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CJEU case law

on Cross-Border Enforcement

Antwerp, 21 November 2019

Table of content

I. ICBE – Informed Choices (for plaintiff)

"IC2BE"-project: about "**Informed Choices"** (in Cross-Border Enforcement)

Research has been carried out on options plaintiff, on attractiveness of various regimes …

Indeed, ***various*** **regimes** of cross-border enforcement, **options** of enforcing claims in cross-border cases

Optional regimes (debt-recovery in cross-border situations) **for plaintiff** – plaintiff may choose.

IC2BE: Choose how?

IC2BE: how do plaintiffs (creditors) choose between various regimes?

Being able to make choices ***presupposes*** regime(s) available

Informed choice ***presupposes*** aware of (dis)advantages, attractiveness

(presupposes that people can see (and weigh) the advantages or disadvantages of the different systems)

Requires having a look at the case law CJEU:

Impact, relevance CJEU here!

A. Availability of regime

See e.g. ZSZ Energia on ESCP (“cross-border”)

And see e.g. CJEU Imtech Marine on EEO (art. 19 EEO, requirement of existence of a review-mechanism in Member State – see discussions in Belgium)

(see e.g. also

CJEU Chudas on EEO

(and see e.g. also

opinion Zulfikarpašić nr. 25 on need/not of internationality regarding EEO

CJEU Pebros Servizi on EEO (“uncontested”))

B. Attractiveness of regime for plaintiff

See e.g. CJEU Rebecka Jonsson on ESCP ("costs")

(and see e.g. CJEU Szyrocka on EPO (article 7 EPO and costs EPO)

Note: e.g. in CJEU Rebecka Jonsson: issue of articulation with national law

issue of articulation with national law in two ways: sometimes referred to national law (see e.g. article 17 ESCP-Regulation) sometimes also through rule that what not regulated, dealt with in regulation itself, left to national (see e.g. article 19 ESCP-Regulation, article 26 EPO-Regulation). Rebecka Jonsson, on ESCP: what is/is not regulated in Regulation itself – article 16-article 19 ESCP-Regulation?

What is European/what is left to national

When national: procedural autonomy of Member States

but principles of effectiveness and equivalence

Remark: What is European/left to national?

Cfr. Raffelsieper and de Duvé, “La protection des débiteurs dans les règlements européens de procedure civile: le réexamen du réexamen”, in book “Boundaries of European Private International Law”, p. 611, with references in footnote 45: “(*A cet égard), il se révèle particulièrement difficile de tracer une ligne nette entre les règles de procedure purement nationales et l’application présupposée uniforme des instruments européens. Il semble que l’ordre juridique européenne se retrouve face à une combinaison complexe de compétence nationale avec une priorité processuelle des règles européennes, dans les cas transfrontières.*”

See e.g. Rebecka Jonsson on ESCP (“successful party” – costs); see also e.g. CJEU Pebros Servizi (“uncontested”) on EEO

(see also on issue of articulation with national law, interplay with national law CJEU Eco Cosmetics nr. 45-47 and dictum, and CJEU Flight Refund nr. 71 and dictum – both on EPO)

Remark: When national: procedural autonomy of Member States, but principle of effectiveness and equivalence

See e.g. CJEU Rebecka Jonsson nr. 27 (ESCP), referring to CJEU Szyrocka nr. 34 (EPO) – reference to CJEU Banco Español nr. 46 (Directive consumer protection)

So reference case law Directive consumer protection, whereas consumer as a defendant

Banco Español: from perspective consumer

Here: from perspective plaintiff,

idea not discourage plaintiff from using procedures

(*possibly in procedure against consumer-defendant*)

So far: is from perspective plaintiff

What about defendant?

Many cases CJEU: “rights of defense” – aims of the regulations.

Rights of defense – aims of the regulations

rights of defense (to be) presented *as opposed to* aims of the regulations, as to be taken into account in a balance? /presented as making themselves part of the aims of the regulations (already taken into account in the Regulations themselves)?

See *e.g.*, on rights of defense in case law of the CJEU*:*

CJEU Eco Cosmetics on EPO nr. 37 ('the balance between the objectives pursued by Regulation No 1896/2006 of speed and efficiency, *on one hand*, and respect of the rights of defence, *on the other hand*") (compare other language versions)

(referring to the opinion nr. 36-41 – see Nr. 36 "(….) considerable importance attached to valid service in the European order for payment procedure. It ensures that defendants will have access to all information necessary to them to defend themselves and thereby secures observance of the rights of the defence. (…)" and Nr. 41 "(…) Observance of those conditions in the European order for payment procedure is of prime importance in maintaining a balance between the different objectives pursued by that regulation."

(and/versus?, nr. 39 – "(…) in accordance with Article 1(1)(a) of that regulation, its purpose is 'to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims') (in French e.g.: celle-ci a pour objet *uniquement* de «simplifier, d'accélérer et de réduire les coûts de règlement dans les litiges transfrontaliers concernant des créances pécuniaires incontestées

Opinion Pebros Servizi on EEO, nr. 26 and 29

Opinion Imtech Marine on EEO, nr. 44 "(…) objective of allowing certification of a judgment as a European Enforcement Order only if the debtor's rights of defence and right to a fair trial (see recitals 10 and 11 in the preamble to the EEO Regulation) have been adequately respected (…)."

…

Aims: e.g. art. 1, 1 EPO and art. 1 ESCP: Easy, quick, cheap procedures; no exequatur

(see e.g. CJEU ZSE Energia nr. 28)

Policy-oriented instruments

And Court takes these policy-oriented objectives into account

Said: enhance “access to justice”

(e.g. objective of the ESCP (see e.g. recital 7, referred to e.g. in CJEU ZSE Energia nr. 28) - said ESCP aim “to improve access to justice in low value cross-border disputes for consumers and SMEs”)

= access to justice from perspective plaintiff, creditor

But, so, what about also “access to justice” *of defendant*? – rights of defense of defendant (debtor)?

Cfr. hereafter:

II. What about defendant? Rules – Caliber, role of parties

Rules in the regulations, especially the rules protecting the defendant/weak party (especially consumer as weak party):

"Caliber" of those rules?

Role of parties – check by judge, remedies …?

Hereafter:

mainly looking at case law CJEU **from this perspective of rights of defense – aims of regulations**

(in comparison to Brussels 1 bis and in comparison to each other;

with special attention for rules protecting consumer as weak party)

"Rights of defense" in various regimes

ultimately also being a point of attractiveness/unattractiveness of regime for plaintiff

- on the one hand not exhaustive, rather explorative

– but on the other hand with some references pending cases/cases outside also the 4 regulations, especially Brussels 1 bis

(see namely CJEU Pillar Securitisation (C-694/17, 2 May 2019), CJEU Weil (C-361/18, 6 June 2019), CJEU Salvoni (C-347/18, 4 September 2019) … and some cases regarding consumer protection, see particularly Karel de Grote (C-147/16, 17 May 2018), Profi Credit Polska (C-176/17, 13 September 2018) and Ksi (C-448/17, 20 September 2018)

(full list of cases CJEU on 4 Regulations: see IC2BE-database; not including pending decisions though. In database: 8 cases CJEU on EEO, 10 on EPO (including 1 radiation), 2 on ESCP, 1 on EAPO – see below for list)

- and also taking into account sometimes some outcome national case law)

when look at practice: some references to Luxembourgish practice, as both frequently applied in *Luxembourg*, judges familiar with – thus Luxembourg *interesting laboratory, testing ground* – some remarks from this perspective

(for a list of cases CJEU, per regulation in chronological order:) (bold: with opinion)

EEO (8):

1. C-292/10 Cornelius de Visser (15 March 2012)
2. C-508/12 Vapenik (5 December 2013)
3. **C-300/14 Imtech Marine (17 December 2015)**
4. **C-511/14 Pebros Servizi (16 June 2016)**
5. **C-484/15 Zulfikarpašić (9 March 2017)**
6. C-66/17 Chudas (14 December 2017)
7. C-289/17 Collect Inkasso (28 February 2018)
8. C-518/18 RD v SC (27 June 2019)

(list)

EPO (10 – if include cases C-618/10 and C-121/3):

1. **C-618/10 Banco Español de Credito (14 June 2012)**
2. **C-215/11 Szyrocka (13 December 2012)**
3. C-324/12 Novontech-Zala (21 March 2013)
4. **C-144/12 Goldbet (13 June 2013)**
5. C-121/13 Rechtsanwaltskanzlei (removed) (Ordonnance 7 May 2014)
6. **C-119/13 and C-120/13 Eco cosmetics and Raiffeisenbank (4 September 2014)**
7. C-488/12 Parva Investitsionna Banka (9 September 2014)
8. **C-245/14 Thomas Cook (22 October 2015)**
9. **C-94/14 Flight Refund (10 March 2016)**
10. **C-21/17 Catlin Europe (6 September 2018)**

(*pending*: Bondora (C-494/18 and C-453/18))

(list)

ESCP (2):

1. C-627/17 ZSE Energia (22 November 2018)
2. C-554/17 Rebecka Jonsson (14 February 2019)

EAPO (1):

1. **C-555/18 K.H.K.** (*expected* 7 November 2019)

II.A. Looking from the perspective of rights of defense and/versus aims of regulations (in comparison to Brussels 1 bis): CJEU Cornelius de Visser and some other cases on EEO

1. First judgment on first regulation CJEU Cornelius de Visser on EEO: immediately very interesting one when looking from this perspective of (in)coherence with Brussels 1 bis and rights plaintiffs/defendants

CJEU de Visser (defendant with unknown address) on EEO (nr. 66): in EEO no refusal ground such as art 34 Brussels 1 in EEO – issue "rights of defense"

Severe (see also art. 14 Regulation)

Regarding coherence/comparison Brussels 1 (bis): *difference* Brussels 1 (bis)

(Note: confirmed recently that defendant needs to have known address – and no change if guardian indicated see consideration nr. 27 in decision CJEU C-518/18 RD v SC)

2. Cfr. Two other cases on EEO: CJEU Collect incasso and CJEU Zulfikarpašić

In same line as Cornelius de Visser**!? Rights of defense, severe, court of origin**

Cfr. Quote Prof. Hess in "50 years Bussels 1 bis", G. Van Calster (red), p. 41-42 discussing CJEU Collect Inkasso and CJEU Zulfikarpašić

"*From a scholarly point of view, these decisions are not very compelling. However, they demonstrate the firm intention of the Court of Justice to* ***reinforce*** ***the right of defence by strictly applying the standards guaranteed by these instruments****. It* ***seems that the CJEU is aware of the imminent dangers of these regulations which permit the direct cross-border enforcement of judgments without any exequatur proceedings****. Yet, in return, these procedures provide for a residual* ***control*** ***in the EU Member State of origin****. Therefore, the Court of Justice has reinforced the judicial control of the proceedings and of the substantial claim in the Member State of origin* ***where the enforceable title is rendered****. This corresponds to the underlying design of these instruments but the CJEU also clearly reinforced the procedural guarantees of these instruments.*"

3. These cases: set the tone, representative?

(pure) shift from Member State enforcement to Member State origin – and there very severe regarding rights of defense, protection of defendant??

Or

Is less, and is/are kind of stripped-down versions of Brussels 1 bis?

Cfr. From this perspective below, II.B

II.B. Looking from the perspective of rights of defense and/versus aims of regulations (in comparison to Brussels 1 bis and to each other, in particular EPO and ESCP): caliber of rules? Task/possibilities judge/defendant? (checks, remedies)

II.B.1. Preliminary remarks

Focus on EPO and ESCP (two European uniform procedures): uniform procedures "court of origin"; optional procedures (to the procedures existing under the laws of the Member States, and optional also to each other, when overlap)

Look at those regulations, procedures:

Rules on the one hand

and their enforcement (including checks, remedies – "caliber" of the rules and role of all actors) on the other hand

uniform procedures: no exequatur (like also EEO), hardly refusal grounds;

how check there, procedures there at court (court of origin) itself, question how then plaintiff-defendant??

Also in the context of a request for a “review” (at court of origin) (last recourse)

Preliminary remarks on “review”:

- **CJEU seemingly strict application of review mechanism**, see CJEU Novontech Zala on EPO; CJEU Thomas Cook on EPO
- Note: review mechanisms in regulations: different, **various regimes**, with different possibilities for “review”, different requirements, conditions etc.
- **Hereafter**: especially focusing on
  - Service issues on the one hand (firstly)
  - And problems not correctly granted (especially issues of international jurisdiction) on the other hand (secondly),

Remark: looking at review mechanisms EPO and ESCP from this perspective:

see **scheme** on review mechanism, comparison **EPO – ESCP**

Regarding service issues plus “errors”, *see scheme on slide below*

(with **note**: attention: review-procedures in EPO and ESCP versus article 19 in **EEO** (EPO and ESCP *European* procedures (not a procedure as a condition as in EEO, Imtech Marine – see on this also e.g. opinion Imtech Marine nr. 40)

(Note in EEO: existence of a “withdrawal” mechanism, article 10 EEO) (cfr. on this also below, II.B.3.ii.c))

Scheme

Service issues, problems service

EPO: art. 20, 1 a (i and ii) and b

a i: art. 14

a ii: not in time

"errors" (e.g. regarding jurisdiction?)

EPO: art. 20, 2 (twofold: "wrongly …" or other exceptional circumstances)

(note: art. 20, 1 b EPO: force majeure or extraordinary circumstances)

ESCP: art. 18, 1 a

(after amendment: all problems service (not limited to art. 14);

Before: cfr. EPO (and cfr. EEO)

Now in line with maintenance regulation)

ESCP: -

(note: art. 18, 1 b ESCP: force majeure or extraordinary circumstances)

(Note: (EEO: mechanism art. 19, but is other kind of mechanism/procedure) EEO: rather *art. 10* (with art. 6) kind of review-mechanism?)

(remark)

(When discussing ESCP and EPO, remedies etc.: taking into account also that **not allowed apply remedies regulations in an "analogous" way** – cannot "stretch" them

cfr. Cases Flight Refund and Eco Cosmetics

(see

Flight Refund nr. 71 and dictum

Eco Cosmetics nr. 45; (see also nr. 30, question))

rules and their enforcement (checks, remedies) *in light aims regulations, as assessed by CJEU?*

Cfr. Opinion A.G. in Goldbet on EPO, nr. 27, about aim art. 1,1, a EPO : "*The aim expressed refers without any possible doubt to a legal instrument that is intended to avoid any challenge on the merits and the delays generally caused by traditional legal proceedings, to the point, indeed, where such a procedure could even, at the Member States' discretion, take place before an administrative body.*"

"delays generally caused by traditional legal proceedings":

What about, e.g., rules of service and rules of international jurisdiction? Taken seriously/considered as pure hurdles in proceedings that, if not respected, don't require to be worried about in the context of these regulations? Cfr. Hereafter:

II.B.2. Service

CJEU Eco Cosmetics (and CJEU Catlin Europe)

(Note: CJEU Eco cosmetics: also here (cfr. above) issue of articulation national law, what is “European”/what is left to national)

See also on Eco-cosmetics (and also C-121/13 – removed) Raffelsieper and de Duvé, in book Boundaries p. 607 (also in comparison to proposal Brussels 1 bis at the time and other regulations) – issue what exactly included here/not included (and with reference to case law CJEU on article 34 Brussels 1, namely case ASML))

See, also Opinion Imtech Marine nr. 42)

Rules of service, CJEU about rights of defense regarding issue of being made aware in a correct way. "**severe**"!

(CJEU Eco Cosmetics: period for opposition at court of origin not even started to run (- question of review even does not arise); CJEU Catlin Europe: language issue can be fixed, but severe: as long as not, period not started to run)

Looking from perspective **defendant: protected, as he should be made aware, informed**

(seems normal, logical in system as EPO where so much depends on the action/lack of action of the defendant: minimum is to make aware defendant)

Rules service apparently very important

Cfr. Also CJEU Eco Cosmetics nr 37 ("*Where these minimum rules are not complied with, the balance between the objectives pursued by Regulation (EPO …) of speed and efficiency, on one hand, and respect to the rights of defence, on the other hand, would be undermined*.")

severe in sense not even started period opposition …

Looking from perspective rights defendants: severe regarding rules of service

But: "this is it"!? (and if these conditions fulfilled, alibi and excuse, green light to go on in the spirit of the regulations – then excuse that as defendant is informed, it is completely left to him to act? And no mercy if not contested?

Or is there "more"?? (more guarantees etc. for defendant?)

Cfr. Hereafter: what about, e.g., rules of international jurisdiction?

Rules of service apparently of high "caliber" in eyes of the CJEU

But what about rules international jurisdiction e.g., rules protecting defendant/consumer: like/not like those rules seen as protecting (directly) rights of defense? Their "caliber", task of actors, checks by judges and remedies?

Some rules/requirements "more equal" than others?

In general 2 **possible reasonings about (respect for) rules jurisdiction**:

- Take it for granted if not respected – hope followed, but if not then taken for granted: no real importance in this context (hurdle that can be ignored!?)
- all the more important, even more important in this context?

(and relevance hereby – if so, in what sense? - that EPO *written* procedure and that ESCP *in principle written* procedure?)

Below, hereafter: about rules international jurisdiction and how important to respect them

– what can be asked from/expected from judge, parties themselves? Control mechanisms?

II.B.3. International jurisdiction

Principle regulations: **same rules as Brussels 1 bis** (principle)

Same rules as Brussels 1 bis – thus, importance case law on Brussels 1 bis, e.g. on forumchoices made by Ryanair (see recent case Belgian Supreme Court 8 February 2019 Happy Flights (interaction with Directive Unfair terms consumer contracts), - see also case CJEU C-629/18 (interaction with Passenger Regulation) – however, removal of this case on 10 September 2019) (here about non-professionals, possibly consumers, as plaintiffs – creditors. No consumers when only carriage packet, see Brussels 1 bis – then competence see article 4 plus article 7 Brussels 1 bis Regulation with CJEU Rehder; procedures against airlines: e.g. in Luxembourg often ESCP-procedures

But additional protection consumer-defendant in 3 regulations (EEO – as a requirement -, EPO and EAPO): *more* protection for consumer-defendant than in Brussels 1 bis

so on the one hand *more* protection (rule)

but on the other hand … (checks, remedies …)*?*

(II.B.3. international jurisdiction)

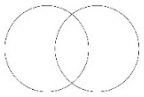
i. So, on the one hand: more protection in 3 Regulations than in Brussels 1 bis (rule)

1. concept!?

- CJEU Vapenik EEO (regarding C2C, emphasis on coherence with Brussels 1 (bis)) (neither in Brussels 1 bis, nor in EEO special protection consumer when C2C – not be more severe (imposing more protection consumers) in EEO than in Brussels bis) ((note: what CJEU said wanting to avoid - regarding this particular aspect - in Vapenik; see though, also already Cornelius de Visser (on another aspect): also there already occurred that CJEU acknowledges that possible under regime Brussels 1 bis, but not under regime EEO)
- But still possible difference with Brussels 1 bis (EEO: no need that additional requirements article 17 Brussels 1 bis fulfilled? – EEO thus **also including active consumers?**) (*if* difference: EEO(/all 3 special regimes) offering more protection to consumer-defendants)

- Note issue of concept “consumers” in various regimes, regulations, directives: issue of interaction with Directives consumer protection regarding notion of consumer (Vapenik, Pillar Securitisation C-694/17 (2 May 2019), …)

Note Luxembourgish case law on EPO here, reference to Directive unfair terms consumer contracts for art. 6 EPO. Concepts:

 or ?

2. In any case: rule like article 6, 2 EPO is **absolute** rule (no forum choice allowed – difference Brussels 1 bis) – thus, in any case more protection consumer-defendant

- *Note, though: employees-defendants* (other category weak party) *no* protection in EEO (and no special, additional protection in EPO); (literature (U. Grusic): "risk" that, thus, plaintiff "undermines" protection employee-defendant Brussels 1 bis using EEO) – but so, *consumer*-defendant seemingly more protection in 3 regulations than in Brussels 1 bis
- Attention though "extensions" of jurisdiction EPO (addressed by plaintiff): even *if wrongly started* by plaintiff, once plaintiff started here (*and if slipped through the cracks in sense that order has been wrongly issued by judge*), defendant should oppose there (where wrongfully started), ask for review there etc. Raises question of check mechanism etc. – see hereafter

(II.B.3. international jurisdiction)

ii. On the other hand: checks, remedies …? (enforcement)

Some remarks hereafter

a. EPO

b. ESCP (no case law yet CJEU on these particular aspects (issues of international jurisdiction) of ESCP so far)

c. (in comparison with EEO)

a. EPO

Apparently, **EPO wants to assure**, guarantee that everything in country domicile consumer-defendant

But what if rule not respected? Still arena determined by plaintiff; what about checks, remedies?

- At moment request?
- Other stages??
  - Note: remarkable practice Luxembourg: (even) checked after opposition (and if then it appears art. 6 EPO has not been respected, stop!?)
  - When issuing certificate??
- At moment review? (last recourse?)

- At moment request?

"automated check" at moment request, see article 8 EPO and preamble nr. 16

relies on what plaintiff says, argues; thus risks slipping through the cracks

CJEU Thomas Cook nr. 42 "*Complex points of law, such as the validity of a jurisdiction clause, the assessment of which could require a more thorough examination than that which is required under Article 8.*"

(and see CJEU Thomas Cook nr. 43 ("*It follows that, in the specific circumstances of the case in the main proceedings, it cannot be considered that the European order for payment issued against the defendant has been clearly wrongly issued, having regard to the requirements laid down in Regulation No 1896/2006*")

: given that automated check, not quickly "error" (in assessment) (thus: distinction between judging if error in jurisdiction/error in assessment of jurisdiction, thereby taking into account limited possibilities of judge?)

Although e.g. opinion AG in case Flight Refund, nr. 54: criticism on notary who had delivered an EPO.

- Other stages??

- Note: remarkable Luxembourgish practice to check also article 6, 2 EPO ***at stage after opposition***!?

(*even* then: Luxembourgish judges already quite severe also at stage request)

Remarkable practice: see e.g. CJEU Flight Refund: rather “restart” check jurisdiction at this moment, checking rules Brussels 1 bis? (taking into account CJEU Goldbet)

(Luxembourgish case law: respects CJEU Goldbet when opposition)

…

(other stages?)

- Possible check rules of jurisdiction by judge **at moment making EPO enforceable** (= hypothesis that no opposition)?

° But article 18 EPO: seemingly no room for check jurisdiction at this stage?

° (remark: might compare situation judge checks at this stage/situation that defendant has opposed, regarding continuation or not of the procedure)

° (remark:

- as far as reasonings possible in this context based on CJEU Weil (C-361/18, 6 June 2019 – especially nrs. 17-18, 30, 32,35) and CJEU Salvoni (C-347/18, 4 September 2019) *on other regime*: direction of reasonings?? Might reason in various directions?? (taking into account ressemblances *and differences* between regimes and that here issue about *jurisdiction*?, and as far as reasonings possible in this context from (pending) case Bondora (C-494/18 and C-453/18) on EPO: direction of reasonings?

(taking into account that here issue about jurisdiction (not about scope such as in CJEU Weil – but on the other hand, see differences in control afterwards with EPO (less refusal grounds – only review, at court origin); (taking possibly also into account that CJEU indicated in CJEU Salvoni that differences in checks consumer protection in Directives/consumer protection in jurisdiction rules – if (even) no consumer protection in Directives when EPO, certainly not stretching consumer protection regarding jurisdiction in EPO? Or, because two different things regarding check: when CJEU in Bondora possibly "severe" regarding consumer protection in Directives, not necessarily "severe" regarding consumer protection in jurisdiction rules/when CJEU in Bondora possibly not severe regarding consumer protection in Directives, possibly still severe regarding consumer protection in jurisdiction rules? Etc. etc.)

- At moment review? (last recourse?)

(Possibilities afterwards: no refusal ground regarding jurisdiction in sense article 45, 1, e Brussels 1 bis in EPO, but:)

review mechanism EPO

At court origin

Regarding review and rules of international jurisdiction: **see CJEU Thomas Cook, CJEU Flight Refund** (note on same day (22 November 2015) decision Thomas Cook and opinion Flight Refund – possible to reconcile both?

Possibility at all for review? CJEU Thomas Cook and opinion Flight Refund (on situation that not opposed)

CJEU Thomas Cook: strict application of review mechanism ("no second chance" to oppose for defendant); CJEU quite severe – in particular situation Thomas Cook (see nr. 47 (and dictum) CJEU)

Cfr. Prof. Nourissat in comment on Thomas Cook: "caractère impitoyable", "prix à payer" to aims Regulation. ("*On ne peut qu'approuver la Cour de justice dont l'arrêt est solidement étayé. Et souligner en définitive à nouveau* ***le caractère impitoyable*** *de la procédure européenne d'injonction de payer.* ***Son efficacité est probablement à ce prix*** *et les débiteurs et leurs conseils ne doivent pas le sous-estimer."*)

Opinion Flight Refund:

(hypothetically about review, because in case Flight Refund an opposition had been lodged) (certainly hypothetically if review not allowed when contestation, which seems to be vision of the CJEU – see CJEU Flight Refund nr. 70))

opinion: seemingly a little bit (more?) flexible about possibilities review mechanism EPO in cases of errors made regarding jurisdiction (AG in Flight Refund, writing about scenario without opposition: possible ("clearly wrongly issued" could be issue of jurisdiction)).

Thus: "wait" for review?? But CJEU Thomas Cook: risk blamed afterwards if not opposed. Thus: not (always) possible/risk if wait/…? Take into account particular circumstances case Thomas Cook? (Particular situation Thomas Cook: CJEU Thomas Cook Nr. 47 "In those circumstances, once the European order for payment had been served on the defendant in accordance with Regulation No 1896/2006, since it was not possible for it to be unaware of such a jurisdiction clause, the defendant could have considered whether the information provided by the claimant in the application form was false with regard, in this instance, to the jurisdiction of the court of origin. The defendant therefore had the opportunity of raising this under the opposition procedure laid down in Article 16 of Regulation No 1896/2006." Dictum CJEU: "Article 20(2) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Commission Regulation (EU) No 936/2012 of 4 October 2012, must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, a defendant on whom a European order for payment has been served in accordance with that regulation from being entitled to apply for a review of that order by claiming that the court of origin incorrectly held that it had jurisdiction on the basis of allegedly false information provided by the claimant in the application form." (cfr. On this opinion AG in Thomas Cook)

(Remark Luxembourgish case law on check jurisdiction (in general, e.g. forum choice/art. 6 EPO) in context Review mechanism EPO

Luxembourg: **already checked jurisdiction rules** and granted review because of violation of jurisdiction rule, see Tribunal de Paix Luxembourg 30 June 2015, n° 2691/2015

(*note*: Tribunal de Paix Luxembourg 26 septembre 2017, nr. 3142: also assessed, but review not granted: said that defendant was no "consumer" in sense article 6, 2 EPO because not acted as a non-professional)

(Note on review and jurisdiction rules EPO, Luxembourg)

* note: see e.g. also decision juge de Paix de Luxembourg 20 octobre 2015, nr. 3582, regarding review because of violation of other jurisdiction rules (not about consumer issues but sales contract – article 25 and 7, 1, b Brussels 1 bis)

* But see e.g. also reference in Tribunal d'Arrondissement Jugement Civil, 1ere Chambre, 17 Janvier 2018, n° 19/2018 to CJEU Thomas Cook, seemingly in sense that quite demanding before might speak of "error", judge not quickly reproached to have made "error", not quickly reproached to have made wrong assessment

"… En l'espèce … le tribunal estime que la vérification de la compétence par la jurisdiction d'origine aurait nécessité un examen approfondi des circontances de fait …

… Par consequent, le tribunal retient qu'il n'est pas "manifeste" que l'injunction de payer européenne … aurait été délivrée à tort au vu des exigences fixées par le règlement et rejette ce moyen."

(so: difference between error as such in jurisdiction/error by judge in (quick) assessment?) (thereby severe, demanding, regarding "error", "fault"?)

(remark: *when* opposed:

CJEU Flight Refund, dealing with case where opposition (and thus, need to transfer case to "competent court" – see article 17 EPO):

(note: again, here, issue of articulation with national law – "no analogous interpretation of article 20 EPO", see nr. 71 CJEU Flight Refund (referring to Eco Cosmetics nr. 45) and part dictum)

CJEU Flight Refund: be "flexible" in process of referring to "competent courts of the Member State of origin")

Said in opinion: "not envisaged" …

“not envisaged” by European legislator – so!?

Remarkable in Opinion AG Flight Refund, nr. 70: “not thought, **“not envisaged”** by European legislator that might occur that EPO issued by incompetent court and contestation - and then, issue of transfer to “competent court”

“(…) the legislature does not appear to have fully envisaged the possibility that the courts of the Member State of origin might not be internationally competent to deal with the underlying claim”)

= symptomatic, that not envisaged??

All in all, **thus, rather purely symbolic rules to protect defendant** (/consumer-defendant), given that very limited possibilities to check, limited remedies**??** Window-dressing?

Just trust that done well, that respected by plaintiff, but if not, not sanctioned? (cfr. Below)

Remark on comparison with Brussels 1 bis

All in all: possibilities review in EPO (at court origin – versus Brussels 1 bis refusal ground in Member State of enforcement!)??

if review granted: touched “at heart” (destroyed)

but issue if/to what extent possibilities to successful use of review regarding rules of international jurisdiction

note: attention if streamline review procedure EPO with ESCP (and Maintenance Regulation) (see e.g. COM(2015)495 regarding service issues) without maintaining part in review regarding “errors”: then even more reduced, limited!

Trust that plaintiff acts correctly and no problem when made error?

(completely) up to defendant to act (where possibilities)?

Interesting: pending Case Bondora (C-494/18 and C-453/18) on particular issue Directive unfair terms in consumer contracts; particular: Spain, Directive but might be interesting regarding issue what judge can/should do, if so at what stage etc. (previously: CJEU Banco Español de Credito (C-618/10) – issue as such not addressed by CJEU; possible relevance CJEU Szyrocka, C-215/11? (see e.g. E. Guinchard (RTD EUR 2013, p. 335) in comment on Szyrocka)).

(taking into account what said in CJEU Salvoni (C-347/18) about differences consumer protection in jurisdiction rules/Directives; but taking also into account differences between various regimes)

“En attendant Bondora”

b. ESCP (so far no case law CJEU on jurisdiction issues ESCP)

ESCP: rules international jurisdiction Brussels 1 bis

(Remarks:

- ESCP: not mentioned rules jurisdiction in articles Regulation itself, but in forms, and generally acknowledged this way)

- Rules Brussels, 1 bis – including consumer protection regime Brussels 1 bis – without additional rule (on top of consumer protection regime Brussels 1 bis) protecting consumer-defendants – thus: seemingly same concept consumer as in Brussels 1 bis (strict concept), and regime protection regime Brussels 1 bis including e.g. (limited) possibility forum choice. Cfr. Above, case Rehder etc.

- European legislator particularly thought about "consumers" using the ESCP – starting themselves ESCP-procedures (cfr. Above, aim to enhance their access to justice); but (cfr. E.g. Luxembourgish practice): ESCP might also be used in case *against* "consumer"/non-professional)

- ESCP contradictory procedure, thus possibility to contest

- Judge, if defendant does not respond: article 28 Brussels 1 bis (applied in many Luxembourgish ESCP-cases where defendant did not respond

  - Relevant, as consumers, when sued abroad, often “apathic” according to e.g. J. Knetsch

  - Issue: does the fact that ESCP-procedure is in principle written procedure, working with standard forms, makes it more or less burdensome for consumer-defendant to act?? (possible reference here to way CJEU reasons in e.g. Karel de Grote (C-147/16, 17 May 2018), Profi Credit Polska (C-176/17, 13 September 2018) and Ksi (C-448/17, 20 September 2018) (checking national procedures) - to what extent made (too) difficult?) (mitigated by forms, more inclined to respond/the opposite?)

  - But so, if not response, in any case art. 28 Brussels 1 bis (not particularly regarding consumers, but *also* regarding consumers) – question though, when consumer does respond, about obligation judge to “warn” consumer (art. 26 par. 2 Brussels 1 bis), with issue of sanction if not warned?

- But, when nevertheless error in jurisdiction:
  - under Brussels 1 bis still refusal ground (in Member State of enforcement) when error in jurisdiction regarding consumer-defendant.
  - **ESCP: no refusal ground regarding jurisdiction afterwards; seemingly even no room for addressing jurisdiction issues in context review mechanism of ESCP** (difference here EPO? Cfr. Above, remarks on ressemblances/differences between regimes, and possible reasonings taking this into account)
  - **Thus**, seen from this perspective, ESCP "**stripped-down**" version Brussels 1 bis**?**

c. EEO

(1) Rules international jurisdiction as a check, condition, requirement to issue an EEO, by court of origin (see article 6 EEO);

if wrong, error: article 10 “rectification or withdrawal”

(thus: article 10 EEO as a kind of “review” mechanism?)

At the court of origin

(remark: see already above regarding Case CJEU Vapenik, on EEO, concept consumer-defendant)

(EEO and beyond)

(2) Remark Recent opinion C-347/18, 7 May 2019 (Salvoni) on Brussels 1 bis, AG making comparison with EEO (nr. 72 of opinion)

- AG: EEO judge should check when issuing an EEO (Brussels 1 bis: no possibility for judge to check and stop at stage of issuing certificate; afterwards up to consumer to come up with refusal ground, in MS of enforcement) (CJEU decision Salvoni in case C-347/18 on 4 September: no possibility for judge)

- Note, looking at this case and comparing Brussels 1 bis with EPO and ESCP: in *EPO and ESCP* even no refusal ground whatsoever for consumer, see above. And see above about possibilities for defendant/checks by court of origin.

- Cfr. Above remarks about – as far as any reasoning possible whatsoever – reasonings looking at cases as Bondora (pending, C-494/18 and C-453/18), Weil (C-361/18, 6 June 2019), Salvoni (C-347/18, 4 September 2019)? Taking into account ressemblances/differences between regimes; taking into account also (policy-oriented) specific aims of these regulations??

Cfr. above: “en attendant Bondora”

Curious Bondora how CjEU will decide - taking into account particular aims of regulations?

(and compared to national procedures (see in this context e.g. recent cases Profi Credit Polska (C-176/17, 13 September 2018) and Ksi (C-448/17, 20 September 2018))

(see also already in this context Belgian Constitutional Court 12 October 2012, on issue if discrimination when more flexible in cross-border situations)

(EEO and beyond)

- **Broader**, and awaiting more case law CJEU, looking from perspective rights of defense – aims of the regulations: **what "sacrificed on altar aims of regulations"**? Differences these regulations/other regimes?

Cfr. again issue above, CJEU Cornelius de Visser: (even more) severe here?

Or some issues of protection of defendants just seen as hurdles to be possibly, eventually, ignored? and cfr. again as above mentioned aims and legal basis of regulations

III. In conclusion

Currently, when plaintiff has to **opt** for a specific regime (choosing between alternatives), note:

° **differences between regimes**

° **and differences between Member States** when comes to what has been left to national level – certainly more on this during the conference, cfr. Also presentations national reports

Various regimes, alternatives, optional for plaintiff

Raffelsieper and de Duvé, in book Boundaries, p. 612: **protection "aléatoire"** regarding review mechanism

("*Quant au réexamen, la situation actuelle rend la protection du débiteur aléatoire et dépendante des ressources de chaque système nationale, malgré le but d'établir un mécanisme coherent.*")

As said, various regimes, alternatives, optional for plaintiff

Differences (and advantages for plaintiff of differences – possible disadvantages for defendants) ***not necessarily*** taken into account in a **strategic** way by plaintiff, when choosing for a specific regime (Plaintiffs perhaps not as ***strategic*** as to choose a particular regulation because less rights defense defendant)

*But might in any case be **result** of choosing the application of a specific regulation: **in any case possible differences*** in remedies etc. (**Differences possible** in what a plaintiff has to do, on what defendant can/is supposed to do, in task judge also)

Rights plaintiffs, rights defendants:

Are **recurring themes** in procedural law, **but here**, thus, particularly regarding alternative regimes debt collection in international situations, in project, **in context of these specific regulations**

Certainly more on this during this conference - e.g. tomorrow, when about rights defendants etc. in these regimes

But this **so far, regarding case law of the CJEU on these regulations**

More:

- "Rules of International Jurisdiction in the Context of the 'Second Generation' Regulations. Some Reflections from the Perspective of Protection of Weak Parties" ("Regels van internationale bevoegdheid in de context van de "tweede generatie" verordeningen: enkele beschouwingen vanuit het perspectief van bescherming van zwakke partijen"), tijdschrift@ipr.be , 2018 issue 3, p. 147-184 (free accessible at https://www.ipr.be/nl/archief), also available at https://www.openrecht.nl/auteurs/12a66a62-6bf7-44f8-8172-74447a637ee4/ (in Dutch)

- "Enforcement of Rules of International Jurisdiction Protecting Consumer-Defendants in the Context of the EPO-Regulation and the ESCP-Regulation, Some Considerations Taking into Account Current Developments. Waiting for Godot?" ("Handhaving van regels van internationale bevoegdheid ter bescherming van consument-verweerders in de context van de EEB-verordening en de EGV-verordening, enkele actuele beschouwingen. En attendant Godot?"), 2019, 23 p, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330821 (in Dutch)

- PowerPoint "Rules of International Jurisdiction in the Context of the "Second Generation" Regulations. Some reflections from the perspective of protection of weak parties", available at https://www.slideshare.net/vvde/rules-of-international-jurisdiction-in-the-context-of-the-second-generation-regulations-some-reflections-from-the-perspective-of-protection-of-weak-parties

- PowerPoint (extended version) seminar 27 September 2019, "EPO and ESCP in Luxembourg; EEO in France"

- Report "Luxembourg" (IC2BE), 84 p.

- Report "France" (IC2BE), 54 p.