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10th Anniversary of the European

Small Claims Procedure

Its practical application in EU-Member

States, especially in Luxembourg

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The European Small Claims Procedure (ESCP)

10 Years of Application

- I. Introduction.
- II. **ESCP as one of several EU regulations of the 2nd generation**
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I. Introduction. Celebrating an anniversary

“10 years European Small Claims Procedure - ESCP”

(Regulation (EU) no. 861/2007. in force since 1/1/2009 –
amended by Reg. (EU) no. 2421/2015)

ESCP (2007): 3rd in line of 4 new regulations:

- European Enforcement Order - EEO (Reg. (EU) no. 805/2004)
- European Payment Order – EPO (Reg. (EU) no. 1896/2006)
- European Account Preservation Order - EAPO (Reg. (EU) no. 655/2014)



II. ESCP as one of several EU regulations of the 2nd generation

1. New regulations: **special regimes** (“second generation” regulations), especially with regard to (direct) enforcement in other EU-Member States.
2. New regulations: **optional regimes** (alternatives), applicable instead of other EU instruments (Brussels Ibis Regulation) and national procedures. The plaintiff may choose among different options.
3. **How do creditors choose** between various regimes? **IC2BE-project**

(see www.mpi.lu and www.ic2be.eu)



III. A closer look at the European Small Claims Procedure

1. General features of the instrument

- a) ESCP: aim of enhancing **access to justice** for “consumers” and small and medium enterprises (SMEs)

(claims up to 5000 euro, since the amendment)

- b) ESCP: a **uniform European procedure** for first instance courts

However, many references to the national procedural laws in the ESCP, especially Article 19.

So far, 2 judgments of the CJEU:

- *C-627/17 - ZSE Energia (scope of application)*
- *C-554/17 - Rebecka Jonsson (national cost rules).*



2. Problems faced by the ESCP in various Member States

Problems of

- lack of awareness of the existence of the ESCP,
- lack of familiarity with the ESCP-procedure,
- cumbersome service (transmission of documents),
- language issues,
- costs of translation and other costs (e.g. often representation costs),
- enforcement uncertainties,

...

“ESCP is not a success story”

Ex. Germany: in 2017, 478 small claim procedures, but a total of 950.000 proceedings in the local courts.



3. The Luxembourgish “atypical” case

Cases collected ourselves when going to Cité Judiciaire:

2014	34
2015	100
2016	83
2017	140
2018	139

Statistics Cité Judiciaire even higher, see figure on next page (“Petits litiges” = ESCP)





3. The Luxembourgish “atypical” case

	Diekirch		Esch/Alzette		Luxembourg	
	2016	2017	2016	2017	2016	2017
Nouvelles affaires						
Petits litiges	72	30	178	186	240	226
Décisions prises						
Petits litiges	17	12	122	169	95	137



3. The Luxembourgish “atypical” case

a) Luxembourgish case law: *varied* ESCP-cases

Luxembourg is interesting as cross-border constellations are rather the rule than an exception in the civil courts (experimental, **laboratory**, testing ground, to examine the practice of the ESCP)

Factors influencing the preferences of a plaintiff

- for the **use** of an **ESCP**-procedure,
- **especially** for the use of an ESCP-procedure in **Luxembourg?**



3. The Luxembourgish “atypical” case

b) Luxembourgish ESCP-procedures in which “consumer” is the defendant (commenced by Luxembourgish plaintiffs)

(= including cases against consumers and similar persons)

* **Typical problems:**

* **Jurisdiction:** possibility to commence ESCP in Luxembourg against a foreign “consumer” (private person)?

Jurisdiction rules: narrow concept of “consumer protection” in article 17 (1) Reg. Brussels 1bis

- Therefore it is often possible for plaintiffs to rely on article 7 no 1 and no 2 of Reg. Brussels 1bis (opening up jurisdiction in Luxembourg)



3. The Luxembourgish “atypical” case

b) Luxembourgish ESC-procedures in which a “consumer” is the defendant (commenced by Luxembourgish plaintiffs)

Jurisdiction rules applicable to the ESCP, in cases against “consumers” (and similar weaker parties):

- Remark 1: difference in jurisdiction rules with Art. 6 (2) EPO
- Remark 2: violation of protective jurisdiction rules: no “refusal ground” for consumers if erroneously applied (difference with article 45 Brussels 1bis)

As a result, the consumers’ protection in the ESCP context is weaker than in the other instruments.

Point of attraction to start proceeding in Luxembourg:

- **no court fees**
- **Judges experienced in cross-border cases**



3. The Luxembourgish “atypical” case

c) “Consumer” as a plaintiff, commencing an ESCP

(= ESCP-procedures by consumers)

- Case law – **varied** cases
- Usual **problems (also present in Luxembourg) faced by consumers commencing an ESCP**: lack of awareness, lack of knowledge, problems in filling out standard forms etc. ...



3. The Luxembourgish “atypical” case

c) “Consumer” as a plaintiff, commencing an ESCP

(= ESC-procedures by consumers)

- **Cases of “consumers” against airlines**

(claims compensation cancelled/delayed flights) – some victories for “consumers”

- (plaintiffs no “consumers” in sense of Brussels 1 bis; jurisdiction often based on article 7 Brussels 1 bis (CJEU *Rehder*))
- recent case law on forum choices airlines – Belgian Supreme Court 8 February 2019; pending case C-629/18

- **Consumers (just) threatening the businesses with the commencement of an ESCP**



IV. Conclusion

Is the ESCP to be considered a “**working legal weapon used by consumers**”?

(Is it:

- an effective instrument used by (- and against? -)
consumers?
- a workable tool to enforce consumer rights?

In EU-Member States – **especially in Luxembourg?**





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Thank you for your attention!

