

Twenty-Second Session
Recognition and Enforcement of Foreign Judgments
18 June – 2 July 2019, The Hague

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 3 of February 2019
Title	Treatment of penalty orders that are imposed on the non-compliance with non-monetary judgments under the 2018 draft Convention	
Author	Permanent Bureau	
Objective	To provide background information on penalty orders that are imposed on the non-compliance with non-monetary judgments To facilitate discussion on this topic at the Twenty-Second Diplomatic Session	
Annexes	Annex I: Paragraph 76 of the revised preliminary Explanatory Report prepared for the attention of the Fourth Meeting of the Special Commission Annex II: Paragraphs 83-84 of the revised draft Explanatory Report prepared for the attention of the Twenty-Second Diplomatic Session	
Related documents		

I. INTRODUCTION¹

1. During the Special Commission meeting of May 2018, the *co-Rapporteurs* discussed the circulation of non-monetary judgments under the draft Convention, referring to paragraph 76 of the revised preliminary Explanatory Report (see Annex I).² In particular, they raised a policy question as to whether orders for the payment of penalties for non-compliance with obligations in non-monetary judgments (Penalty Orders) could circulate under the draft Convention. The *co-Rapporteurs* invited the Special Commission to give directions on this matter.

2. Such penalties are payable to *parties* in some jurisdictions, but to *courts* or *public authorities* in others. The experts considered whether these Penalty Orders would be enforced generally, and in particular whether orders for the payment of penalties to the State would fall within the scope of the draft Convention. In this respect, some experts raised the further issue of asymmetric enforcement (*i.e.*, whether orders for payment to a judgment creditor would be covered by the draft Convention, whereas orders for payment to a court or public authority would not). Due to the different views expressed, the Special Commission reserved this issue for further reflection at the Diplomatic Session.³ The *co-Rapporteurs* updated the revised draft Explanatory Report (the relevant extract is included in Annex II of this Note) to reflect the discussions at the meeting.

3. With a view to facilitating the consideration and discussion of this issue before and during the Diplomatic Session in June 2019, the Permanent Bureau has prepared this Note to provide background information and to help Members consider whether, and if so, how Penalty Orders will be specifically dealt with under the draft Convention. This Note will begin by outlining the issues to be discussed (see Section II), and then move on to examine the laws and practices of various jurisdictions in dealing with Penalty Orders (see Section III). Section IV will then turn to discuss cases concerning the enforcement of foreign Penalty Orders in certain jurisdictions. Having analysed the circulation of Penalty Orders under the draft Convention in Section V, Section VI will present conclusions and recommendations.

II. OUTLINE OF ISSUES

4. At the outset, it should be noted that this Note focuses only on Penalty Orders. In some States Penalty Orders may be included in the original judgment⁴ as a “subsidiary” or “conditional” obligation, with the purpose of securing compliance with the main court obligations. Thus, an original judgment which imposes obligations – monetary or non-monetary – may also contain provisional / conditional “subsidiary” penalties or fines in anticipation of non-compliance.⁵ These Penalty Orders are imposed before a breach of the primary obligation has occurred; and may or may not require a further court order to be made before they take effect (such as a subsequent order to fix the amount of the penalty to be paid). In other States it is more common for Penalty Orders to be made if and when the judgment

¹ The author is grateful to D. Goddard QC, Chair of the Special Commission on the Recognition and Enforcement of Foreign Judgments, and Professors G. Saumier, F. Garcimartin and T. Domej for their assistance in the preparation of this Note. Current and former interns at the Permanent Bureau (PB): Hana Mia, Sophie Yates, Charlotte Weinekötter and Coline Lopez have also contributed to this paper.

² See “Judgments Project: revised preliminary draft Convention”, Prel. Doc. No 10 of May 2018 for the attention of the May 2018 Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018) (available on the HCCH website at < www.hcch.net > under “Judgments”) (hereinafter, “preliminary draft Explanatory Report”).

³ Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 6, paras 44-51 (available on the Secure Portal of the HCCH website at < www.hcch.net > under “22nd Diplomatic Session”).

⁴ Please note that the terms “original judgments” and “primary judgments” will be used interchangeably throughout this Note.

⁵ This Note does not discuss punitive damages, which are awarded to penalise the egregious conduct of the defendant. Punitive and exemplary damages are sufficiently dealt with under Art. 10 of the 2018 draft Convention. More discussion about Art. 10 and Penalty Orders can be found in Section V, Scenario 2.

debtor breaches the court ordered obligation: the court of origin or a court of the State of origin makes a subsequent order providing for “penalties”. However, orders for the *payment of compensation for delay* in the performance of a court-imposed obligation will not be discussed in this Note: awards of this kind are purely compensatory of the loss sustained by the claimant, and as such, they are likely to be treated as damages and therefore enforceable under the draft Convention. Nevertheless, it is well acknowledged that in some cases it can be difficult to determine whether orders for a periodic payment for non-compliance are compensatory or penal.⁶

5. This Note will use four Scenarios to illustrate whether and how Penalty Orders would be enforced under the current version of the draft Convention. State X is the State of origin, and State Y is the requested State. Each of the Scenarios is based upon two assumptions. First, the Scenarios assume that both State X and State Y are parties to the draft Convention. Secondly, they assume that the judgment sought to be enforced is capable of satisfying one of the jurisdictional filters in Articles 5 and 6.

Scenario 1 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, but that order does not specify the consequences of non-compliance.

Scenario 2 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, but that order does not specify the consequences of non-compliance. However, a subsequent order of the court of origin imposes a civil penalty on Party B for non-compliance.

Scenario 3 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, and that order specifies the consequences of non-compliance (*e.g.*, a penalty of \$1,000 per day). The penalty is not payable under the law of State X until the court in State X is asked to fix, and does fix, the amount payable following non-compliance.

Scenario 4 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, and that order specifies the consequences of non-compliance (*e.g.*, a penalty of \$1,000 per day). The penalty is payable under the law of State X without any need for the court in State X to fix the amount payable and does not require any further court order.

There are variants for Scenarios 2, 3 and 4 in which penalties become payable either to Party A or to the State. These will be discussed in more detail in Section V.

6. Before turning to the Scenarios to consider the contentious aspects of Penalty Orders, two points should be highlighted. First, the order delivered by the court of State X will be governed by the draft Convention provided that it relates to civil or commercial matters, and is not an interim measure. The 2018 draft Convention also contains (in square brackets) a potentially relevant exclusion relating to judgments ruling on the infringement of intellectual property rights.⁷ Secondly, the enforcement of State X judgments by the courts of State Y involves the exercise of State Y’s coercive power to ensure compliance. If, however, there are no equivalent or similar remedies available under the law of State Y, the current version of the draft Convention does not require the courts of State Y to grant a remedy that is not available under its own law, nor “create new kinds of remedies for the purpose of the [draft] Convention”. Instead, the court of State Y should apply the enforcement measures available under its

⁶ Awards of compensation for delay could also be delivered in an additional court order. If this is the case, would these orders be judgments “on the merits” within the meaning of Art. 3(1)(b), or are they analogous to a cost order that is covered under Art. 3? These questions fall outside the discussion of this Note.

⁷ As for judgments ruling on the infringement of an intellectual property right, the issue of whether only monetary remedies ordered in the judgment should be recognised and / or enforced under the draft Convention is still pending discussion.

“internal law in order to give as much effect as possible to the foreign judgment”.⁸ This understanding was confirmed at the plenary session of the Special Commission.⁹

Scenario 1 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, but that order does not specify the consequences of non-compliance.

7. What would a court in State Y do if Party A were to seek the enforcement of this order in State Y, where Party B resides or has assets? If the judgment requiring Party B to take or refrain from taking certain action is enforceable under the draft Convention, then it will be recognised and enforced in State Y. As stated above, the procedure of the requested State will apply in relation to enforcement of the judgment.¹⁰ Such procedures include the measures taken by the court to ensure the judgment debtor obeys the foreign judgment (such as seizure, confiscation, and attachment)¹¹ and sanction mechanisms available under the law of the requested State. Thus, in Scenario 1, once the order has been recognised or enforced in State Y (or the enforceability of the judgment has been declared), the court of State Y could impose penalties on Party B according to State Y’s law if Party B failed to comply with the judgment.

8. In Scenarios 2 to 4 the court in State X has also made orders in relation to penalties for non-compliance with its primary orders. Section V discusses whether and how these penalty orders can be enforced in State Y under the draft Convention. To situate that analysis, this Note first explores the treatment of Penalty Orders in different jurisdictions.

III. PENALTY ORDERS ISSUED IN CERTAIN JURISDICTIONS

9. It is useful to examine how orders for non-compliance with primary orders are regulated under the laws of certain jurisdictions. Sub-section A outlines the laws and practices of several jurisdictions (as examples) which do not allow the imposition of “subsidiary” or “conditional” Penalty Orders (similar to the situation described in Scenario 2). Sub-section B discusses the laws and practices of certain jurisdictions that do allow the imposition of “conditional” Penalty Orders (similar to the situations described in Scenarios 3 and 4).

A. No “subsidiary” or “conditional” Penalty Orders

10. In most jurisdictions, judgments do not provide for the penalties to be paid in the event of non-compliance. This does not mean that those jurisdictions do not later impose penalties or fines should non-compliance occur. Upon a request made by the judgment creditor or *ex officio*, the court of origin or a court or an authority of the State of origin may require the judgment debtor to pay a certain penalty or fine. This is the practice, for example, under Chinese law¹² and Korean law.¹³

⁸ See “Judgments Convention: revised draft Explanatory Report”, [Prel. Doc. No 1](#) of November 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (hereinafter, “revised draft Explanatory Report”), para. 113 (see path indicated in note 2). The issue of adaptation of remedies was discussed at the Third Meeting of the Special Commission and it was decided to interpret this issue in the same manner as in the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, the “2005 Choice of Court Convention”) and its accompanying Explanatory Report, prepared by Professors T. Hartley & M. Dogauchi (hereinafter, the “Hartley/Dogauchi Report”), in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements*, Antwerp - Oxford - Portland, 2010, pp. 785 and 787.

⁹ Minutes of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2018), Minutes No 9, paras 18-31 (see path indicated in note 3).

¹⁰ Art. 14(1) of the 2018 draft Convention.

¹¹ Revised draft Explanatory Report, para. 354.

¹² Art. 253 of the Chinese Civil Procedure Law.

¹³ Art. 261 of the Korean Civil Execution Act.

11. In common law jurisdictions, a civil fine for contempt of court may be imposed for failure to comply with court orders.¹⁴ For example in Australia, the breach of a court order may provide a party to the underlying proceedings or the Registrar with a basis to apply for an order finding that the other party is in contempt of court. If contempt is made out, the court may impose one or more of the available sanctions including a fine, imprisonment (where the contemnor is a natural person) or sequestration (where the contemnor is a corporation).¹⁵ This action can also be taken by the court of its own motion in the exercise of its inherent jurisdiction (enjoyed by the various superior State courts) or implied jurisdiction (enjoyed by the Federal Court).

B. Penalty payment imposed as “conditional” Penalty Orders

1. Benelux Convention providing a Uniform Law on Penalty Payments (*astreinte*)

12. In the *Benelux Convention providing a Uniform Law on Penalty Payments* (hereinafter the “Benelux Convention”),¹⁶ *astreinte* is described as a conditional penalty payment imposed by a civil court at the request of an interested party in order to compel the opposing party to comply with the judgment on the merits.¹⁷ It is independent from the main obligation of the judgment and has no connection to the damages (and interest) that the judgment creditor suffered or will suffer. The following are some of the key elements of *astreinte* under the Benelux Convention:

- *astreinte* is only attached per request of the parties;¹⁸
- *astreinte* cannot be attached to monetary obligations;¹⁹
- *astreinte* is payable to the creditors;²⁰
- *astreinte* can be a fixed amount, or set per violation or per time unit;²¹
- the court that attached *astreinte* can modify it if it appears that the main obligation is impossible to perform.²²

The Benelux Convention does not lay down any procedure for the quantification of penalty payments.

13. As a result of the Benelux Convention, identical statutory rules on penalty payments have been adopted under Belgian (*astreinte* / *dwangsom*),²³ Luxembourg (*astreinte*)²⁴ and Dutch law (*dwangsom*).²⁵ The uniform interpretation of the rules concerning *astreinte* in the three countries is

¹⁴ In the UK, Civil Procedure Rule 81; in the US, 18 U.S. Code § 2333 - Civil remedies; in Canada, Ontario Rules of Civil Procedure, RRO 1990, Reg 194, s. 60.11, see also *Carey v. Laiken*, 2015 SCC 17, paras 30-37.

¹⁵ See *Federal Court Rules 2011 (Cth)*, Div 42.2; *Supreme Court Rules 1970 (NSW)*, Part 55; *High Court Rules 2004 (Cth)*, Part 11.

¹⁶ The Benelux Convention was signed on 26 November 1973, in The Hague, and is available at: < http://www.benelux.int/files/7913/9230/2839/19731126_DWANGSOM_FR.pdf > (last consulted on 28 January 2019).

¹⁷ Art. 1 of the Annex of the Benelux Convention.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, Art. 3.

²¹ *Ibid.*, Art. 2.

²² *Ibid.*, Art. 4.

²³ Art. 1385bis - *nonies* of the Belgian Judicial Code Provisions. See also discussions in the Report Belgium prepared by Prof P. Wautelet, Study JLS/C4/2005/03, available at < http://ec.europa.eu/civiljustice/news/docs/study_bxl1_belgium.pdf > (hereinafter the Wautelet Study) (last consulted on 28 January 2019). Question 4.1.11, “Since Belgian courts ordering a defendant to do something or to refrain from doing something abroad will in most cases add to the order an order for the payment of a daily penalty fine in case of violation of the primary order. [...] it is submitted that Belgian courts will see no difficulty of principle in granting effect to a reverse foreign order (ordering a party to do or to refrain from doing something and adding a daily penalty fine to the main order).”

²⁴ Arts 2059-2066 of the Civil Code of Luxembourg.

²⁵ Art. 611(a)-(h) of the Dutch Civil Procedure Code.

guaranteed by the Benelux Court of Justice. To explain how Penalty Orders operate within the Benelux countries, Dutch law and practices are taken as an example.

Dutch law

14. *Dwangsom* is considered to be an indirect means of enforcing a judgment. It is indirect because it does not directly grant the creditor that to which it is entitled. It is a means of enforcing a judgment (similar to a seizure of the assets of the judgment debtor), because the intention of a *dwangsom* is to encourage the judgment debtor to perform the main obligation established by the court.²⁶ As such, it is considered to enhance the efficiency of judicial decisions.

15. The range of court orders to which a *dwangsom* can be attached is broad. Any court decision ordering a person, a company or even a governmental body to do, give or refrain from doing something, could be enforced by means of a *dwangsom*. Such orders have been issued to stop infringements of intellectual property rights, to restore a piece of land on which a building has been built without a permit to its original condition, and to family related matters.²⁷

16. Under Dutch law, judgments containing Penalty Orders are a sort of “two in one” judgment.²⁸ Only at the request of the plaintiff can a court attach a *dwangsom* in its main judgment, and the *dwangsom* can only be attached in relation to non-monetary obligations.²⁹ If judges decide to impose a *dwangsom*, they can determine the amount and the conditions under which it becomes due at their discretion. A *dwangsom* can be set in a fixed amount, per infringement or per unit of time. For example, in a Dutch Supreme Court (*Hoge Raad*) case,³⁰ while confirming that the court which originally attached the *dwangsom* should determine whether it is impossible for the judgment debtor to comply with the obligation, the Supreme Court ruled that the enforcing court may investigate whether the conditions under which the *dwangsom* is due, are fulfilled and whether the ruling in which the *dwangsom* is imposed, in light of the new circumstance, is up to date and is executable. The court of first instance in this case ordered the debtor to deliver a number of properties which he owned to the creditor. In the judgment, the court attached a *dwangsom* of 50 euros per day up to a maximum of 10,000 euros for each day that the properties remained undelivered to the creditor.

17. In cases where the judgment debtor is in default, the judgment creditor could then collect the *dwangsom*, but the collection needs to be initiated within six months so as to prevent a passive creditor’s attitude leading to a large amount of penalties becoming due.³¹ Since the enforceable instrument permitting recovery of the penalty payment is the judicial decision imposing that penalty, the judgment creditor does not need to have the penalty payment quantified prior to enforcement.³² In practice, the judgment creditor needs to request the bailiff to collect the *dwangsom* due. A judge becomes involved again if the judgment debtor contests the violation or if the execution is ineffective.

2. French law

18. French law allows a court to impose an *astreinte* for non-compliance with the main obligation of a judgment.³³ A provisional *astreinte* (*astreinte provisoire*), which is a hypothetical amount, would

²⁶ T. Jongbloed, “The Netherlands”, in M. Andenas, B. Hess and P. Oberhammer (eds), *Enforcement Agency Practice in Europe*, London, BICI, 2005, pp. 205-207.

²⁷ *Ibid.*, p. 206.

²⁸ The same applies for Belgium and Luxembourg.

²⁹ Art. 611(a)(1) of the Dutch Civil Procedure Code. It should be noted that in Belgium, *dwangsom/astreinte* is also not allowed in relation to the performance of an employment contract, see Art. 1385bis of the Belgian Judicial Code Provisions.

³⁰ Dutch *Hoge Raad*, ECLI:NL:HR:2017:2455.

³¹ Art. 611(i) of the Dutch Civil Procedure Code; T. Jongbloed (*op. cit.* note 26), p. 207.

³² Art. 611(c) of the Dutch Civil Procedure Code. The same practice in Belgium, Art. 1385 quater of the Belgian Judicial Code Provisions.

³³ Arts L131-1-4 of the French Civil Procedure Code, see Bruns, 118 ZPP (2005), 1, 9-10. See also A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, para. 13.507.

be included in the original judgment to encourage performance. The *astreinte* will arise when the judgment debtor does not comply with or is delayed in performing the obligations imposed by the court. Under these circumstances, the judgment creditor must apply to the French court to fix the definitive amount of the *astreinte* during the enforcement proceedings (liquidation: *astreinte définitive*). The *astreinte définitive* can only be imposed after an *astreinte provisoire* has already been delivered and for a limited period determined by the judge. Unlike *astreintes provisoires*, the amount of *astreintes définitives* cannot be modified once liquidated.³⁴

19. The liquidation of the *astreinte* transforms the threat of a pecuniary penalty into a real debt in the event of non-compliance.³⁵ The liquidation must be requested by the judgment creditor. The judge of the execution court is competent to liquidate the *astreinte*, except if the judge who ordered the *astreinte* is still competent, or asks to remain competent for the liquidation.³⁶ It could be the case that the final amount of the *astreinte* is lower than the “hypothetical” amount of the original judgment.³⁷

20. The following are some of the key elements of the *astreinte* under French law:

- *astreinte* is independent of damages;³⁸
- *astreinte* is payable to the judgment creditor;³⁹
- *astreinte* can be attached at the request of the party, or by the court on its own motion;⁴⁰
- *astreinte* can be attached to both monetary and non-monetary obligations;
- *astreinte* cannot be enforced until the court has “liquidated” it at the end of the period given to the debtor to perform.

3. German law

21. German law distinguishes between “penalties” imposed for the failure to comply with court judgments for actions that may not be taken by others (e.g., the rendering of an account or giving of particular information) (*Zwangsgeld*),⁴¹ and for orders which force the judgment debtor to cease and desist from actions, or to tolerate actions (*Ordnungsgeld*).⁴² *Ordnungsgeld* is the disciplinary fine imposed by the first instance courts on the judgment debtor who refuses to perform the act. Unlike *Zwangsgeld*, the imposition of *Ordnungsgeld* (e.g., when the debtor disobeys an injunction order issued by the court) requires the court of first instance to provide a warning to the debtor. This may be done in the original judgment.⁴³ Unlike the French *astreinte*, the warning often indicates only a broad outline of the amount.

22. Some of the key elements of *Zwangsgeld* and *Ordnungsgeld* can be summarised as follows:

- the decisions on *Zwangsgeld* and *Ordnungsgeld* will be delivered by a court order;⁴⁴

³⁴ M. Niboyet and S. Lacassagne, “France”, *op. cit.* note 26, p. 161.

³⁵ *Ibid.*, p. 162.

³⁶ Art. L131-3 of the French Civil Procedure Code.

³⁷ See A. Dickinson and E. Lein (eds.) (*op. cit.* note 33) para. 13.507.

³⁸ Art. L131-2 of the French Civil Procedure Code.

³⁹ Perrot, article préc., *Gaz. Pal.* 1991. 2. Doctr. 801, spéc. p. 806. (*l'astreinte est en France une sanction pécuniaire qui tombe directement et exclusivement dans la caisse du créancier en plus des intérêts compensatoires et des intérêts légaux qui sont dus à raison du retard dans l'exécution de l'obligation.*) The English translation: in France, *astreinte* or a periodic penalty payment is a monetary penalty imposed on the debtor for delay in compliance with an obligation. The periodic penalty payment is automatically awarded to the creditor in addition to compensatory and statutory damages.

⁴⁰ Art. L131-1 of the French Code of Civil Procedure Code.

⁴¹ Art. 888 (*Zwangsgeld*) of the German Code of Civil Procedure.

⁴² *Id.*, Art. 890 (*Ordnungsgeld*).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, Art. 891.

- *Zwangsgeld* and *Ordnungsgeld* are punitive and penal in nature, payable to courts.⁴⁵

4. Swiss law

23. Swiss law provides for three options for enforcing judgments ordering injunctive relief, including the possibility of issuing a threat of civil penalty.⁴⁶ Such penalties are paid to the court, not to the judgment creditor. For example, in an unfair competition case, the Commercial Court of the Canton of Aargau issued a preliminary injunction against the defendant to prevent the defendant from using the controversial label, and ordered him to pay a disciplinary fine of CHF 1000 for each day of non-compliance with the injunction. In the final decision of the court, the defendant was ordered to pay a fine of CHF 48,000 "for non-compliance with the court prohibition for 48 days". The Swiss Federal Supreme Court ruled that a disciplinary fine was justifiable, because the defendant did not comply with the order of the Commercial Court.⁴⁷ It should be noted that although this judgment concerns the enforcement of preliminary measures issued *ex parte*, which falls outside the scope of the draft Convention, the principles outlined by the Federal Court concerning enforcement would presumably also apply to final judgments granting injunctive relief.

24. In a judgment where the High Court of Appeal of the Canton of Zurich looked into the lawfulness of a fine pursuant to Article 343(1)(b)-(c) in a settlement proceeding, the court distinguished a threat of punishment under Article 343(1)(a) and a threat of a fine under Article 343(1)(b)-(c). It pointed out that, unlike the threat of punishment under Article 343(1)(a), the fine of Article 343(1)(b)-(c) does not have a punitive character. By observing that the amount of the fine is not being measured according to culpability, because of its non-punitive character, the High Court found that a fine pursuant to Article 343(1)(b)-(c) should be less severe than the threat of punishment under Article 343(1)(a).⁴⁸

5. Summary

25. Three characteristics of Penalty Orders are relevant to discussions of the draft Convention. First, although Penalty Orders are dealt with differently under national laws, they have one thing in common: they are independent of damages and interest awarded by the court of origin.⁴⁹

26. Secondly, Penalty Orders can be issued either in the primary judgment or as a subsequent order. In certain jurisdictions (*e.g.*, the Netherlands and Belgium), Penalty Orders are issued in the primary judgment and not as separate orders (a "two in one" judgment). They are designed to encourage / compel the judgment debtor to comply with the court order. The laws of those jurisdictions do not require the amount to be liquidated for the purposes of enforcement.

27. In several other jurisdictions, Penalty Orders are issued separately, although they are part of the original judgments to be imposed as a type of subsidiary or conditional obligation. Under those systems (*e.g.*, French law), an *astreinte* can only be enforced once the amount is liquidated by the court, thus there will mostly be a separate judgment. Similarly, under German law, *Zwangsgeld* and *Ordnungsgeld* are imposed in separate judgments.

⁴⁵ *Bundesgerichtshof* (German Federal Supreme Court), Decision of 10 May 2017, file number XII ZB 62/17; *Bundesverfassungsgericht* (German Federal Constitutional Court), Decision of 9 May 2017, file number 2 BvR 335/17.

⁴⁶ The three options are: Art. 343(1)(a) of the Swiss Civil Procedure Code imposes the threat of criminal fine (under Art. 292 of the Swiss Criminal Code), which seems comparable to contempt of court, and the fine is imposed by the criminal court; Art. 343(1)(b) imposes one-time penalty up to CHF 5000; Art. 343(1)(c) imposes penalty payment of up to CHF 1000 for each day on which the debtor violates the order contained in the judgment.

⁴⁷ BGE 142 III 587 E. 3, (BGer Urteil 4A_406/2015 vom 11 Juli 2016), the case is available at, https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F11-07-2016-4A_406-2015&lang=de&type=show_document&zoom=YES& (last consulted on 28 January 2019). The Federal Supreme Court also ruled that when imposing a penalty, the amount must be proportionate, taking into account the extent of the violation.

⁴⁸ *Beschluss und Urteil des OG ZH RV160005-O/U vom 10 August 2016.*

⁴⁹ Damages and interests are the monetary reliefs often delivered by courts. As long as they are compensatory in nature, thus not punitive, they will be covered by the draft Convention (Art. 10 of the draft Convention).

28. Thirdly, while some Penalty Orders are payable to judgment creditors, such as *dwangsom* under Dutch law and *astreinte* under Belgian and French law, other Penalty Orders are payable to courts or authorities, such as Swiss law, and *Zwangsgeld* and *Ordnungsgeld* under German law.

IV. ENFORCEMENT OF PENALTY ORDERS IN CERTAIN JURISDICTIONS

29. Foreign Penalty Orders have been enforced in certain jurisdictions. Often, the issues raised in the available cases concern the nature of these orders and whether they are enforceable under the law of the requested State.

1. The EU

30. The Brussels I Recast Regulation states that “a judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of payment has been finally determined by the court of origin.”⁵⁰

31. Since some Penalty Orders are payable to courts or States, the question as to whether such orders can also circulate under the Brussels I Regulation was clarified by the Court of Justice of the European Union (CJEU). The *Realchemie Nederland BV v. Bayer* case⁵¹ concerned the enforcement of six German court orders in the Netherlands in relation to an alleged patent infringement. The German court issued an interim order prohibiting Realchemie from importing into, possessing or marketing certain pesticides in Germany. The Order was issued on pain of a fine. The court also ordered Realchemie to provide details of its commercial transactions involving the pesticides and to transfer its stock into the custody of the courts. Having found that Realchemie failed to comply with the above orders, the German court ordered Realchemie to pay a fine of 20,000 euros (*Ordnungsgeld*) pursuant to Article 890 of the German Code of Civil Procedure (*ZPO*), which was to be paid to the court, and a periodic payment of 15,000 euros (*Zwangsgeld*) pursuant to Article 888 of the *ZPO*. *Bayer* brought an enforcement proceeding in the Netherlands to enforce and collect these fines from Realchemie.

32. In the enforcement proceedings, Realchemie, among others, argued that Bayer was not entitled to request the enforcement of the order imposing the fine because the fines were payable to the cashier of the German court. The Dutch *Rechtbank 's-Hertogenbosch* however took the view that the fact that the order required Realchemie to pay a fine of 20,000 euros to the court in no way detracted from Bayer’s right to and interest in having Realchemie actually pay the fine to the court, which constituted an incentive to comply with the basic order, and that Bayer could therefore pursue the enforcement of that order in the Netherlands.

33. On appeal, the *Hoge Raad* (Dutch Supreme Court) questioned whether such penalty orders would fall under the scope of the Brussels I Regulation. It raised several factors: “[f]irst of all, the fine penalises an infringement of an injunction imposed by the court at the request of a private party, which is not payable to Bayer but to the German State. Next, that fine is recovered not by the private party or on its behalf but automatically. Finally, the actual recovery is also made by the German judicial authorities.”⁵² In light of these considerations, the *Hoge Raad* stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

⁵⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (hereinafter, “Brussels I Recast Regulation”), Art. 55. Similar provisions were also provided in earlier versions of the Brussels I Regime: e.g., Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, “Brussels I Regulation”), Art. 49.

⁵¹ Judgment of 18 October 2011, *Realchemie Nederland BV v. Bayer CropScience AG*, C-406/09, ECLI:EU:C:2011:668. See A. Dickinson and E. Lein (eds.) (*op. cit.* note 33), para. 13.512.

⁵² *Realchemie Nederland BV v. Bayer* (*op. cit.* note 51), para. 36.

“is the phrase ‘civil and commercial matters’ in Article 1 of Regulation ... No 44/2001 ... to be interpreted in such a way that this regulation applies also to the recognition and enforcement of an order for payment of a fine pursuant to Paragraph 890 of the ZPO?”.⁵³

34. The CJEU answered the question affirmatively, finding that although the fine at issue in the main proceedings was punitive, the dispute was between two private persons. The CJEU found that the action was intended to protect private rights and did not involve the exercise of public powers by one of the parties to the dispute. By classifying the legal relationship between Bayer and Realchemie as "a private law relationship", the CJEU found that it was covered by the concept of "civil and commercial matters" within the meaning of the Brussels I Regulation.⁵⁴ As such, the Regulation applies to penalties payable to the State for breach of an injunction granted in favour of a private party in a civil and commercial matter.⁵⁵

2. The US

35. The US Court of Appeals for the Ninth Circuit considered the nature of the French *astreinte* issued in a copyright infringement case. In the *De Fontbrune v. Wofsy* case,⁵⁶ the plaintiff de Fontbrune owned copyright in a catalogue. He sued an American art editor Alan Wofsy and Associates (collectively, "Wofsy") to protect his *pièce de résistance*: copyright in photographs of Pablo Picasso's artwork. When Wofsy published his own Picasso catalogue using a number of the copyrighted photographs in de Fontbrune's catalogue and offered it for sale at a Paris fair, de Fontbrune sued Wofsy in France. In 2001, the Paris Court of Appeal held that Wofsy had infringed de Fontbrune's rights and awarded de Fontbrune 800,000 Francs in damages and issued an injunction prohibiting Wofsy from further use of the photographs. Furthermore, it ruled that if Wofsy did not obey the injunction, he would be required to pay an *astreinte* of 10,000 Francs for each violation. Several years later, when noticing that Wofsy had used the photographs again, de Fontbrune initiated a new action to compel Wofsy to pay the *astreinte* set out in the 2001 judgment. Having obtained a judgment in the French court granting him the remedy of *astreinte* and an award of two million euros, de Fontbrune sought to enforce this award in the Californian courts.

36. The District Court of California concluded that the award of an *astreinte* in this case constituted a penalty that was not recognisable for the purposes of the California Uniform Recognition Act (hereinafter, the "Act"). It held that *astreinte* was not a compensatory award for copyright infringements but rather a foreign "fine or other penalty". On appeal, the Ninth Circuit ruled to the contrary. Having looked into the nature of the French *astreinte* in this case and the process of rendering the *astreinte*, the Ninth Circuit found that the French *astreinte* was similar to civil contempt: its purpose was not to punish a harm against the public but to vindicate de Fontbrune's personal interest in having his copyright respected, and to deter further infringement by Wofsy. In addition, the *astreinte* awarded was payable to de Fontbrune, the proceedings were before a civil court, and the award was not a mandatory fine in the sense that the amount to be paid was freely determined by the French judge. Based on these findings, the court held that the French remedy of *astreinte* for copyright infringement awarded to de Fontbrune was not a "fine or other penal" award but a judgment that "[g]rants . . . a sum of money" within the meaning of the Act.

3. France

37. The Supreme Court of France (*Cour de cassation*) considered that a financial penalty imposed by a US court for non-compliance with an injunction was civil in nature, and could thus be declared

⁵³ *Ibid.*, para. 34.

⁵⁴ *Ibid.*, para. 41.

⁵⁵ See Dicey, Morris & Collins, *The Conflict of Laws*, Vol. 1, Chapter 5, 15th ed, London, Sweet & Maxwell, 2012, footnote 104.

⁵⁶ 838 F.3d 992 (9th Cir. 2016). The case is available at <<https://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/26/14-15790.pdf>> (last consulted on 28 January 2019).

enforceable.⁵⁷ In *SEC v. Credit Bancorp Ltd*, the US Court had ordered the defendant, Mr. Blech, a U.S. citizen, to co-operate with an appointed receiver to trace the proceeds of the fraud he committed. As the defendant did not co-operate, the receiver applied for a renewal of the injunction, together with a sanction of 100 US dollars per day for non-compliance, which was to double each day, paid to the court. Four months later, on application by the same receiver, the court ordered the defendant to pay 13 million US dollars. The receiver then sought enforcement in France, where the defendant had property. In this case, the French court did not examine whether the penalty was criminal in nature or not, and declared the judgment enforceable. This may be due to the fact that the amount of the foreign penalty was fixed by the court of origin (the US court) and thus the contempt fine was turned into an actual order to pay.

V. PENALTY ORDERS AND THE DRAFT CONVENTION

38. This section will now examine the operation of the draft Convention with respect to Scenarios 2 to 4. Specifically, it discusses whether a secondary Penalty Order obtained in the State of origin after the primary judgment is enforceable in the requested State, and if so, what considerations the court addressed should take into account. Before proceeding, it is useful to highlight two relevant principles that are adopted by the draft Convention.

39. *Severability* Article 9 of the draft Convention provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the draft Convention.⁵⁸

40. *Damages* Article 10 of the draft Convention allows a court to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered. If a judgment awards damages that are in part compensatory and in part punitive, the court addressed may refuse to enforce the punitive component of the damages.⁵⁹

41. Turning now to the specific treatment of Scenario 2 under the draft Convention, the issue is whether under the current version of the draft Convention the subsequent order made by the court in State X must be enforced in State Y under the draft Convention. (An order may of course be enforceable under the national law of State Y even if it is not enforceable under the draft Convention, as Art. 16 confirms: but this Note is concerned only with enforceability under the draft Convention.)

Scenario 2 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, but that order does not specify the consequences of non-compliance. However, a subsequent order of the court of origin imposes a civil penalty on Party B for non-compliance.

42. There are several arguments that Party B might raise to oppose enforcement under the draft Convention.

43. First, Party B might argue that the subsequent order does not relate to a civil or commercial matter and is thus outside the scope of the draft Convention. The subsequent order arises from the need for the court to punish past non-compliance and / or encourage future compliance, which is not a civil or commercial matter. However, there is a strong argument that the judgment imposing the penalty relates to the same civil or commercial matter as the earlier primary judgment. This is essentially the issue the CJEU considered in *Realchemie*, concluding that the sanction did relate to the underlying civil or commercial dispute.⁶⁰ There is also some analogy with the conclusion reached by the US Court of Appeals in *De Fontbrune v. Wofsy*.

⁵⁷ *Cour de cassation, Arrêt n°65 du 28 janvier 2009 (07-11.729)*.

⁵⁸ More discussion of Art. 9 of the 2018 draft Convention, see revised draft Explanatory Report, paras 331-332.

⁵⁹ More discussion of Art. 10 of the 2018 draft Convention, see *ibid.*, paras 333-335.

⁶⁰ *Realchemie Nederland BV v. Bayer (op. cit. note 51)*, para. 41.

44. Secondly, Party B might argue that the penalty order is not a “judgment” because it is not a decision “on the merits” within the meaning of Article 3 of the draft Convention: it does not finally determine the merits of any substantive dispute between the parties. It might also be argued that having regard to the structure of the instrument as a whole, the term “judgment” relates to primary orders that determine the parties’ substantive rights and obligations, not to secondary enforcement measures. Hence the need for the definition of the term “judgment” to expressly provide for inclusion of costs orders. The procedural means for enforcement are a matter for the court addressed under its national law (Art. 14) and cannot be prescribed by the court of origin. The likely outcome of this argument is difficult to predict, and different results could be reached in different States.

45. Thirdly, Party B might argue that even if the penalty order does form part of a judgment that comes within the scope of the draft Convention, the court in State Y should decline to enforce the penalty under the draft Convention by virtue of Article 10, as it is not compensatory in nature. In response, Party A might argue that Article 10 does not apply because the penalty is not an award of “damages”, which is the term used in Article 10. But it would be odd if Article 10 applied to an award labelled “punitive damages”, but not to an award simply labelled “penalty”. The better view would appear to be that Article 10 applies to any sum of money awarded, however described, that is not compensatory in nature. This point may need to be considered and clarified in the Explanatory Report.

46. It seems likely that for one or more of these reasons, the separate order awarding the penalty would not be enforceable under the draft Convention. The question raised by the next two scenarios is whether it makes a difference if the penalty was provided for in the judgment that contained the primary order. As a matter of policy, it is difficult to see why a difference in timing and / or form of the orders should produce a different result.

47. Finally, if the penalty were payable to the State of origin rather than to Party A the argument against enforcement under the draft Convention would if anything be stronger. But in circumstances where an order in favour of Party A probably would not be enforceable, it is not necessary to consider this variation in any detail.

Scenario 3 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, and that order specifies the consequences of non-compliance (e.g., a penalty of \$1,000 per day). The penalty is not payable under the law of State X until the court in State X is asked to fix, and does fix, the amount payable following non-compliance. Sub-variants involve this penalty being payable to Party A or to the State.

48. Unlike in Scenario 2, the Penalty Order referred to in this Scenario is included in the primary judgment. However, it only materialises once there is non-compliance. Four key questions arise in Scenario 3.

49. The first is whether the order can be characterised as “relating to civil or commercial matters”. The argument that it does relate to a civil or commercial matter seems if anything stronger than in Scenario 2, by virtue of its inclusion in the primary judgment, which plainly does relate to a civil or commercial matter. But as noted above, the better view is probably that this requirement would be met even in Scenario 2.

50. The second issue, as in Scenario 2, is whether the Penalty Order qualifies as a “judgment” in the sense of being a “decision on the merits”.⁶¹ Like with Scenario 2, it may be argued that matters relating to enforcement are for the court addressed, and therefore this Penalty Order is not an enforceable part of a judgment under the draft Convention. This argument has the same force that it has in the context of Scenario 2.

⁶¹ Art. 3(1)(b) of the 2018 draft Convention.

51. The third question is whether Article 10 applies to the Penalty Order, allowing a court to refuse to enforce it, as discussed in the context of Scenario 2. This argument has considerable force, as in Scenario 2.

52. A fourth question is whether the Penalty Order in the original judgment is not enforceable by virtue of Article 4(3) because it is not enforceable in the State of origin unless and until a further order has been made quantifying the penalty payable. This is another strong argument against enforceability. (This issue falls away if the court in State X makes a further order quantifying the penalty payable – however in that respect, the second order is essentially the same as the order discussed in Scenario 2, and is subject to the same arguments against enforceability under the draft Convention discussed in that context.)

53. For one or more of these reasons, it seems likely that the court in State Y could decline to enforce the Penalty Order in the judgment under the draft Convention. This would not affect the enforceability under the draft Convention of other orders in the judgment, including the primary obligation to take or refrain from taking certain action, as the Penalty Order can be severed from recognition and enforcement under Article 9.

54. As in Scenario 2, if the penalty were payable to the State of origin rather than to Party A the argument against enforcement under the draft Convention would if anything be stronger.

Scenario 4 The court in State X makes an order requiring Party B to take (or refrain from taking) certain action, and that order specifies the consequences of non-compliance (*e.g.*, a penalty of \$1,000 per day). The penalty is automatically payable under the law of State X without any need for the court in State X to fix the amount payable – it is payable in the event of non-compliance without any further court order.

55. The only difference between Scenarios 3 and 4 is the need for the court of origin to liquidate (fix) the amount payable under the Penalty Order in Scenario 3. Thus, the analysis concerning Scenario 3 is also relevant for Scenario 4 except to the extent that it does not raise Article 4(3) considerations.

56. It seems likely that even in this Scenario, the Penalty Order would not be enforceable for one or more of the first to third reasons given in relation to Scenario 3.

VI. CONCLUSIONS AND RECOMMENDATIONS

57. The draft Convention deals with the circulation of non-monetary judgments, including injunctions, *e.g.*, the enforcement of injunctions to prevent a defendant from continuing unlawful activity is necessary for the efficient protection of judgment creditors. When enforcing such injunctive relief, some jurisdictions attach “subsidiary” or “conditional” penalty orders to the main court order so as to encourage / compel compliance. These types of Penalty Orders are enforced under national law in certain jurisdictions. When considering whether and how the draft Convention should deal with such Orders, the following options are presented to the Diplomatic Session for consideration:

Option 1. The draft Convention does not include specific provisions on the enforcement of Penalty Orders. This is also the approach adopted by the 2005 Choice of Court Convention. If this approach is adopted it seems likely, for the reasons set out above, that it would be open to a court addressed to decline to enforce Penalty Orders under the instrument. But the basis on which that result would be arrived at is less than clear. In the interests of clarity, and to facilitate uniform enforcement, the Diplomatic Session may wish to further consider whether this issue should be clarified in the Explanatory Report. This clarification might be provided in the context of the discussion of the definition of judgment (clarifying whether Penalty Orders should be seen as forming part of a judgment for the purposes of the instrument) and / or in the context of the discussion of Article 10 (clarifying

whether this provision applies to all money awards however described that are not compensatory in nature, including awards described as penalties for non-compliance with primary orders).

Option 2. The draft Convention includes express provisions on its applicability to Penalty Orders. Two sub-options are provided here:

2.1 The draft Convention contains express provisions stating that it *does not* cover Penalty Orders. (As noted above, this would not affect the ability of national courts to recognise or enforce such Orders under national laws (Art. 16).)

2.2 The draft Convention contains express provisions stating that it *covers* Penalty Orders. In this respect, further consideration will be required in terms of what types of Penalty Orders will fall within the scope of the draft Convention, including:

- whether the draft Convention deals with all types of Penalty Orders, or only those that are conditional or subsidiary to the primary judgment on the merits (such as those in Scenarios 3 and 4);
- whether Penalty Orders that are payable to public authorities would be covered by the draft Convention; and
- whether the amount of the penalty stated in Penalty Orders should be fixed before enforcement and, if so, who should fix the amount.

ANNEXES

Paragraph 76 of the revised preliminary Explanatory Report states:

“76. Non-monetary judgments. Non-monetary (or non-money) judgments, *i.e.*, judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction, are often enforced by means of pecuniary penalties that “reinforce” the main part of the judgment. That is, the judgment defendant is ordered to perform, or not to perform, an act and may be required to pay a sum of money to encourage compliance with the order. These pecuniary penalties are severable from the part of the judgment providing the injunctive remedy and they may have been granted by the courts of the State of origin, which also may determine the final amount, or by the courts of the requested State.⁵⁷ Furthermore, in some jurisdictions these pecuniary penalties are payable to the courts or fiscal authorities, whilst in others they are payable to the judgment creditor. In the former case, those penalties are not within the scope of the draft Convention since they do not qualify as civil or commercial matters. In the latter case, in principle, they may be within this scope if their objective is to compensate the judgment creditor for any delay in the fulfilment of the injunction. However, Article 10 may apply in this case.

[Alternative formulation: periodic penalties that accompany injunctive relief are not decisions on the merits and therefore do not meet the definition of judgment for the purposes of the draft Convention, irrespective of whether they are payable to a public authority or the judgment creditor. One may also consider the consistency of this formulation with the concept of a decision on the merits, since the judgment as a whole is a decision on the merits, and this is one aspect of the relief ordered in the course of determining the merits of the dispute.]⁵⁸”

Footnotes:

- 57 Note also that the “penalty” may be a fixed sum, e.g., a civil fine, or a periodic penalty payment for each day of delay.
- 58 [The Special Commission should make a decision on this issue.]

Paragraphs 83 to 84 of the revised draft Explanatory Report prepared for the Twenty-Second Diplomatic Session

83. **Non-monetary judgments.** Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the draft Convention (see however Art. 11). In some legal systems, non-monetary judgments sometimes include pecuniary penalties (in French, *astreintes*) to “reinforce” the main part of the judgment. Such judgments contain a non-monetary primary obligation – to perform, or not to perform, an act – and a monetary “penalty” as a conditional secondary obligation in anticipation of non-compliance and to encourage compliance. The legal regimes governing these pecuniary penalties vary significantly.
84. Inclusion of these pecuniary “penalties” was thoroughly discussed during the last Meeting of the Special Commission,⁷⁰ but no definitive conclusion was reached and the issue will require further reflection.⁷¹ Three factors may be relevant to the application of the draft Convention to these pecuniary “penalties”. In relation to the process, in some jurisdictions these penalties are ordered by the court that renders the non-monetary judgment, but in others they are ordered by a different authority in an enforcement procedure. In relation to their content, in some cases these pecuniary penalties may be a fixed sum or a periodic penalty, *e.g.*, a sum of money for each day of delay. Finally, in relation to the beneficiary of the order, in some jurisdictions these pecuniary penalties are payable to the courts or State authorities (civil fines), but in others they are payable to the judgment creditor even though they are not truly compensatory.

Footnotes:

⁷⁰. See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 6, paras 42-51.

⁷¹. Under the Brussels I Regulation (recast), for example, judgments which order a payment by way of a penalty shall be enforceable “only if the amount of the payment has been finally determined by the court of origin” (see Art. 55). A similar rule is contained in the 2007 Lugano Convention (see Art. 49). The European Court of Justice has concluded that the Regulation applies to a pecuniary penalty that must be paid to the State insofar as it is related to a dispute between two private persons (see ECJ Judgment of 18 October 2011, *Realchemie Nederland vs Bayer*, C-406/09).