

# Contents

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

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

**Conclusion to Part I**

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

**4 The Right to a Fair Trial in Civil Cases** . . . . . 123

4.1 Introduction . . . . . 124

4.2 The Right to a Fair Civil Trial in the European Treaties . . . . . 126

4.2.1 Article 6(1) of the European Convention on Human Rights . . . . . 126

4.2.2 EU Law and Article 47 of the EU Charter on Fundamental Rights. . . . . 129

4.2.3 Relationship and Interplay . . . . . 130

4.2.4 Structure, Internal Connections, and Interpretation . . . . . 131

4.3 The Right to a Fair Civil Trial in the Case Law of the European Courts. . . . . 133

4.3.1 Elements of the Right to a Fair Civil Trial . . . . . 133

4.3.2 The Right to a Fair Hearing . . . . . 136

4.3.3 Right to a Public Trial and Public Pronouncement of the Judgment . . . . . 153

4.3.4 The Right to Adjudication by an Impartial and Independent Tribunal. . . . . 155

4.3.5 The Right to a Trial Within a Reasonable Time . . . . . 157

4.3.6 The Right to Enforcement . . . . . 159

4.3.7 Consequences of a Failure to Observe the Right to a Fair Trial . . . . . 161

4.4 Theoretical Foundations for the Right to a Fair Trial in Civil Cases . . . . . 165

4.4.1 Introduction: The Need to Delve Further into the Right to a Fair Trial. . . . . 165

4.4.2 The Fair Civil Trial as a Means to an End . . . . . 166

4.4.3 The Fair Civil Trial as an End in Itself. . . . . 169

4.4.4 Is It Possible to Distinguish a ‘Core’ and a ‘Periphery’ Within Article 6(1)? . . . . . 172

4.5 Conclusion . . . . . 173

References. . . . . 173

**5 Free Movement of Judgments and the European Convention on Human Rights.** . . . . 177

5.1 Introduction . . . . . 178

5.2 The Scope of Application of *Pellegrini* . . . . . 179

5.2.1 Application of *Pellegrini* to Situations Where Both States are Party to the ECHR. . . . . 179

5.2.2 Application of *Pellegrini* to Situations Governed by EU Law . . . . . 182

5.3 A Different Frame of Reference for Intra-European Union Situations: The *Bosphorus* Test. . . . . 183

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

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

**Conclusion to Part II**

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

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

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

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



<http://www.springer.com/978-94-6265-161-6>

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

Hazelhorst, M.

2017, XV, 448 p., Hardcover

ISBN: 978-94-6265-161-6

A product of T.M.C. Asser Press