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Enforcement fees: clear, transparent and reasonable

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Disclaimer:

The findings, views, opinions and recommendations expressed in this report are purely those of the writer and do not necessarily reflect the views of UIHJ.

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
Comonex	World Code on enforcement (International Union of judicial officers)
CEPEJ	European Commission for the Efficiency of Justice
CEPEJ (2009) 11	Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement, European Commission on the efficiency of Justice (CEPEJ)
CoE	Council of Europe
COMONEX	UIHJ World Code on Enforcement
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECHR	European Convention for Human Rights
ECtHR	European Court on Human Rights
EEO	European Enforcement Order (procedure) based on EU Regulation 805/2004 of creating a European Enforcement Order for uncontested claims (21 April 2004)
EPO	European Payment Order
EPOP	European Payment Order (procedure) based on EU Regulation 1896/2006 of creating a European Order for Payment procedure (12 December 2006)
ESCP	EU Regulation 861/2007 of establishing a European small claims procedure (11 July 2007)
EU	European Union
EU Service	EU Regulation 1393/2007 on the service on

Regulation	the member states of judicial and extrajudicial documents in civil and commercial matters
HCCH	Hague Conference for Private International Law
HR	Human Resources
IMF	International Monetary Fund
IT	Information Technologies
OSCE	Organisation for Security and Co-operation in Europe
PEA	Private Enforcement Agent
PPP	Power Point Presentation
PSC	Project Steering Committee
Rec 16/2003	Council of Europe Recommendation (2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
Rec 17/2003	Council of Europe Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
Receiving Agency	Court, public officer, authority or other person competent for the receipt of judicial and/or extra judicial documents to be served or enforced in another State
Regulation	Regulation 655/2014 of the European

655/2014	Parliament and the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters
RoL	Rule of Law
Transmitting Agency	Court, public officer, authority or other person competent for the transmission of judicial and/or extra judicial documents to be served or enforced in another State
UIHJ	International Union of Judicial Officers
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

1. INTRODUCTION

Enforcement fees are under attack: from creditors who are disappointed in the outcomes of an unsuccessful enforcement and are confronted with payment of enforcement costs; from debtors who are confronted with, at least in their opinion, unnecessary and too high enforcement costs; from politicians who consider a discussion on the fairness of enforcement costs a challenge to attract new voters; from courts and authorities who hear those complaints and finally from the enforcement agents who have to continuously justify themselves.

At the request of the UIHJ, I have tried to make an overview of the various visions regarding the structure of enforcement costs in the UIHJ member countries. Many thanks to the UIHJ countries that have participated in the survey. Many thanks also to the UIHJ “Grande Questionnaire” working group (Patrick Gielen, Jonathan van Leeuwen, Fanny Cornette and UIHJ’s secretary-general Mathieu Chardon) for the effectuation of the survey and the collection of the data, data capture and data editing.

Many thanks also Marc Schmitz (Belgium), Todor Lukov (Bulgaria), Elin Vilippus (Estonia), Guna Berlande (Latvia), Dovile Satkauskiene (Lithuania) and Jacinto Neto (Portugal) for the information I received from them on their respective fee systems.

This publication further gives an overview of international principles regarding a clear, transparent and reasonable fee structure. For this I also considered it useful to put those principles in a broader context. Reason that this publication

starts with a general overview of principles on enforcement and the enforcement professional, the enforcement agent.

Finally, this publication does suggestions for the establishment of a fair fee structure. Suggestions that are based on my long-term experience as an active enforcement agent, as a board member of the Dutch Chamber of enforcement agents (KBvG) and UIHJ, and, last but not least, my long years of commitment as an expert in legal reform projects in various countries.

I hope this publication is a good and balanced basis for any discussion towards a clear, transparent and reasonable fee structure. Regarding the information on the fee systems in various countries: as much as possible this is the situation as per 31 October 2017. It means that e.g. the amendments to the Civil Procedure Code from 27 October 2017 in Bulgaria are also implemented.

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PART I INTERNATIONAL STANDARDS AND PRINCIPLES

1. GENERAL INTERNATIONAL STANDARDS AND PRINCIPLES

1.1. The European Court on Human Rights

1.1.1. Article 6 ECHR

Article 6 ECHR guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him:

Article 6 paragraph 1 ECHR: Right to a fair trial:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The title of the article ("fair trial") might give the impression that the provision only refers to proceedings. From case law however, it is obvious that the "fair trial" principle also applies to the enforcement phase. The article needs to be interpreted in such a way that the fair trial guarantee not

only refers to proceedings, but also applies to the enforcement phase. The landmark case in that respect was *Hornsby v Greece*.¹ In this case the ECtHR held by seven votes to two that there had been a violation of Article 6 paragraph 1 of the ECHR on account of the Greek administrative authorities' failure to comply within a reasonable time with two judgments of the Supreme Administrative Court. By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision the Greek authorities had deprived the provisions of Article 6 § 1 of the Convention of all useful effect:

*"[...] Article 6 § 1 secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodied the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constituted one aspect. **However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.** [...] to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. **Execution of a judgment given by any court therefore had to be regarded as an integral part of the "trial" for the purposes of Article 6;** [...]."*

Based on this judgment, the enforcement of a *court* judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with