Cross-border enforcement of debts: EU unified procedures in Belgium

The research on the cross-border collection of debts (in particular through the unified procedures in the EU) in the EC²BE project has produced interesting results. Here is a summary of the Belgian results. For those who want to know more, don't forget to enrol to our final conference, which will address the matter in various EU States.

(This blog has also referred you to the various national seminars – for an overview, see here or contact one of the partners.)

EXECUTIVE SUMMARY

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A INTRODUCTION

'By nature advocates and judges appear to adopt a conservative approach. They are generally averse to changes or reforms in the field of procedure. The apathy of legal practitioners regarding the adoption of new legal provisions concerning civil procedure is widely known. (…) New procedural routes are not followed. Some novelties do not get entrenched.' [J. Laenens e.a., Handboek Gerechtelijk Recht, 2016, p. 9 and 26 (own translation)].

Research by the University of Antwerp shows that EU legislation concerning civil procedure, specifically the European Enforcement Order (EEO 2004), the European Payment Order (EPO 2006), the European Small Claims Procedure (ESCP 2007) and the European Account Preservation Order (EAPO 2016) are seldom applied in Belgian legal practice. These Regulations nevertheless have the common feature that they all strive to provide simpler, cheaper, faster and more efficient procedures in the European judicial area. In that framework the EU Regulations provide favourable procedures for international claims. This has an added value for Belgian legal practitioners seeking to enforce such claims.

The crucial question that arises is whether the lack of enthusiasm for these

Regulations can be explained with reference to the general situation regarding "new" procedural rules in Belgium, or whether there are additional reasons that can be addressed in order to guarantee the added value of these Regulations in Belgium. The University of Antwerp examined this question during the period from the beginning of 2018 up to the end of 2019. The results and recommendations of that study are published in Dutch in *Tijdschrift@ipr.be* (2019 issue 3), of which this executive summary gives the main traits.

The approach of the research is a classical method of qualitative legal analysis, where the sources legislation, case law and legal literature are at the core. All the decided cases were uploaded to a special data base, where central aspects and a summary of each case can be consulted free of charge: www.ic2be.eu. Here the reader will also find similar information about Germany, France, Italy, Luxembourg, The Netherlands, Poland, Spain and case law of the Court of Justice of the EU. This information was gathered by our project partners namely the University of Freiburg, the University of Milan, Erasmus University Rotterdam, the University of Worclaw, the Complutense University of Madrid, and the Max Planck Institute in Luxembourg for Procedural Law. The research was co-funded by the European Commission.

To complement this classical legal research, we conducted semi-structured interviews with legal practitioners from four target groups: judges, advocates/attorneys, corporate lawyers and consumers' organisations.

In what follows we start by setting out a number of issues concerning the application of the Regulations, such as the extent to which the Regulations are known, the course of the actual procedure, technical questions and the protection of (weaker) procedural parties. Thereafter we provide some highlights of the research results for each of the Regulations investigated. Finally conclusions and recommendations are provided.

B INVESTIGATION RESULTS

B.1. Urgent problems

a) Acquaintance with the Regulations

It appears that the general acquaintance with the Regulations is relatively low in Belgium. The interview participants unanimously stated that many judicial

institutions (presiding officers and registrars), advocates and bailiffs are generally unaware of, and have little knowledge of the Regulations. At the same time it was determined that acquaintance with EU Regulations is a general problem in Belgium. Various participants said that the average Belgian presiding officer or advocate has problems in “reading and understanding” EU law and, as a result, interest for it is low.

In this context the question was asked whether sufficient information about the Regulation exists. Some participants stated that it is difficult to obtain reliable information, while others said that adequate information can be found if practitioners take the trouble to find it. Often reference is made to the European Judicial Atlas. The participants agreed that the Belgian government does little to make information available and distribute it.

b) Problems related to procedure

Under problems related to procedure the following were classified: the language, the speed of the procedure, the costs of the procedure, the notice or service of documents, the standard formulas and the use of modern information technology.

The interviews indicate that these issues were indeed problematic in Belgian legal practice. This has a negative impact on the application of the procedures. The article contains a detailed discussion of the extent of these problems and how some difficulties are avoided or resolved in practice.

1. **c) Technical problems**

Under technical problems are classified: the scope of the Regulations, the area of application, the determination of the judge with international and internal capacity. From the interviews it appears that uncertainty exists concerning scope of the EPO-Regulation, which is only applicable to cross-border claims. The question is whether creative constructions that aim to bring legal relationships that were initially purely Belgian within the scope of the Regulation are permissible. Opinions on this matter differ widely.

In addition, particularly concerning the *domestic jurisdiction*, there are a number of problems. It was seen that the complex Belgian jurisdiction rules can refer to a big merry-go-round of judges who may be able to hear the case. Some participants raised questions as to whether this situation conforms with EU rules

because ‘it can hardly be expected from a foreign party to understand the complex Belgian competence rules’. Another point emerging from the interviews is that the large number of courts that may have jurisdiction could have a negative impact on the quality of the decisions because it can occur a judge with no, or only very little, experience with the Regulation or who do not properly understand it have to apply it.

d) Problems connected with the protection of parties

Problems connected with the protection of parties include consumer protection, the protection of the defendant against fraudulent or abusive procedures and the absence of a public policy test.

Problems concerning consumer protection arise in Belgium particularly in the EPO procedure. Many Belgian judges take a negative view of the system and the rules of the EPO-Regulation, particularly from the point of view of consumer protection (in particular the so-called *inversion du contentieux* – inversion of the procedure -, the low requirements regarding proof and the uncertain methods of service). According to one participant all Justices of the Peace are in principle opposed to an EPO procedure in B2C disputes. This attitude can be seen clearly in the various additional requirements that judicial officers impose in EPO procedures. This obviously reduces the attractiveness of these procedures, as is confirmed by various interviewed advocates and corporate lawyers, who criticise this situation severely and point to serious inroads on the EPO-Regulation.

B.2. The application of the Regulations in the Belgian legal practice

a) EEO-Regulation

The research has pointed out two problems in relation to the EEO: 1. The absence of a review procedure, as is described in the minimum standards of the EEO-Regulation; 2. The meaning of allowing a default for the possibility to dispute a claim or not.

The issue regarding the possibility of review is very serious, particularly because it is at present not even clear whether a decision can be certified as an EEO. Obviously this has a very negative effect on the application of the EEO-Regulation in Belgium, as has become apparent in the *Imtech* judgment of the Court of Justice EU (C-300/14) and the subsequent judgment of the Court of Appeal of

Antwerp of 27 February 2017. The Court of Appeal found that the result of the *Imtech* judgment is that Belgian procedural law does not conform to the minimum standards set by the EEO-Regulation and that EEOs can therefore not be issued.

Having regard to these reasonably serious problems, many participants stated that they try to avoid using the EOO-Regulation. They rather opt for a national procedure in combination with the Brussel I*bis*-Regulation because 'the abolition of the *exequatur* in that instrument has the same effect'.

b) EPO-Regulation

From the investigation it appears that there is a fairly diverse legal practice in Belgium on the application of the EPO procedure, which has a negative effect on the success of the procedure. Without being exhaustive the following can be mentioned: the concepts 'uncontested claim' and 'description of evidence', the acceptance of the signing of the request by the bailiff, who has to serve the payment order, the time periods stipulated in the Regulation, the circumstances under which a review can take place, the requirements for compensation for legal costs and the divergent attitudes surrounding the EPO procedure itself.

The divergent practice can have far-reaching effects. For example, the concept of 'uncontested claim' permits the interpretation that the claim is initially (seriously) contested; the mere delivery of the plea causes the claim to be contested within the meaning of the EPO-Regulation. Some judges apply this correctly, while on the other hand a judge described the fact that the claim had previously been contested as 'misleading' the court, which resulted in the success of the review application.

c) ESCP-Regulation

It appears from the investigation that the ESCP procedure is seldom applied in Belgium. This means that this procedure has the same fate as in many other Member States. From earlier research it appeared that the causes are i.a. the lack of awareness of the procedure, the high translation costs and absence of clear rules regarding service and the actual enforcement.

Some participants in addition pointed out that there is a diversity between on the one hand the parties wanting to start the ESCP procedure and on the other hand the specialists dealing with cross-border disputes. The latter in principle do not

concern themselves with minor claims, while the local advocate who is asked for advice is not necessarily aware of the ESCP procedure and furthermore does not derive much financial gain from conducting such proceeding.

Moreover consumer organisations point out that consumers still run the risk of high procedural costs when commencing a ESCP procedure.

d) EAPO-Regulation

It appears from the investigation that the EAPO-Regulation is seldom applied in Belgium, but this can be explained by its recent entry into force.

It is however important to note that it seems that the Belgian legislator made a mistake in the implementing act regarding the conditions under which the claimant has to provide security. Article 12 EAPO-Regulation requires that the claimant has to put up security in an amount that is sufficient to avoid abuse in the situation where the claimant does not yet have title. By means of the implementing act this has now been turned on its head in the Belgian Code of Civil Procedure, where the claimant who does have a title must provide security while the claimant who does not have a title clearly does not have to provide security. This must obviously be an error, because there is no logic to this provision.

C. CONCLUSIONS AND RECOMMENDATIONS

The main conclusion is that there is great variation in the application of the investigated Regulations in Belgian legal practice. Apart from the EAPO-Regulation, Belgium has not passed supplementary legislation to embed the Regulations in the Belgian legal order, whereas Belgian procedural law conflicts with the Regulations on various points. The absence of domestic legislation leads to many problems with regard to the efficacy of the procedure in Belgium and this has a substantial effect on the choices parties make between the different procedural routes.

It appears from the interviews that many legal practitioners experience problems when they invoke the Regulations. Some have given up the Regulations, while others use the Regulations but in doing so pay close attention to the specific legal practice at the court. The EPO procedure is comparatively used the most but, as one participant put it, it should have been used ‘millions and millions of times’.

Apart from the internal Belgian problems, it appears that the effectiveness of the procedures is still strongly influenced by the lack of harmonisation regarding the service of documents and the execution phase of the payment of the debt. Many participants said in the interviews that these two missing elements were the 'Achilles heel' in every cross-border case. One participant stated that 'it could be very easy to obtain an enforceable title, but then there are paradoxically no EU rules for the actual enforcement phase'.

The low application of the Regulations in Belgium is thus not (only) caused by the general reservation by practitioners to use new procedural rules. A targeted approach can improve the success of these Regulations.

The article contains several detailed *recommendations*.

At a Belgian level these are mainly:

- embedding the Regulations in the Belgian legal order via legislation; and
- improving the judicial organisation.

At EU level these concern:

- EU action regarding cross-border service of documents and the enforcement phase;
- more support and stimuli for Member States to embed Regulations adequately in their national systems;
- the adaptation of the courts' duty to serve documents.