UNIVERSITÀ DEGLI STUDI DI MILANO
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Report on Belgian case-law

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I. Pre-selection

The selection of judgements has been quite complicated, due to the lack in Belgium of a systematic and accessible publication of court' decisions. Very few law cases to report have been found. Equal difficulties have been encountered for the entire court system.

II. Brussels I bis Regulation and its predecessor Brussels I Regulation

Court of Cassation, 3rd May 2011, P. 10.1805.N. /Court of Cassation, 27th April 2010, P 10.0512.N.

Summary

As for the term of appeal provided in Article 43§5 of Brussels I bis Regulation, it is to be quoted these decisions of Belgian Court of Cassation. According to the Court' decisions, the time-limit for appeal can be suspended due to force majeure (for the time the force majeure lasts) being an insurmountable impediment to lodge an appeal, which has to be proved by the party lodging the appeal after the expiration of the time-limit. Only situations which occur despite human will and which cannot be foreseen or prevented are accepted as force majeure. The non- or malfunctioning of the mail delivery service is not considered force majeure since the documents could have been delivered in another way. Mistakes or negligence of an authorised representative (lawyer, bailiff, etc.), which took place within the limits of the representation, are generally considered to be the mistakes or negligence of the person represented and cannot give rise to force majeure.

Court of Cassation, Judgement 29th April 2010, C. 09.0176.N – C. 09.0479.N

in e-publication, University of Maribor, http://press.um.si/index.php/ump/catalog/book/345, August 2018.

Summary
The tendency in Belgian jurisprudence shows that the grounds of refusal are very strictly applied in that system. Effectively, parties can only rely on the grounds provided for by the Brussels I(bis) Regulation. The Court of Cassation confirmed that the Belgian judge cannot review the "substance" of the foreign decision, even in case the foreign decision would violate EU law. Since evasion of law that assimilates fraud is a specific and important ground for refusal of recognition under Belgian private international law, it can cause a refusal on ground of violation of international public policy. There are nevertheless situations in which the Belgian judge will have jurisdiction for the (refusal of) recognition, but domestic law can't allow the start of the procedure, e.g. when the action is barred by limitation. These grounds only apply when they are consistent with the EU law.
The Belgian courts apply a strict assessment for the recognition of foreign judgments, in line with the objective of free movement of judgments. If judges can ex officio refuse the recognition of a foreign decision is currently being discussed. According to the jurisprudence this is only possible in case of a manifest breach of international public policy.

Court of Cassation, Judgement 8th February 2019, C. 18.0354.N

It is useful to quote the relevant parts of the decision. "1. The defendant puts forward two grounds of appeal:
- the plea, in this branch, is irrelevant because the decision to validate the choice of court clause under Article 25 of Brussels Ibis Regulation and not to apply Irish Law No 27/1995, which transposes into Irish law Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts remains legally justified since the claimant is not protected by that directive or by that law since she is not herself a consumer but acted as an assignee of consumer claims;
- Furthermore, the plea in this branch is also irrelevant because the decision to validate the choice of court clause under Article 25 of the Brussels Ibis Regulation and not to refer to Irish law remains legally justified since, by virtue of Annex 1(e)(ii) of the Irish Act No 27/1995 transposing Directive 93/13/EEC into Irish law, that Act does not apply in any case to a choice of court clause in accordance with Article 25 of the Brussels I bis Regulation.
2. The contested judgment does not make any findings as to the plaintiff's standing. The Belgian Court of Cassation cannot itself make a factual assessment of that status".
So, the first ground of appeal could not be upheld. (…)
"6. By virtue of Article 25(1) of the Brussels Ibis Regulation, the substantive validity of this clause conferring international jurisdiction must therefore be assessed in accordance with Irish law, including Irish Law No 27/1995, which transposed Directive 93/13/EEC into Irish law.

7. According to Section 3(1) of the Irish Act No 27/1995, the Act applies, subject to the provisions of Schedule 1, to all terms of a contract concluded between a seller of goods or a provider of services and a consumer which have not been individually negotiated.
(…)
8. According to the settled case-law of the Court of Justice of the European Union, Article 3(3) of Directive 93/13/EEC, of which Article 3(7) of Irish Law No 27/1995 is the transposition, must be interpreted as meaning that, in a contract concluded between a consumer and a seller or supplier a clause drawn up in advance by the trader and not individually negotiated, the purpose of which is to confer jurisdiction for all disputes arising under the contract on the court within whose jurisdiction the trader has his registered office, may be regarded as unfair (CJEU 27 June 2000, Océano Grupo, C-240/98-C-244/98 ; CJEU 4 June 2009, Pannon, C-243/08; CJEU 9 November 2010, VB Pénzügyi Lízing, C-137/08).
9. The contested judgment, which confines itself to assessing the formal validity of the international jurisdiction clause at issue in the light of the conditions laid down in Article 25 of the Brussels Ibis Regulation without ascertaining whether, according to the law applicable by virtue of the referral rule enshrined in that provision, that clause creates, to the detriment of the consumer, a significant imbalance between the rights and obligations of the parties, is not legally justified".
So the appeal judgement has been annulled, giving the judges of appeal the task to verify the consumer's status of the concerned part.

Court of Cassation, Judgement 3rd May 2018, C 17.0387.N

The Supreme Court decision relates to jurisdiction and recognition of provisional measures. It is clear from the documents submitted to the Court that : a) the first and second defendants, in the form of a temporary company (hereinafter: the subcontractors), concluded a contract of enterprise with Besix s.a. (hereinafter: the main contractor) for the construction of a steel structure for a car park and an office complex in Ostend; b) in 2014, the subcontractors purchased steel tubes from the third defendant which the latter had acquired from the plaintiff; c) the steel tubes were used in the steel construction after shaping and painting or galvanising; d) the main contractor found that there were problems after the tubes had been galvanised or painted, so he requested the appointment of an expert from the interim relief judge in Brussels; e) the expert was appointed on 18 May 2015and at a later date, the main contractor filed an application for forced intervention in the summary proceedings against the claimant and the third defendant; f) the claimant contests the jurisdiction of the Belgian interim relief judge. (…)
The appeal judges considered that :
4. According to the case law of the Court of Justice of the European Union, "provisional or protective measures" within the meaning of Article 35 of the Brussels Ibis Regulation means measures intended to maintain a factual or legal situation in order to safeguard rights the recognition of which is or must be sought before the court having jurisdiction as to the

substance of the matter (C. ECJ 26 March 1992, Reichert and Kockler, C-261/90, No 34; ECJ 17 November 1998, Van Uden, C-391/95, No 37; ECJ 28 April 2005, Saint Paul Dairy Industries, C-104/03, No 13).
According to the above-mentioned judgment in C-104/03, a measure whose sole purpose is to enable the applicant to assess the chances or risks of a possible trial cannot be classified as a provisional or protective measure within the meaning of the above-mentioned Article 35.
5. It is clear from this case-law and from the abovementioned recital 25 that a measure intended to obtain information or preserve evidence, the main purpose of which is not to enable the applicant to assess his chances at trial but to maintain a factual or legal situation in order to safeguard his rights, constitutes a provisional or protective measure within the meaning of Article 35 of the Brussels I Regulation. (…)
7. The judges of appeal noted that:
a) the object of the expertise, i.e. the steel construction in question, is located in Belgium; b) eight actors are all established in Belgium; in these circumstances, it would be unreasonable, from both an economic and a practical point of view, to require that, if necessary, a satellite expertise be carried out in Germany; f) the stoppage of construction activity on a building site due to a technical phenomenon may lead to very significant progressive damage and therefore requires an urgent technical solution in the interests of all the professionals potentially affected and the future users of the project.
8. The judges of appeal, who admitted that the application for intervention in the expert's report aims at obtaining and securing evidence and thus has as its object the maintenance of a factual and legal situation with the aim of safeguarding the rights of the defendants, have, on this basis, legally justified their decision that it is a provisional or protective measure within the meaning of Article 35 of the Brussels I bis Regulation for which the Belgian judge in charge of interim relief has jurisdiction".
So the appeal judgement was confirmed.

III. European Enforcement Order Regulation (EEOR)

First Chamber of the Commercial Court of Hasselt, Judgement of 1 February 2006[1]

in *Tijdschrift@ipr.be*, 2006 (1), 53

Summary

Pursuant to Article 6 of Regulation No 805/2004 on the European Enforcement Order (EEO) for uncontested claims, a certification of a court judgement (in an uncontested claim)

[1] In Dutch: *Rechtbank van Koophandel te Hasselt, vonnis van 1 februari 2006*.

as a European Enforcement Order can be obtained "*at any time at the request of the court of origin*". The Article, however, has not determined the specific authority that will be competent for issuance of such certificate. As a result, this is up to the Member States to determine the competent authority. In Belgium, there was a conflict among the courts in determining the competent court to issue the EEO certificate. Part of the legal doctrine believed that the 'court' must be strictly interpreted as a judge, while the other part was of an opinion that the 'court' – as mentioned in the Regulation – can also refer to the registrar and/or other administrative services of the court.

To resolve the conflict, the Belgian Circular of 22 June 2005[2] stipulated that *"since it is not – subject to the interpretation of the courts and tribunals – a judicial act as such, the application may be submitted to the chief registrar of the court or tribunal that made the decision or court settlement."* [3]

The Commercial Court of Hasselt – within its decision – did not agree with this interpretation. The judgement was mainly lied on the fact that issuing an EEO certificate requires for a judicial examination of the conditions of Article 6 of the EEO Regulation by the court. For instance, the court must check whether the judicial procedure in the Member State of origin complies with the requirements laid down in Chapter III of the Regulation, whether the service met the minimum standards, the debtor was duly informed of the procedural steps necessary to contest the claim, and whether the law of origin provides for the possibility of requesting a reconsideration if certain conditions are met.

To check these conditions is indeed a judicial act that is more than an administrative formality and more suitable for a judge (and not for the chief clerk). Therefore, the 'court' in the context of certifying a judgement as an EEO – as stipulated by the EEO Regulation – must be carried out by a judge.

Court of Appeal of Antwerp, Judgement of 27 February 2017

in *Tijdschrift@ipr.be*, 2019 (3)

Summary

[2] Circular of 22 June 2005 - Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, 28 October 2005, 2nd ed., 47042-47049.

[3] It is to be noted that in Belgium the circular letter does not create new legal rules, then one has to deal with a number of gaps in Belgian legislation, i.e. there is no legal basis for the competence of the registrar to certify as an EEO certificate.

Article 19 (1) of the European Enforcement Regulation No 805/2004 refers to the minimum standards for review under exceptional circumstances.[4] This means that, in order for a court decision to be certified as an EEO, the debtor must be able to request a review if the notification or service of the document initiating the proceedings has not taken place in accordance with provisions of Article 14 of the EEO Regulation[5] on the service of documents/notifications in order to enable the debtor to prepare for his/her defence. The same limitation is imposed where the debtor has not been able to formally file a defence within the deadline, due to force majeure or other extraordinary circumstances beyond its control. In both cases, the debtor must act without undue delay.

The circumstances in which the debtor fails to file a request for review due to force majeure or extraordinary circumstances beyond his/her control raised questions regarding the extent to which Belgian procedural law meets this minimum standard (considering the fact that the procedural law does not provide for this review possibility in the situations stipulated by the Regulation). In the intended case, the Court of Appeal of Antwerp answered this question by reasoning that the time limits and the possibilities for their extensions under the Belgian law do not offer sufficient legal certainty to the debtor to be used in situations of force

[4] **Article 19 (1):** "Minimum standards for review in exceptional cases: **1**. Further to Articles 13 to 18, a judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgment where: **(a) (i)** the document instituting the proceedings or an equivalent document or, where applicable, the summons to a court hearing, was served by one of the methods provided for in Article 14; and **(ii)** service was not effected in sufficient time to enable him to arrange for his defense, without any fault on his part; or **(b)** the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly."

[5] **Article 14** on the "Service without proof of receipt by the debtor: **1.** Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected by one of the following methods: **(a)** personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there; **(b)** in the case of a self-employed debtor or a legal person, personal service at the debtor's business premises on persons who are employed by the debtor; **(c)** deposit of the document in the debtor's mailbox; **(d)** deposit of the document at a post office or with competent public authorities and the placing in the debtor's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits; **(e)** postal service without proof pursuant to paragraph 3 where the debtor has his address in the Member State of origin; **(f)** electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty. **3.** Service pursuant to paragraph 1, (a) to (d), shall be attested by: **(a)** a document signed by the competent person who effected the service, indicating: **(i)** the method of service used; and **(ii)** the date of service; and **(iii)** where the document has been served on a person other than the debtor, the name of that person and his relation to the debtor, or **b)** an acknowledgement of receipt by the person served, for the purposes of paragraphs 1(a) and (b).

majeure and/or circumstances beyond his/her control as described in Article 19 (1) of the EEO Regulation. Therefore, the Belgian law does not provide for a review procedure as required under the Regulation. The problem with the Court's approach is that the claimants in these proceedings ultimately still must go to a foreign court to obtain an enforceable title, which is precisely contrary to the intention of the Regulation. In addition, to being purely legal, such an outcome results in unnecessary lawyer and court costs for the creditor, something that cannot be justified in the current socio-economic climate. There is therefore an obvious need for a legislative initiative in Belgium to adapt the Judicial Code to meet the minimum standards required to obtain an EEO certified decision.

IV. European Payment Order Regulation (EPOR)

Court of Appeal Ghent, Judgement of 5 November 2018, No 2018/7737

in *Tijdschrift@ipr.be*, 2019

Summary

A notification of an EPO via registered mail with proof of receipt, is a correct notification according to the applicable French law and article 13 EPO.
Article 20 EPO, regarding the remedy of review, should, as an exception, be interpreted strictly, given the goal of the EPO procedure is to be quick and effective.
The possibility to lodge a review should not mean that the defendant is granted another possibility to oppose the EPO (CJEU 22 October 2015, C-245/14, Thomas Cook).
According to the Court, the EPO was not wrongly granted. Neither can the debtor raise international jurisdiction issues, as this should have been done ex article 16 EPO.

Constitutional Court 12 October 2017, No 6504 117/2017

In *Tijdschrift@ipr.be,* 2017 (4)

Summary

Articles 1138 and 1340 Belgian Judicial Code do not violate articles 10 and 11 Belgian Constitution (provisions on non-discrimination).

The fact that a creditor in the special procedure of judges, regarding small claims under €1.860, ('summiere rechstpleging') must comply with extra criteria compared with the EPO procedure does not result in any discrimination. According to the court, an international case is different from a national case and cannot be compared, because the principle is that similar and comparable situations are to be treated equally (and if not, the non-discrimination principle shall be considered violated).

V. European Small Claims Procedure Regulation (ESCPR)

Commercial Court of Antwerp (Turnhout Division), Judgement of 20 February 2019
in *Tijdschrift@ipr.be*, 2019 (3)

Summary
In accordance with Recital 10 of the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (ESCPR), in order to facilitate the calculation of amount or value of the matter in controversy, the interests should be disregarded. The Recital indicates that the court or tribunal is, however, free to calculate the interests in its final judgement. In the intended case, despite the parties' agreement on the principal sum of the ESCP claim, the dispute was over the interests. The applicant claimed the interests of the delayed payments and the defendant refused to pay – any additional amount to the principal sum of the claim – arguing that he formulated a proposal for the repayment. The court, however, stated that there was no proof showing that the claimant agreed to this repayment formula under the conditions that he would not take any legal action or would not charge any interest for the delayed payments. As a result, the court found out that according to the Law of 2nd August 2002 on the supervision of the financial sector and financial services, the ESCP claim was sufficiently proven to be eligible for the legal interest rate under Belgian laws.

VI. European Account Preservation Order Regulation (EAPOR)

No case law regarding this Regulation has been published in the available sources.

VII. Recurring issues

The general awareness of the Eu Regulations in Belgium is relatively low. Judges, lawyers and bailiffs don't have sufficient knowledge of them, and this appears to be a general problem. Many lawyers do not use recitals, because it is hard to find trustworthy information and the Belgian government does not do enough to provide information. Other obstacles to the effectiveness of the procedures appear to be language issues. Nevertheless, language issues are a general problem regarding cross-border cases in which two or more languages are used. Eu Regulations, in particular European Payment Order and Small Claims Procedures, have standardised forms and offer the possibility to change a model form of language X to a form of language of preference. The language transformation option,

however, only covers the text of the form. It would be better if it could extend the translation to the text boxes that are filled out (e.g., the reasons given by a judge). In practice, parties are often asked to provide the translation, and, in some cases, this has created a considerable delay.
Finally, regarding the speed of the proceedings under review, there is a sufficient speediness in enforcement procedure, since it is normally adequate the respect of the terms by the parties and by the judge, when EU Regulations provide specific time-limit.

VII. Summary and overall assessment

The legal ground on which these Regulations are applied is different. While the implementation in Belgian system of Brussels Ibis, EOP, EEO, ESCP Regulations stays on their direct and immediate applicability, the EAPO Regulation has been implemented through a specific Belgian law, applicable also to strictly internal cases. Consequently, the EOP, EEO and ESCP Regulations only apply to cross-border cases.
The effectiveness of Regulations is still seriously affected by the lack of uniformity regarding the service of documents and the execution phase. This could be one of the reasons for which some Regulations have not been very frequently applied.
Finally, Belgian law cases are not systematically published and very few are available to the public.