



# REVISTA IBÉRICA DO DIREITO

Volume 1, Número 1, Ano 1 [2020]

Porto, Portugal

A Revista Ibérica do Direito (RID) é a revista jurídica do Instituto Iberoamericano de Estudos Jurídicos (IBEROJUR), sediado na Cidade do Porto, Portugal. Promove a difusão do conhecimento jurídico Iberoamericano nas variadas vertentes do Direito Público e Direito Privado, valorizando estudos que destacam o direito comparado Iberoamericano ou aqueles originários dos países da América Latina, Espanha e Portugal.

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APECCJ – Associação de Promoção do Ensino, da Ciência e da Cultura Jurídica.

NPC n.º 514289759.

# REVISTA IBÉRICA DO DIREITO

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## **Editorial RID - Revista Ibérica do Direito, Ano 1, vol. 1.**

Os editores da **Revista Ibérica do Direito (RID)** têm a honra de disponibilizar ao público internacional uma revista de caráter científico cujo principal objetivo é propagação do conhecimento jurídico nas línguas portuguesa e espanhola, e adicionalmente, inglesa, galega e italiana.

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Nesta primeira edição da **RID**, apresenta-se artigos de destacados juristas internacionais, como os trabalhos dos professores italianos **Alessandro Boscati**, Catedrático de Direito do Trabalho da Universidade de Milão; **Davide Casali**, professor Titular de Direito do Trabalho da *Alma Mater* Universidade de Bolonha; e **Stefania Pedrabissi**, Professora Agregada de Direito Ambiental da Universidade de Parma.

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De Espanha, a RID recebeu os trabalhos de: **Patricia González Pulido**, professora da área de Direito Administrativo da Universidade de Extremadura, doutoranda em Direito na Universidade de Alcalá e integrante do Grupo de Investigação *Fiscalitas & Iuris* da Universidade de Extremadura.

Da Macedónia do Norte provém um trabalho de altíssima importância internacional: das professoras e investigadoras **Tatjana Zoroska Kamilovska**, Catedrática de Direito da Faculdade de Direito “Iustinianus Primus” da *Ss. Cyril and Methodius University*; e **Milka Rakočević**, professora Assistente da mesma instituição.

Do Brasil, a RID publica os trabalhos de reputados professores de três universidades brasileiras de importante referência: **Melina Girardi Fachin**, Professora Adjunta dos cursos de graduação e pós-graduação da Faculdade de Direito da Universidade Federal do Paraná; **Leila Bijos**, doutora em Sociologia do Desenvolvimento pela Universidade de Brasília, Professora Visitante do Centro Europeu de Formação e Investigação dos Direitos Humanos e Democracia da Universidade Kari-Franzens, Universidade de Graz; e **Denise Fincato**, Professora Pesquisadora do Programa de Pós-Graduação em Direito (Mestrado e Doutorado) da Pontifícia Universidade Católica do Rio Grande do Sul (PUCRS).

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Desejamos a todos excelentes leituras.

**Fábio Veiga e Rubén Miranda**

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**OBTAINING AN ENFORCEABLE TITLE FOR UNCONTESTED MONETARY  
CLAIMS: PARALLELS BETWEEN MACEDONIAN AND SPANISH LAW**

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Tatjana Zoroska Kamilovska\*

Milka Rakočević\*\*

**Introductory Remarks**

One of the rather challenging tasks for many policymakers in Europe over the last decades regarding the reforms of the judicial system has been the establishment of efficient procedural instruments for recovery of claims, particularly the uncontested ones. Due to the fact that considerable part of initiated court proceedings in many European countries are not those over a dispute of fact or law, but those where the creditor must address the court in order to obtain an enforceable title against the debtor due to his unwillingness or inability to pay, the need for existence of a quality system of certification<sup>1</sup> of uncontested claims is more than obvious.<sup>2</sup>

The existence of such a system is essential for the proper functioning of the judicial system as a whole for several reasons. It provides for an early stage distinction between actual (truly contentious) and “unreal” (where no real legal dispute exists) disputes<sup>3</sup> in the proceedings which

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<sup>1</sup> In this paper, the procedural instruments that are adjusted to obtain an enforceable title for uncontested monetary claims, regardless of their different naming and legal qualification (payment order, notarial payment order, writ of execution based on a trustworthy document) will be referred to as certification of uncontested claims.

<sup>2</sup> For example, out of all cases dealt with by ordinary lower civil courts, the percentage of uncontested claims ranges between 50% in Ireland and more than 80% in Germany, Austria and Sweden. *Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed up Small Claims Litigation COM(2002) 746, p.7* (hereinafter *Green Paper*).

<sup>3</sup> Due to absence of any contentious questions over fact or law, some authors name these cases as “unreal” disputes. Here, the court proceedings serves just to examine the contentiousness of the claim, and in case of its absence, the court serves as a “payment service” for (mechanical) obtaining of an enforceable title against the debtor (germ. Titelbeschaffung). See A. Galič, *Izdavanje platnog naloga i arbitraža* [Issuing of a Payment Order and Arbitration], *Pravo u gospodarstvu*, Vol. 51, br. 6, 2012, str. 1482.

## Obtaining an Enforceable Title for Uncontested Monetary Claims: Parallels Between Macedonian and Spanish Law

allows the latter to proceed on a separate, fast-track procedure. It produces more rational use of the scarce resources allocated to the courts. The courts are concentrated on “real” dispute adjudication within a reasonable time, while the settlement of “unreal” disputes is modified to the needs of their efficient resolution. A procedural legislation that ensures efficient and speedy adjudication of uncontested claims is also a deciding factor in the prevention of huge backlogs in the courts.<sup>4, 5</sup>

Each country has a different approach to the problem of mass recovery of uncontested claims. The solutions vary due to the difference in the conceptual organization of the civil procedure as well as their different legal traditions. In general, a default judgment, a specific summary proceedings and even provisional measures are considered to be the main procedural means in managing these types of claims.<sup>6</sup> The non-contentious nature of procedures for obtaining an enforceable title for uncontested monetary claims also gives the possibility for the policymakers to opt among different authorities as competent for their certification. Surely, the selection should be done in a manner that would pose a procedure that is both cost-effective and guarantees proper protection of rights. In that respect, competent authorities are usually first instance courts or notaries. In most countries, the reform aimed for obtaining a system that will provide for a speedy, simple and inexpensive collection of uncontested claims is mainly carried out by introduction of payment order procedures; assigning notary public service with the authority of issuing enforceable titles, digitalization and centralization of the process.<sup>7</sup>

The paper will discuss the legislative framework of Macedonia and Spain regarding the available procedural mechanisms for obtaining an enforceable title for uncontested monetary claims. Similarities and differences of the procedural systems are observed, as well as their results. The comparison of procedural mechanisms of both countries highlights the conceptual diversity,

<sup>4</sup> See also A. Uzelac, M. Bratković, *Certificiranje nespornih tražbina u domaćem i poredbenom pravu* [Certification of Uncontested Claims in National and Comparative Law], *Zbornik Aktuelnosti građanskog procesnog prava – nacionalna i uporedna pravnoteorijska i praktična dostignuća*, Split, 2015, p. 83; *Green Paper*, p. 8.

<sup>5</sup> The Austrian *Mahnverfahren* is a good example of a quality mechanism for certification of uncontested monetary claims. As a result of its simplicity and efficiency as a no-evidence, one-step and digitalized certification system, it even displaced the special proceedings for issuing of documented payment order (*Mandatsverfahren*) resulting with its removal from the Austrian *Zivilprozessordnung (ZPO)* due to its poor practical application.

<sup>6</sup> *Green Paper*, p. 9.

<sup>7</sup> For example, since 2008 Slovenia has a centralized and digitalized system of certification of uncontested claims in the competence of the District Court in Ljubljana. Estonia, Hungary and Poland also have an electronic filing and processing of the claims within a centralized system. See World Bank, *Towards Effective Enforcement of Uncontested Monetary Claims: Lessons from Eastern and Central Europe*, June 2017, p. 15, 17.

but also proximity of two countries, especially in the light of their affinity to different procedural circles within the continental Europe.

## 1. Debt Recovery Methods

Respecting payment terms remains a real challenge in the contemporary world. It is rather common nowadays that many companies encounter quite unpleasant situations where clients do not pay their services. Even though the economic effects of late or non-payments are well known, the payment behavior of private individuals and businesses is slowly changing. Taking this into account a solid legal framework that guarantees creditor access to prompt recovery of due monetary claims, especially the ones whose justification is not called into question is more than needed.

As in many other jurisdictions, Macedonian and Spanish policymakers appreciate resolving the disputes out of court. But, when amicable debt collection turns out to be unsuccessful, the creditor remains dependent upon obtaining an enforceable title through judicial proceedings. Upon failure of extrajudicial collection, the creditor has to decide which judicial proceedings is the most appropriate method depending on the type, amount and nature of the debt. In this respect, most common debt recovery methods in both countries include initiation of ordinary civil proceedings or special summary proceedings. Macedonian, as well as Spanish law recognizes some proceedings that are faster and more convenient for the creditor when the debt is recognized and documented in some type of financial legal instruments or trustworthy documents.

In that respect, in Macedonia, within the structure of ordinary civil procedure there is a payment order procedure. Beside the judicial proceedings there is also a procedure for issuing notarial payment order.<sup>8</sup> The Spanish law also regulates several separate swift proceedings along with the ordinary civil procedure (*juicio ordinario*), such as the “*monitorio*” procedure (for claims documented in common commercial papers) and the “*cambiarío*” procedure (for claims

<sup>8</sup> Judicial payment order procedure is regulated with the Civil Procedure Act (Official gazette of RM, No 9/2005, 110/2008, 83/2009, 116/2010 and 124/2015, hereinafter CPA). The procedure for issuing notarial payment order is regulated with Notary Public Act (Official gazette of RM, No 72/2016 and 142/2016, hereinafter NPA)

documented in negotiable instruments). The claim for payment can be realized through a notary public as well in the so called “*monitorio notarial*” procedure.<sup>9</sup>

## 2. Procedural Mechanisms for Certification of Uncontested Monetary Claims

Among the different procedural mechanisms intended for managing uncontested claims, the payment order procedure has proven to be an exceptionally valuable tool to ensure their rapid and cost-effective collection. The payment order procedure is widely used and it is generally regarded as successful method for recovery of debts due to its main characteristic as a fast-track and easy accessible procedure. It is a particular civil proceeding that has certain specific characteristics compared to the ordinary civil proceedings. The principal characteristic of this procedure is that it is aimed to ensure prompt enforceability of uncontested claims. Therefore, it is non-contentious in its essence and it is carried out without debtor’s participation. It is considered as a summary and reduced procedure for collection of overdue monetary claims that are proven by qualified documents which deserve special trust with regard to their origin and content.<sup>10</sup> It is a procedure of reduced cognition which gives the possibility of determining the so-called conditional condemnation. In the course of this procedure the competent authority decides *in merito* whether the prerequisites for issuing an order for payment are fulfilled or not.<sup>11</sup>

Macedonian and Spanish law recognize fast-track proceedings for recovery of uncontested monetary claims which are acknowledged as payment order proceedings in its substance. Both countries have dual-track regime for obtaining an enforceable title for uncontested monetary claims: standard judicial proceedings for issuing a payment order<sup>12</sup> and procedures before a notary public.

<sup>9</sup> Juicio ordinario, juicio verbal, proceso monitorio and proceso cambiario are regulated with the Ley de Enjuiciamiento Civil (Civil Procedure Act, BOE-A-2000-323, hereinafter CPA). The monitorio notarial (reclamación de deudas dinerarias no contradichas) is regulated with the Ley del Notariado (Law on Notaries, BOE-A-1862-4073, hereinafter LN).

<sup>10</sup> See also A. Јаневски, Т. Зороска Камилувска, Граѓанско процесно право, книга прва, парнично право [Civil Procedural Law, First Book, Civil Litigation Procedure], Скопје, 2012, p. 511.

<sup>11</sup> Even though this procedure has different manifestation in different countries and also in the EU context, in general, it concerns a specific, *ex parte* procedure for obtaining an enforceable title in debt collection cases.

<sup>12</sup> The procedure for issuing a judicial payment order in Macedonia and “*proceso monitorio*” in Spain.



Regarding Macedonian legislative solutions in this sphere, it should be noted that for a considerably long time the enforcement on the basis of a trustworthy document was considered as the main mechanism for certification of uncontested claims.<sup>13</sup> Certification of uncontested claims within the enforcement procedure is quite an unusual and unfamiliar procedural instrument in European context that was established due to merely practical reasons.<sup>14</sup> With the enactment of the Enforcement Act of 2005, the trustworthy document was excluded as a ground for enforcement. This solution produced rapid increase of the number of court procedures for issuing a payment order since the creditors whose claims were proven with a trustworthy document (in order to collect them) had no other option but to initiate separate civil proceedings for issuing a payment order. This state of affairs generated great inefficiency causing additional burdening of the courts with new cases.<sup>15</sup> In order to provide more efficient administration of justice and respond to the need of unburdening the courts from undisputed cases, the modern concept of “outsourcing” certain judicial responsibilities was accepted as a key reform in the sphere of certification of uncontested claims. In 2009 public notaries were given a genuine competence to render, upon creditor’s proposal, decisions to allow enforcement on the basis of a trustworthy document. From 2016, with the enactment of the new NPA, this procedure is regulated by the NPA as notarial payment order.<sup>16</sup> As for the effects of dejudicialization regarding the certification of uncontested

<sup>13</sup> As of today, certification of uncontested claims through a procedure of enforcement on a basis of a trustworthy document exists in Serbia, Croatia and Slovenia as primary method of certification. In Serbia, the court is competent, except in cases of collection of monetary claims based on utility bills which is in competence of the enforcement agent. In Croatia, the procedure is in the competence of the notary public, while Slovenia has opted for a centralized and digitalized system in the competence of the court.

<sup>14</sup> The introduction of a trustworthy document as a ground for enforcement was made in 1978. Apart from the principal rule that a ground for enforcement could only be an enforceable title and without inclining to any similar experience in comparative context, the Enforcement Procedure Act of 1978 introduced the trustworthy document as ground for enforcement due to pragmatic reasons – the main goal was to simplify the forcible collection of monetary claims by bypassing the payment order procedure. Taking into account the same reasons why the payment order procedure was introduced – the possibility of issuing a conditional condemnation in *ex parte* procedure if the claim is proven with a trustworthy document – it was considered that there is no obstacle to go a step forward and to allow enforcement on the basis of a trustworthy document instead of firstly initiating a payment order procedure and afterwards commencing enforcement. Given the fact that according to the new EA of 2005, the enforcement is conducted directly, without a prior proceedings for allowing enforcement, there was no possibility for the trustworthy documents to be considered as ground for enforcement mainly because they do not contain a statement of the debtor that he agrees not to be guaranteed the legal protection of his rights (which means reduction of his procedural rights), nor such an act of disposal of the rights can be assumed even though they have high degree of probability which proves the existence of a certain overdue monetary claim.

<sup>15</sup> For illustration only, on 15 November 2008, 314.504 enforcement cases were pending before the Basic Court Skopje 2 in Skopje, in which the court had to act on a basis of a trustworthy document.

<sup>16</sup> In Macedonia, the procedure for issuance of notarial payment order is in the competence of around 200 notaries.

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claims, the relevant figures for the last couple of years show positive results.<sup>17</sup> Although there is no explicit provision stating that the procedure for issuing notarial payment order is mandatory, it nevertheless has such a character. In light of the CPA which explicitly states that the judicial payment order is issued only if the obligation is to be fulfilled abroad<sup>18</sup>, the notarial payment order is considered as regular and principal instrument for collection of uncontested claims.

As for the available procedural instruments for obtaining an enforceable title for uncontested monetary in Spain, the *proceso monitorio* is a relatively new institute in the Spanish procedural law. It was introduced with the enactment of the Civil Procedural Act of 2000 as one of the principal novelties in order to strengthen the protection of the creditors.<sup>19</sup> It was designed to take the form of swift proceedings through which the creditors seek to obtain an enforceable title promptly. It is currently one of the most widely used procedures in Spain.<sup>20</sup> Before the amendments of CPA in 2009, the issuance of the payment order was in competence of the judge. As of May 2010, this power is delegated to the court clerks. This solution produced more efficient and faster

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Data regarding the notarial payment order	2012	2013	2014	2015	2016	2017
Initiated proceedings	243.254 (100%)	241 966 (100%)	205 259 (100%)	275168 (100%)	256627 (100%)	84487 (100%)
Forwarded cases to the court	193 (0.08%)	198 (0,08%)	292 (0.14%)	68 (0.025%)	31 (0.012%)	241 (0.28%)
Issued notarial payment orders	216.753 (89%)	204 310 (84,4%)	175 760 (85.6%)	247393 (90%)	246534 (96.07%)	79771 (94.42%)
Final and enforceable payment orders	120.396 (49.5%)	115 027 (47.5%)	101 003 (49.4%)	125816 (51%)	125085 (51%)	27973 (35.1%)
Filed oppositions	13.061 (5.4%)	8 610 (3,5%)	7490 (3.7%)	6963 (3%)	7251 (2.94%)	3733 (4.68%)

Source: Notary Public Chamber of Republic of Macedonia

<sup>18</sup> Art. 418 para 1 of the CPA.

<sup>19</sup> Regarding the reasons for introduction of such a procedure, Section XIX of the Preamble of the *Ley de Enjuiciamiento Civil* states that it is deemed that through the channels of this procedure, which is efficient in several countries, a rapid and effective protection of monetary claims will be obtained, especially for professionals and medium and small businesses.

<sup>20</sup> According to the statistical data provided by the General Council of Judiciary in 2016 a total of 537,054 *monitorio* proceedings were registered in first instance courts in Spain. See Consejo General del Poder Judicial, "La Justicia dato a dato", Madrid, 2016, p. 64.

processing of the application. Since October 2015, another mechanism for obtaining an enforceable title for uncontested claims is provided – the so-called *monitorio notarial*. Its substance is two folded: it is aimed to provide a protection of claims, on the one hand, and to lighten the workload of the courts, on the other. As it is explicitly noted in the Preamble of Ley de la Jurisdicción Voluntaria: "It can contribute significantly to a substantial decrease in the volume of cases that enters annually in the Courts, by constituting itself as an alternative to the judicial collection of claims."<sup>21</sup> Unlike the legal regulation in Macedonia, the Spanish system provides a concurrent competence of the courts and notaries regarding the certification of uncontested claims. Namely, *monitorio notarial* is an optional instrument available to the creditor for recovery of certain claims<sup>22</sup> that exists as alternative to the *proceso monitorio*. It is considered to be a fast and convenient mechanism for obtaining enforceable title in those cases where the creditor has a document that accredits the debt but lacks enforceability, avoiding the court proceedings when there is no contentiousness among the parties but an unjustified resistance of the debtor to fulfill his obligations.

### 3. Claims Suitable for Certification and Grounds for Certification

The laws of both countries prescribe several criteria that the recoverable claim must meet in order for the creditor to obtain an enforceable title based on the presumption that the claim will remain uncontested. Those criteria refer to the nature and the characteristics of the claim as well as the appropriate written evidence that prove the existence of the claim. Fulfillment of such criteria is essential for the admissibility and justification of the application for certification of uncontested claims.

The scope of application of procedures for certification of uncontested claims is limited only to monetary claims in both legal systems. While in Macedonia, the legislator insists that the

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<sup>21</sup> See Section XI of the Preamble of Ley de la Jurisdicción Voluntaria, 15/2015, of 2 July, 2015.

<sup>22</sup> According to Art. 70 para 1 of the Spanish NPA certain claims cannot be recovered through this procedure, such as claims based on a contract between an entrepreneur or professional and a consumer or user or claims in which public administration is concerned.

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claim must be monetary and due, the Spanish approach is more detailed, providing that the claim must be monetary, liquid, specific, due and exigible.<sup>23</sup>

Regarding the issue whether the certification of uncontested claims should be limited only on claims up to a certain amount, unlike some procedural systems where the access to the available procedural mechanisms is restricted by introduction of a ceiling as to the amount that can be claimed<sup>24</sup>, in Macedonia and Spain these procedures are accessible to the creditors regardless of the amount. Though, Macedonian legislator has never provided an upper limit regarding the availability of such procedures, in Spain that wasn't always the case. Namely, in 2000 when it was introduced for the first time, *proceso monitorio* was suitable for recovery of claims up to 30.000 Euros. Since May 2010, the ceiling was raised considerably to an amount of 250.000 Euros. As of October 2011, the value census was vacated entailing that the *monitorio* procedure is accessible for recovery of monetary claims irrespective of their value.<sup>25</sup>

As for the requirement of production of written evidence that justifies the existence of the claim that is to be recovered through a procedure of certification, both countries have accepted the “evidence” model of procedure for certification of uncontested claims meaning that the creditor is obligated to deliver documentary evidence in order for the procedure to be admissible.<sup>26</sup> In that regard, procedural provisions ask for production of certain documents as an essential prerequisite for processing of the claim having *numerus clausus* approach<sup>27</sup> when prescribing them. According to the Macedonian law, these documents are set under the term of a trustworthy document. The CPA sets the following documents as trustworthy: public documents; bills of exchange and checks

<sup>23</sup> See Art. 418 para 1 of Macedonian CPA, Art. 70 para 1 of Macedonian NPA, Art. 812 para 1 of Spanish CPA, Art. 70 para 1 of Spanish NPA.

<sup>24</sup> The issuance of a payment order up to a certain amount is common for Austria (for monetary claims up to 75.000 Euros) and Portugal (for monetary claims arising from contracts up to 15.000 Euros)

<sup>25</sup> Although the uncontested nature of the claim cannot be related to the magnitude of the amount involved in anyway, the justification of any such constraint of access can possibly be found in the protection of the debtor due to the fact that the certification of uncontested claims is an *ex parte* procedure. But, this reasoning can be acceptable only if the ordinary proceeding provides a higher degree of protection of the debtor then the proceedings for certification of uncontested claims. As for Spain, the limitation of the amount that can be claimed can partly be explained by the novelty of the payment order procedure to its procedural system. See *Green Paper*, p. 21.

<sup>26</sup> The acceptance of the “evidence” model is intended to provide for the debtor’s protection as a safeguard against frivolous applications allowing the issuance of a payment order only after a summary examination of the merits of the case is done by a competent authority.

<sup>27</sup> The *numerus clausus* approach regarding the trustworthy documents is a result over the practical experience that the claims for which there are written evidences that deserve trust with regard to their origin and content generally exist and the arguing over them in litigation *ex post* commonly turns out to be pointless. S. Triva, M. Dika, *Gradansko parnično procesno pravo* [Civil Litigation Procedural Law], Zagreb, 2004, p. 812.

with protest and with return accounts if those are necessary for founding of the claim; invoices; and documents which according to separate regulations have the meaning of public documents. The NPA regulation slightly defers, prescribing the excerpt from certified business books of bank, savings bank, financial corporation, financial lessor or insurance company in addition to the documents mentioned previously.<sup>28</sup> According to the Spanish CPA, one of the following documents is required to substantiate the application submitted: documents which are signed by the debtor or contain his seal, stamp, imprint or trademark or any other physical or electronic sign, regardless of their form and nature or the support used; invoices, delivery notes, certifications, telegrams, telefax or any other documents that, even unilaterally created by the creditor, are commonly used to document the credits and debts in relations that appears between creditor and debtor.<sup>29</sup> In addition to this, the CPA provides that the *proceso monitorio* can be used when together with the document recording the debt, commercial documents evidencing a previous enduring relationship are provided and the debt is credited by means of certification of non-payment of amounts due for common expenses of communities of owners of urban real estate.<sup>30</sup> Regarding the enumeration of the trustworthy documents in both legal systems, obviously there is significant difference in the type of qualified documents prescribed. For example, as to the negotiable instruments, like bills of exchange and checks prescribed by the Macedonian laws, the same type of documents in Spain is subject to a different fast-track procedure for recovery of debts, the *proceso cambiario*.

#### 4. Initiation and Course of the Proceedings for Certification of Uncontested Monetary Claims

The initiation of the proceedings for certification of uncontested claims is in the disposition of the creditor. The creditor whose claim fulfills the criteria for obtaining an enforceable title through proceedings for certification can file a motion<sup>31</sup> to the competent authority (court or notary

<sup>28</sup> Arts. 418-a of CPA and 70 para 2 of the NPA.

<sup>29</sup> Art. 812 para 1 of the Spanish CPA

<sup>30</sup> Art. 812 para 2 of the Spanish CPA.

<sup>31</sup> In Macedonia, the proceeding for issuance of judicial payment order is commenced with a claim and the procedure for issuance of notarial payment order is commenced with a proposal. In Spain, both *proceso monitorio* and *monitorio notarial* are commenced with a request.

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public) with regard to the provisions regulating the jurisdiction. Both countries have the same approach when prescribing the rules on jurisdiction in these procedures with minor differences. In general, courts and notaries of the domicile of the debtor have the jurisdiction for certification of uncontested claims.<sup>32</sup> The provisions that regulate the further processing of the claims are more or less the same. After the initial motion, the competent authority *ex parte* examines whether the criteria for certification of uncontested claims are fulfilled, and if the motion is admissible and the assessment of the information given and the documentary evidence produced indicates that the claim is founded, the court or the notary public shall issue a payment order obligating the debtor either to recover the claim or to file an opposition in the specified time limit.

According to Macedonian law, the judicial payment order is issued without holding a hearing. In the payment order the court shall declare that the defendant (debtor) is obligated to fulfill the claim within 8 days (in disputes over bills of exchange or check, within 3 days) or to submit an opposition against the issued order within the same time limits. If the court does not accept the proposal for issuing a payment order, it shall continue the procedure upon the claim.<sup>33</sup>

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The procedure for issuing judicial payment order has to be completed within 3 months.<sup>34</sup> Regarding the notarial payment order, the notary public is only entitled to act upon admissible and justified proposals for issuance of notarial payment order. In that case, the notary shall render a decision granting the relief sought i.e. he shall oblige the debtor within eight days to settle the creditor's claim or to file an opposition. If the notary considers that the proposal is inadmissible or unjustified, it shall forward the case to the competent court for further action and deciding as if a claim was filed. The final and enforceable decision for issuing a notarial payment order is an enforceable title.<sup>35</sup>

Regarding Spanish procedures, once the *proceso monitorio* is initiated, if the documents are valid or constitute a *prima facie* evidence of the right of the creditor, confirmed by what is set out in the request, the court clerk shall request the debtor to pay the creditor within a time-limit of 20 days or to appear before the court to oppose. If the debtor does not comply with the payment

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<sup>32</sup> According to Macedonian law, the court and notary of the domicile of the debtor have the jurisdiction to process the claim (Art. 68 para 1 of the Macedonian NPA and Art. 39 of the Macedonian CPA). In Spain, the jurisdiction lies with the court or the notary of the domicile of the debtor, the habitual residence or the place where the debtor could be found (Art. 813 of the Spanish CPA and Art. 70 para 1 of the Spanish NPA).

<sup>33</sup> See Art. 420 and 421 of the CPA.

<sup>34</sup> Art. 418 para 2 of the CPA.

<sup>35</sup> Arts. 71 para 1/4, 78 and 73 para 4 of the NPA.

order or does not appear, the court clerk shall issue a decree terminating the payment order procedure and transfer the matter to the enforcement office. If the debtor complies with the payment order, the court clerk shall order the staying of the proceedings as soon as the payment has been evidenced.<sup>36</sup> In compliance with the judgment of the Court of Justice of the European Union of 14 June 2012<sup>37</sup>, holding that Spanish law is not in accordance with the EU law on consumer protection since it does not allow the judge before which an application for an order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, whether a term contained in a contract concluded between a seller or supplier and a consumer is unfair, in 2015 the new provision was introduced regarding the *monitorio* procedure. It lays down that if the claim is grounded on agreements concluded with consumers, the judge shall *ex officio* examine whether any of the contractual terms may be classified as unfair. If any of the terms appears that could be found as unfair, the judge shall hear the parties and render a decision. If any of the terms are deemed to be unfair, the judge may decide either to decline the claim as inadmissible or to continue with the proceedings without applying the terms considered to be unfair.<sup>38</sup> In respect of *monitorio notarial*, if the request of the creditor is admissible and justified, the notary shall require the debtor to pay the creditor within 20 days. If the defendant appears before the notary to formulate an opposition, the proceedings before the notary shall be terminated without prejudice to the creditor's right to recover the claim through judicial proceedings. If within the given time limit the debtor does not appear before a notary or does not file an opposition, the notary shall record such circumstance. In this case, the minutes shall be considered as enforcement title.<sup>39</sup>

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Although provisions regulating ordinary civil procedure prescribe presence of qualified representatives (attorney or procurator) above a certain amount, the Spanish CPA explicitly states that the presentation of the initial request in *proceso monitorio* shall not require an attorney or procurator.<sup>40</sup> In Macedonia, representation in the procedure for issuance of judicial payment order is not required. On the contrary, the NPA provides mandatory presence of an attorney when filing the proposal for issuing a notarial payment order.<sup>41</sup>

<sup>36</sup> Arts. 815, 816 and 817 of the Spanish CPA.

<sup>37</sup> Judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349.

<sup>38</sup> See Art. 815 para 4 of the Spanish CPA.

<sup>39</sup> Art. 71 of the Spanish NPA.

<sup>40</sup> Art. 814 para 2 of the Spanish CPA.

<sup>41</sup> Art. 68 para 2 of the NPA.

## 5. Protection of the Debtor

Given the fact that procedural mechanisms for certification of uncontested monetary claims are carried out as *ex parte* proceedings, the protection of the debtor is an important issue to be discussed. In comparative context, there are a number of instruments intended to provide for the debtor's protection: by introducing a ceiling as to the amount that can be claimed in this type of proceedings; by establishing the so called "evidence" procedural model where the creditor should produce written evidence which proves the justification of the claim; or by the possibility of stating an opposition against the issued payment order.

Both countries recognize the same mechanisms for protection of debtor's rights. They both have the so-called "evidence" model of payment order procedure and the possibility of opposing the issued payment order. Until recently, Spain also provided a ceiling for the access to the order for payment procedure.

Nevertheless, the possibility of filing an opposition against the payment order is considered as the most solid mechanism for protection of the debtor's rights. It is important to notice that in both legal systems the opposition is the only legal remedy available to the debtor in this type of proceedings meaning that the debtor has only one opportunity to contest the claim. The issuance of the payment order is regulated as one step procedure, so there is no further possibility of an ordinary appeal against the decision in the absence of opposition.

Regarding the opposition, the time limit for contesting the claims differs in both countries.<sup>42</sup> In Macedonia, the CPA provides that the debtor can oppose the judicial payment order within 8 days and in disputes over bills of exchange and checks, within 3 days from reception of the payment order.<sup>43</sup> As for the notarial payment order, it can be opposed within 8 days from reception of the decision for issuance of the notarial payment order.<sup>44</sup> In Spain, time limits for filing opposition are significantly longer. In *monitorio* procedure the debtor can file an opposition within 20 days from the notification.<sup>45</sup>

<sup>42</sup> Even though setting time-limits is rather a technical matter for the policymaker, granted time-limits should be such to provide a real opportunity for the debtor to prepare his defense.

<sup>43</sup> Art. 420 para 2 of the CPA.

<sup>44</sup> Art. 72 para 2 of the NPA.

<sup>45</sup> Art. 815 para 1 of the Spanish CPA.



Another question that arises in this context is whether the opposition should be reasoned. In many countries, the opposition against the issued payment order does not require the debtor to provide any justification. It is sufficient to state that he objects without the need for any further explanation.<sup>46</sup> Procedural provisions of both countries insist on reasoned opposition. This can be explained with the tendency of providing some kind of safeguard against frivolous oppositions given the fact that their filing can be used as dilatory tactic. The Macedonian CPA states that in the opposition the debtor is obligated to state the facts and evidence in respect of the contested part of the judicial payment order.<sup>47</sup> On the other hand, the NPA does not contain any provision whether the opposition against the notarial payment order should be reasoned or not. By our opinion, the opposition should be reasoned, stating the facts and evidence against the rendered decision of the notary. As for the Spanish *monitorio* procedure, in 2015 there was an amendment to include an obligation for the defendant, if opposing to the order for payment to file a founded and reasoned opposition, as opposed to succinct as was previously the case. The current procedural provision states that the debtor is obligated in a justified and grounded manner to allege the reasons why, in his opinion, he does not owe the amount claimed, either in full or in part.<sup>48</sup>

Regarding the filing of the opposition, it should be noted that in certain cases a need of a qualified representative is required. According to Spanish law, the opposition should be signed by an attorney or a procurator if their intervention is required depending on the amount of the claim. The CPA imposes their intervention if the amount exceeds 2000 Euros.<sup>49</sup> In Macedonia, the intervention of the attorney is obligatory only if opposing against the decision of the notary for issuing a notarial payment order.<sup>50</sup> If opposing against judicial payment order there is no need of legal representation.

As for the course of the proceedings if the debtor files an opposition, the initiated procedure regularly follows the path of civil litigation. In Spain, there are distinct rules depending on the amount of the claim. If the amount does not exceed that set for “*juicio verbal*” (for claims not exceeding 6000 Euros), the court clerk shall terminate the *monitorio* procedure and the procedure will continue in accordance with the provisions for the oral procedure. If the amount of the claim

<sup>46</sup> For example, in Germany and Sweden.

<sup>47</sup> Art. 423 para 3 of the CPA.

<sup>48</sup> Art. 815 para 1 of the Spanish CPA.

<sup>49</sup> Art. 818 para 1 of the Spanish CPA.

<sup>50</sup> The opposition should be written by an attorney, containing his seal and signature. Art. 68 para 2 of the NPA.

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exceeds 6000, the creditor shall be given a time limit of 1 month to file the claim according to the rules of ordinary civil procedure (*juicio ordinario*), on the contrary he shall issue an order declaring the staying of the proceedings and ordering the creditor to pay the costs.<sup>51</sup> Regarding the *monitorio notarial*, if the defendant appears before the notary to formulate an opposition, the proceedings before the notary shall be terminated without prejudice to the creditor's right to recover the claim through judicial proceedings.<sup>52</sup>

In Macedonia, if an opposition is filed against the judicial payment order within the given time limit the court shall assess whether it is necessary to schedule a preparatory hearing, or it may immediately schedule a main hearing. In the decision on the main issue, the court shall decide whether the payment order completely or partially stays in force or it is vacated.<sup>53</sup> Upon opposition against the notarial payment order, it is provided that the competent court decides in accordance with the provisions of the CPA, which means in a same manner as if opposition against the judicial payment order was filed.<sup>54</sup> The opposition is to be filed before a notary who rendered the payment order. The notary should submit the opposition to the competent court within 3 days from the date it was filed.<sup>55</sup> With the amendments of the CPA introduced in 2015, the procedure upon the opposition against the notarial payment order before the first instance court has to be completed within six months from the date of receipt of the case. If an appeal against the court decision is filed, the second instance court must render its decision within 30 days.<sup>56</sup> The prescribed time frame is expected to contribute to greater efficiency of the procedure.

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### Conclusion

The comparative analysis of Macedonian and Spanish legislative framework showed that the available procedural mechanisms for obtaining an enforceable title for uncontested claims differ, more or less, in their conceptual organization and arrangement of the procedure. Notwithstanding the dissimilarities, both countries have established functional and effective

<sup>51</sup> Art. 818 para 2 of the Spanish CPA.

<sup>52</sup> Art. 71 para 2 of the Ley del Notariado.

<sup>53</sup> Art. 423 para 5 of the CPA.

<sup>54</sup> Art. 428-a para 1 of the CPA.

<sup>55</sup> Art. 72 para 3 of the NPA.

<sup>56</sup> Art. 428-v para 2 of the CPA.

systems that deliver encouraging results while coping with the problem of mass recovery of uncontested claims. Even though, in both countries the system for certification of uncontested monetary claims is considered as efficient and operative, there is always a room for improvement, especially if compared with national systems that carried out reforms which proved to be more than successful in this field. The identified effectiveness and good practices of particular mechanisms for certification of uncontested monetary claims can be an example for the policymakers regarding the optimization of the proceedings in their regulatory framework. By our opinion, the following steps should be taken into account as key reform measures regarding the further improvement of the system for certification of uncontested claims. The abandonment of the “evidence” model should be considered, given the fact that the “non-evidence” model significantly simplifies and shortens the time the competent authority needs to process the motion for certification. Simultaneous digitalization and centralization of the process should be taken into account as well. Centralized and fully electronic systems for obtaining enforceable title for uncontested claims are most appropriate in the context of mass recovery of uncontested claims since they provide expectable timelines, minimal engagement of judges or other high profiled legal professionals, equal workload for the officials competent for processing the claim and greater opportunity for cost-effective procedure.

