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CAPÍTULO 19

Party autonomy in domestic and cross-border enforcement proceedings

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I. INTRODUCTION

In an open society, freedom of contract is usually the starting point of every discussion about the organisation of relationships governed by private law. As regards enforcement, however, even in civil cases party autonomy normally only refers to the freedom of the person pursuing enforcement:[2] It is up to the judgment creditor to decide if and when he will bring enforcement proceedings.[3] The debtor, on the other hand, seems to have almost no saying. Of course, he can be allowed to apply for a postponement or a judicial review of execution measures. But when it comes to enforcement, at least in principle, he is not a partner on an equal footing but subject to all legal measures as long as he is not willing and prepared to do what he has been convicted to do. This is at least the traditional approach, which, in turn, may explain why enforcement agreements have received less attention than consensual solutions in other fields of procedural law.[4]

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2. This paper does not deal with enforcement in criminal or administrative law cases.
3. In German: „Grundsatz der Parteidisposition". Cf. *Baur/Stürner/Bruns*, Zwangsvollstreckungsrecht (13th edition 2006) para. 6.5; *Stamm*, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts - Ein Beitrag zur Rechtsvereinheitlichung auf europäischer Ebene (2007) pp. 110 et seq.
4. For example, hardly anything is said on enforcement agreements in the comprehensive chapter that the great Greek scholar *Konstantinos Kerameus* has contributed to the International Encyclopaedia of Comparative Law; see *Kerameus*, Enforcement Proceedings, in: *Zweigert/Drobnig* (editors), International

Nevertheless, it might be premature to consider enforcement agreements a topic of little theoretical or practical relevance, to be touched upon only for the sake of completeness when dealing with procedural contracts in general. It is a truism that law in practice and law in the books may differ, and this surely holds true for procedural law and in particular for enforcement proceedings, which to a great extent are not carried out by courts and judges but by judicial officers and enforcement agents. But in recent years, even "in the books" one can find interesting new perspectives, advocating a trend towards "participatory or amicable enforcement". To this effect, the Council of Europe's guiding principles concerning enforcement propose that the parties should have a duty to co-operate appropriately in the enforcement process and that, in particular in family law matters, the relevant authorities should facilitate this co-operation.[5] Following such recommendations by the Council of Europe and the European Commission on the Efficiency of Justice (CEPEJ),[6] another prominent statement is the "Global Code of Enforcement" (GCE), a set of unbinding principles drafted by the International Union of Judicial Officers (UIHJ).[7] Article 10 GCE requires states to "ensure that the professional instructed with the enforcement has the option of adopting a consensual enforcement procedure at the request of the debtor" (paragraph 1) and stipulates that, "in order to adapt the enforcement to the

Encyclopaedia of Comparative Law, vol. XVI (Civil Procedure, edited by *Cappelletti*), chapter 10 (2002). The same holds true for the elaborate chapter dealing with the enforcement of judgments in *Chase/Hershkoff/Silbermann/Sorabji/Stürner/Taniguchi/Varano*, Civil Litigation in Comparative Context (2nd edition 2017). Furthermore, enforcement agreements are hardly mentioned in the otherwise highly informative study on "Enforcement Agency Practice in Europe", edited by *Andenas, Hess & Oberhammer* (2005).

5. Council of Europe, Recommendation Rec (2003) 17 of 9 September 2003 of the Committee of Ministers to Member States on Enforcement, III (1) (c) (the document is accessible here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df135).

6. On 9. December 2009, the European Commission on the Efficiency of Justice (CEPEJ) adopted Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement (accessible here: https://rm.coe.int/16807473cd). Para. 8 of these 2009 CEPEJ Guidelines reads: "The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests. The enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a 'post judicial mediator' during the enforcement stage." See also the CEPEJ Good Practice Guide on Enforcement of Judicial Decisions, adopted on 10 December 2015 (accessible here: https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf).

7. *Moutout*, Code mondial de l'exécution - Global Code of Enforcement (3rd edition 2016). The articles of the GCE are accessible on the UIHJ's homepage (www.uihj.com/en ["Publications"]). For a discussion of this project, see *Ferrand*, Code mondial de l'exécution et droit français des procédures civiles d'exécution - Convergences en vue d'une exécution à la fois effective et soucieuse des garanties fondamentales, ZZPInt (Zeitschrift für Zivilprozess International) 20 (2015), 27.

situation of the creditor and the debtor, states must allow the active participation of the parties to the enforcement" (paragraph 2).[8]

Against this backdrop, this paper outlines to what extent there already is – or should be more – room for party autonomy in enforcement proceedings or even for "enforcement à la carte".[9] These considerations are presented from the perspective of Germany,[10] where the topic has been attracting a lot of attention for quite some time now[11] and still is under discussion.[12] While the main focus of the paper is on domestic cases, some thought is also given to the widely unexplored topic of enforcement contracts in cross-border scenarios.

II. SUBJECT-MATTER OF ENFORCEMENT AGREEMENTS

1. Enforcement procedure

As far as the conceivable subject matter of enforcement agreements is concerned, the GCE speaks of "enforcement terms and conditions".[13] Indeed,

8. See also the glossary, annexed to the GCE (note 7), which states that "participatory or amicable enforcement" is supposed to mean "enforcement procedure that allows parties to reach an agreement on enforcement terms and conditions under the authority of the enforcement agent and the supervision of a judge".
9. This paper deals only with enforcement proceedings for the benefit of individual creditors, leaving out of consideration the special problems of contracting in the context of insolvency proceedings.
10. For introductions to German enforcement law in English language, see *Rützel/Wegen/Wilske*, Commercial Dispute Resolution in Germany (2nd edition 2016) chapter 1 V; *Murray/Stürner*, German Civil Justice (2004) chapter 11 F; *Hau*, The Law of Civil Procedure, in: *Wagner/Zekoll* (editors), Introduction to German Law (3rd edition 2018) p. 479 (496–501); *Hess/Mack*, Germany, in: *Andenas/Hess/Oberhammer*, Enforcement Agency Practice in Europe (2005), p. 176. For a brief introduction in Portuguese language, cf. *Beneduzi*, Introdução ao processo civil alemão (2nd edition 2018) chapter 10. For overviews of procedural agreements under German law, see the contributions by *Schlosser*, Einverständliches Parteihandeln im deutschen Zivilprozess, and *Kern*, Procedural Contracts in Germany, in: *Cabral/Nogueira* (editors), Negócios Processuais (2nd edition 2016) pp. 117–142, 191–204.
11. Cf. *Bartels*, Der Verzicht auf den gesetzlichen Vollstreckungsschutz, Rpfleger (Der Deutsche Rechtspfleger) 2008, 397; *Gaul/Schilken/Becker-Eberhard*, Zwangsvollstreckungsrecht (12th edition 2010) § 33 (compilation of older treatises on p. 568); *Emmerich*, Zulässigkeit und Wirkungsweise der Vollstreckungsverträge, ZZP (Zeitschrift für Zivilprozess) 82 (1969), 416; *Philipp*, Zulässigkeit und Durchsetzbarkeit von Parteivereinbarungen in der Zwangsvollstreckung, Rpfleger (Der Deutsche Rechtspfleger) 2010, 456; *Rinck*, Parteivereinbarungen in der Zwangsvollstreckung aus dogmatischer Sicht (1996); *Scherf*, Vollstreckungsverträge (1971); *Wagner*, Prozessverträge – Privatautonomie im Verfahrensrecht (1998) chapter 10 B (compilation of older treatises in note 99).
12. For recent accounts, see *Heinze*, Mehr Freiheit wagen in der Zwangsvollstreckung: Plädoyer für eine Neuordnung und Neubewertung von Vollstreckungsvereinbarungen, in: *Dutta/Heinze* (editors), Mehr Freiheit wagen – Beiträge zur Emeritierung von Jürgen Basedow (2018) p. 303; *Hergenröder*, Gütliche Erledigung der Zwangsvollstreckung als Leitprinzip – Vollstreckungsvereinbarungen im Spannungsfeld zwischen Gesetz und Privatautonomie, DGVZ (Deutsche Gerichtsvollzieher Zeitung) 2012, 105; *Hergenröder*, Die Vollstreckungsvereinbarung im System der Zwangsvollstreckung, DGVZ (Deutsche Gerichtsvollzieher Zeitung) 2013, 145; *Loyal*, Parteivereinbarungen bei der Vollstreckung von Gerichtsentscheidungen anderer EU-Mitgliedstaaten, GPR (Zeitschrift für das Privatrecht der Europäischen Union) 2018, 63; *Musielak*, Parteivereinbarungen in der Zwangsvollstreckung, in: *Meller-Hannich/Haertlein/Gaul/Becker-Eberhard* (editors), Rechtslage – Rechtserkenntnis – Rechtsdurchsetzung: Festschrift für Eberhard Schilken (2015) p. 749.
13. GCE (note 7), glossary.

it seems obvious that parties might be interested in modifying the rather technical rules that organise enforcement procedures. A typical case of application for such arrangements, as already highlighted in the 2009 CEPEJ Guidelines,[14] is the definition of the enforcement timeframe. In more general terms, article 190 of the Brazilian Code of Civil Procedure of 2015 (CCP) provides that, "when the action deals with rights that permit the resolution of the dispute by the parties themselves, the competent parties can lawfully stipulate changes in the procedure to adapt it to the specific requirements of the action and to agree upon their burden, powers, procedural rights and obligations, before or during the proceedings".[15] Placed in the general part of the CCP, it seems as if this provision is supposed to apply also to enforcement proceedings, which are dealt with in the second book of the CCP's special part.

The existence of such a general clause is anything but self-evident. Rather, it is due to the fact that today, Brazil has one of the most advanced and state-of-the-art codifications of civil procedure in the world. In most other legal systems, there are either no such general clauses allowing the parties to adjust procedural rules to their needs, or they only deal with ordinary court proceedings, not with enforcement proceedings. The German Code of Civil Procedure (Zivilprozessordnung - ZPO),[16] for example, is much older than the CCP: Originally it dates from 1877, although since then it has undergone numerous reforms.[17] Even in its current version, there are only few signs that hint towards the possibility of enforcement agreements. One of the few examples is section 816 ZPO, which provides that upon attachment, the creditor and the debtor are free to agree on the date and the location of the sale at auction of the objects attached. Another instance is section 876 ZPO mentionong an agreement between creditors in order to settle a dispute over the distribution of the debtor's assets. The traditional German view was that such spotty provisions do not reflect a general rule but constitute exceptions that are confined to their genuine scope of application and, in consequence, should be interpreted narrowly. Based on this assumption, by way of an *argumentum e contrario*, it was concluded that enforcement agreements are only admissible when expressly mentioned in the ZPO. The main reason for this was the thinking that the law of civil procedure does not belong

14. 2009 CEPEJ Guidelines (note 6) II.3.1.2 (para 70).
15. All citations of the CCP in this paper are based on the translation by *Arruda Alvin/Didier Jr.* (editors), Código de Processo Civil Brasileiro - Traduzido para a Língua Inglesa (2017).
16. An official English translation of the ZPO is available online: www.gesetze-im-internet.de/englisch_zpo/index.html. Most English citations of the ZPO in this paper follow this translation.
17. For an account of the most relevant reforms see *Hau*, Recent German Reforms of Civil Procedure, in: *Lipp/Fredriksen* (editors), Reforms of Civil Procedure in Germany and Norway (2011) p. 61.

to private law but to public law, which is not governed by party autonomy but the principle of strict law-abidance.[18]

Notwithstanding this restrictive approach traditionally undertaken by German courts, for many years practitioners and scholars have pointed out that less formalism and some more flexibility would be desirable.[19] In fact, one can find provisions dealing with different aspects of enforcement in many German standard contracts in a variety of legal fields, in particular in commercial and consumer contracts, but also in company agreements, prenuptial agreements and agreements dealing with the law of succession. Adapting, at least to a certain extent, to that practice, even in Germany the wind has changed over the years and the prevailing opinion today is more liberal and open-minded: Enforcement agreements are still neither taken at face value nor always regarded as valid, but they can be recognised, even in contexts not expressly mentioned in the ZPO, depending on their specific content and the circumstances of their accomplishment. This is to be explored in more detail below (sub V.).

2. Enforceability

In theory, a legal system could stipulate that it is up to the parties to decide not only on rather technical details of enforcement proceedings but also on the preliminary question of enforceability as such. In consequence, parties could agree that an obligation or a private law instrument (for example a settlement) should be enforceable without having to fulfil any further procedural conditions.[20] In Germany, party autonomy certainly does not reach so far: Enforceability cannot simply be agreed upon by the parties but must be imposed by law. This is indicated by section 794 [1] no. 1 ZPO, which provides that "compulsory enforcement may be pursued based on settlements concluded by the parties before a German court in order to resolve the legal dispute". This provision underlines that it is not the parties who impose enforceability; rather, the ZPO states that a settlement reached under certain circumstances, especially in court, shall *ipso iure* be enforceable in the same way as a judgment would be. To the same effect, the debtor who is obliged to pay money (or to carry out certain other types of private law duties) can subject himself to immediate compulsory enforcement. This, however,

18. A recent revival of this traditional approach is the suggestion to analyse enforcement procedure accordingly to administrative procedure. In consequence, this would leave very little, if any, room for party autonomy once the proceedings have been initiated. For this perception, see *Stamm* (note 12), but also the critical assessment by *Gaul/Schilken/Becker-Eberhard* (note 11) § 33 para 2 note 9.
19. Cf. *Heinze* (note 12) for a recent statement advocating "more courage" in upholding enforcement agreements.
20. For some comparative observations on this point, see *Chase/Hershkoff/Silbermann/Sorabji/Stürner/Taniguchi/Varano* (note 4) pp. 600–606.

only entails enforceability if the submission has been recorded in accordance with specific formal requirements by a German notary public within the bounds of his official authority (section 1] 794] no. 5 ZPO).

On the other hand, this does not mean that the question of enforceability could never be affected by agreement. In principle, under German law, parties can agree that a legal instrument that normally would be enforceable as such (for example a judgment or a payment order issued by a court) shall not be enforceable or shall be enforceable only under additional circumstances. It is suggested that the same holds true for Brazil where at least the broad wording of article 190 CCP would cover such negative enforcement agreements.

3. The claim

The promotion of settlements is a general feature of modern procedural doctrine and law making.[21] In particular, both in Brazil (article 139 [v] CCP) and in Germany (section 1] 278] ZPO), judges are required to foster, at any time during the proceedings, the resolution of the legal dispute by the parties, and conciliation hearings preceding the hearing are arranged for the purpose of reaching such amicable settlement of the dispute (article 334 CCP; section 6]-[2] 278] ZPO). Comparative analysis reveals that this does not only hold true for lawsuits before the court, but also for execution proceedings.[22] This shift in enforcement law and practice from traditional debt collection towards amicable solutions is confirmed, for example, by section 802b ZPO: The enforcement officer is required to endeavor an amicable termination of the matter and to grant to the debtor a period within which payment is to be made, or may allow payment in instalments, as long as the creditor has not ruled out such a payment agreement. The same attitude is expressed in the 2009 CEPEJ Guidelines (stating that the enforcement agent can have the role of a "post judicial mediator" during the enforcement stage)[23] and in article 11 GCE, according to which the states shall introduce procedures that make it possible to settle the liabilities of the debtor, when it is necessary for the reestablishment of the debtor.

For an analytical framework of enforcement agreements, however, it is important to distinguish between the creditor's claim against the debtor on the one

21. The other, often criticised side of the coin can be a tendency to excessively favour compromise in order to avoid a court decision at any price. For such warnings, see, for example, *Eidenmüller/Fries*, Against False Settlements: Designing Efficient Consumer Rights Enforcement Systems in Europe, in: Micklitz/Wechsler (editors), The Transformation of Enforcement - European Economic Law in a Global Perspective (2016) p. 87.
22. See *Hess*, Comparative Analysis of the National Reports, in: Andenas/Hess/Oberhammer, Enforcement Agency Practice in Europe (2005), p. 25 (42).
23. 2009 CEPEJ Guidelines (note 6) para. 8.

hand ("materiell-rechtlicher Anspruch", i.e. the private law right in dispute between the parties) and the enforceable instrument in which the claim is couched on the other hand ("Vollstreckungstitel", for example the judgment). German law does not subscribe to the Anglo-American doctrine of merger, which supposes that the claim (or cause of action) merges into the judgment and thereby loses its independent existence.[24] Instead, it is suggested that claim and judgment can co-exist, and that, in consequence, agreements on the enforcement stage can deal with one aspect and/or the other. So, for instance, when the parties agree on an extension for payment, the claim is the object of the agreement. This is an ordinary contract and its preconditions and consequences are governed by the rules of substantive law only, notwithstanding the fact that the creditor has already obtained a judgment against his debtor. On the other hand, it is not the claim but the enforceability of the judgment that is concerned when the parties agree that enforcement procedures shall not be started or continued for a certain period: Such an agreement has to be assessed from the perspective of procedural law. To make things even more complicated, there are also mixed agreements. Take, for example, a scenario in which, after the creditor has obtained a judgement for a lump sum, the parties agree on an instalment plan and the creditor promises not to start execution as long as the creditor pays his dues. In such a case, both the rules of contract law and the rules of procedural law can apply, depending on which aspect of the agreement is in question.

It goes without saying that in many cases it can be difficult to distinguish between agreements concerning the claim and agreements concerning its enforcement, and for some this may seem to be over-theoretical altogether. From the perspective of legal doctrine, however, this distinction is not *l'art pour l'art* but has important implications. In particular, it makes a difference whether the preconditions of a valid consent are governed by the rules of substantive law or by the rules of procedural law. Furthermore, the distinction is relevant in respect of the remedies and procedural consequences when one party refuses to comply with the agreement (*infra* VI).

III. PARTIES TO ENFORCEMENT AGREEMENTS

1. Creditor and debtor

As already seen, certain provisions in the Brazilian CCP and the German ZPO refer to an agreement concluded by the creditor and the debtor. This is

24. The aim of the doctrine of merger, i.e. to prevent a second action for the relief already granted, is under German law reached on the basis of the doctrine of *res adjudicata*; cf. Murray/Stürner (note 10) pp. 360–362.

to say that they are parties to a veritable contract in the field of enforcement law. Obviously, the GCE means the same when speaking of the parties reaching "an agreement on enforcement terms and conditions".[25] In other cases, however, an adjustment of the standard rules for enforcement does not take place by way of an agreement but through a unilateral act, usually a simple declaration of will. This distinction is well known in German procedural doctrine, which draws a line between unilateral party acts[26] and procedural contracts, and a very similar distinction is neatly highlighted by article 220 CCP according to which the acts of the parties consisting of unilateral or bilateral declarations of will shall immediately produce the constitution, modification or extinction of procedural rights.

In the enforcement context, it is generally up to the judgment creditor to make such unilateral declaration of will. For example, the creditor can abandon either the execution proceedings entirely or merely one enforcement measure (article 755 CCP) and is free to consent that assets may be deposited with the judgment debtor (article 840 § 2 CCP). Similar provisions can be found in Germany, such as section 843 ZPO, stating that the creditor may waive the rights acquired by the attachment notwithstanding his claim and that such waiver is effected by a corresponding declaration, which is to be served on the debtor. In other cases, however, the law requires a declaration of will by the debtor. A practically important example is a submission to enforceability in accordance with section 794 [1] no. 5 ZPO.

Since this paper shall mainly be focused on enforcement agreements, unilateral declarations will not be dealt with in more detail. It should, however, be clear that in practice the legal basis for a unilateral declaration is normally an agreement of the parties. To illustrate this, take the example just mentioned: More often than not, the debtor will submit himself to enforceability only because he has agreed to do so, for instance in a loan contract. And the same holds true for unilateral declarations by the creditor: Usually he will not abandon a right granted to him under the rules of enforcement law because he has all of a sudden turned into a generous and indulgent person, but only because he has previously promised to do so, for example in a settlement agreement. Technically speaking, however, it is the unilateral declaration, not the underlying agreement between the parties, that directly affects the enforcement law situation in such cases (as opposed to the level of the contractual obligation).

25. GCE (note 7), glossary.
26. This, in turn, entails a further distinction between unilateral acts having immediate effect ("Bewirkungshandlungen") and acts merely asking the court to trigger the aimed effect ("Erwirkungshandlungen"). See *Beneduzi* (note 10) p. 100.

2. Enforcement authorities

In certain circumstances, the conclusion or implementation of the parties' agreement requires some sort of participation or approval by the court or other enforcement authority. In this respect, the GCE states that the parties shall reach "an agreement on enforcement terms and conditions under the authority of the enforcement agent and the supervision of a judge".[27] Aiming in the same direction, article 922 CCP assigns an active role to the judge: "If the parties agree, the judge shall declare the stay of execution for the period granted by the judgment creditor so that the judgment debtor may voluntarily perform the obligation." In more general terms, according to article 190 (sole paragraph) CCP, the judge shall control the validity of the agreement.

In other cases, the enforcement authority is only entrusted a decision when the parties cannot agree upon an amicable solution. For instance, under article 869 CCP, the judge may appoint either the judgment creditor or the judgment debtor as bailee-trustee, but, in case an agreement has not been reached after hearing the opposing party, he shall appoint a qualified professional to perform that function. Quite similar, an officer of the court shall perform the appraisal of the attached assets (article 870 CCP), but this is not required when one of the parties accepts the estimate made by the other (article 871 [I] CCP).

When reading the Brazilian Code, one gets the impression that the court can even become a veritable party to a procedural agreement. This is indicated by the wording of article 191 CCP, according to which "by mutual agreement, the judge and the parties can establish a timetable for the performance of procedural acts, when appropriate". From a comparative perspective, this is very remarkable. In Germany, for example, the enforcement authority can be required by law to initiate an agreement, especially an amicable solution of the dispute (cf. section 802b ZPO, as already mentioned *supra* II.2). It must, however, be emphasised that notwithstanding its involvement, the enforcement authority under German law does never become a party to the agreement. Rather, it either performs a duty imposed by law or, as far as provided for by law, acts as representative of a party. To this effect, section 754 [1] ZPO states that the court-appointed enforcement officer is authorised to enter into payment agreements binding upon the creditor.

3. Third parties

Depending on the context, agreements dealing with enforcement issues are conceivable not only between the creditor and the debtor but also

27. GCE (note 7), glossary.

between various creditors. For instance, as already mentioned, section 876 ZPO deals with an agreement between creditors intended to settle a dispute over the distribution of the debtor's assets. Other agreements in the field of enforcement law are made by the creditor and a third party, such as the highest bidder in the course of the foreclosure auction of real property. A rather technical example can be found in section 91 [2] of the German Act on Enforced Auction and Receivership.[28] A more common instance might be the case of a creditor who promises to a third party, maybe a parent of the debtor, that he will not start enforcement proceedings against the debtor. In terms of legal doctrine, however, this is not an enforcement agreement but an ordinary contract, governed by the substantive rules of contract law, and has no direct impact on the enforcement law situation between the creditor and the debtor. Sometimes it is the other way around: it is debtor who contracts with a third party in order to make arrangements for enforcement. For instance, the debtor may agree to transfer a valuable asset to a third party subject to the condition that his creditor starts enforcement proceedings. It goes without saying that such an agreement is highly problematic because it tries to protect the debtor at the disadvantage of the creditor's legal position. In consequence, most legal systems would regard such contracts as void or at least voidable upon application by the creditor.

IV. OBJECTIVES OF ENFORCEMENT AGREEMENTS

1. Restricting enforcement

In order to structure the spectrum of enforcement agreements, one can distinguish between arrangements extending and arrangements restricting enforcement. To start with the latter, there is a broad spectrum of conceivable clauses aiming at limiting the creditor's right to execution. In theory, the most far-reaching example would be a clause that completely rules out any enforcement by the creditor against the debtor's assets. Other clauses are less extensive and thus more commonly used: They suspend enforceability (or enforcement, respectively) for a specific time or attach certain preconditions that would otherwise not be required by the applicable enforcement law. The third option is a clause that limits the (types of) assets subject to execution, e.g. providing that execution is only possible against the debtor's movables, but not with regard to his immovable property. A legal basis for such an arrangement is article 833 CCP, which states that assets are non-leviable when declared, by a voluntary act,

28. For an official English translation, see www.gesetze-im-internet.de/englisch_zvg/index.html.

exempt from execution. Obviously, all clauses restricting execution provoke the question whether legal safeguards for the protection the creditor's interests are required (*infra* V.4).

2. Extending enforcement

The second group of agreements aims in the opposite direction. In practice, there is a broad spectrum of conceivable clauses trying to enhance the creditor's right to execution. In particular, the creditor might be interested in an option to start enforcement proceedings sooner and/or depending on lower requirements than otherwise prescribed by the applicable provisions. Other clauses allow for enforcement even in debtor's assets which are subject to special legal protection and therefore normally exempt from execution. Such clauses must be analysed with regard to the question whether legal safeguards for the protection of the debtor's interests are required.

V. FACTORS RELEVANT FOR THE VALIDITY OF ENFORCEMENT AGREEMENTS

Against this backdrop, the question arises whether there are useful guidelines for the analysis of the validity of enforcement agreements. As regards procedural agreements in general, the Brazilian CCP in its article 190 (sole paragraph) gives an answer to the effect that the judge shall control the validity of the agreement, but shall deny its application only in the case of nullity or inclusion of unconscionable terms in adhesion contracts or in cases where any of the parties is in a manifest position of weakness. This seems to be a remarkably generous approach, almost a *laissez-faire* attitude, which is in line with the general tendency of the Brazilian CCP to favour party autonomy over strict formality. In contrast it does not come as a surprise that the German ZPO is silent and leaves it to the courts and doctrine to find appropriate tests for the evaluation of procedural agreements. In the following, the factors are set out which are usually considered relevant for enforcement agreements.

1. Mode of the agreement

In respect of the way in which the parties conclude the enforcement agreement, article 190 (sole paragraph) CCP refers to the legal regime governing add hesion contracts. Indeed, it makes sense to give more room to a procedural agreement that has been individually negotiated by both parties than to a clause contained in the standard terms of the party that has the stronger bargaining position. From the German perspective, this distinction is relevant for the assessment of enforcement agreements, which, at least in principle, are subject to

the general provisions of the Civil Code (Bürgerliches Gesetzbuch - BGB[29]). While, as a general rule, an ordinary contract is not to be considered void unless it violates a statutory prohibition (section 134 - "gesetzliches Verbot") or is contrary to public policy (section 138 BGB - "Sittenwidrigkeit"), a much stricter test applies regarding standard business terms ("Allgemeine Geschäftsbedingungen"; sections 310-305 BGB), i.e. contract terms that have not been negotiated in detail between the parties but were pre-formulated for more than two contracts and presented by one party to the other party upon the entering into of the contract. Provisions in such standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party, in particular when they are either not sufficiently clear and comprehensible or incompatible with essential principles of the statutory provision from which they deviate.[30]

2. Parties to the agreement

Reference to a position of weakness, as expressly mentioned in article 190 (sole paragraph) CCP, asks the judge to distinguish between agreements concluded by parties acting on an equal footing and situations in which one party is clearly more vulnerable than the other. This consideration is also relevant under German law, which allows the court to take into account whether the case concerns a business-to-business relation or a business-to-consumer relation: In b2c scenarios, judicial control of standard business terms is even stricter than in b2b scenarios (cf. section 1] 310], [3] BGB). Furthermore, special attention to the protection of the more vulnerable party can be given in the case of employment disputes or family disputes (e.g over a duty to pay maintenance).

3. Effect of the agreement

Another factor that is not explicitly mentioned in the wording of article 190 (sole paragraph) CCP but plays an important role in the German discussion is the effect of the arrangement: It seems to be of particular interest for the evaluation of an enforcement agreement whether it further weakens the debtor's position or, on the contrary, restricts the creditor's rights (*supra* IV). In case of doubt, it seems better to uphold an agreement of the latter variety. The rationale behind that is the idea that in the context of enforcement proceedings, the law only

29. For an official English translation see www.gesetze-im-internet.de/englisch_bgb.
30. For a detailed analysis of the relevance of the BGB provisions on standard business terms for enforcement agreements, see *Hau*, Zwangsvollstreckung, in: Wolf/Lindacher/Pfeiffer (editors), AGB-Recht (6th edition 2013).

provides for a minimum standard of protection for the debtor, and that only under very exceptional circumstances it would be fair to lag even behind this minimum level. By comparison, the creditor is in lesser need of protection: Since it is anyway up to him to decide if and when he brings enforcement proceedings, a consensual limitation of his procedural rights is usually not alarming.

4. Timing of the agreement

Another factor worth being taken into consideration is timing: The parties can make provisions for the case that enforcement will be necessary either at the very beginning of their legal relationship or later, after their dispute has become manifest, or even only when enforcement proceedings have already started. As regards the impact of timing on the validity of enforcement agreements, one could think: the earlier, the better. This would be in line with the "veil of ignorance" which is at the heart, for example, of *John Rawls'* theory of justice:[31] From this perspective, one would expect that an enforcement agreement should be better balanced when at the time of the conclusion of the agreement no party already knows whether he will end up in the position of judgment creditor or judgment debtor. But on the contrary, in case of doubt, it seems reasonable to favor an agreement only made during the course of enforcement proceedings: Only at this stage of the dispute a weaker party, usually the debtor, can really oversee the consequences of the agreement and has a chance to comprehend that (and in how far) it is going to weaken his legal situation.

VI. ENFORCING ENFORCEMENT AGREEMENTS

A rather technical question that has still gained a lot of attention in Germany concerns the remedies and the applicable procedural rules in case of non-compliance or in case of dispute over the scope or validity of an enforcement agreement. This issue is closely related to the system of remedies in enforcement proceedings in general, which in turn can be rather complex.[32] The problem is further complicated due to the fact that enforcement agreements, as already mentioned (*supra* II.3), can refer to the creditor's claim as such or the enforceability of the judgment.

It seems appropriate to distinguish between two main aspects. Firstly, one has to answer the question which consequences can be expected when the

31. *Rawls*, A Theory of Justice (1999).
32. For some brief comparative observations on this point, see *Chase/Hershkoff/Silbermann/Sorabji/Stürner/Taniguchi/Varano* (note 4) pp. 634–642.

enforcement authority regards the agreement as valid but one party (the debtor or the creditor, respectively) refuses to comply: Is the enforcement authority allowed to uphold and apply the agreement or can the party relying on the agreement only claim damages for non-compliance against the other party? Secondly, it is necessary to determine the suitable remedy in case the enforcement authority disregards the agreement. Only recently, this question has led to a landmark decision by the German Federal Court of Justice (Bundesgerichtshof),[33] holding that the right remedy is an action against the claim being enforced (section 767 ZPO - "Vollstreckungsgegenklage") rather than a mere objection against the manner of enforcement or non-enforcement (section 766 ZPO - "Vollstreckungserinnerung"). For the time being, this pragmatic decision may settle the issue for practical purposes in Germany; upon closer examination from a theoretic perspective, however, it raises almost as many new questions as it has tried to answer.[34]

VII. THE INTERNATIONAL DIMENSION

It seems obvious that enforcement in general and enforcement agreements in particular pose even greater problems in cross-border cases. This is additionally complicated by the fact that there is almost no guidance provided by national or international law-makers. The GCE, for example, is expressly meant to address domestic and cross-border settings alike, but in the latter respect it turns out to be very vague. Another example of quite an unspecific provision is article 34 of the 2007 Hague Maintenance Convention,[35] which requires its Contracting States (such as Brazil and the Member States of the European Union) to make available in domestic law effective measures to enforce decisions under this Convention, specifying that such measures may include "the use of mediation, conciliation or similar processes to bring about voluntary compliance". Taking a closer look, three sets of problems seem particularly worthy of discussion:

Firstly, a problem often faced in transnational litigation is immunity of the defendant. Under public international law, it is generally acknowledged that an immune party, such as a state or state entity, may submit to the jurisdiction of the courts of another state, either by way of a unilateral declaration or by an agreement to that effect. In practice, such agreements can often be found in the terms of state bonds. The tricky question, however, is whether submission to jurisdiction does also apply on the enforcement level when a judgment has been

33. Bundesgerichtshof, 18 May 2017 - VII ZB 38/16, ECLI:DE:BGH:2017:180517BVIIZB38.16.0.
34. For (at least partly critical) assessments see Gössl, NJW (Neue Juristische Wochenschrift) 2017, 2205; Walker/Schmitt-Kästner, WuB (Entscheidungsanmerkungen zum Wirtschafts- und Bankrecht) 2017, 506.
35. Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

rendered against the defendant. This is answered in the negative, for example, by article 4] 32] of the Vienna Convention on Diplomatic Relations of 18 April 1961: "Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary."

Secondly, it should be considered whether ordinary private parties could determine by agreement the states in which enforcement can or cannot take place.[36] Such an arrangement would work similarly to a choice-of-court agreement as regards execution. Unfortunately, instruments such as the Brussels Recast Regulation[37] and the Hague Choice of Court Convention[38] provide no provisions dealing with enforcement agreements. It seems as if under the domestic law of most states it is not up to the parties do decide under which preconditions a foreign judgment can be recognised and enforced. More attention should be paid to negative agreements stipulating that foreign judgments shall not be enforced in particular states or groups of states. Such agreements would allow the debtor to protect his assets in certain *fora*, leaving it to the creditor to bring enforcement proceedings in other states. This can make sense as long as it does not deprive the creditor of any realistic chance to achieve satisfaction. Therefore, *in dubio pro libertate*, it is suggested to allow such agreements in international business, and it would be helpful to get guidance from the legislator in the near future, in particular on the EU level or from the Hague Conference.

The third question is whether in cross-border cases there should be room for choice of enforcement law. It seems clear that the parties, even by voluntary agreement, cannot stipulate that enforcement in Brazil, for instance, should be carried out completely in accordance with the German rules. But maybe it would be reasonable and thus admissible for parties to select the law applicable to particular aspects of enforcement. So, for example, it might make sense to uphold an agreement providing that it is not the *lex fori executionis* but the rules of the debtor's domicile that should determine which assets shall exempt from execution.

VIII. CONCLUSIONS

At least to a certain extent, leaving room for enforcement agreements can facilitate enforcement proceedings and increase the likelihood of an amicabl

36. For a discussion of some basic questions related to this see *Hau*, Executio non conveniens? – Ausschluss der Vollstreckung anerkennungsfähiger ausländischer Entscheidungen, ZVglRWiss (Zeitsc. für Vergleichende Rechtswissenschaft) 116 (2017), 23 (41-43).
37. Regulation (EU) no. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast).
38. Hague Convention of 30 June 2005 on Choice of Court Agreements.

termination of disputes. However, there is and there should be no "enforcement à la carte": In many cases, it is simply in the best interest of a vulnerable party to limit freedom of contract when it comes to enforcement agreements. Even parties acting on an equal footing should not be allowed to adjust each and every parameter to their particular preferences, likes and dislikes. Presumably, there is no doubt as to the objectives of enforcement law: efficiency, fairness and a positive balance between the rights and interests of the parties.[39] However, in this context, it is an end in itself that enforcement is defined and substantiated by a clear legal framework, setting out the powers, rights and responsibilities of the parties themselves as well as third parties and authorities.[40] Taylor-made solutions may ensure flexibility, but on the flipside, in many cases flexibility will run contrary to transparency and predictability. Therefore, concerning powers, rights and responsibilities, but also the parameters of the organisation of the enforcement process, it is the legislators' task to put things on the right track. The parties, on the other hand, should not be saddled with that, but should rather enjoy autonomy for minor adjustments to their particular needs. It does seem reasonable, however, to boost party autonomy in international cases in terms of consensual choice between the available *fora* for enforcement.

39. See, for example, Council of Europe Rec (2003) 17 (note 5), preamble.
40. This, too, is correctly emphasised in the aforementioned Recommendation, sub III [1] [a]-[b], [2] [a]-[c].