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## Notaries and their debt-collection writs under the Brussels Ia Regulation. A difficult characterisation

Martina Mantovani\*

This paper analyses and compares the notarial summary debt collection procedures of Croatia, Hungary and Spain with the aim of determining the status that notaries shall be given under the Brussels Ia Regulation. Against the backdrop of the CJEU’s judgment in *Pula Parking*, this paper contends that the choice of including or excluding notaries within the Brussels Ia Regulation notion of “court” is essentially “political” in nature and lies with the EU legislature. Noting the impossibility, in current law, of encompassing Croatian and Spanish notaries within that notion, this paper will additionally assess whether their “orders to pay” could circulate as “authentic instruments” under that regime.

**Keywords:** Brussels Ia Regulation; European enforcement order regulation; notaries; order for payment procedures

### A. Introductory remarks

The principle of mutual trust in the administration of justice constitutes the backbone of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Brussels Ia).<sup>1</sup> It allows for the creation of a “EU judicial area” within which judgments in civil and commercial matters given in one Member State can freely circulate in all Member States “without the need for any special procedure”.<sup>2</sup> Grounded in the principle of equality of Member States before the law,<sup>3</sup> the principle of mutual trust in the administration of justice requires each Member State to presume that, in rendering “judgments” subject to the regime of free circulation, the systems of administration of justice of all its peers are equally capable of ensuring compliance with the fundamental rights and principles recognised by the Charter, particularly Article 47.

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<sup>1</sup>Reg (EU) 1215/2012 [2012] OJ L351/1.

<sup>2</sup>*Ibid*, Recital 26.

<sup>3</sup>See K Lenaerts, “La vie après l’avis: Exploring the principle of mutual (yet not blind) trust” (2017) 54 *Common Market Law Review* 805, 807.

Nonetheless, the task of defining what exactly forms part of a Member State's "system of administration of justice" may be complicated by the ongoing phenomenon of privatisation of civil justice. This has resulted in the creation of hybrid judicial systems where judicial or quasi-judicial powers are exercised not only by courts "in the institutional sense", but also by other private and profit-seeking actors or agencies.

This paper focuses on one example of this phenomenon: the devolution to notaries of legal actions for debt recovery. Conceived as a response to the increased demand for debt-collection proceedings during the global financial crisis,<sup>4</sup> three Member States have outsourced<sup>5</sup> debt recovery to notaries – Croatia (2006), Hungary (2009) and Spain (2015). By transferring debt-collection procedures from state-financed court systems to notaries, these reforms have significantly shifted costs from the public to the private sector,<sup>6</sup> while unburdening courts of a considerable number of cases.<sup>7</sup> These are now processed by notaries through a summary *ex parte* procedure,<sup>8</sup> which guarantees swift handling of these cases in the interest of procedural expediency.

While indisputably beneficial for the efficiency of domestic civil justice systems, reforms of this kind remain a source of concern for EU private international law instruments based on the principle of mutual trust and mutual recognition. In particular, should these notaries be encompassed within the scope of

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<sup>4</sup>In Hungary, non-litigious proceedings (including order for payment proceedings) increased around 58.5 per cent from 2006 to 2009: M Kengyel, "Economic Analysis of Civil Litigation in Hungary", in *Recent Trends in Economy and Efficiency of Civil Procedure, Materials of International Conference*, (Vilnius University Press, 2013), 123. In Spain, the number of new *procedimientos monitorios* introduced on an annual basis increased 112 per cent from 2007 to 2010 (data retrieved from <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Datos-penales-civiles-y-laborales/Civil-y-laboral/Efecto-de-la-Crisis-en-los-organos-judiciales/> accessed on 12 October 2018). In Croatia, the reform aimed at rectifying the country's poor performance in the EU efficiency indicators for the judiciary during the pre-accession phase: A Uzelac and M Bratković, "Certificiranje nespornih tražbina u domaćem i poredbenom pravu", in V Rijavec (ed), *Zbornik Radova. Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična dostignuća* (Pravni fakultet, 2015), 93.

<sup>5</sup>Outsourcing is defined as the procuring of products or services from an outside supplier, usually on the grounds of economising. See "outsourcing" in *Black's Law Dictionary* (West, 10th edn, 2014).

<sup>6</sup>European notaries are usually not public servants but private professionals paid by the parties who resort to their services (exceptions apply: eg notaries are public employees in Baden-Württemberg).

<sup>7</sup>In Croatia, the reform relieved courts to such an extent that they could clear their outstanding backlog of enforcement cases in just one year: see data from Croatian Ministry of Justice <https://pravosudje.gov.hr/pristup-informacijama-6341/strategije-planovi-i-izvjesca/statisticki-pregled/6719> 21 accessed on 12 October 2018. In Hungary, following the reform the number of new non-contentious proceedings brought before state courts decreased by around 56 per cent over a single year: see Kengyel, *supra* n 4, 123.

<sup>8</sup>See *infra*, B2.

these principles? The answer to this question will finally depend on the characterisation that these notaries receive under the Brussels Ia Regulation. Three alternatives *prima facie* present themselves. One, notaries might be assimilated to ordinary “courts” and thus empowered to render proper “judgments” subject to free circulation under the Brussels regime. Two, their debt-collection activities might be included in the better-established notarial competence in drafting authentic instruments, equally subject to free circulation under that regime. Three, notaries acting in this specific capacity might be considered as a *tertium genus*, excluded from either characterisation and therefore falling outside the scope of application of the Brussels Ia Regulation.

Part B of this paper examines how the Brussels Ia Regulation approaches the identification of a “court or tribunal of a Member State”, empowered to issue “judgments” under that regime. Part C and D focus on the CJEU’s judgment in *Pula Parking*<sup>9</sup> and critically examine the legal argument used to exclude Croatian notaries from that notion, *i.e.* an alleged noncompliance with the adversarial principle. Noting that, as opposed to Croatian notaries, Hungarian notaries are explicitly assimilated to a “court” under Article 3 of the Brussels Ia Regulation, Part E attempts to rationalise the approach adopted by that instrument by looking into the nature of that provision. This clarification will additionally allow for a prognosis on the legal regime governing the cross-border circulation of Spanish notarial writs. Finally, Part G seeks to determine whether, lacking any possibility of characterising notaries as “courts”, their debt-collection writs could circulate as “authentic instruments” under the Brussels Ia Regulation.

## B. Notaries as “courts” under the Brussels Ia Regulation

The question of the characterisation of an adjudicating authority as a “court” is a long-standing one, having engaged the CJEU on multiple occasions particularly within the framework of Article 267 TFEU. Under this provision, a “court”, entitled to refer a request for a preliminary ruling to the CJEU, shall be an independent body established by law, with permanent character and compulsory jurisdiction, applying rules of law and following an “*inter partes*” procedure, *i.e.* acting in full compliance with the rights of the defence.<sup>10</sup> On the basis of this provision, which enshrines the EU law idea of “public justice”,<sup>11</sup> the CJEU has

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<sup>9</sup>C-551/15 *Pula Parking* [2017] EU:C:2017:193.

<sup>10</sup>Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings [2016] OJ C439/1, para 4.

<sup>11</sup>See PL Murray, “The privatization of civil justice” (2008) 6 *Judicature* 272, defining the idea of “public civil justice” as a system made of public decision-makers, chosen, paid and regulated so as to insulate them from outside influence, who decide cases in transparent and public proceedings, in accordance with rules of law and in full compliance with the rights of the defence.

excluded, over the years, a number of adjudicating bodies from the scope of that notion.<sup>12</sup>

This conception of public justice, which underlies the principle of mutual trust in the administration of justice in the Union, may be significantly undermined by reforms entrusting notaries with a specific competence in debt-collection proceedings. These present two principal weaknesses: firstly, they defer debt-collection cases to *private adjudicators*, as opposed to public decision-makers, paid by the party by whom they are appointed and placed outside the State's system of administration of justice by virtue of external delegation.<sup>13</sup> Secondly, they dispense with full compliance with the rights of the defence in the first, *ex parte* phase of the proceedings, by virtue of the technique of the *inversion du contentieux*.<sup>14</sup>

For some of the instruments of EU private international law, this departure from the "traditional conception" of public justice may be a major obstacle to the assimilation of notaries to a "court" in the institutional sense. This may be the case, in particular, for the Brussels Ia Regulation, whose approach to external delegation of judicial functions is considerably stricter than that of other sectoral instruments dealing with family law and succession (1). Moreover, the relatively recent *Pula Parking* judgment diagnosed a non-compliance of the Croatian procedure with the principle of *audi alteram partem*, thus denying those notaries the status of "court" under that regime (2).

### 1. *The Brussels Ia Regulation vis-à-vis external delegation of judicial functions*

EU private international law instruments dealing with family law and succession acknowledge, to a variable extent, the ongoing phenomenon of privatisation of civil proceedings – having adopted a general and open-ended definition of "court".<sup>15</sup> The Brussels Ia Regulation reasserted a more rigid approach in civil

<sup>12</sup>For example, the Italian prosecution service, for lack of the necessary independence (C-74/95 *X* [1996] ECR I-6609); courts performing merely administrative functions, without being called on to decide a dispute (C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561); arbitration bodies, whose jurisdiction is not compulsory (102/81 *Nordsee Deutsche Hochseefischerei* [1982] ECR 1095).

<sup>13</sup>C-551/15 *Pula Parking* [2017], Opinion of AG Bobek, para 92.

<sup>14</sup>See *infra*, B2

<sup>15</sup>These definitions disregard formal aspects, such as an entity's institutional links to the State's apparatus, focussing rather on the kind of functions performed and/or on the scope of its jurisdiction: see Art 2(1) of Reg (EC) 2201/2003 [2003] OJ L338/1 (Brussels IIa Reg); Art 3 of Reg (EU) 650/2012 [2012] OJ L201/107 (Succession Reg) and Art 2(2) Regulation (EC) 4/2009 [2009] OJ L7/1 (Maintenance Reg)). To overcome the practical difficulties that definitions of this kind may generate, these are often accompanied by the Member States' obligation to notify the Commission of the lists of domestic authorities assimilated to "courts and tribunals" in the institutional sense and provide for simplified procedures for their amendment. On the "merely indicative value" of these lists, see C-658/17, *WB* [2019] EU:C:2019:444, para 48.

and commercial matters.<sup>16</sup> It refused the introduction of a general definition of “court or tribunal”, discussed during its recast, including “any authorities designated by a Member State as having jurisdiction in the matters falling within the scope of this Regulation”.<sup>17</sup> Consequently, Article 2(a) simply provides that “a judgment” under the Brussels Ia Regulation shall be rendered by a “court or tribunal of a Member State”, without providing any definition of such.

Although the absence of a proposed general definition of “court or tribunal” may express an undisguised preference for a purely “institutional” approach to the interpretation of that notion,<sup>18</sup> the Brussels Ia Regulation is not completely impervious to the ongoing privatisation of civil proceedings. Article 3 lists entities that, while not being “courts” in the institutional sense, are expressly included within that concept for specific functions, currently limited to the processing of order for payment applications.<sup>19</sup>

Article 3 expressly includes Hungarian notaries acting within the framework of the (domestic) order for payment procedure. As a result, Hungarian notaries are bound by the rules of jurisdiction of the Brussels Ia Regulation, and their writs circulate as “judgments” under the favourable regime established by Chapter III. Conversely, because Spanish and Croatian notaries are not mentioned, both their status and the fate of their writs under that regime remain, to the present day, highly controversial.

The problem is anything but negligible for the potential adverse effects it may have on legal certainty for economic operators. While still far from the more than 500,000 orders for payment issued annually by Hungarian notaries,<sup>20</sup> Croatian notaries still adjudicate a fairly significant number of cases, 165,300 per year.<sup>21</sup> Spanish notaries, who only adjudicated on 519 cases between 2015 and 2017,<sup>22</sup>

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<sup>16</sup>A more permissive approach is adopted, in civil and commercial matters, by Art 5(3) of Reg (EC) 1896/2006 [2006] OJ L 399/1(EOP) and by Art 62 of the 2007 Lugano Convention [2009] OJ L 147/5, both based on functionality.

<sup>17</sup>Art 2(c) of the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final. For an overview, see A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 2015) 110.

<sup>18</sup>Encompassing only judicial bodies forming part of the “judicial structure of a Member State”: see Opinion of AG Bobek, *supra* n 13, para 85.

<sup>19</sup>As opposed to the instruments mentioned *supra* n 17, the Brussels Ia Regulation does not provide for any simplified procedure for amending this provision. An identical approach is adopted by Art 4(7) of Reg (EC) 805/2004 [2004] OJ L143/15 (EEO).

<sup>20</sup>This data refers to 2012, when Hungarian notaries issued 560,361 orders for payment: see H Rész, “A Fizetési Meghagyásos Eljárást Követő Peres Eljárás Szabályai”, in I Varga and T Éless (eds), *Szakértői Javaslát az új polgári perrendtartás kodifikációjára* (HVG-Orac, 2016), 802.

<sup>21</sup>Average from 2006 to 2016, calculated on the basis of data retrieved from the website of the Croatian Ministry of Justice, *supra* n 7.

<sup>22</sup>Data retrieved from the Centre for Statistics of the Spanish General Counsel of Notaries, <http://www.notariado.org/liferay/web/cien/estadisticas-al-completo>, “Acta de procedimiento de reclamación de deudas dinerarias non contradichas”, accessed on 12 October 2018.

seem nonetheless set to play a bigger role in the future given the considerable number of order for payment cases introduced annually in Spain.<sup>23</sup>

While the silence of Article 3 on the legal status of Spanish notaries is easily explainable – the Brussels Ia Regulation having been adopted in 2012, well before the 2015 introduction of the *procedimiento monitorio notarial* in Spain – different considerations apply to Croatian notaries. Their position is by far more delicate, insofar as said Regulation was adopted 6 months *before* the accession of Croatia to the EU, but *after* the publication of the list of technical adaptations to the EU secondary legislation rendered necessary by virtue of this accession. According to AG Bobek, the Croatian Government was consequently “simply unable” to have its notaries included in Article 3 during the legislative process, while being nonetheless bound by this provision after the accession.<sup>24</sup>

In 2017, however, the status of Croatian notaries under the Brussels Ia Regulation was clarified by the CJEU, called to decide whether the system set in place by that instrument allowed it to expand in any way the range of authorities qualifying as “courts or tribunals” under that regime.

## **2. The Brussels Ia Regulation vis-à-vis the technique of the inversion du contentieux: the case Pula Parking**

In 2005,<sup>25</sup> the Croatian legislator transferred a specific kind of enforcement proceedings – those based on “credible” documents – from state courts to notaries. Since then, these notaries decide on debt-collection applications within the framework of a procedure based on the technique of the *inversion du contentieux*.

In procedures inspired by this technique, the competent authority adopts a decision *ex parte*, i.e. on the basis of the submissions of the claimant and without any prior participation of the defendant. Only after the writ has been served can the defendant exercise his rights of defence by lodging an opposition. If he fails to act, the order becomes an enforceable title. Therefore, while in ordinary proceedings an enforceable title arises *only after* the claimant has introduced a contradictory debate with the defendant, in procedures based on said technique the enforceable title comes into existence if the defendant manifests no interest in pursuing a contradictory debate.<sup>26</sup>

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<sup>23</sup>With an average of 583,776 cases per year over the last 5 years: data retrieved from [www.poderjudicial.es](http://www.poderjudicial.es), n 4.

<sup>24</sup>Cf AG Bobek, *supra* n 13, paras 64-5. Croatia was present in the Council Working Party on Civil Law Matters (Brussels I) and could have *at least* raised the issue there (thanks to Paul Beaumont for this point based on his presence in the Working Party representing the UK).

<sup>25</sup>Art 102 of Law of 12th July 2005, amending the pre-existing Law on Enforcement.

<sup>26</sup>See JP Correa Delcasso, “Le titre exécutoire européen et l’inversion du contentieux” (2001) 53 *Revue internationale de droit comparé* 61 defining this procedure as a « subtle

In C-551/15, *Pula Parking*, a Croatian company resorted to the domestic *ex parte* notarial procedure to obtain a writ of execution against a German domiciliary who omitted to pay the amount due for using the facility managed by the applicant. The defendant opposed the writ, contesting that notaries are included in the scope of application of Brussels Ia Regulation because they are not “courts” under that instrument.

Despite the seemingly exhaustive enumeration of the authorities classified as a “court” in Article 3, the CJEU struggled to come up with a convincing reason to exclude Croatian notaries from that classification. Finally, having analysed the architecture of the Croatian notarial procedure in the light of the fundamental objectives pursued by the Brussels Ia Regulation, the Court concluded that Croatian notaries shall be excluded from the notion of “court or tribunal of a Member State” due to the allegedly non-*inter partes* character of the procedure within which they operate. However, in *Pula Parking* the link between compliance with the adversarial principle and the notion of “court or tribunal of a Member State” remains rather obscure, calling for further clarification.

### C. The *inter partes* argument in *Pula Parking*: genesis and interpretations

The adversarial principle, or *audi alteram partem*, states that a decision cannot stand unless the person directly affected by it was given a fair opportunity to state his claim and to answer to the other side’s case.<sup>27</sup> As seen above, the technique of the *inversion du contentieux* limits to a certain extent the contradictory proceedings between the parties, changing in any case its underlying logic. Because of that, in *Pula Parking* both the Advocate General and the CJEU found that Croatian enforcement proceedings did not comply with the adversarial principle. However, different standards were used in the assessment reached in the AG’s Opinion (1) and in the Court’s judgment (2). Since the wording of this judgment is rather unclear and leaves room for interpretation, it could be argued that the CJEU is basing its assessment on its previous case law on the identification of a “contentious judgment” under the Brussels Ia Regulation.

#### 1. The opinion of AG Bobek

AG Bobek’s diagnosis of the *ex parte* character of the Croatian procedure follows from a reasoning which distinguishes, at the outset, a “default approach” to the interpretation of the notion of “court” under the Brussels Ia Regulation from an approach reserved to “unexpected and exceptional situations”.

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adaptation » of ordinary proceedings, where one of their components – the contradictory debate – has simply been postponed to a later point in time and not completely eradicated.  
<sup>27</sup>“Natural Justice”, in *Oxford Dictionary of Law* (Oxford University Press, 8th edn, 2015).



While, in his view, the “default approach” to the identification of a “court” shall remain “institutional” – *ie* “based on a simple deferral to the recognised judicial structures of the Member States”<sup>28</sup> – AG Bobek acknowledges that a correction might be needed for those entities which operate “as courts” by virtue of an external delegation of judicial functions.<sup>29</sup> For these purposes, he construes an autonomous “EU law functional definition of court”, meant to operate as a “safety valve”.

Surprisingly, this functional definition is not based on the CJEU’s case law on the Brussels regime. It purports, instead, to transpose within this regime the criteria from Article 267 TFEU for the identification of a “court”<sup>30</sup> which, as seen above, include an “*inter partes*” procedure, “*i.e. a procedure of contradictory judicial nature*”.<sup>31</sup>

According to the AG, this condition is only fulfilled where an entity is empowered to adjudicate on an “actual dispute” between the parties as a result of the effective submission *by both* of contradictory arguments. On this basis, Croatian enforcement proceedings are deemed “not *inter partes by definition*” since, in the light of the notary’s obligation to transfer the case to the court of first instance in case of objections, only this court will have “jurisdiction over any *actual dispute*”.<sup>32</sup>

This interpretation of the adversarial principle therefore sees in the limitation of the notary’s competence to the first phase of the procedure the reason for its exclusion from the notion of “court”. One may admittedly object that an identical limitation characterises the competence of court clerks, whose decisions are nonetheless “judgments” under the Brussels Ia Regulation.<sup>33</sup> In reality, albeit formalistic,<sup>34</sup> the solution devised by the AG is perfectly consistent with its premise. The orders issued by a court clerk – eventually through the use of an IT system – draw their “judicial character” from the organisational link this clerk has with “a court in the institutional sense”. Conversely, this “default (institutional) approach” cannot

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<sup>28</sup>AG Bobek, *supra* n 13, para 83.

<sup>29</sup>*Ibid.*

<sup>30</sup>With an important correction, dictated by the principle of mutual trust: whereas in the context of the admissibility of preliminary rulings, “the practice could arguably be labelled as a somewhat lenient ‘if in doubt, it’s admissible’ approach”, here any of these criteria shall be a *conditio sine qua non* of the characterisation of an entity as “court or tribunal” under the Brussels regime: AG Bobek, *supra* n 13, paras 104-6.

<sup>31</sup>*Ibid.*, para 101.

<sup>32</sup>*Ibid.*, paras 111 and 113.

<sup>33</sup>See, for Germany, Austria and Spain, G Porcelli, *Decreto Ingiuntivo Europeo. Sistema e Pratica del Recupero Crediti* (Altalex, 2011).

<sup>34</sup>Some argue that the “judicial” nature of a decision should not depend on its formal aspect, “such as what it is called and how it came into being”, but rather on its substantive effects of being enforceable and capable of having legal force: C-394/07 *Gambazzi* [2009] ECR I-2563, Opinion of AG Kokott, paras 28-9 and G Cuniberti, “La reconnaissance en France des jugements par défaut anglais”, in (2009) *Revue critique de droit international privé* 685.

be retained with respect to notaries, the notarial system being generally separate from the State's judicial apparatus.

It is worth stressing that the understanding of the principle of *audi alteram partem* propounded by the Opinion has no clear roots in the CJEU's earlier case law interpreting the Brussels regime. This case law adopts no clear stance on the question as to whether the second phase of the procedure, concerned with the review of the writ, may occur before an entity other than the one adopting it. If it is true that all cases dealing with *ex parte* orders decided before *Pula Parking* concerned instances where the adoption of the writ and its review were entrusted to the same authority, the wording used by the Court is not in itself conclusive in establishing that this shall unfailingly be the case.<sup>35</sup>

## 2. The CJEU's interpretation

On first reading, the *Pula Parking* judgment does not seem to openly embrace the line of argument proposed by the Advocate General. The CJEU does not overtly emphasise either the obligation of the notaries to transfer all "actual dispute[s]" to the court of first instance, or the limitation of the notarial competence deriving therefrom. Moreover, the judgment contains no mention of the case law on Article 267 TFEU. It builds, instead, a self-standing definition of 'court or tribunal', entirely based on the scheme and objectives of the Brussels Ia Regulation,<sup>36</sup> requiring it, *inter alia*, to operate "in compliance with the principle of *audi alteram partem*".<sup>37</sup> In *Pula Parking*, following a brief description of the Croatian procedure, the CJEU summarily concludes that:

57 It follows ... that the writ of execution based on an "authentic document", issued by the notary, is served on the debtor only after the writ has been adopted, without the application by which the matter is raised with the notary having been communicated to the debtor.

58 Although it is true that debtors have the opportunity to lodge oppositions against writs of execution issued by notaries and it appears that notaries exercise the[ir] responsibilities ... subject to review by the courts, to which notaries must refer possible challenges, the fact remains that the examination, by notaries, in Croatia, of an application for a writ of execution on such a basis is not conducted on an *inter partes* basis.

Based on the wording of the judgment, it may appear that the main problem with Croatian proceedings is that the defendant is made aware of the action

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<sup>35</sup>While in 125/79 *Denilauler* [1980] ECR I-1553, para 13 and 474/93 *Hengst Import* [1995] ECR I-2113, para 14, the Court refers to the existence of a remedy, in the form of an *inter partes* hearing, "in the State" where the order was made, in other judgments it refers to a defence "before the court which gave the judgment": 166/80 *Kloms* [1981] ECR I-1593, para 9, and C-123/91 *Minalmet GmbH* [1992] ECR I-5661, para 18.

<sup>36</sup>Cf *Pula Parking*, *supra* n 9, para 43.

<sup>37</sup>*Ibid*, para 54.

against him *only after* the writ is adopted, being thus prevented from actively participating in the procedure prior to this moment.

This reading, however, would have the effect of calling into question the *inter partes* character of all procedures based on the principle of *inversion du contentieux*, whose core characteristic is, precisely, that a decision is adopted at the end of a phase of the proceedings where the defendant had no possibility to participate, and without any prior communication of the claimant's application. In procedures of this kind, the protection of the rights of the defence is postponed to a later stage, being embodied in the opportunity to prevent an enforceable title from coming into being through the opposition.<sup>38</sup>

In spite of the categorical terms used by the CJEU in *Pula Parking*, its former case law on the Brussels regime openly recognises that a procedure based on *inversion du contentieux* may be "adversarial in nature", if it complies with three cumulative conditions. Firstly, according to *Denilauler*,<sup>39</sup> an order adopted at the conclusion of a first "*ex parte*" phase of the procedure may still qualify as a "contentious judgment" if it "has been, or has been capable of being, the subject in the State of origin of an inquiry in adversary proceedings". For a procedure to be "adversarial", it suffices that the defendant had a genuine opportunity to state his claim in the State of origin, without it being necessary that said opportunity was effectively taken up.

Secondly, the order shall not have "any effect in law"<sup>40</sup> prior to being served upon the defendant. The case *Minalmet* further specified that the order shall not have, in particular, any legally enforceable effect pending the deadline granted to the defendant for filing an opposition, so as to grant him a genuine possibility to defend himself before the coming into being of an enforceable title.<sup>41</sup> Finally, such a "genuine possibility" exists, according to Article 45(1)(b) of the Brussels Ia Regulation, only where the "document instituting the proceedings or an equivalent document" was served upon the defendant "in sufficient time and in such a way to enable him to arrange his defence". The case *Hengst Import* clarified that the defendant shall also be given, in that document, due and complete information about both the claim and the procedural steps to lodge an opposition. Since, in procedures based on the principle of *inversion du contentieux*, only the combined reading of the creditor's initial application and of the order would provide the defendant with an adequate level of information, the "document instituting the proceedings" may consist of the combination of these two documents.<sup>42</sup>

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<sup>38</sup>See Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM/2002/0746 final, point 2.2.

<sup>39</sup>*Denilauler*, *supra* n 35, para 13, emphasis added.

<sup>40</sup>C-39/02 *Mærsk Olie & Gas* [2004] ECR I-9657, para 51.

<sup>41</sup>*Minalmet GmbH*, *supra* n 35, para 20.

<sup>42</sup>*Hengst Import*, *supra* n 35, where the Court stressed that, on the one hand, the *decreto ingiuntivo* was just a form whose intelligibility depended on its combined reading with the claimant's original application and, on the other hand, service of the application alone would not equally have enabled the defendant to decide whether or not to defend

In short, according to the *Denilauler/Minalmet/Hengst Import* case law, the adversarial character of a procedure derives from (1) lack of provisional enforceability, (2) timely service and (3) provision of due information to the defendant. When assessed against this backdrop, the CJEU's remark whereby, in Croatian enforcement proceedings, (1) "a writ of execution", therefore presumably an enforceable title in itself (2) "is served on the debtor only after it has been adopted" and (3) "without the application by which the matter is raised with the notary having been communicated to the debtor",<sup>43</sup> may acquire new meaning. In particular, this passage may signal that the CJEU is actually excluding the *inter partes* nature of those proceedings on the basis of their ascertained non-compliance with one or more of the requirements set forth by said case law.

This reading, which does not clearly emerge from an analysis limited to *Pula Parking*, seems nevertheless confirmed by the judgment rendered, on the same day and by the same Chamber, in *Zulfikarpašić*,<sup>44</sup> also dealing with the question of whether Croatian notaries could qualify as "courts", although for the purposes of the EEO Regulation.<sup>45</sup> Therein, the CJEU replicates, with an identical wording, the findings set out by paragraphs 57 and 58 of *Pula Parking*,<sup>46</sup> but it also develops its argument by adding that:

48 Article 16 of that regulation, read in the light of recital 12 thereof, provides for the communication of "due" information to the debtor in order to enable him to arrange for his defence and thus ensure the *inter partes* nature of the proceedings leading to the issuing of the enforcement order capable of giving rise to a certificate. Those minimum standards reflect the EU legislature's intention to ensure that proceedings leading to the adoption of judgments on uncontested claims offer adequate guarantees of respect for the rights of the defence ...

49 A national procedure whereby a writ of execution is adopted without service of the document instituting the proceedings or the equivalent document, and whereby information is provided, in that document, to the debtor about the claim, having the effect that a debtor is aware of the claim only when that writ is served on him, cannot be classified as *inter partes*.<sup>47</sup>

*Zulfikarpašić* clearly states that the *inter partes* nature of the proceedings follows from the communication of due information to the debtor, and that the Croatian procedure does not satisfy that standard. Even though the CJEU specifically refers to provisions of the EEO Regulation, this additional clarification seems perfectly transposable to *Pula Parking*. In fact, the provisions referred to in

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the action since, without the *decreto ingiuntivo*, he would not know whether the court had granted or refused the application.

<sup>43</sup>*Pula Parking*, *supra* n 9, para 57.

<sup>44</sup>C-484/15 *Zulfikarpašić* [2017] EU:C:2017:199.

<sup>45</sup>Reg (EC) No 805/2004, *supra* n 19.

<sup>46</sup>*Zulfikarpašić*, *supra* n 44, paras 44-6.

<sup>47</sup>*Ibid.*

*Zulfikarpašić* aim at achieving, within the framework of the EEO, the same objectives pursued by the *Denilauler/Minalmet/Hengst Import* case law within the system of the Brussels Ia Regulation. In cases where the claim remained uncontested, both sets of principles link the possibility of enforcing the judgment in another Member State to the existence of sufficient guarantees of respect of the rights of the defence in the State of origin.<sup>48</sup>

The parallel reading of these two judgments may effectively confirm that Croatian proceedings are, owing to their architecture,<sup>49</sup> deemed incapable of ensuring that the defendant receives, in sufficient time and in such a way as to enable him to arrange for his defence, adequate information about (1) the action against him; (2) the requirements for his active participation in the proceedings to contest the claim and (3) the consequences of his non-participation.<sup>50</sup> To assess whether this reading of the *Pula Parking* judgment is correct, the next section will analyse the Croatian procedure in the light of the requirements set by the *Denilauler /Minalmet/Hengst Import* case law.

#### **D. The adversarial nature of the Croatian notarial procedure?**

An assessment of the Croatian enforcement proceedings through the prism of the *Denilauler/Minalmet/Hengst Import* case law requires a prior clarification as to the *nature* of those proceedings (1). Having ascertained that these proceedings apparently satisfy all three conditions set forth by said case law (2), the present section concludes that the interpretive solution devised by the CJEU in *Pula Parking* is grounded in a different, and ultimately prevailing, argument, centred upon the principle of legal certainty (3).

##### **1. The relevance of the *Denilauler/Minalmet/Hengst Import* case law for assessing the *inter partes* character of the Croatian procedure**

The formal denomination of the Croatian notarial procedure as “enforcement proceedings”<sup>51</sup> may in principle be an argument against the use of *Denilauler/ Minalmet/Hengst Import* case law for assessing its compliance with the adversarial principle. Since the objective pursued by this case law is to ensure that the defendant has a genuine possibility of preventing an enforceable title from coming into

<sup>48</sup>As concerns the Brussels Ia Reg, see recital 29 and Art 45(1)(b), as well as *Denilauler*, *supra* n 35, paras 13-4, *Minalmet*, *supra* n 35, para 20, *Hengst Import*, *supra* n 35, paras 20-1. As concerns the EEO Regulation, see its recital 12, invoked in *Zulfikarpašić*, *supra* n 44, para 48, as well as Arts 16 and 17.

<sup>49</sup>Cf *Pula Parking*, *supra* n 9, para 57 and *Zulfikarpašić*, *supra* n 44 para 49.

<sup>50</sup>Cf recital 12 to the EEO Regulation and the *Denilauler/Minalmet/Hengst Import* case law, described above.

<sup>51</sup>On the incorrect translation as “enforcement proceedings based on an authentic document” in the English version of the judgment, see Part G.

being, its relevance is necessarily limited to a phase of the procedure where an enforceable title in the proper sense still does not exist. Conversely “traditional” enforcement proceedings are generally situated at a later stage, presupposing that an enforceable title already exists.

However, despite its denomination, the Croatian procedure does not seem to belong to the *genus* of enforcement proceedings *strictu sensu*, its functional appreciation disclosing instead a strong resemblance to an order for payment procedure<sup>52</sup> based on the evidence model.<sup>53</sup> The first branch of this debt-collecting procedure, managed by the notary, is in fact situated before the coming into being of an enforceable title,<sup>54</sup> the use of the technique of *inversion du contentieux* opening a fast track for its creation.

Croatian proceedings present nonetheless the peculiarity of merging together two phases – the creation of the enforceable title and its execution – which are generally kept separate in the procedural traditions of other Member States. This hybridity emerges, at once, in the contents of an application for a writ of execution and in the writ itself. The application shall contain *both* a request for an order, directed to the debtor, to settle his debt within 8 days, *and* a request concerning the subsequent enforcement of this payment order. Similarly, the writ issued by the notary does not simply enjoin the debtor to settle the claim but orders, as well, execution for the purpose of future forced execution of the claim.<sup>55</sup> At this stage, however, the effects of this order of execution are merely potential, since this writ is not yet enforceable<sup>56</sup> and it does not directly open the way to execution. For this purpose, the writ must be served on the debtor in accordance with rules ensuring that he has the opportunity to contest the claim.<sup>57</sup> It is only if no objection is lodged in time that the notary will, at the creditor’s request, certify the claim as “undisputed” and append the veritable order of enforcement by stamping the original writ.<sup>58</sup>

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<sup>52</sup>As recognised, as well, by C-484/15 *Zulfikarpašić* [2017], Opinion of AG Bot, para 110.

<sup>53</sup>Requiring the plaintiff to produce a written proof to justify the claim at stake, such as the “credible document” required by the Croatian law of enforcement.

<sup>54</sup>The “credible document” on which the procedure is based is not, as such, an enforceable title. Pursuant to Art 31(1) of the Croatian Law on Enforcement, a “credible document” may consist of “an invoice, a bill of exchange or a cheque protest accompanied, where appropriate to establish a claim, by return invoices, an official document, an extract from accounting records, a legalised private document or any document considered to be an official document under specific rules”.

<sup>55</sup>Art 41 of the Law on Enforcement.

<sup>56</sup>While, as a general rule, Art 44 of the Law on Enforcement provides that execution may be carried out even before a writ of execution becomes legally effective, para (3) specifies that when the enforcement is ordered on the basis of a credible document, said enforcement shall take place only after the writ of execution becomes “legally effective”, ie after the apposition of the order of enforcement.

<sup>57</sup>AG Bot, *supra* n 52, para 111.

<sup>58</sup>Arts 41(4) and 283(1) of the Law on Enforcement.

Albeit peculiar, this “hybrid character” of Croatian notarial proceedings does not change the fact that, in Croatian proceedings as in ordinary order for payment procedures, the phase concerned with “enforcement”, in the proper sense *only begins at a later stage*, after the title becomes enforceable. In Croatian proceedings this happens once the writ, stamped by the notary with the order of enforcement, is served (again) on the defendant.<sup>59</sup>

Against this backdrop, resorting to the *Denilauler/Minalmet/Hengst Import* case law to inquire into the *inter partes* character of the first branch of Croatian procedure, concerned with the creation of the enforceable title, seems legitimate.

## **2. The Croatian procedure vis-à-vis the requirements of *Denilauler/Minalmet/Hengst Import***

When analysed from the standpoint of compliance with the rights of defence, as embodied in the CJEU case law, the Croatian procedure seems to conform to the standard set by EU law. For starters, the CJEU’s finding that a Croatian writ of execution is adopted “without service of the document instituting the proceedings or the equivalent document”<sup>60</sup> appears in contradiction with the authority of *Hengst Import*. This authority requires seeing *the writ itself* as forming an integral part of the document instituting the proceedings, if necessary<sup>61</sup> in conjunction with the creditor’s original application. Admittedly, Article 281(1) of the Croatian Law on Enforcement provides that only the writ of execution, and not with the creditor’s application, will be served upon the defendant. However, under Croatian law, the statutory contents of the writ replicate almost in full the contents of the application, so that the latter is somehow incorporated into the former.<sup>62</sup> Since the writ provides also for additional information on the procedural steps to be taken to lodge objections,<sup>63</sup> the service of the writ can arguably ensure, alone,

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<sup>59</sup>In this subsequent phase, the defendant will have an additional possibility to file objections, although on very limited grounds (Arts 284(5) and 286(1) Law on Enforcement).

<sup>60</sup>*Zulfikarpašić*, *supra* n 44, para 49 and *Pula Parking*, *supra* n 9, para 57, although the latter refers to the notion of “application”.

<sup>61</sup>*Supra* n 42. The Court’s holding in *Hengst Import* should be read as implying that the “document instituting the proceedings or an equivalent document” shall be constituted by both the order and the application only in cases where the contents of any of the two, taken individually, provide the claimant with insufficient or incomplete information.

<sup>62</sup>Both application for a writ of execution (Art 39 of Law on Enforcement) and the writ of execution (Art 41, in the version prior to the 2017 reform) shall include an indication of: the enforceable or trustworthy document which serves as basis for demanding execution; the execution creditor, the execution debtor and their personal identification numbers; the claim whose fulfilment is demanded/ordered, the means of execution; if necessary, the object upon which enforcement shall take place; any other data necessary to carry out execution.

<sup>63</sup>In addition to the elements listed above, a writ of execution shall also contain “a warning to the defendant that the objection must be reasoned, and the indication of the legal consequences of his default” (Art 41(3)) and the indication of “a legal remedy” (Art 41(5)).



stronger protection of the rights of defence. Content wise, the amount of information provided thereby seems moreover aligned with the minimum standard of due information set by EU law for “documents instituting the proceedings or equivalent documents” in cases involving uncontested claims.<sup>64</sup>

The Croatian procedure appears equally unproblematic as concerns the *timing* with which this due information is communicated to the defendant. Following the service of the document instituting the proceedings, as understood above, the proceedings continue before the notary in perfect compliance with the *Denilauler* and *Minalmet* case law. The debtor is effectively given an opportunity to state his claim<sup>65</sup> before actual enforceability arises, the order of execution contained in the writ having no “effect in law”<sup>66</sup> before the expiry of the deadline granted for exercising the rights of defence.

### **3. The relevance of the *Denilauler/Minalmet/Hengst Import* case law for construing the notion of “court or tribunal” under the Brussels Ia Regulation**

In light of the above, it seems reasonable to assume that the writ in *Pula Parking* would have qualified as a “contentious judgment” under the Brussels Ia Regulation had it been adopted by “a court in the institutional sense”, the minimum standard set out by Article 45(1)(b) and by the *Denilauler /Minalmet/Hengst Import* case law having been met.<sup>67</sup>

According to AG Bobek, however, said case law has no bearing on the identification of a “court or tribunal of a Member State” under that Regulation. He seems to assume, in that respect, that since the notion of “judgment” is necessarily downstream of the notion of “court”, the former could never contribute to the construction of the latter.<sup>68</sup> Such an assumption is however hardly convincing once the overall scheme of the Brussels system is taken into account. It could be argued that the historical origin of the Brussels regime as a “double Convention” implies that a “court or tribunal” under that regime should always at least be capable of producing a “judgment” under that regime. As it is, vesting such a

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<sup>64</sup>It suffices to compare, for these purposes, the text of Art 41, especially (1), (3) and (5) of the Law on Enforcement with Arts 16 and 17 of the EEO Regulation. Although the wording of the Croatian law is quite vague, referring to the indication of “a legal remedy”, AG Bot, *supra* n 52, para 58 clarifies that the debtor is “duly informed of his right to [lodge objections] and of the detailed rules and deadlines for taking such action”.

<sup>65</sup>*Denilauler*, *supra* n 35, para 13.

<sup>66</sup>*Maersk Olie & Gas*, *supra* n 40, para 51, cfr, *supra*, n 56.

<sup>67</sup>A similar stance was taken by AG Bot, *supra* n 52, para 110, concluding that Croatian notaries “indeed engage in an activity of a judicial nature” while examining applications for writs of execution.

<sup>68</sup>AG Bobek, *supra* n 13, para 86-7, remarks that “the ‘functional’ or ‘procedural’ analysis is reserved mainly for the assessment of the act, not the institution adopting it”, whose nature as a court is never even called into question.



characterisation upon an authority that, due to the architecture of its proceedings, is structurally unfit to produce such an output would have the sole effect of subjecting said authority to the rules of direct jurisdiction established by Chapter II of the Brussels Ia Regulation. However, this result would be hardly consistent with the spirit of that instrument, given that these direct rules of jurisdiction have been set in place for the sole purpose of facilitating the free movement of *judgments*, which remains the “ultimate objective” of that regime.<sup>69</sup>

In any case, even where the aptitude to produce a (contentious) judgment is seen as a minimum precondition for a characterisation as “court or tribunal”, meeting this baseline may still not be enough for vesting this status upon the authority from which this decision emanates. What *Pula Parking* finally establishes is that the ability of producing a contentious judgment is, in the view of the CJEU, not enough to ensure compliance with the principle of *audi alteram partem*, when this assessment is made for the purpose of identifying a “court or tribunal” under the Brussels Ia Regulation. For this, something more is needed.

At a closer inspection, *Pula Parking* sees compliance with the adversarial principle merely as tool in a greater quest for legal certainty within an area characterised by the free circulation of judgments in civil and commercial matters. In fact, according to *Pula Parking*, the concept of ‘court’ shall be interpreted in the light of “the need to enable national courts ... to identify judgments delivered by other Member States’ courts and to proceed with the expeditiousness required by that Regulation” to their enforcement. This would require, “in particular” that said judgments are delivered in “court proceedings” offering guarantees of independence, impartiality and compliance with the principle of *audi alteram partem*.<sup>70</sup>

The CJEU, however, does not explain how departing from a well-established understanding of the adversarial principle – stemming from consistent case law dating back to 1979 – could help in achieving the evoked objectives of expeditiousness and predictability in the identification of “judgments” delivered by other Member States’ “courts”. To make sense of the *Pula Parking* judgment, we have to refer, again, to *Zulfikarpašić*, where the Court expressly connects the need to protect “the principle of legitimate expectations in a context of free circulation of judgments” with the necessity of “a strict assessment of the defining elements of the concept of court”, which should concern, we must conclude, also the understanding of the adversarial principle. In practice, this entails that different standards shall be used for assessing compliance with the principle of *audi alteram partem*: while the identification of a “contentious judgment” still relies on the “more established” understanding arising out of the *Denilauler /Minimalmet/Hengst Import* case law, the identification of a “court” follows a stricter

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<sup>69</sup>Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/1, 7.

<sup>70</sup>*Pula Parking*, *supra* n 9, para 54.

standard, whereby a national procedure based on the principle of *inversion du contentieux* is simply not *inter partes*.

### E. Article 3 as a provision on legal certainty

Having previously acknowledged that the position of Croatia in the recast process is not relevant for interpreting the Brussels Ia Regulation,<sup>71</sup> nothing would have prevented the CJEU from referring to Article 3 to exclude Croatian notaries from the relevant notion of “court”. By listing both the “non-judicial” authorities assimilated to a “court in the institutional sense” and the type of functions for which this assimilation operates, this provision embodies, within that normative framework, the objectives of expeditiousness and predictability in the identification of “judgments” and “courts” evoked by *Pula Parking*. The CJEU could have therefore convincingly submitted that, lacking a specific mention in that provision, a characterisation of Croatian notaries as “court” would have circumvented the hard-and-fast solution provided therein, thus unacceptably hindering the proper functioning of that system.

Against this backdrop, the emphasis put by the CJEU on the argument based on compliance with the adversarial principle is regrettable. On the one hand, it seems to allow, hypothetically, for the characterisation as “courts” of notaries acting within debt-collection proceedings which do not adopt the *inversion du contentieux*. This would be nonetheless in open contradiction with the political rationale emerging from the preparatory works of the Brussels Ia Regulation. Behind the refusal to introduce within that instrument the proposed open-ended definition of court lies a lack of mutual trust among Member States in the interpretive capacity of some of their peers, in particular, their ability to correctly apply the minimum standards which, according to the Proposed Regulation, would have led to the identification of a “court or tribunal”.<sup>72</sup> Hence the option in favour of the hard-and-fast solution enshrined in Article 3. The CJEU’s express allowance, in *Pula Parking*, of the identification of a “court” on a case-by-case assessment of compliance with the principles of independence, impartiality and *audi alteram partem*, even if strictly interpreted, amounts to reintroducing, through the backdoor, a policy option which was explicitly rejected by the EU legislature.<sup>73</sup>

On the other hand, the interpretive solution devised in *Pula Parking* elicits questions concerning the nature and purpose of Article 3. This may hypothetically have either a merely elucidatory function, listing authorities which present the defining elements identified in *Pula Parking*, or an extensive function, allowing for a characterisation as “court” in spite of the non-compliance with one or more of said elements.

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<sup>71</sup>*Ibid*, para 46.

<sup>72</sup>See Dickinson and Lein, *supra* n 17, 110.

<sup>73</sup>The proposed general extension of the notion of “court” included, in fact, a reference to “specific guarantees with regard to impartiality and the right of all parties to be heard”: *ibid*.

To shed light on this point, Croatian notarial proceedings shall be compared with the Hungarian order for payment procedure, where notaries are expressly placed on an equal footing with a “court or tribunal of a Member State” (1). Once clarified, the nature of Article 3 will allow for a prognosis on the legal status to be vested upon Spanish notaries under the Brussels Ia Regulation (2).

### 1. *The Hungarian order for payment procedure*

In Hungary, Law No. 50 of 2009 devolved order for payment procedures from courts to notaries, to reduce the workload of courts while providing citizens with a speedy and cost-efficient solution for debt recovery.

Hungarian notaries act within an *ex parte* summary procedure, requiring no examination of the merits of the claim and no supporting evidence,<sup>74</sup> presenting only minor differences from Croatian notarial proceedings, mainly relating to the use of an IT system, the MOKK, for the processing of applications. In Hungary, the seised notary – either selected by the claimant or randomly appointed by the MOKK system itself<sup>75</sup> – shall only perform a *prima facie* assessment of the existence of the statutory requirements provided for by law for the issuance of orders for payment, and the lack of any manifest ground for rejection.<sup>76</sup> He will then process the application through the MOKK, which will automatically generate the order to pay. Lacking the defendant’s timely opposition, this order will acquire the same force and effect as a final judgment issued by a court.<sup>77</sup>

The use of an IT system could impact on the characterisation as “court” in a twofold manner.

On the one side, it may be relevant under the *Solo Kleinmotoren*<sup>78</sup> authority, where the CJEU established that a “judicial body” shall be able to decide “on its own authority on the issues between the parties”. This has been interpreted

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<sup>74</sup>See V Harsági, “The notarial order for payment procedure as a Hungarian peculiarity”, <https://www.ssrn.com/abstract=2302284> at 4.

<sup>75</sup>While written applications are processed by the notary chosen by the claimant, who will register the data in the MOKK platform, applications filed online are automatically distributed by the IT system among the existing notarial practices.

<sup>76</sup>Such as the lack of jurisdiction, ascertained *lis pendens*, the claimant’s lack of standing. For the whole list, see s 1.4, “Rejection of application” at [https://e-justice.europa.eu/content\\_order\\_for\\_payment\\_procedures-41-hu-en.do?member=1](https://e-justice.europa.eu/content_order_for_payment_procedures-41-hu-en.do?member=1) accessed on 12 October 2018.

<sup>77</sup>No analogous provision is set out in Croatian law, where it seems possible to introduce new proceedings based on the same facts, thus questioning the writ’s aptitude to deploy *res judicata* effects: M Bratković, “Zašto hrvatski javni bilježnici nisu sud. U povodu tumačenja Uredbe br. 805/2004 i Uredbe Bruxelles 1 bis u presudama Zulfikarpašić i Pula parking”, (2017) 67 *Zbornik Pravnog fakulteta u Zagrebu*. The Brussels Ia Reg does not require a judgment to have a *res judicata* effect, nor to be final and conclusive see L Merrett, “Article 2”, in U Magnus and P Mankowski (eds) *ECPII, vol I, The Brussels Ibis Regulation – Commentary* (Otto Schmidt, 2015) 89.

<sup>78</sup>Case 414/92 *Solo Kleinmotoren* [1994] ECR I-2237, para 17.

as meaning that this body shall always be able to examine the sufficiency of the pleadings prior to delivering a “judgment” reflecting its intention.<sup>79</sup> Hungarian notaries, however, operate through an IT system which requires no “human participation”<sup>80</sup> and, according to the letter of the law, are not “adjudicating on the merits” of a dispute but rather carrying out only “formal tasks relating to the administration of justice”.<sup>81</sup> Against this backdrop, the “judicial” nature of the notarial phase of the procedure may be even more questionable in Hungary than it is in Croatia, where notaries assess whether the claim is “admissible and well-founded”.<sup>82</sup>

On the other hand, the use of an IT system might in principle be an argument in favour of the greater compliance of the Hungarian procedure with judicial impartiality and independence, the first of the defining elements of a “court” identified by *Pula Parking*. Notaries operate in a competitive environment, are unilaterally chosen and paid by the party who resorts to their services, and might therefore be keen on adopting an applicant-friendly approach in the hope of being re-appointed in the future.<sup>83</sup> While in Croatia the rule of venue regulating the appointment of the competent notary leaves a considerable margin of choice to the claimant,<sup>84</sup> the MOKK either eliminates all possibility of choosing the processing notary or deprives of all practical effects the choice eventually made by the claimant.<sup>85</sup>

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<sup>79</sup>Rather than the sheer recording of the allegation of the parties: see AG Kokott, *supra* n 39, para 25; Dickinson and Lein, *supra* n 17, para 2.100, referring to the existence of a “power of assessment”. This aspect is also important in other instruments of EU private international law, eg the Succession Regulation, *supra* n 15, Art 3(3) and recital 20, where the assimilation of notaries to a court presupposes that these “exercise judicial functions like courts”. Albeit vague, the notion of “exercise of judicial functions” revolves around the activity of settling disputes through the application of rules of law: see P Wautelet, “Article 3”, in A Bonomi and P Wautelet (eds), *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012* (2nd edn, Bruylant, 2016), 174. However, within this specific framework, the CJEU has recently established that the sheer verification of compliance with legal requirements does not amount to an “exercise of judicial functions”: C-658/17, *WB*, *supra* n 15.

<sup>80</sup>See Harsági, *supra* n 74, 3.

<sup>81</sup>*Ibid*, 3.

<sup>82</sup>Art 281 Law of Enforcement.

<sup>83</sup>This argument was put forth in Spain by the Consejo General del Poder Judicial, [http://www.poderjudicial.es/cgpj/es/Poder\\_Judicial/Consejo\\_General\\_del\\_Poder\\_Judicial/Actividad\\_del\\_CGPJ/Informes/Informe\\_al\\_Anteproyecto\\_de\\_Ley\\_de\\_Jurisdiccion\\_voluntaria](http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Consejo_General_del_Poder_Judicial/Actividad_del_CGPJ/Informes/Informe_al_Anteproyecto_de_Ley_de_Jurisdiccion_voluntaria), para 536, accessed on 12 October 2018.

<sup>84</sup>While the defendant’s choice was completely free in the aftermath of the 2005 reform, the claimant’s choice is now limited to the notarial practices registered in the district where the person subject to enforcement has its domicile or seat (Art 279).

<sup>85</sup>See Harsági, *supra* n 74, 8, noting that even in the event of paper applications, the choice of the notary is “of little practical significance” because of the automatic processing via the MOKK system. Therefore “choosing one or another notary may, at most, mean a relatively quicker procedure within the 15-day limit prescribed for disposing of such cases, depending on the momentary workload of the chosen notary”.

In practice, however, this procedural difference should not be overemphasised, as the existence of an effective system of public supervision of the notarial system and of appropriate sanctions for ascertained violations of professional duties should be sufficient to ensure that Croatian notaries will comply with their legal obligations of independence and impartiality.<sup>86</sup>

What is important to note, for the purposes of the present paper, is that irrespective of the adversarial principle being retained – be it the narrower interpretation advanced by *Pula Parking* or the more lenient approach of the *Denilauler/Minalmet/Hengst Import* case law – Hungarian and Croatian notarial proceeding are, as concerns their structure, factually *identical*.<sup>87</sup> Both are based on the technique of the *inversion du contentieux*, and the order issued by the notary is served upon the debtor only after it has been adopted, without the application with which the matter was raised having previously been communicated to him. In Hungary as in Croatia, the order becomes enforceable only after the defendant is given an opportunity to state his claim within a certain time limit. In case of opposition, in both systems the notary himself is the competent authority for receiving the objections filed by the defendant, but has an obligation to transfer the file to a court. Therefore, “the contradictory part of the procedure of judicial nature” still happens, in both cases, only before state courts, and not in front of notaries.<sup>88</sup>

In the light of the above, the Hungarian procedure would also fall short of the requirement of compliance with the principle of *audi alteram partem* as understood in *Paula Parking*. Yet, Hungarian notaries have the status of “courts” under Article 3 of the Brussels Ia Regulation. This confirms that Article 3 should be regarded as an exception, extending this status to entities which would not qualify as such under the definition developed by the CJEU in *Pula Parking*.

## 2. Article 3 as a “purely political gateway” and the status of Spanish notaries

One of the fundamental questions raised by the *Pula Parking* case was as to whether, in the light of the impossibility for Croatia to influence the contents of Article 3 within the Recast of the Brussels I Regulation, the inclusion of its notaries within the notion of “court” would have still been possible on a different basis. The easiest solution would have been using the argument by analogy to

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<sup>86</sup>According to Arts 132(2) and 140(1) of the Croatian Law on Notaries, n 6, both the Chamber of Notaries and the Ministry of Justice have extensive supervisory powers, ensuring that notaries perform their duties conscientiously and in accordance with the law. Furthermore, the notary who “seriously endangers the trust in impartiality and the documents he compiles” commits a disciplinary offence, entailing heavy sanctions (Arts 145 ff). In addition to this, he may be liable vis-à-vis the injured defendant under the ordinary regime of tort law.

<sup>87</sup>For a detailed description of the Hungarian procedure, see Harsági, *supra* n 74.

<sup>88</sup>AG Bobek, n 18, para 113.

extend the list set out by Article 3, owing to the undeniable similarity between the Hungarian and the Croatian procedures.

The CJEU, however, cordially declined the implicit invitation to proceed this way, thus confirming that the gateway provided under Article 3 is *purely political* in nature. On the one hand, this provision grants Member States the possibility to have the external delegation of judicial functions eventually set in place domestically recognised at EU level. On the other hand, however, it subjects this recognition to the *ex ante* political agreement of the EU. Within this framework, a judicial extension of the scope of this provision on the basis of an argument from analogy might have been, indeed, an inappropriate overstepping of authority by the EU judiciary.

Against this backdrop, not only Croatian notaries, but also their Spanish colleagues have little possibility of being characterised as “courts” under the Brussels regime, lacking a legislative amendment of that provision. As hinted above, Spain has introduced, in 2015,<sup>89</sup> a *procedimiento monitorio notarial*,<sup>90</sup> ie a summary notarial<sup>91</sup> procedure for the recovery of uncontested monetary claims in civil and commercial matters.<sup>92</sup>

These proceedings are organised according to the technique of the *inversion du contentieux*: the notary appointed by the claimant<sup>93</sup> will draft – without any prior hearing of the defendant – an order enjoining the debtor to either settle the claim or lodge an objection within 20 working days. This order, which is not provisionally enforceable, will then be served on the defendant. If an opposition is filed within this deadline, the notary registers the legal basis upon which this is grounded and, after having informed the creditor, terminates the notarial proceedings. It is for the parties to decide whether or not to bring their dispute in front of a court. If, conversely, the debtor does not timely appear before the notary, either to file an opposition or to settle his debt, the document will become an enforceable title.

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<sup>89</sup>Law 15/2015 on Voluntary Jurisdiction, of 21 July 2015, in BOE-A-2015-739, amending the Law on the Notarial Profession, of 28 May 1862, in BOE-A-1862-4017 (hereinafter, LN), where the new procedure is regulated by Arts 71 and 71.

<sup>90</sup>Formally called “*reclamación de deudas dinerarias no contradichas*”, this procedure is commonly referred to as *procedimiento monitorio notarial* for its striking similarity with the *procedimiento monitorio* regulated by the LEC. The legislature however specified that it “is not an order for payment procedure or a small claims procedure, as it follows, rather, the technique of Regulation (EC) 805/2004”: see Law 15/2015, XI, in fine.

<sup>91</sup>While the competence of Hungarian and Croatian notaries in their respective proceedings is exclusive and compulsory, in Spain these notarial proceedings find a functional surrogate in the ordinary *procedimiento monitorio* still available before first instance courts.

<sup>92</sup>Their competence extends to any claim, irrespective of its amount, which is duly documented, determined, liquid, due and payable. However, Art 70(1) LN, inspired by a clear protective intent, sets out a list of excluded matters, barring access to this procedure, *inter alia*, to claims based on a contract between a professional and a consumer and maintenance claims involving minors or vulnerable adults.

<sup>93</sup>Art 70(1) LN leaves the claimant a margin of manoeuvre in choosing the notary who will process his case, vesting the competence with one of the practices existing in the place where the debtor is domiciled or habitually resident, or in the place where he can be found.

Even though this procedure is adversarially structured according to *Denilauler/Minalmet/Hengst Import*, the fact that Spanish notaries are not currently included in Article 3 of the Brussels Ia Regulation should be an overwhelming reason for their exclusion from the notion of “court” under that regime.

In any event, the impossibility of a characterisation as “court” does not automatically exclude the debt-collection writs issued by Croatian and Spanish notaries from the scope of that regime. The next section will therefore seek to clarify whether these could qualify as “authentic instruments” under the Brussels Ia Regulation.

### G. Notarial writs as “authentic instruments” under Article 58 of the Brussels Ia Regulation

Chapter IV of the Brussels Ia Regulation governs the cross-border circulation and enforcement of “authentic instruments” according to the fundamental principle whereby “an authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required” (Article 58).

The *Pula Parking* judgment, in some of its language versions, contributes to generating the erroneous impression that the “credible document” upon which the Croatian notarial procedure is based could *itself* circulate under the Brussels Ia Regulation, by consistently referring to enforcement proceedings “based on an authentic document”.<sup>94</sup> If that was indeed the case, however, the claimant’s attempt to have the notarial writ recognised and enforced as a “judgment” under Chapter III of the Brussels Ia Regulation would have made little sense, since it would have been much easier to have the supporting document circulating as such under the equally liberal regime set out by Chapter IV.

However, a cursory look at the “legal framework” reported in *Pula Parking* already reveals that most of the documents listed in Article 31 of the Croatian Law on Enforcement – such as a simple invoice (as in *Zulfikarpašić*), or an extract from accounting records (as in *Pula Parking*)<sup>95</sup> – are documents drafted by parties. They are *not*, therefore, authentic documents under the *Unibank*<sup>96</sup> definition, which links authenticity to the involvement of a public or state-delegated authority.<sup>97</sup>

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<sup>94</sup>*Pula Parking*, *supra* n 9, para 9; *Ibrica Zulfikarpašić*, *supra* n 44, para 14; Ag Bot *supra* n 52, para 13. The same applies with respect to the Italian (*atto autentico*) and Spanish (*documentos auténticos*) translations, in line with the English expression “authentic document”. Conversely, the French (*acte faisant foi*) and the German (*Glaubwürdige Urkunde*) versions of the judgments adopt a more accurate translation of the Croatian expression.

<sup>95</sup>For the full list, see *supra* n 54.

<sup>96</sup>C-260/97 *Unibank* [1999] ECR I-3715.

<sup>97</sup>Different considerations may apply to “legalised private documents”, included in the list under Art 31 of the law of enforcement (javna isprava: public document).



Moreover, these supporting documents are not even “authentic” under Croatian law, the confusion originating from the mistranslation in the CJEU’s judgments of the Croatian terms *vjerodostojna isprava*, which literally mean “credible” or “trustworthy” documents and not authentic documents. The same applies to the effects produced by these documents, described in the judgment in terms of sheer enforceability<sup>98</sup> whereas, under Croatian law, these are simply “suitable for enforcement” (*podobna za ovrhu*).

As concerns, conversely, the (uncontested) writ issued by the notary at the end of the first phase of the enforcement proceedings, both the condition of the involvement of a public authority and the requirement of actual enforceability in the Member State of origin are met. In *Zulfikarpašić*,<sup>99</sup> the CJEU, at the prompting of the referring court, moves from the premise that this writ could potentially qualify as an “authentic instrument”. According to the Croatian notary, in fact, this notion “should cover” also “a document drawn up by a notary such as a writ of execution”.<sup>100</sup>

However, not all documents drafted by notaries are automatically, *ie* by sole virtue of their notarial origin, “authentic instruments” under the Brussels Ia Regulation, which adopts an autonomous definition requiring *inter alia*<sup>101</sup> a document to be “formally drawn up or registered” as an authentic instrument in the Member State of origin. In practice, a characterisation as “authentic instrument” under that regime presupposes compliance with domestic authentication procedures.<sup>102</sup> These are usually extremely formal procedures, encompassing solemn formalities<sup>103</sup> meant to facilitate the achievement of the legal objectives of

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<sup>98</sup>“An authentic document shall be enforceable if ...”: *Pula Parking*, *supra* n 9, para 9; *Zulfikarpašić*, *supra* n 44, para 14. An inaccurate translation may be found in other language versions: cf the French (est exécutoire), the Italian (è esecutivo), the Spanish (tendrán carácter ejecutivo), and the German (ist vollstreckbar) translations.

<sup>99</sup>*Zulfikarpašić*, *supra* n 44, paras 53-4.

<sup>100</sup>*Ibid*, para 25. In that case, however, the CJEU did not have to address the question of the characterisation of the writ, solving the case on the different basis of the lack of the debtor’s “express agreement” to the claim established in a notarial writ of execution, as required under Art 3(1)(d) of the EEO Regulation.

<sup>101</sup>This autonomous definition additionally requires that the authenticity of the instrument relates to both the signature and its contents and is established by a public authority or other authority empowered for that purpose by the State.

<sup>102</sup>See DG for Internal Policy C, Comparative Study on Authentic Instruments: UK, FR, DE, PL, RO, SW, 2008 available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI\\_ET%282008%29408329](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET%282008%29408329), iv and 25, accessed on 12 October 2018. See also Wautelet, “Article 3”, *supra* n 79, 165 and 168, commenting on the definition of “authentic instrument” set out by Art 3 of the Succession Regulation.

<sup>103</sup>Such as the notary’s obligation to read the document out loud as a requirement for validity, the mandatory participation of witnesses and the specific advisory duties imposed upon the notaries: see Comparative Study on Authentic Instruments, *ibid*, 21, 25 and 54.



authentication, ie preventing the parties from acting with undue haste or on the basis of incomplete or erroneous information, and ensuring that the resulting instrument will constitute “a certain and reliable proof of its contents”.<sup>104</sup>

The national law of the drafting authority equally governs the question of the types of documents which can be subject to authentication. In fact, as opposed to Article 3(1)(d) of the EEO Regulation, Article 2(c) of the Brussels Ia Regulation does not set as an autonomous requirement that an authentic instrument shall be based upon an express agreement between the parties. Such an additional condition is nonetheless quite common at a comparative level.<sup>105</sup> In this case, the question would be whether and to what extent an agreement between the parties could be deemed to exist in relation to a document such as the notarial debt-collection writ, which is merely not contested by the defendant.

Ultimately, it will therefore be for Croatian and Spanish law to determine whether in issuing a debt-collection writ, notaries shall abide to the specific formalities required for authentic instruments and whether these writs meet the requirements for authentication. We must remark, however, that under current law neither legal framework seems to require compliance with solemn formalities or to vest upon the writ the heightened probative value which generally characterises authentic instruments.<sup>106</sup> In both cases, the notarial procedure is merely a fast and efficient way to access either court or out-of-court execution, without pursuing any of the ulterior legal objectives of authentication described above.<sup>107</sup> These considerations may warrant the cautious conclusion that the existing notarial debt-collection writs should not qualify as “authentic instruments” under the Brussels Ia Regulation.

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<sup>104</sup>*Ibid.*, 25.

<sup>105</sup>See, for example French law: “the documents that may be authenticated ... are documents and agreements freely entered into by the parties. ... The notary’s intervention thus presupposes the prior existence of consent or a voluntary agreement of the parties”: C-50/08 *Commission v France* [2011] ECR I-4195, para 80. In his Opinion in that case, AG Cruz Villalón remarked that at a comparative level, “obviously, notaries do not employ coercion or impose any obligation unilaterally”.

<sup>106</sup>Croatian law is not unfamiliar with the concept of authentic or public document: pursuant to Art 230 ZPP, this is a document issued by a competent court or a public body within the limits of its jurisdiction and in the prescribed form, providing full proof of the facts recorded therein. Nonetheless, the Law on Enforcement introducing the notarial procedure does not qualify the writ of execution as a public document. As concerns Spanish law, Art 71 LN classifies notarial writs as “enforceable title(s) under article 517(2) n 9 of the Spanish LEC”, subjected to the enforcement regime for extrajudicial titles. The systematic analysis of Art 517(2) of the LEC evidences that this order is neither a judgment – which constitutes an enforceable document under Art 517(2) n1 – nor an “escritura publica”, included in n4 of that same provision and which would require compliance with the formalities set out by Art 1216 of the Civil Code.

<sup>107</sup>*Supra* n 103.

## I. Conclusion

The substantive solution reached by the CJEU in *Pula Parking*, *i.e.* the exclusion of Croatian notaries from the relevant notion of “court” retained by the Brussels Ia Regulation, is certainly to be approved. The legal argument used to reach this result, however, could have been better chosen. The introduction of a double standard for assessing compliance with the adversarial principle seems bound to generate more confusion than legal certainty. Conversely, reliance on Article 3 and on its “political nature”, albeit a bit formalistic *vis-à-vis* Croatia, would have provided for a more coherent solution, allowing for a rational explanation of the divergent legal treatment that the Brussels Ia Regulation currently reserves for a set of notarial procedures which remain extremely similar in their fundamental architecture.

A solution grounded in Article 3 would have additionally been in line with the *rationale* of the principle of mutual trust in the administration of justice. This trust is never intended as an acritical *a priori*, but is rather supported and boosted by trust-enhancing legislation, *ie* EU secondary legislation seeking to facilitate the mutual recognition of judicial decisions by defining basic procedural rights.<sup>108</sup> In this respect, the CJEU ascertained in the past the existence of “fundamental differences” between the judicial and the notarial function, precluding the applicability to the latter of some of the obligations following from said legislation.<sup>109</sup> Against this backdrop, the cross-border recognition of the atypical role that notaries have recently acquired in debt-collection activities requires a certain degree of caution, expressed through the prior political agreement of all Member States manifested within the ordinary legislative procedure required for the amendment of Article 3. However, the workability of a system of this kind might be called into question in the future, if more Member States were to resort to a similar kind of delegation of debt-collection procedures to civil law notaries. If this was the case, both exempting of notaries from the ordinary obligations of “courts” and subjecting their assimilation to “courts” to the burdens of the ordinary legislative procedure may work against the overall efficiency of the EU Judicial Area.

### Disclosure statement

No potential conflict of interest was reported by the author.

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<sup>108</sup>See Lenaerts, *supra* n 3, 812.

<sup>109</sup>C-32/14, *ERSTE Bank Hungary Zrt* [2015] EU:C:2015:637, para 47, referring to the obligation to assess, of its own motion or at the consumer’s request, the unfairness – under Directive 93/13/EC – of a term contained in a contract. An obligation of this kind has been recently extended to default proceedings managed by courts (C-147/16, *Karel de Grote* [2018] EU:C:2018:320), encompassing also order for payment procedures (C-176/17, *Profi Credit Polska S.A.* [2018] EU:C:2018:711).