *Ros v SGREB*, 3 May 1985 (1985) Bull Civ II, n 91 (Civ II).

[7] See, eg, *Charbois v Remivex* 17 June 1986 (1986) Bull Civ IV, n 124 (Com.). There are exceptions to the rule in family law for privacy protection purposes (judgments ruling on an adoption, for instance), and for a variety of procedural decisions (decisions ruling on a joinder or on costs, for instance).

15 years that judgments lacking reasons are a violation of the right to a fair trial. In other words, a critical feature of English default judgments seems to make them not only different, but repugnant to the French and the European courts. However, the actual practice of French courts has been normally to declare English default judgments enforceable. By contrast, in the other cases where the French judiciary has been open to English judicial practices, it has often found support in European law.[8]

This article will seek to determine what could be perceived by French courts as so important to make them go over the case law of the ECtHR and recognise English default judgments. It will argue that the seemingly technical issue of the recognition of foreign judgments lacking reasons actually raises different and indeed potentially conflicting policy issues. On the one hand, the ECtHR insists that reason-giving is the only way to assess whether the parties were offered actual access to justice. But on the other hand, French courts may have found that foreign judgments lacking reasons are often the consequence of a strategy of avoidance of the foreign court, which should not be tolerated. Finally, the aim of the European Union to cut the costs of enforcement by simplifying and accelerating the circulation of judgments will make it increasingly difficult to resist the enforcement of many judgments lacking reasons, and should thus be recognised as another competing value.

II. REASON-GIVING AND THE RIGHT TO A FAIR TRIAL

Judgments lacking reasons first raise the issue of access to justice. The ECtHR considers that there is a duty to state reasons under European law to make access to justice effective. This section will assess the content of this duty, and whether European States are under the obligation to deny recognition to foreign judgments failing to comply with this duty.

A. The Duty to State Reasons

The ECtHR has held since 1994 that the right to a fair trial granted by Article 6 of the European Convention of Human Rights (ECHR) requires that 'judgments of courts and tribunals should adequately state the reasons on which they are based'.[9] Although judgments of the ECtHR are not precedents in the common law sense, the rule can certainly be considered, and is indeed so termed by the Court itself, as an 'established case law'.

[8] For instance, when the Cour de Cassation declared enforceable an English *Mareva* injunction, it was because the ECJ had held that conservative measures were enforceable under the Brussels Convention (*Deninauler v SNC Couchet Freres*, C 125/79 [1980] ECR 1553).

[9] *Hirvisaari v Finland*, Judgment of 27 September 2001, No 49684/99, para 30. See also *Ruiz Torija v Spain*, Judgment of 9 December 1994, série A n° 303-A, p 12, para 29; *Higgins v France*, Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p 60, para 42.

The cases brought to the Court since 1994 have been remarkably similar. The vast majority of them deal with judgments of higher courts which rule essentially by incorporating the reasons given in the first instance by the lower court. The issue at stake in such cases was whether a court giving the reasons of another adjudicator could be considered as adequately stating the reasons for its decision. It has been another established case law of the ECtHR that it could not be enough:

> The notion of a fair procedure requires furthermore that a national court which has given sparse reasons for its decision, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower instance.[10]

Only in a few cases has the Strasbourg Court dealt with the simpler issue of courts merely failing to address an argument. In *Ruiz Torija v Spain*,[11] the ECtHR held that Spain violated Article 6 of the Convention because a Spanish higher court had simply not ruled on an argument of the appellant. In *Albina v Romania*[12] the ECtHR also found a violation of Article 6 on the same ground, but the reasons that the Romanian higher court had stated were incorporated from a first instance decision in the first place anyway. Finally, in *Higgins v France*[13] France was found to be in violation of Article 6, because the *Cour de Cassation* not only failed to rule on an argument, but also failed to rule on a claim.

In most cases where the ECtHR has ruled on the duty to give reasons, it has held that the duty is not autonomous, but rather that it is a tool to ensure that one particular aspect of the right to a fair trial, the right to access justice, is effective.[14] A court must always be available to the parties, in order to decide the dispute. The reasons are thus evidence that the court actually decided the case,[15] which in turn is evidence that a court was actually accessible to the parties.

It is interesting to note that no case has dealt with the issue of a European first instance court deciding a dispute without stating any reasons for its decision. This is quite surprising. As addressed below,[16] French courts have dealt repeatedly with the issue of the enforcement of judgments rendered by the courts of other European States which had not stated the reasons for their decision. It is thus clear that it is the practice of some European jurisdictions to

[10] *Jokela v Finland*, Judgment of 21 May 2002, *Reports* 2002-IV, § 73. See also *Nedzela v France*, Judgment of 27 July 2006, para 55; *Albina v Romania*, Judgment of 28 July 2005, para 34; *García Ruiz v Spain*, Judgment of 21 January 1999, *Reports* 1999-I, para 26; *Helle v Finland*, Judgment of 19 December 1997, *Reports* 1997-VIII, para 60.

[11] See above, n 9.

[12] See above, n 10.

[13] See above, n 9.

[14] *Nedzela* (n 10), para 15.

[15] *Jokela* (n 10), para 72, *Albina* (n 10), para 30.

[16] Below, III.

render judgments without stating reasons. Why then have none of the parties who lost in such circumstances brought the case to Strasbourg?

In 15 years, it is increasingly difficult to believe that the vagaries of litigation have prevented all interested parties from petitioning the ECtHR.[17] Maybe one could argue that such parties all saw clearly that the argument was weak, but this article will argue precisely to the contrary. More convincingly, it could be pointed out that the ECtHR only has jurisdiction when local remedies have been exhausted,[18] and that this will most often not be the case at the first instance level. This certainly explains why the decisions of the ECtHR have focused so much on the reasons given by higher courts. However, if the civil procedure of a European jurisdiction allows its courts to render decisions without stating reasons, the law would be the same for higher and lower courts, which ought to make the same decisions. It is true that in some jurisdictions, courts may be entitled to declare the local rules of civil procedure contrary to the ECHR but, again, such power could have been entrusted to all the courts of the jurisdiction.[19]

It is submitted that the clear and repeated statements of the ECtHR that 'judgments (. . .) should adequately state reasons on which they are based'[20] indicate that the Court would probably find that judgments which state no reasons are violations of Article 6. The conclusion can also be drawn from the numerous decisions of the Court defining the level of reason giving that it will consider as adequate to meet its standard. These decisions have always provided that some reasons should be given. First, the Court has repeatedly held that the duty to state reasons should not 'be understood as requiring a detailed answer to every argument',[21] which seems to imply that the duty should be understood as requiring a short answer to the essential arguments. Secondly, it was already mentioned that the ECtHR has repeatedly held that higher courts ought to give at least 'sparse reasons'.[22] It is hard to believe that the Court did not have in mind that a complete lack of reasons would be a violation of Article 6 when it made these decisions.

B. Foreign Judgments

The right to a fair trial could not only have a direct effect by obliging ECHR Contracting States to comply with the requirements of Article 6. It could also

[17] Certainly, the present author knows of one case, but the action was most surprisingly dismissed by the ECtHR as non-serious, and for such decisions the ECtHR unfortunately (and quite ironically) does not state the reasons on which they are based.

[18] ECHR, Art 35-1.

[19] This is the law of France, where all courts may declare any statute contrary to the Convention. They have indeed done so quite frequently in recent years, redesigning many rules of French civil procedure.

[20] See the cases at n 9 above.

[21] See, eg, *Hirvisaari* (n 9), para 30; *Jokela* (n 10), para 72; *Albina* (n 10), para 34.

[22] See above, n 10.

have an indirect effect by obliging them to deny recognition to foreign judgments rendered by courts which have not complied with the same requirements. The issue has been extensively debated in recent years,[23] and will only be briefly presented below.

1. *The indirect effect of Article 6 in the ECHR case law*

Could an ECHR Contracting State be held in violation of Article 6 for declaring enforceable a foreign judgment giving no reasons, be it a judgment made in a European State, and in a State which would not be a party to the ECHR? Although the ECtHR has not ruled specifically on the issue of foreign judgments failing to state reasons, it has delivered several decisions which make it clear that Article 6 has an indirect effect and does not allow the recognition of foreign judgments which did not comply with the right to a fair trial. The leading case is *Pellegrini v Italy*,[24] whereby the ECtHR held that, before authorizing enforcement of a Vatican court decision, Italian courts ought to have duly satisfied themselves that the Vatican proceedings fulfilled the guarantees of Article 6. As the Vatican is not a Contracting State of the ECHR, the ECtHR held that its task was not to examine whether the Vatican court had properly applied the ECHR, but rather whether the Italian court had granted enforcement after examining whether the Vatican proceedings complied with Article 6. Article 6 creates a duty to enforce only foreign judgments which are ECHR compatible.

In *Government of the United States of America v Montgomery (No 2)*,[25] the House of Lords surprisingly held that *Pellegrini* had to be confined to its facts as it turned on the special relationship between the Italian civil court and the Vatican court. Accordingly, the House of Lords held that *Pellegrini* could not be regarded generally as an authority for the enforcement of foreign judgments. English commentators have widely criticized this interpretation of the European decision, underlining that nothing in the relevant part of the *Pellegrini* decision suggests that the decision turned on the special relationship between Italy and the Vatican.[26] From a civil law perspective, which cannot be completely irrelevant when it comes to the interpretation of European decisions, the *Montgomery* proposition is even harder to accept, as facts have never played a significant role in the determination of the meaning of judge-made rules in the civil law tradition. To the knowledge of the author,

[23] See JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 ICLQ 1; P Kinsch, 'The Impact of the Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments' in T Einhorn and K Sierh (eds), *International Cooperation Through Private International Law—Essays in Memory of Peter Nygh*, 2004, 197.

[24] Judgment of 20 July 2001 (2001) 35 EHRR 44.

[25] [2004] UKHL 37, [2004] 3 WLR 2241.

[26] See JJ Fawcett (n 23) 35; A Briggs (2004) 75 BYBIL 537; Hartley (2004) 120 LQR 211.

no continental writer has argued that *Pellegrini* would not be generally relevant in enforcement matters.[27]

Two questions remain open after *Pellegrini*. First, it is unclear if courts of ECHR Contracting States are under the obligation to examine whether the foreign proceedings complied with Article 6 when the foreign judgment was made by the court of another Contracting State. The scope of *Pellegrini* could be confined to judgments from Non-Contracting States, both because the *Pellegrini* foreign court was indeed a Non-Contracting State Court, but also because the ECtHR held:

> The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorizing enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention.[28]

For the writers who confine *Pellegrini* to Non-Contracting States judgments, review of the compliance of Contracting States judgments is optional.[29] It is argued that allowing the victim of a violation to sue the enforcing Contracting State would not bring much as the foreign State could also be sued before the ECtHR.[30] Yet, the consequence would be that a judgment infringing the Convention would be enforced. It seems that if judgments from courts which were under no duty to comply with Article 6 are denied enforcement, judgments from courts under such duty should have even less chance to be declared enforceable. Several commentators believe that *Pellegrini* applies to all foreign judgments,[31] or that this is at least arguable.[32]

The second open question is whether any breach of Article 6 by the foreign court will preclude enforcement in a Contracting State, or whether only a flagrant violation will. In fact, the question does not find its origin in the *Pellegrini* decision, which does not mention that Italian courts ought to have considered only flagrant violations of Article 6. But a line of European cases, beginning with *Soering v United Kingdom*,[33] have ruled that Contracting States should only be concerned when a 'flagrant denial of fair trial' occurs in a Non-Contracting State.[34] This line of cases deals with the deportation in a

[27] See, eg Judge J-P Costa (2002) Rev Trim Dr H 473; LL Christians (2004) Rev Crit DIP 112, 114; L Sinopoli, 'Droit au procès équitable et exequatur: Strasbourg sonne les cloches a Rome' (2002) Gaz Pal, Doct, 1157.

[28] Para 40.

[29] See Kinsch (n 23) 227–8, Sinopoli (n 27) 1162.

[30] LL Christians (n 27) 119.

[31] See JP Costa (n 27) 475; C Focarelli, 'Equo processo e riconoscimento di sentenze straniere: il caso *Pellegrini'* (2001) Riv Dir Int 955, 960, n 13.

[32] JJ Fawcett (n 23) 43.

[33] Judgment of 7 July 1989, (1989) 11 EHRR 439.

[34] See also *Einhorn v France*, Judgment of 16 October 2001, Reports of Judgments and decisions 2001-XI, p 275; *Tomic v United Kingdom* (14 Oct 2003) unreported.

Non-Contracting State of a person who argues that he would be subjected to a treatment which would violate the ECHR rules, including Article 6. Because *Pellegrini* also ruled on the application of Article 6 in a Non-Contracting State, many came to believe that it belonged to the same line of authorities. But this conclusion left a question unanswered: why did *Pellegrini* not refer to the requirement of 'flagrancy'? In *Montgomery*, the House of Lords held that the requirement also applied in the context of the enforcement of foreign judgments, which is to say that the *Pellegrini* court merely forgot to mention 'flagrancy'. On the continent, many commentators had concluded that *Pellegrini* had simply overruled *Soering* on that point.[35] However, the ECtHR applied the requirement in a deportation case two years later.[36] It may thus well be that *Pellegrini* never belonged to the *Soering* line of cases. As Professor Briggs has convincingly argued,[37] the rationale behind the requirement of 'flagrancy' seems to have been the predictive nature of the assessment of whether a foreign court *will* violate the ECHR if the deportation occurs. To the contrary, when the enforcement of a foreign judgment is sought, the foreign proceedings have already taken place and it is possible to simply assess whether they complied with Article 6.

2. *The remote effect of Article 6 in the ECJ case law*

Remarkably, the duty to enforce foreign judgments upon the condition that they be Article 6 ECHR-compatible also follows from the case law of the ECJ and its interpretation of the Brussels Convention[38] (now Brussels I Regulation).[39] More precisely, Article 34 of the Brussels I Regulation provides that a judgment made by a court of an European Union (EU) state in civil and commercial matters 'shall not be recognised: 1) if such recognition is manifestly contrary to public policy of the member state in which recognition is sought'. The ECJ held that while each Member State remains free in principle to determine the content of its own public policy, there are limits to this freedom. In *Krombach v Bamberski*,[40] it made it clear that the public policy of Member States ought to include human rights as defined by the ECHR and by the case law of the Strasbourg Court. In that case, the Luxembourg Court held that a particular interpretation of Article 6 of the ECHR adopted by the Strasbourg Court ought to be considered as defining the public policy of

[35] See LL Christians (n 27) 119, H Muir Watt (2005) Rev Crit DIP 316, 321; J-P Marguenaud (2001) RTDCiv 986.
[36] See, eg *Tomic* (n 34).
[37] (2004) 75 BYBIL 537, 539–43.
[38] Convention of 27 Sept 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1978] OJ L 304/77.
[39] EC Regulation 44/2001 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.
[40] Case C-7/98 [2000] ECR I-1935.

Member States for the purposes of Article 27 of the 1968 Brussels Convention (now Article 34 of the Brussels I Regulation).

At first sight, *Krombach* seems to entail a legal consequence which is very close to that of *Pellegrini*. Judgments from other EU States which do not comply with Article 6 of the ECHR ought to be denied recognition. Article 6 seems to be given again an indirect effect. Yet, there is nothing in *Krombach* which suggests that Article 6 is actually applied by courts ruling on the recognition of foreign judgments pursuant to Article 34 of the Brussels I Regulation. To the contrary, Article 34 seems to be the only applicable provision. A part of the substance of Article 6 and its law is borrowed to define the meaning of Article 34, but ultimately, it is only Article 34 which applies. The question which arises is the extent of this borrowing. In *Krombach*, the ECJ borrowed not only Article 6 itself, but also the interpretations of the Strasbourg Court on the content of the right to a fair trial. So, if Article 6 was interpreted as requiring courts to give reasons, it seems that this law is borrowed and ought to be used to define the meaning of public policy in Article 34. But what about the rules laid down in *Pellegrini* on the indirect effect of Article 6?

It has been seen that it may have been held in *Pellegrini* that it is only optional for European courts to examine whether other European courts had complied with Article 6. It was also underlined that there is a debate as to whether judgments from non-contracting States could only be denied recognition if the violation of the guarantees of Article 6 was flagrant. But it seems clear that the requirement of 'flagrancy' does not apply between Contracting States. So, it may be that ECHR law only gives an option to the enforcing court to refuse recognition on the ground of a violation of Article 6, but that it may do so even if the violation is not flagrant. If these two rules exist, and if they are not complied with, victims could certainly sue the enforcing State in Strasbourg. But would the enforcing court have also misapplied Article 34 of the Brussels I Regulation? Are these two rules borrowed as a consequence of *Krombach*?

It is submitted that they are certainly not if Article 34 actually contradicts them. Article 34 could have borrowed ECHR law to help defining the vague concept of public policy, it could have arguably borrowed ECHR law to fill gaps if it were silent on some issues, but it could not possibly be amended as a result of this process. It appears that Article 34 expressly addresses the two issues under scrutiny. First, Article 34 provides that when one of its grounds for the denial of recognition applies, the judgment 'shall not be recognized'. There is an obligation to deny recognition of the foreign judgments for courts applying Article 34.[41] Secondly, only judgments 'manifestly contrary to

[41] See, eg A Briggs and P Rees, *Civil Jurisdiction and Judgments* (4th edn, Informa Finance, 2005) para 7.14.

public policy' must be denied recognition. A violation which would not be manifest is not a ground for denial of recognition. This last requirement could be understood in different ways. It is a novelty of the Brussels I Regulation, but in *Krombach* the ECJ had interpreted the Brussels Convention as allowing denial of recognition on the ground of public policy only in the presence of a 'manifest breach of a fundamental right'. It is thus likely that the decision in *Krombach* is a good indication of how the ECJ would interpret Article 34 on this point. The Luxembourg court held that the rationale for the requirement was to avoid 'revision au fond', ie that the enforcing court would deny recognition because it disagrees with how the foreign court decided the case on the merits. Thus, the violation ought to be manifest in so far as it could be easily found by the enforcing court, without there being a need to get too far into the reasoning of the foreign court. A manifest violation would then be an obvious one, one which is easy to detect. But it is submitted that it would not be a more severe breach.[42] The public policy defence can only be triggered if a fundamental right is violated. Once a right has been characterized as fundamental, its breach is always an important concern, and one cannot see why it should not always be sanctioned.

It has been seen that in ECHR law, judgments which do not give reasons do not comply with Article 6 of the ECHR. If a Member State makes a judgment which does not give reasons, it is submitted that its recognition in other Member States is contrary to public policy. It is also submitted that it is manifestly so, as the lack of reasons can most easily be detected.[43] As a consequence, enforcing courts of other Member States are under the obligation to deny recognition to such judgment.

III. A FRENCH PERSPECTIVE: REASON-GIVING AND PUBLIC POLICY IN FRANCE

The *Cour de Cassation* has held since 1972 that foreign judgments which do not state the reasons on which they are based are contrary to French public policy and may not, in principle, be recognized in France.[44] In principle only, because it is also always ruled that such judgments will not be denied recognition if documents can be provided that can be regarded

[42] Contrast H Gaudemet Tallon, (2000) Rev Crit DIP 504, 510.

[43] Contrast *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell, 2006) para 14-208.

[44] *Viliard Charbonnieras v Viliard Charbonnieras*, Civ 1ère, 17 Oct 1972 [1972] Bull Civ I, n 205; *Vanclef v TTI*, Civ 1ère, 17 May 1978 (1979) Clunet 380; *X v Y*, Civ 1ère, 22 Apr 1981 [1981] Bull Civ I, n 124; *P v N*, Civ 1ère, 28 Oct 1981, [1981] Bull Civ. I, n 319; *Polypetrol v Société Générale Routière*, Civ 1ère, 9 Oct 1991 (1992) Rev Crit DIP 516, (1993) Clunet 157; *Chemssi v Sollac*, Soc (7 December 1993), unreported; *Ifafood v Grandpré*, Civ 1ère (9 Feb 1994) unreported; *Stolzenberg* (n 2); *Printed Forms Equipment Ltd v Matériel Auxiliaire d'Informatique*, Civ 1ère, 17 Jan 2006 (2006) Droit et Procédures 220; *Casamata v Union Discount Ltd*, Civ 1ère, 28 Nov 2006 (2007) Clunet 140; *X v Y*, Civ 1ère, 28 Nov 2006, [2006] Bull Civ I, n 520.

as equivalents to the reasons lacking in the judgment.[45] In other words, the rule is far from being absolute, and can only be appreciated by assessing the scope of this exception. An additional, but not less important issue, is which judgment French courts will consider as lacking reasons in the first place.

A. What is a Judgment Lacking Reasons?

The *Cour de Cassation* has not given any directions as to what ought to be considered a judgment lacking reasons for the purpose of the rule. The meagre reasons that the Court itself traditionally gives in any of its decisions makes it impossible to assess whether it ever even appeared to be an issue for any of the members of the Court. It may well be that the definition of a lack of reasons was considered an obvious one: is not a judgment which lacks reasons simply a judgment which does not give any?

The issue, however, is certainly more complicated, because foreign judgments considered for enforcement will never be blank sheets of paper. They will always state something, at the very least the name of the court which made the decision, the date of the decision, and what the decision actually decides. Otherwise, the issue could well become whether the foreign judgment exists.

Of course, the name of the court or what it grants is no reason for the decision. It is only the decision itself. So, the obvious definition that French courts may have considered is a judgment failing to provide any justification for the decision reached by the foreign court. It may be that some of the judgments that the *Cour de Cassation* characterized as lacking reasons actually provided no reason. This is hard to assess, as the court not only does not conceptualize the lack of reasons, but also does not normally state the actual content of the foreign judgment.

It seems, however, that in several instances the foreign judgments which were found to be lacking reasons were not merely silent on the reasons of the decisions. There are two ways to know what those foreign judgments contained. First, lower courts' decisions that were appealed before the *Cour de Cassation* are more developed and can cite the entirety of the reasons given by the foreign court. Secondly, the origin of the foreign judgment is always known, and a comparative study could thus give indications on what the foreign judgment is likely to have stated given the foreign rules of civil procedure. In 30 years, the *Cour de Cassation* has characterized as decisions lacking reasons judgments made by courts from Belgium,[46] Canada,[47]

[45] 'Des documents de nature à servir d'équivalents à la motivation défaillante': *Casamata* (n 44). See also, eg *Stolzenberg* (n 2); *Printed Forms Equipment Ltd* (n 44).

[46] *Vanclef* (n 44).

[47] *Ifafood* (n 44).

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Germany,[48] Morocco,[49] Switzerland,[50] the United Kingdom,[51] and the United States.[52]

The present author has only studied the civil procedure of one of these jurisdictions, which will be known to most readers, English civil procedure. In addition, a French lower court decision on the recognition of a Swiss judgment is available which cited the foreign judgment in its entirety. It appears that these judgments, which were all found by the French courts to be lacking reasons, were not merely silent in this respect. They all gave reasons, but these reasons were very different in the Swiss and the English cases.

1. *The Swiss judgment in* Brero v Blech

The Swiss judgment gave reasons which were not particular to the case. It gave reasons which were so general that they seemed to be usable for any judgment of the Swiss court. In *Brero v Blech*,[53] the Labour Court of Geneva stated only that: 'nothing in the case shows that the court lacks jurisdiction or that the arguments of the plaintiff contradict the facts or the evidence.'[54] The Geneva court had given reasons. However, the reasons were so general that they did not reveal the reasoning of the court. They were unhelpful for the parties to understand why the court had made that decision. Even worse, they did not reveal that the foreign court had actually made a decision on the merits of the case. The judgment did not show that the court had actually looked at the case and made a decision based on the particular facts and the applicable law. In other words, reasons were only given formally. Substantively, they were lacking.

The practice of Swiss courts raises many issues. First, it is submitted that, if French courts want to stick to the requirement that foreign judgments should give reasons, they cannot accept the Swiss practice. From a French perspective, counting formal reasons towards the requirement would amount to abandoning the requirement itself. Secondly, if the rationale of the requirement is to make the right to a fair hearing meaningful, the Swiss practice is even less acceptable. Such practice certainly allows, if not gives incentives to make partial or biased rulings. If the law need not be stated, it need not be

[48] *X v Y*, Civ 1ère, 22 Apr 1981 (n 44); *P v N* (n 44); *Polypetrol* (n 44). See also *Dasse v Banque Populaire de la Région Economique de Strasbourg*, Court of Appeal of Colmar (28 Feb 2002) unreported.

[49] *Viliard Charbonnieras* (n 41); *Chemssi* (n 44).

[50] *Brero v Blech*, Civ 1ère, 20 Sept 2006 (2007) Clunet 139.

[51] *Stolzenberg* (n 2); *Printed Forms Equipment Ltd* (n 44); *Casamata* (n 44). See also *Camenzuli v Desira*, Civ 1ère, 17 Nov 1999 (2000) Rev Crit DIP 786.

[52] *X v Y*, Civ 1ère, 28 Nov 2006 (n 41). The foreign court was the Superior Court of California.

[53] See above, n 50.

[54] '[A]ttendu que le dossier ne fait donc pas ressortir que le tribunal est incompétent ou que les conclusions de la partie demanderesse sont en contradiction avec les faits articulés ou les pièces produites'. See *Brero v Blech*, Court of Appeal of Chambery (20 Sept 2002) unreported.

applied either. The rule of law turns into the rule of men, ie judges. Another risk is that the court just stops looking seriously at cases, and jeopardizes access to justice for plaintiffs. Of course, there is no evidence that Swiss courts are actually doing a bad job, but the main evidence to the contrary is normally the reasons given by judgments, and this evidence is precisely lacking.

2. English default judgments

The English judgments which were characterized by French courts as lacking reasons seem to have been of a very different kind. Unfortunately, none of them was cited in its entirety by any available French decision. But almost all of them were characterized as judgments in default (*jugements par defaut*) by the French decisions which ruled on their enforceability.[55] Thus, it is very likely that the English judgments were made pursuant to Part 12 of the Civil Procedure Rules 1998 (CPR), and were default judgments in the meaning of these provisions. In other words, because the English court had found that the defendant had failed to file an acknowledgement of service or a defence, the judgment had been obtained without there being any trial on the merits. The judgment was purely a result of the defendant's failure to comply with the procedural requirements of the English trial, namely acknowledging service or filing a defence. It is easy to understand why such judgments could be considered as giving no reasons. English default judgments do not say anything as to why the losing party is wrong on the merits. Indeed, it is probably fair to say that they do not say that the losing party is wrong on the merits. They only say that a procedural requirement has not been met, and that it follows that the defendant loses.

Yet, if English default judgments do say that a procedural requirement has not been fulfilled, can it really be said that they do not give any reasons? They do give one reason on which they base their decision: the defendant either did not acknowledge service or did not file a defence. Unlike the Swiss judgment in *Brero v Blech*, the reason is not general and could not have been used in any judgment. It is based on the particular facts and the applicable law. The defendant has actually failed to take the relevant procedural step. But the English court has not ruled on the merits of the claim of the claimant. Indeed, the English judgment refers to the statement of claim of the claimant for the facts and the law. So the court does not hide that what the claimant gets is what he asks for, not what the court found he deserved or was entitled to under the substantive applicable law.[56]

[55] See *Stolzenberg* (n 2); *Casamata* (n 44). See also *Camenzuli* (n 51).

[56] By contrast, French courts must always be satisfied that the plaintiff gets what he deserves under the applicable law. The difference can be tenuous when a French court will refer to the pleadings of the wining party and endorse its reasoning in one word (for instance, by ruling: 'as the plaintiff *rightly* submits . . .'), but it is very clear in principle.

What does not seem to be accepted by French courts[57] is thus that a reason which is entirely procedural could count enough to characterize the judgment as giving reasons. Yet, it is common to lose on purely procedural grounds, including in France. Claims can be inadmissible for many reasons in French civil procedure and, certainly, French superior courts would consider French lower courts dismissing claims on procedural grounds as giving reasons. So what is wrong with the English rule on default judgments? Is it that the claimant wins on a procedural ground, when most procedural rules terminating proceedings would make him lose? Or is it just that the English rule is another procedural rule which is shocking from a civil law perspective? If this were so, the issue would not be so much that the English court did not give reasons, but rather that it applied a rule which is contrary to French public policy as such.

Of course, one could think that French courts feel that they are bound by European law to deny recognition to English default judgments. Actually, there is no sign of such rationale. The *Cour de Cassation* has never ruled that Article 6 of the ECHR was the foundation of its decisions, and the first of them were made before the ECtHR had laid down the duty to give reasons. But the question needs to be answered: are EU courts bound to deny recognition to English default judgments? It was already submitted[58] that, if English default judgments could be characterized as lacking reasons for the purposes of Article 6, EU courts would be under the obligation to deny recognition to them. So, can it be predicted that the ECtHR would rule that English default judgments are not compliant with Article 6?

Predictions are always difficult, but it seems that the answer will depend on two issues. First, it is not clear that the ECtHR would find that English default judgments can be characterized as lacking reasons. English default judgments do formally give two kinds of reasons. First, they state that there was no acknowledgment of service or no defence, and that English law thus authorizes the court to enter into judgment without trial. Secondly, they formally give reasons on merits by reference to the statement of claim of the claimant. It seems clear that the reasons given on the merits cannot suffice. As was already discussed,[59] the ECtHR has repeatedly held that incorporating reasons from a lower court 'or otherwise' could not be regarded as giving reasons when the essential issues had not been addressed by the higher court. So the characterization of English default judgments would depend on whether the procedural reason given can suffice. One cannot really see why it would not, just as a reason that the claim was time-barred should suffice. But some courts, in France, could be convinced to rule otherwise.

Secondly, even if English default judgments could be characterized as lacking reasons, it would not necessarily follow that the ECtHR would find a

[57] At least in principle: see below III B.
[58] Above, II A.
[59] Above, II B 2.

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breach of Article 6. It must be recalled[60] that the Court rules that the duty to give reasons is not autonomous, but is a means to achieve access to justice. Courts must give reasons so that the parties can verify that their arguments were heard. This rationale, which is the only one that the ECtHR has put forward, seems to dictate that courts give reasons to parties who submit arguments to them, and more generally seek access to them. But when a party chooses not to appear before a court, and does not present arguments, it seems hard to argue that its right to access to that court has been infringed. It could thus follow from the foundation of the duty to give reasons in European law that the duty is only owed to parties seeking access to a given court, and not to parties fleeing it. It must be underlined, however, that, although the ECtHR has only insisted on access to justice, many commentators have stressed that the right to an impartial and unbiased court could also justify that courts always give reasons.[61] If the ECtHR was to adopt this interpretation, it would be harder to argue that default judgments could lack reasons, as courts may not owe access to justice to those who flee them, but they certainly must be impartial in all circumstances.

B. Can Reasons be Found Outside of the Judgment?

Although French courts have ruled almost continuously for more than 30 years that the recognition of foreign judgments which do not give reasons is contrary to public policy, they have regularly allowed the recognition of such judgments in France. For 30 years, the *Cour de Cassation* has held that, although foreign judgments lacking reasons were contrary to French public policy, they could be declared enforceable 'if documents, which could serve as equivalents to the lacking reasons, could be produced'.[62] In many cases, the court found that such documents had been produced and thus declared the foreign judgment enforceable in France.[63]

The *Cour de Cassation* has never been willing to give guidance as to what can constitute such document. However, in some of the cases where the foreign judgment was actually declared enforceable, the French court mentioned the documents that had been found to be satisfactory in this respect. In most cases, the documents which were retained were documents issued by the parties in the foreign proceedings. For instance, in cases where the enforcement of English default judgments was sought, the statement of claim was

[60] See above, n 14.

[61] See, eg, L Boré (2002) JCP éd G, I, 104; JF Renucci, *Droit européen des droits de l'homme*, LGDJ (2002), n 143.

[62] '[E]st contraire à la conception française de l'ordre public international de procédure, la reconnaissance d'une décision étrangère non motivée lorsque ne sont pas produits des documents de nature à servir d'équivalent à la motivation défaillante', *Casamata* (n 44). See also *Vanclef* (n 44); *Stolzenberg* (n 2); *Printed Forms Equipment Ltd* (n 44).

[63] See, eg, *Stolzenberg* (n 2); *Printed Forms Equipment Ltd* (n 44).

regularly accepted as an equivalent document.[64] French courts have also accepted as equivalent documents previous judgments of the foreign court. For instance, in *Printed Forms Equipment Ltd v Matériel Auxiliaire d'Informatique*,[65] the enforcement of an English judgment assessing the damages was sought. The *Cour de Cassation* relied on the prior English judgment which had ruled on the principle of liability, and had given reasons. Finally, the *Cour de Cassation* was prepared to rely directly on evidence. In *Printed Forms Equipment Ltd v Matériel Auxiliaire d'Informatique*, it relied on the witness statement of the defendant which was found to be an admission of liability.

One of the main differences between the civil law and the common law is the emphasis put on the logic and the coherence of the law. While common law courts have traditionally readily acknowledged that law is much more experience than logic, civil lawyers in general and civil law supreme courts in particular have always regarded logic as one of the most important qualities of the law. In this context, it is all the more surprising that a doctrine which makes so little sense could last for so long. The idea that the reasons of the foreign court could be typically found in documents issued by the parties is dumbfounding. By definition, the parties are not the court, and none of them can pretend to represent it. Courts must be third parties in the dispute. In addition, experience shows that parties tell opposite stories. There is a little more logic in the proposition that previous documents issued by the foreign court itself could help find the reasons of its judgment. However, it is hard to see how a former judgment ruling on a different issue could be of much help. It may well be that the reason why the foreign court chose to make a second judgment is because it was needed, and the first judgment could not suffice, as it did not address the issue addressed by the second judgment. For instance, it is hard to see how a judgment ruling on liability could provide the reasons for a judgment to come assessing damages. In any case, this is the law of France. It shows that, while the ideal of French lawyers is to build a legal system based on coherence and logic, French courts can be pragmatic and lay down rules which are only satisfactory by what they achieve.

The 'equivalent document exception' begs another question. Is the actual rule applied by the *Cour de Cassation* really that foreign judgments lacking reasons are shocking and should not be enforced in France? In practice, the truth of the matter is that most foreign judgments characterized as judgments lacking reasons are eventually declared enforceable. For years, some French authors[66] have argued that the way the *Cour de Cassation* presents the rule is

[64] See, eg *Stolzenberg* (n 2); *Printed Forms Equipment Ltd* (n 44). See also *Casamata* (n 44), denying enforcement after noting that the 'document instituting the proceedings' had not been produced.

[65] Civ 1ère, 17 Jan 2006 (n 44). See also *Casamata* (n 44), denying enforcement after noting that a prior judgment had not been produced.

[66] P Mayer and V Heuzé, *Droit International Privé* (8th edn MontChrestien, 2004) n 384.

wrong and that the actual rule is that foreign judgments lacking reasons are in fact not contrary to public policy. The *Cour de Cassation* itself seems unsure. In *Brero v Blech*[67] it held for the first time in 30 years that foreign judgments lacking reasons were not contrary to public policy, but upon the condition that an equivalent document be produced. At the end of the day, there was not much change in the rule since, although the opposite rule was adopted, the exception to the old rule was turned into a requirement for the new rule. And, in any case, the court came back to the traditional rule two months later.[68] But *Brero v Blech* certainly shows that the rule on the recognition of judgments lacking reasons is far from being the result of a clear rejection of the practice. It also shows that European case law, which seemed to command the denial of recognition of such judgments, does not have the influence that one would expect. The *Cour de Cassation* could have found support for its traditional rule in the European case law, but it does not seem to be willing to call for this support. Is the French highest court more supportive of foreign judgments lacking reasons than it seems?

C. Judicial Sympathies?

In recent years, French courts were mostly confronted with English default judgments. Most of these judgments were declared enforceable, despite the official discourse that they should not be, and a growing European pressure to the same effect. This result was achieved through the application of a doctrine, the 'equivalent document exception', which seems to be essentially a means to an end. But to what end? Certainly, what the *Cour de Cassation* gets from the rule is a wide discretion. It does not seem really constrained when it comes to deciding whether to deny recognition to a foreign judgment lacking reasons. Sometimes, it itself makes a decision without really giving reasons. In *Brero v Blech*, the lower court had found that the Swiss judgment lacked reasons, and that no equivalent document had been produced. The *Cour de Cassation* held in a two-line decision that such documents had been produced and that the foreign judgment should thus be declared enforceable.[69] But it did not identify the said documents, when the lower court had found precisely none. What could such a decision mean, if not that the *Cour de Cassation* had found a good reason to enforce the foreign judgment, which it was not ready to reveal, or turn into a formal exception of the traditional rule?

It is thus submitted that the French judiciary appreciates the enforcement of foreign judgments from a variety of perspectives, only some of which have been formalized and turned into formal rules of law. There are policy reasons other than access to justice or the need for an impartial judiciary, which lead the *Cour de Cassation* to favour the recognition of some judgments, and thus

[67] Civ 1ère, 20 Sept 2006 (n 51).
[68] *Casamata*, Civ 1ère, 28 Nov 2006 (n 44).
[69] See above, n 51.

to ignore that they are lacking reasons. The reason these needs are met through the use of this discretion might be that there is no available rule to meet them.

The *Cour de Cassation* has given no indication of what these reasons could be. It is not even certain that the same result has always been produced by the same causes. There are more than 100 judges on the court, and when three of them decide a case, they may feel that they have no other constraint than formally applying the law, which gives them a wide discretion. As a consequence, they may just use their discretion to do justice in the case in hand.

This conclusion is certainly disappointing, if not irritating. Maybe it could be made less so by submitting the following. When the foreign judgment is a default judgment, denying its enforcement in France would help the defendant in his strategy of avoidance of foreign justice. If the enforcement in France was critical, the defendant could force the claimant to sue him before French courts, at least if French courts had jurisdiction. This could damage the claimant's case, if for instance French civil procedure was less favourable to its case than the foreign procedure. If French courts did not have jurisdiction, the defendant could be unreachable and defeat the judicial process. French senior judges may have felt that, in such circumstances, it was not right to deny enforcement to the foreign judgment for the sole reason that it did not give reasons. After all, reasons would have been given if the defendant had not defaulted abroad. He could then be perceived as being at the origin of the flaw of the foreign judgment.

There is no evidence that French courts have regularly made the choice to enforce foreign judgments lacking reasons to defeat defendants' strategy to avoid foreign courts.[70] But the French experience has shown that the judgments in question have often been default judgments. Furthermore, there is at least one case where the *Cour de Cassation* took into account the fact that the defendant had defaulted abroad, to declare enforceable in France an English judgment. In *Turczynski v Wilde and Partners*,[71] a French lawyer, Mr Turczynski, had sought the advice of a firm of solicitors in England, but had not paid the entirety of their fees. The English firm sued its debtor before the High Court, before which the latter did not appear. A judgment was entered into against the defendant, but it is unclear whether it was a default judgment in the meaning of Part 12 CPR and thus lacked reasons on the merits. The firm sought to enforce the English judgment in France. Mr Turczynski argued against the enforcement on one ground only, that the judgment had been obtained by fraud. The *Cour de Cassation* held that, as the defendant had not raised the argument in the English proceedings since he had defaulted before the English court, the argument could not be raised in the French enforcement

[70] Yet, there is some anecdotal evidence that it was not irrelevant to at least a few judges. See, eg the oral conclusions of Advocate General Lautru before the Court of Appeal in *Stolzenberg v CIBC Mellon Trust* (unreported).

[71] Civ 1ère, 29 Jan 2002 (2002) Rev Crit DIP 573.

proceedings and the English judgment should be declared enforceable in France. It was thus relevant that the defendant had failed to appear abroad in order to determine whether he could raise a defence in the French enforcement proceedings.

It is submitted that the recognition of foreign judgments lacking reasons not only raises issues of access to justice and judicial impartiality, but also, especially in an international setting, the issue of court avoidance. It is often because the defendant defaulted abroad that the foreign court made a judgment without giving reasons. The forum may thus be willing to sanction the behaviour of the defendant, and to ignore the defect of the judgment that he will have contributed to create.

At first sight it seems that the willingness of the forum to help the foreign court defeat the strategy of the defendant should be welcome. Is not help always welcome? And especially so when the common goal is to strengthen the judicial process? It is to be hoped that this is how the French practice would be perceived in England. However, spontaneous judicial help could be a cause for concern. The perception of the forum could not be shared by all the actors involved in the foreign proceedings. First, it could not be shared by the foreign court. The foreign court could feel that it is primarily its business to care and, as the case may be, take action against strategies aiming at defeating its own judicial process. This is indeed what the English commercial court did, as will be addressed shortly. There is thus a danger that the action of the forum is perceived as intrusive. But it is submitted that there is no such danger when the forum only rules on the recognition of the foreign judgment. Secondly, the perception of the forum will certainly not be shared by the defendant. If he did not behave appropriately, this should not matter. But his conduct will not be inappropriate for the sole reason that he did not appear before the foreign court. This would only be so if he had been under the obligation to litigate before the foreign court, but in many instances it might be a perfectly reasonable and appropriate behaviour to refuse to do so. By making the choice to sanction foreign court avoidance, the forum may in fact be choosing between two foreign courts which are two reasonable fora to try the dispute. For comity reasons, helping one over another may not be a good idea. However, in a European context, the situation is very different. Under the Brussels I Regulation, when proceedings will have been initiated before the court of a Member State, all European courts should consider that one court only is legitimate to try the dispute. This is because either one court only will be entitled to retain jurisdiction under the Regulation, or the *lis pendens* rule will give jurisdiction to the court seised first. Thus, when the issue of the avoidance of a foreign court will appear, there should not be disagreement throughout Europe as to whether the foreign court is legitimate. The court which will have jurisdiction pursuant to European law will be the only legitimate one, and thus the only one that ought to be helped by courts of other Member states ready to do so. If the English court which made the default judgment had jurisdiction

under the Brussels I Regulation, it seems appropriate for French courts to sanction any behaviour aiming at defeating the English judicial process.

IV. THE REACTION OF THE COMMERCIAL COURT

The issue raised by the lack of reasons of English default judgments has been clearly perceived in England. Claimants in English proceedings who were entitled to obtain a default judgment, requested that the English court conduct a full trial so that the judgment would be enforceable abroad.

This proposition was accepted by the commercial court in *Berliner Bank AG v Karageorgis.*[72] The defendants, Mr Ioannis Karageorgis and a company called Silver Carriers SS, had guaranteed the performance of various ship-owning companies who had borrowed from the plaintiff, Berliner Bank AG. The borrowing companies defaulted under the loan agreements. Berliner Bank terminated the loan and claimed under the guarantees. Karageorgis and Silver Carriers SS were served, but did not acknowledge service of the writ. Under English law, Berliner Bank was thus entitled to a default judgment. However, the plaintiff invited the English court to conduct a full trial, so that the English judgment could be enforced abroad. Coleman J. was fully aware of the risk. He said:

> However, a plaintiff may well be in the position were the defendant is outside of the jurisdiction of the English Courts, or at least where the defendant's assets are outside of the jurisdiction of the English Courts. In those circumstances, the plaintiff may well wish have a judgment that he can enforce in overseas jurisdictions. It has been brought to my attention, and is indeed well known that default judgments such as one would obtain under O. 13 are in many cases effectively unenforceable outside of the jurisdiction of the English Courts. This is because the defendant has taken not part in the proceedings and, no doubt, because the Court in giving judgment in this automatic way has not reviewed the merits of the claim, has not investigated the substance of the claim and has directed no judicial mind to whether in fact the plaintiff is entitled to recover.

He then accepted that the English court had inherent jurisdiction to let the plaintiff present its case, to evaluate the evidence and to conduct a full trial.

Berliner Bank v Karageorgis was rendered before the reform of English civil procedure in 1998. However, it was applied in *Bhatia Shipping and Agencies Pvt Ltd v Alcobex Metals Ltd.*[73] The commercial court held that the inherent jurisdiction recognised in *Berliner Bank* still existed under the new Civil Procedure Rules. In *Bhatia Shipping*, the claimant, Bhatia Shipping and Agencies Pvt Ltd, had contracted with Alcobex Metals Ltd to carry eight boxes of bronze tubes from Mumbai, India, to Stafford, England, via Avonmouth. The goods were discharged in Avonmouth, but Alcobex alleged

[72] [1996] 1 Lloyd's Rep 426.
[73] [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336.

that a misdelivery and a conversion of the goods then took place. Bhatia Shipping issued proceedings in England seeking a negative declaration that it was not liable to Alcobex. The claimant obtained leave to serve the proceedings on Alcobex in India. Alcobex failed to acknowledge service. The claimant had received advice according to which an English default judgment would not be enforceable in India.[74] It thus invited the English court to exercise its jurisdiction to order a full trial on the merits. Mr Julian Flaux QC accepted and issued the negative declaration.

The *Berliner Bank v Karageorgis* line of authorities is interesting in many ways. First, it shows that English courts could adapt and offer a response to the strategic behaviour of defendants trying to avoid the English judicial process. One would hope that English courts would welcome the efforts of courts of other countries to the same effect, but it seems clear that it is primarily the business of English courts to take action against strategies aiming at defeating their own judicial process. Secondly, it is interesting to note that Coleman J. did not require any specific evidence of potential enforcement difficulties. Indeed, the likely place of enforcement was not even mentioned. Julian Flaux QC mentioned that the claimant had received advice on the unenforceability of an English default judgment in India, but he did not seem to make it a condition of his allowing the conduct of a full trial.

Finally, one wonders why there are still so many creditors who seek to enforce English default judgments in France. One could have expected many of those knowing that enforcement of such judgments in France is difficult to invite English courts to conduct full trials and to give reasoned judgments. Yet, the French experience shows that this is not happening. One explanation could be that English claimants (and their lawyers) do not know of the problem, and maybe think that the European law of judgments solves it.[75] It could also be that they do not know that enforcement in France will be needed when they apply for a default judgment. Finally, they could be aware of the possibilities to obtain such enforcement notwithstanding the lack of reasons of the English judgment.

V. EUROPEAN ENFORCEMENT ORDER

On 21 October 2005, EC Regulation 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (the 2004 Regulation)[76] became applicable. This may be a critical development for the issue under consideration in this article. Indeed, as will be developed below, the 2004 Regulation is likely to enable many European default judgment creditors to

[74] The court stated: 'To be enforceable in India, a judgment should be on the merits, after due consideration of the pleadings, evidence and argument, and should set out reasons for the decision'.

[75] Yet, Dicey and Morris on the conflict of laws has been warning English lawyers specifically on the French situation for a long time: see *Dicey and Morris on the Conflict of Laws*, 13th edn para 14-205.

[76] OJ C L 143/16.

enforce their judgment abroad 'without the need for a declaration of enforceability and without the possibility of opposing its recognition'.[77] Thus, all grounds for denial of recognition may become irrelevant, including the violation of Article 6 ECHR.

A. A Brief Presentation of the Framework and Relevance of the 2004 Regulation

The 2004 Regulation aims at simplifying and accelerating the circulation of judgments ruling on uncontested claims. It thus creates the European Enforcement Order (EEO). Courts of Member States ruling on uncontested claims are empowered to certify their judgments as EEOs upon the condition that certain procedural requirements are met.[78] Judgment creditors who obtain such certification are enabled to seek enforcement of the certified judgment throughout the EU without the need for a declaration of enforceability and without the possibility of opposing its recognition. The 2004 Regulation abolishes *exequatur*.[79] Certified judgments can be directly enforced abroad. Defendants willing to challenge the EEO ought to petition the court of origin.[80] Courts of the State of enforcement may not review the EEO on the substance.[81] They may only limit or, 'in exceptional circumstances', stay the enforcement proceedings if the EEO is challenged before the court of origin.[82] There is only one exception. Courts of the State of enforcement can refuse enforcement if the EEO is irreconcilable with an earlier judgment, and if the argument was not waived in the proceedings of origin.[83] Finally, actual enforcement of the judgment shall be governed by the law of the Member State of enforcement.[84]

The consequences of the EEO are obvious. Grounds for denial of enforcement available under the Brussels I Regulation are unavailable under the 2004 Regulation. Even the irreconcilability with an earlier judgment is not available if the argument could have been made in the state of origin and was not. In particular, a violation of the public policy of the state of enforcement is no ground for denial of enforcement.

The 2004 Regulation is directly relevant to the topic of this Article because it applies to judgments on uncontested claims, and that, according to Article 3 (1) of the 2004 Regulation, 'a claim shall be regarded as uncontested if: . . . (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State

[77] 2004 Regulation, Art 5.
[78] Art 6. On these requirements, or minimum standards, see below B.
[79] Art 5.
[80] Art 10.
[81] Art 21.
[82] Art 23.
[83] Art 21.
[84] Art 20.

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of origin'. It seems clear that English default judgments fall within the ambit of this provision. More generally, it may be that judgments which do not state reasons can often be obtained in proceedings where the defendant does not enter into appearance. When this will be the case, the EEO procedure will be available.[85]

B. A New Competing Value: Efficiency

The 2004 Regulation is part of a larger process of simplification and acceleration of the circulation of judgments within the European Union. The process was initiated by the European Council meeting in Tampere on 15 and 16 October 1999, which 'endorsed the principle of mutual recognition of judicial decisions as a cornerstone for the creation of a genuine judicial area'.[86] The first step of this process was the abolition of *exequatur* by the 2004 Regulation.[87] The abolition of the *exequatur* means that there should be no intermediate proceedings in the Member State of enforcement prior to recognition or enforcement. As a consequence, recognition may not be denied on any ground, at least in principle.

It is not possible to provide a full analysis of this process in this article. Suffice it to say that the value underlying this new trend in the European law of recognition and enforcement of judgments is efficiency. Cross-border enforcement should be more efficient. It costs too much and takes too long. Improving the efficiency of cross-border enforcement is thus presented as critical for the general welfare.[88]

It seems that European authorities have chosen to begin the process with judgments on uncontested claims, because the abolition of *exequatur* was perceived as more acceptable for such judgments. It was probably felt that anybody failing to contest a claim on the merits should not be offered the possibility to challenge enforcement on any other ground. In other words, procedural rights should not allow debtors to avoid paying their debts. If the defendant owes money, he should just pay. The *exequatur* procedure has appeared much more as a means to delay payment than as a possibility to redress the infringements of the procedural rights of the defendant. In practice, it is

[85] It is only an option for the plaintiff who can seek a declaration of enforceability of his judgment under the Brussels I Regulation if he so chooses (2004 Regulation, Art 27). But if there is a risk that his judgment could be denied recognition abroad, his interest will obviously be to seek the certification of his judgment as an EEO.

[86] Recital 3 of the preamble to the 2004 Regulation.

[87] See Recital 4 of the preamble to the 2004 Regulation. Other steps of the process have been Regulation 1896/2006 of 12 December 2006 creating a European order for payment procedure (OJ C L 399/1) and Regulation 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (OJ C L 199/1).

[88] See Recital 6 of the preamble to Regulation 1896/2006: 'late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and resulting in numerous job losses.'

true that foreign judgments are rarely denied recognition, especially under the European law of judgments.

This perception of the *exequatur* procedure as a tool to delay payment raises two issues. The first one is the definition of uncontested claims. The 2004 Regulation equates failure to appear before the court to unwillingness to contest the claim. This is, to say the least, a conceptual shortcut. One thing is to choose the forum, another is to argue on the merits. It can be perfectly reasonable for a defendant to refuse to litigate before a given court irrespective of the merits of his case. The truth of the matter is that the 2004 Regulation is actually assuming an obligation for the defendant to litigate before the court where he was sued. As the Brussels I Regulation applies, this is a reasonable assumption. The 2004 Regulation is not only promoting efficiency, but is also a tool against foreign court avoidance.

The second issue raised by the perception of the *exequatur* procedure as an obstacle to efficiency is that any other value promoted by the *exequatur* procedure is at least partly sacrificed. The rationale of *Pellegrini* and *Krombach*[89] is that the *exequatur* procedure was promoting the values of a fair trial, by denying enforcement to foreign judgments which were not compliant with Article 6 of the ECHR. Judgments certified as EEOs will now be recognised even if they do not comply with Article 6. Efficiency and the right to a fair trial thus appear, at least at first sight, as two conflicting values. And the policy choice made by European institutions has been to make efficiency prevail.

European institutions would certainly object to this presentation. First, they would underline that they have not preferred any of these two values over the other, but have found a way to reconcile them. The preamble of the 2004 Regulation shows that European institutions were eager to show that they had not sacrificed the right to a fair trial. Recital 11 of the preamble reads: 'this Regulation seeks to promote the fundamental rights and takes into account the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.' But despite the generality of this statement, the 2004 Regulation seeks to promote only some fundamental rights. As the following recital announces,[90] the 2004 Regulation has only set up a mechanism to ensure that the debtor is informed about the proceedings. Courts of the Member States may not certify a judgment as an EEO without verifying that minimum procedural standards relating to the information of the debtor were met. What the 2004 Regulation seeks to promote is thus neither fundamental rights in general, nor the right to a fair trial in

[89] Above, II B.

[90] '(12) Minimum standards should be established for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against him, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence.'

all its dimensions, but the right to be heard. If other violations of the right to a fair trial were to occur, there is no mechanism to redress them.

European institutions could also object that it is not clear that the 2004 Regulation does not comply with the ECHR in general, and with its Article 6 in particular. In *Pellegrini*, the ECtHR ruled that a contracting State enforcing a judgment infringing Article 6 ECHR would itself violate this provision. One of the consequences of the EEO is to allow the enforcement of judgments which are contrary to the ECHR. Under the Brussels I Regulation, the violation of the ECHR could have been raised through the public policy exception, but that cannot be done under the 2004 Regulation. Yet, it could be argued that *Pellegrini* and the 2004 Regulation can be reconciled for two reasons.[91] First, some consider that *Pellegrini* is concerned with the recognition of judgments from Non-Contracting States only.[92] It would thus not apply to judgments originating from EU States, which are all Contracting States to the ECHR. The rationale for this interpretation would be that the violation of the ECHR can be raised in the State where it first occurred, and that the victim of the violation needs not necessarily to have the option to raise it in another state. It seems, however, that most commentators interpret *Pellegrini* as a general authority.[93] Secondly, it could be argued that *Pellegrini* only requires enforcing courts empowered to deny recognition to verify whether the foreign court has not violated the ECHR. But *Pellegrini* would not require enforcing States to create a procedure aiming at making such verifications when it would not exist. Arguably, then, as the *exequatur* procedure was abolished by Article 5 of the 2004 Regulation, enforcing courts could not be asked to verify anything. This argument is unconvincing for two reasons. First, the *Pellegrini* decision does not mention any such limit. Secondly, it would not be accurate to state that, under the 2004 Regulation, courts of the State of enforcement are incapable of denying enforcement to EEOs. Article 21 of the 2004 Regulation has kept one ground for denial: the existence of an irreconcilable judgment. The truth of the matter is thus that the *exequatur* procedure has been dramatically limited, but not fully abolished.

It is submitted that the 2004 Regulation creates a true conflict between efficiency and the right to a fair trial. At first sight, the conflict seems to be solved in favour of efficiency. Yet, some may not be satisfied with this solution, and wish to find a way to bypass the 2004 Regulation.

[91] Obviously, the most radical way to reconcile *Pellegrini* and the 2004 Regulation is to accept the proposition of the House of Lords that *Pellegrini* must be confined to its facts.

[92] See the commentators cited above, n 29.

[93] That is governing the enforcement of judgments originating both from Contracting and Non-Contracting States. See the commentators cited above, n 31.

C. Will Efficiency Prevail? Bypassing the 2004 Regulation

Efficiency and fundamental rights are competing values. A conflict exists, and it must be resolved. Several solutions could be envisaged. First, each of these values could be redefined in order to be reconciled with the other. The European Union could decide that the right to a fair trial as interpreted by the ECtHR is different from the right to a fair trial as defined by Article 47 of the Charter of Fundamental Rights of the European Union. The European Union could also decide to allow courts of the State of enforcement to deny recognition to EEOs which do not comply with Article 6 of the ECHR. After all, it already allows denials on the ground of irreconcilability.

If none of the competing values is redefined, a decision must be made in favour of one of them. It seems clear that the European Union will decide in favour of efficiency. However, Member States may disagree and seek ways to favour the values promoted by the ECtHR. Two paths could indeed be followed to reach that result.

The first path would be to challenge the application of the 2004 Regulation as is, as a consequence of its failure to comply with the ECHR. The legality of the 2004 Regulation could be challenged before the ECJ.[94] Access to justice is indeed not only a legal consequence entailed by Article 6 of the ECHR, but also a general principle of EU law.[95] As such, it must be complied with by EU law-makers, and failure to do so would result in an illegality. Although the period of two months for instituting proceedings before the ECJ in order to review the legality of the 2004 Regulation has obviously expired, the matter could still be brought to the ECJ. First, the issue of the validity of acts of the community can be referred to the ECJ in the same way the issue of the interpretation of such acts can.[96] Secondly, the inapplicability of the 2004 Regulation could be invoked on this ground before the ECJ, for instance in proceedings initiated by the Commission against a Member State for failure to comply with the 2004 Regulation.[97] If there are Member States willing to challenge the application of the 2004 Regulation, they have tools to that effect. Their courts could ask the ECJ whether the 2004 Regulation ought to be interpreted as providing an implicit ground for denial of enforcement if the foreign judgment is not compliant with the ECHR or, if not, whether it is illegal. But Member States could also decide to take action directly and allow defendants to challenge the enforcement of EEOs on the ground of a violation of the ECHR.[98] This would obviously be a breach of the 2004 Regulation, but

[94] The argument was made by several French writers: see M-L Niboyet, 'La réception du droit communautaire en droit judiciaire interne et international' in J S Bergé and M-L Niboyet (eds), *La réception du droit communautaire en droit privé des Etats membres* (Bruylent, 2004) 153, 172; L d'Avout, 'La circulation automatique des titres exécutoires imposées par le règlement 805/2004 du 21 avril 2004' (2006) Rev Crit DIP 1, 46.

[95] See, eg *Coote v Granada Hospitality Ltd* C-185/197 [1998] ECR 5211.

[96] EC Treaty, Art 234.

[97] EC Treaty, Art 241.

[98] See d'Avout (n 94), 46.

its inapplicability could be raised in any proceedings initiated by the Commission for failure to comply with it.

The second path would be to argue that the 2004 Regulation does not actually prevent Member States from challenging the enforcement of a foreign EEO if it does not comply with the ECHR. This path has been followed by the German Parliament, which claims that actual enforcement is not harmonized by the 2004 Regulation, and that Member States may allow the challenge of the enforcement of a foreign EEO just as they would allow the challenge of the enforcement of any domestic order. The 2004 Regulation does indeed distinguish between the declaration of enforceability (exequatur) and enforcement. While Article 5 of the 2004 Regulation abolishes *exequatur*, which is not needed anymore, Article 20 provides that the enforcement of the EEO shall be governed by the law of the Member State of enforcement and is thus outside of the scope of the harmonization. It follows that enforcement procedures of the Member States remain untouched by the 2004 Regulation, including any procedure to challenge enforcement. On 18 August 2005, the German Parliament passed a law in order to implement the 2004 Regulation domestically.[99] The law added several provisions to the German Code of civil procedure. The most relevant for the purpose of this Article is paragraph 1086, which expressly provides that paragraph 767(2) of the Code remains applicable with regard EEOs. Paragraph 767(2) allows challenges of the enforcement of a judgment (or any other order) on grounds which could not be raised in the trial. In other words, it gives a second chance to German debtors, but only if they were unable to raise a point during the trial. In the context of the 2004 Regulation, the purpose of this provision is quite clear: bypassing the abolishment of *exequatur*.[100] German law-makers were aware of the issue, as they made clear in the official introductory report to the law.[101]

The German experience shows that there are Member States which are not willing to accept the 2004 Regulation as is. The German Parliament has chosen a clever and less adversarial way to allow debtors to challenge foreign EEOs than directly challenging the legality of the 2004 Regulation. But even if it is accepted that paragraph 767 is an enforcement rule, which remains untouched by the 2004 Regulation, European authorities could still argue that it impairs its effectiveness, and that it cannot be tolerated. Thus, eventually, challenging the legality or the applicability of the 2004 Regulation may be the only way to avoid its full application.

[99] BGBl, 2005, I, 2477.

[100] See, eg E Jayme and C Kohler (2005) Iprax 486.

[101] 'The Regulation allows debtors to raise arguments against the title, which was certified as a European Enforcement Order in another Member State, that they could have raised under German law in an enforcement challenge. Therefore, this is not a forbidden challenge on the merits, since the arguments could not be raised before the court of the state of origin. Furthermore, the enforcement challenge is to be found in Book 8 of the Code of civil procedure on enforcement, which remains untouched by article 20 of the 2004 Regulation.' BT-Drs 15/5222, 15 (translation by the author).

VI. CONCLUSION

There are several ways to look at the relationship between the ECHR and the 2004 Regulation. The one which comes to mind first is that the 2004 Regulation has established a vehicle which consolidates violations of the ECHR. At first sight, this seems wrong. It shows that it is hard to take mutual trust seriously when the ECtHR rules regularly that EU States violate Article 6 or other provisions of the ECHR. The ECHR can be used by the supporters of the abolition of *exequatur* to minimize the differences between the Member States and to claim that public policy is a ground for denial of recognition which is increasingly unlikely to be raised successfully. But the truth of the matter is that, for the time being, the ECtHR continues to find violations of the ECHR. The case law of the ECtCR thus underlines that there are still wide differences between the Member States, and that if there was no obligation to trust other Member States, many would not.

However, there is another way to look at this issue. The recognition of foreign judgments lacking reasons raises not only one, but several policy issues. The ECtHR has chosen to insist on one, access to justice. But the French experience shows that it may also raise the issue of foreign court avoidance. And finally, the 2004 Regulation shows that there are also issues of efficiency of civil procedure and cost of enforcement. So, all in all, the ECtHR has made a policy choice which does not necessarily deserve to be accepted for the sole reason that it was made by the Strasbourg court, and that it could give it a moral superiority by calling it a 'human right'. All courts involved in this field will have to decide between these conflicting policies, and then see whether their preferred solution can find a legal basis.