

The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

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Introduction

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the

Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto* deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that

arose in the litigation discussed below are at least as significant for European private international law as the infamous case *C-7/98 Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted improperly in flagrant breach of European and domestic human rights standards.

Facts

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target - who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay - was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid

Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10 G v de Visser ECLI:EU:C:2012:142*. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593*; *Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825*; *Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the

claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais*, 22 March 2010) suggest both that the claimant regarded Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia*

judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced - in fact at that point the Spanish lawyers had only been *instructed* to bring a challenge - and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyrrhic victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 - 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private

international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

"This Regulation seeks to promote the fundamental rights and takes into account the principles recognised 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."

These events left Lee's lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

"All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense."

The Constitutional Court - which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts - concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence

had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

Reflections on some of the wider issues

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings - all of which *Lee* also had to fund - concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find

English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee*, like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

