

THE EUROPEAN SMALL CLAIMS

PROCEDURE

International cooperation in civil matters

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INTRODUCTION

The European Small Claims Procedure has been established by Regulation No 861/2007 of the European Parliament and of the Council of 11 July 2007. The main aim of the following Regulation was to improve access to justice by simplifying cross-border small claims litigation in civil and commercial matters and reducing costs of it¹.

Before implementing the Regulation Member States have noticed the strong need of creating the special procedure to deal with common, small claims of citizens and small and medium-sized enterprises. At the same time, the potential number of cross-border disputes was rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The development of the Internet increased the problem. The consumers were ordering over the Internet goods from abroad which were never dispatched or which turned out to be faulty. There was an issue of individuals involved in an accident while on holiday or while making a shopping trip abroad or those who had bought goods, which later turned out to be faulty or dangerous. It appeared that previous domestic procedures were not efficient. It caused additional high costs (traveling to the Court country, legal representatives). The overall expense of obtaining a judgment against a defendant in another Member State were often disproportionate to the amount of money involved. These factors disposed Member States to find a new solution to described issue. The main idea of establishing the ESCP was to ensure that cross-border small claims will be dealt in a speed-up, low cost and simple way².

The following paper tries to present and describe general issues connected with the ESCP. It also attempt to answer if the procedure achieves its main goal and improves access to justice in case of cross– border small claims.

Chapter 1

INITIAL INFORMATION

SCOPE OF THE ESCP

The scope of the ESCP has been described by the Article 2 of the Regulation. According to this provision the procedure shall apply to cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2000 at the time

¹ see Green Paper on a European Order of Payment procedure and on measures to simplify and speed up small claims litigation, Commission of the European Communities, Brussels 20.12.2002. COM (2002) 746 final, p. 52;

² J. Zatorska, Komentarz do rozporządzenia WE nr 1896/2006 Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. ustanawiające postępowanie w sprawie Europejskiego Nakazu Zapłaty, 2009, published in: LEX;

when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. The scope is compatible with the scope provided by the Regulation No 44/2001 and Regulation No 1896/2006 (creating a European order for payment procedure) which allow to take advantage of jurisprudence and ECJ judgments given in the matters provided by those Regulations.

The following scope includes not just consumer disputes, but a range of civil claims, such as personal injury compensation, disability discrimination and unequal access to services. There are a number of exceptions to the ESCP given by Article 2 paragraph 2³.

Regulation does not provide explanation to the “civil and commercial matters” term. It was defined by the jurisprudence and judicial practice in accordance with the Joint Declaration to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and Regulation No 44/2001. These terms should not be interpreted in response to domicile law but to European Union legal framework. “Civil and commercial matters” can be understood differently in each Member State so the aim of the following way of interpretation is to avoid inaccuracy⁴.

Contrary to the order for payment procedure the Small Claims procedure does not apply for monetary claims only⁵. If claim is not monetary it is obligatory to specify the subject of the claim and to present estimated value of the claim⁶.

CROSS-BORDER CASE

According to Article 3 of Regulation No 861/2007 for the purposes of it, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized. As it is stated in Article 2 paragraph 2 of the Regulation domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001⁷.

The term of cross-border case has been provided identically as it was regulated in the order of payment procedure (Article 3 of Regulation No 1896/2006). Relevant issue is to point the date on

³ see http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm;

⁴ Łukasz Goździaszek Europejskie postępowanie w sprawie drobnych roszczeń, Monitor Prawniczy 2009/9, p.472;

⁵ Green Paper on a European Order of Payment procedure and on measures to simplify and speed up small claims litigation, Commission of the European Communities, Brussels 20.12.2002. COM (2002) 746 final, p. 53;

⁶ see 7.2.1 – 7.2.2 of annex 1 to Regulation no. 861/2007;

⁷ Juan Pablo Cortes Dieguez, Does the proposed European procedure enhance the resolution of small claims? Civil Justice Quarterly 2008;

which the case can be determined as a cross- border. In accordance with Article 3 paragraph 3 of Regulation No 861/2007 the following date is a date of receiving the claim form by the court or tribunal with jurisdiction (which is also identical to the order of payment procedure– Article 3 paragraph 3 of Regulation No 1896/2006). In terms of presented provisions the most significant matter is a domicile of the party, if only other party has domicile in a Member State other than a State of the court or tribunal with jurisdiction⁸. There is a possibility to start the procedure if both parties are domiciled in the same Member State, as long as the court with jurisdiction is placed in another Member State.

LANGUAGES

Due to the fact that small- claims procedure concerns only cross- border cases it is relevant to provide accurately the matter of languages that might be used during the case. This is one of the biggest challenge that the ESCP faces. It is of top importance because it affects the length and cost of the ESCP. The issue was regulated by the Article 6 of Regulation No 867/2001. The general rule is to submit all documents like claim, response etc. in a language of the court with jurisdiction. It is obligation of the party to provide an appropriate translation of any document that is submitted during the case. However, if this obligation is not fulfilled by the party, the court may require translation of a document received in another language, but only if that document seems to be necessary for giving the judgment⁹. It is evident that, due to the fact that the procedure concerns only cross-border cases, the other party might not be able to understand documents submitted by the opponent. If a party refuses to accept a document because it is in a language he does not understand or a language other than one of the official languages of the Member State addressed, the court will notify the other party, so that he can supply a translation.

LEGAL REPRESENTATION

It is evident that during the procedure both parties can be represented by professional layers. Although, it has to be said that, according to the Article 10 of Regulation, litigants do not have the obligation to be represented by lawyers during the ESCP, nor during their appeals. It is compatible with the general rule and aim of the small claim procedure which is to simplify and reduce costs of pursuing these claims. However, parties will be compensated for the costs of legal representation when the judge considers these costs necessary and proportionate to the value of the claim. Although there is no specific provision regulating this matter, it is understood that litigants can be represented or assisted by someone who is not necessarily a lawyer by training. There are

⁸ Łukasz Goździaszek Europejskie postępowanie w sprawie drobnych roszczeń, Monitor Prawniczy 2009/9, p. 475;

⁹ see Article 6 paragraph 2 of Regulation;

suggestions that a specific provision should clearly allow consumers to be represented by consumer associations and professional associations to represent their members¹⁰.

The Regulation No 861/2007 provides also that litigants should receive assistance not only from professional layers, but also from the Member State of the court with jurisdiction and from the court itself. According to the Article 11 of Regulation the assistance should concern filling in the forms while Article 12 paragraph 2 provides that the court should inform parties about procedural questions.

Considering the issue of legal representation during the procedure, the rule which is stated by the Article 12 paragraph 1, has to also be mentioned. It provides that the court or tribunal shall not require the parties to make any legal assessment of the claim. It has to be noticed that the obligation of the parties does not regard the legal part of the case, but matters of fact only. Litigants are not obliged to present legal appraisal of case circumstances or legal arguments on the claims¹¹.

THE SERVICE OF DOCUMENTS

The other matter, which is relevant in order to speed up the ESCP and to make it an effective way of pursuing claim, is servicing documents during the case. This matter has been provided in the Article 13 of Regulation No 861/2007. Paragraph 2 of this provision refers to the Regulation No 805/2004 creating a European Enforcement Order for uncontested claims. The Article 13 and 14 of Regulation No 805/2004 states both service with or without proof of receipt by the debtor. It has to be said that these provisions set different and numerous means of servicing documents, including electronic means, such as fax or Internet, which needs to be find as a very beneficial solution. The effective way of exchanging documents is a crucial issue in order to speed up whole proceeding, so it should not be any limitation in this matter, especially when it comes to using electronic means¹².

TIME LIMITS

According to the Article 14 paragraph 1, where the court or tribunal sets a time limit, the party concerned shall be informed of the consequences of not complying with it. The following provision comes from the basic rule of the ESCP, that litigant can pursue the claim without necessity of being represented by professional layer. In order to guarantee this the Regulation compels the court with

¹⁰ Juan Pablo Cortes Dieguez, Does the proposed European procedure enhance the resolution of small claims? Civil Justice Quarterly 2008;

¹¹ J. Zatorska, Komentarz do rozporządzenia WE nr 1896/2006 Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. ustanawiające postępowanie w sprawie Europejskiego Nakazu Zapłaty, 2009;

¹² Juan Pablo Cortes Dieguez, Does the proposed European procedure enhance the resolution of small claims? Civil Justice Quarterly 2008;

jurisdiction to keep litigants informed about consequences of not complying with time limits. These obligation also ensures that the proceeding will not be postponed more than necessary because of the party's negligence¹³.

Article 14 is also a source of a right of tribunal to extend the time limits given by the other provisions of Regulation No 861/2007 (which are: Article 4 paragraph 4, Article 5 paragraph 3 and 6 and Article 7 paragraph 1), in exceptional circumstances, if necessary in order to safeguard. It is another way of simplifying pursuing of small claims. In those "exceptional circumstances" it will be allowed to avoid rejecting the claim only due to the fact of missing deadline. The idea of the ESCP is not only to speed up the procedure, but also to improve access to justice, especially for litigants not represented by professional layers (like consumers etc.). The exception provided by Article 14 paragraph 2 is another manifestation of this prior rule.

Chapter 2

PROCEDURE – from claim to judgment

Regulation No 861/2007 states a specific procedure for the ESCP. Firstly, we should indicate that according to the Article 19 of the ESCP should be provided by the procedural law of the Member States in which the procedure is conducted, subject to the provisions of the Regulation. In reference to this the ESCP the court or tribunal will proceed basing on two legal acts– Regulation No 861/2007 and Member State's law (in Poland *The Code of Civil Procedure*¹⁴). The ESCP is created as an alternative to the existing, national procedures¹⁵.

THE CLAIM

Obviously the procedure commence by action of claimant who should lodge to the court or tribunal a special standard claim Form A, filled in language of this court or tribunal. The Regulation does not provide the indications of competent court to deal with the case. Therefore it is necessary to refer to the Brussels Regulation and to the Rome Convention. The Form A is included in annex I of the Regulation and it is also available on the internet in all official languages of the EU¹⁶. According to points 21-22 of Preamble of the Regulation 861/2007 the practical assistance that should be available for the parties need to include technical information concerning the availability and the filling in of the forms. Furthermore the court or tribunal staff may also give the relevant

¹³ Łukasz Goździaszek, Europejskie postępowanie w sprawie drobnych roszczeń, Monitor Prawniczy 2009/9, p. 475;

¹⁴ The use of these two acts of law doesn't mean that they are equal. Under polish Constitution the European Law has the priority before the intern law;

¹⁵ Xandra E. Kramer, The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Legislation, Zeitschrift für Europäisches Privatrecht, Vol. 2, pp. 355-373, 2008;

¹⁶ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm;;

information in accordance to national law. The Regulation provides a direct way of lodging the form, sending by post or by *any other means of communication such as fax or e-mail* under condition of acceptance of the Member States. According to Article 4 point 2 the Member States should give the Commission an information about accepted means of communication what will be announced publicly. Polish law recognizes only the direct and postal way of imposing the claim which most certainly undermines the realization of the objectives of the ESCP such as speeding up and simplifying the procedure.

The Form A, divided into 10 sections, includes a detailed information (before each section) about all necessary elements that should be written in this paper. At the beginning the claimant is informed that he should enclose any relevant supporting documents, which does not mean that he would not be able to present further evidence in the future (during the procedure). In order to avoid the translation costs the form should include a description of the evidence supporting the claim¹⁷. In the claim form there needs to be indicated the court or tribunal (section 1) before which it will be lodged, the information about the claimant (section 2) and the defendant. Filling sections 2 and 3 the claimant should be very careful when indicating the address because the address not sufficient enough (e.g. without number of building) may result in failure of serving the documents. Subsequently the claimant should motivate the chosen jurisdiction by ticking 1 of 8 possibilities—grounds of jurisdiction- provided by section 4, such as domicile of the defendant, domicile of the consumer, place of the harmful event etc. The claimant must justify the cross- border nature of his case by filling section 5. Section 6 is optional and concerns a bank details. The most important are following two sections: 7- which refers to the claim and 8- entitled *details of claim*. Before each section, the form explains what the claimant should do clearly and understandably, for ordinary citizen, without any knowledge of procedure. The claimant must choose the type of claim - monetary on non- monetary with indicating the currency, than he decides if he will be claiming for the costs and interest. Afterwards, in the section 8, the claimant presents the essence of the claim. In this section he should describe the facts and the evidence supporting his claim, he can also demand an oral hearing. It depends on the tribunal/court whether this oral hearing will be held or not . The general rule is that the ESCP is a written procedure and court or tribunal is not obliged to proceed oral hearing. The oral hearing is hold if the court or tribunal considers that necessary and also if one of the party request it. However, in this case court or tribunal can refuse it, if the oral hearing is not necessary for the fair conduct of proceeding, regarding the circumstances of the case. Such a refusal cannot be contested separately.

The last decision to make concerns the recognition and enforcement of judgment in another

¹⁷ Article 4 paragraph 2 of the ESCP;

Member State. If the claimant intends to ask for that he may request it in section 9. After filling the form A the claimant has to indicate the date and sign the paper by writing his name clearly.

In Poland to commence the action the claimant should pay a fixed court fee of 100 zloty's¹⁸. The rule of one proceeding– one fixed court fee is clear and eliminates the problem of fixing the court fee, however this court fee will be too high if the value of the claim is low. In these cases the better solution would be to impose the minimum court fee (in Poland it is 30 zlotys).

The court or tribunal which receives the claim form examines the formal conditions, such as the scope of the claim, but also the essentials of the claim- an adequacy of the information presented by the claimant in the section 8 of the form A. According to the Article 4 paragraph 3, if the claim is outside the scope of the Regulation the court or tribunal shall inform the claimant, and if he does not withdraw the claim, the court or tribunal proceeds in accordance with the relevant procedure of domicile law of the Member State. This solution is justifiable as it responds for the general rule of speeding up the procedure. In connection with the above the case will be examined without dismissing the claim which counteracts to the prolongation of proceeding. The court or tribunal is able to demand from the claimant to complete or rectify the claim filled in improper way or to supply additional information or documents if the information was inadequate or insufficiently clear. For this correspondence the court or tribunal uses form B in annex II. When the claimant fails to complete or rectify the claim within the specified time limit, the court or tribunal will dismiss the claim. The court or tribunal may also dismiss the claim which is *clearly unfounded or the application inadmissible*. The abovementioned premise is related to the examination of the matter (the essence) of the case- not the formal examination- which causes the complication in the Polish law. We should indicate that, according to the point 13 of the Preamble of the Regulation, these two notions should be determinate in accordance with the national law. The Polish procedure provides the dismissal of the claim in the following situations: when the formal conditions have not been kept or the costs have not been paid (Article 130 paragraph 1 of Code of Civil Procedure). In this case the judge dismisses the claim. This procedure, however, does not include the examination of the essence of the claim, at that stage of the proceeding. To adjust the dispositions of the Polish CCP to the ESCP Regulation the domestic legislator entered a special disposition- Article 505²⁴- which creates the possibility for the court to dismiss the claim if *the relevant dispositions¹⁹ provides the dismissal of the claim²⁰*.

The Regulation, in Article 4 paragraph 5, introduces an important obligation for Member States –

¹⁸ Article 27b of the Act of 28.07.2005 on the court fees in civil matters;

¹⁹ Meaning the Regulation 861/2007;

²⁰ Łukasz Goździaszek *Europejskie postępowanie w sprawie drobnych roszczeń*, p. 473;

they should ensure an availability of the claim forms in all courts and tribunals at which the ESCP can be commenced. Unfortunately, the Regulation does not impose any kind of control regarding the failure of compliance of this duty.

THE RESPONSE OF THE DEFENDANT

After receiving the claim filled in proper way (from the beginning or after the supplement or rectification of the claim form) the court or tribunal fills the part one of the standard answer Form C (annex III) and sends it to the defendant with the copy of the claim and, where applicable, with the supporting documents. The documents should be dispatched within 14 days of receiving the properly filled claim. According to the Article 13 all documents shall be served by postal service attested by an acknowledgement of receipt with the date of receipt and if it is not possible they can be served in accordance with one of the methods provided in Articles 13 or 14 of Regulation No 805/2004²¹. The form C contains also the introduction informing the defendant about the possibility of answering for the claim by filling the second part of received document, within 30 days after receiving the claim form. The defendant may respond by filling form C (part II) or in any other appropriate way (Article 5 paragraph 3). The response is the right of the defendant, he is not obliged to send the answer for the claim. If he would not answer within the time limits, the court or tribunal may deliver the judgment (if it has all the necessary information). The form C contains the guidelines for the defendant which may help him while filling in the form. All the guidelines are given in clear understandable way. The defendant is informed that, in case he is being passive for this 30 days period, the court or tribunal may deliver a judgment. According to point 28 of preamble, in case when the court or tribunal is required to set a time limit, the party concerned should be informed of the consequences of not complying with it. The crucial information concerns the language because the defendant has to answer in the language of the court or tribunal to which the form has been sent. The information indicates all the possibilities that the defendant disposes, on the basis of the Regulation, especially making the counterclaim. The notion of counterclaim should be interpret in accordance with Article 6 paragraph 3 of the Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as arising from the same contract or facts on which the original claim was based. The defendant may lodge his counterclaim by filling the abovementioned form A and adding the supporting documents, which will be dispatched within 14 days of receiving. In this case the claimant has another 30 days (like the defendant before) to answer for the counterclaim. It need to be mentioned that, if the counterclaim exceeds the limit of EUR 2000, not only the counterclaim but also the claim will be

²¹ 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;

proceeded in accordance with the relevant procedures of domestic law- not in ESCP. Previously, the Commission proposed that, if the counterclaim exceeds EUR 2000 in value and arises from the same legal relationship, the claim in its entirety should be referred to the court with jurisdiction to hear and determine larger claims²². Where the defendant invokes the right of set-off such claim is not treated as a counterclaim for the purpose of the Regulation. In this case the defendant is not obliged to use the standard form A.

According to Article 6 the claim, the answer, the counterclaim, any response to counterclaim and all descriptions of supporting documents shall be presented in the language/one of the languages of the court or tribunal. This disposition enumerates the documents that need to be submitted in the language of the court or tribunal. In regard to any other documents, as it was said before if there are in different language than the language of the proceeding, the court or tribunal may require a translation but only if it is necessary for giving the judgment. This rule is related with the principal of speeding up the procedure. Unfortunately, in the following disposition (Article 6 paragraph 3), the objective of making the ESCP faster is hold because of the possibility of prolonging the proceeding given to the parties. One of the parties may refuse to accept a document when it is not in any of the following languages: the official language of the Member State addressed or– in case when there are more than one official language– in official language/one of the official languages of the place where is to be effected or where the document is to be dispatched or in language understandable for the addressee. In such a situation the court or tribunal informs the other party to deliver the translation of the document.

The defendant sends his response to the court or tribunal and afterwards within 14 days of receipt the court or tribunal dispatches a copy of the answer with relevant supporting documents to the claimant. The aforesaid procedure is compliant with the general rule of written procedure. In case of non- monetary claim, when the defendant indicates that the value of the claim exceeds EUR 2000, the court or tribunal decides if the claim can be proceeded in ESCP, within 30 days of sending the response to the claimant. To this point, the procedure has been conducted for 2 months.

JUDGMENT

The judgment shall be given within 30 days of receipt of the response from the defendant or the claimant. But this is not the only one possibility for the court or tribunal. It can also, according to Article 7 paragraph 1 sub- paragraphs a- c, demand from the parties more details about the claim, in additional 30 days, that cannot be exceed. The court or tribunal may also take evidence in

²² See Article 4 paragraph 6 of The Commission propos al for a Regulation Establishing a ESCP, http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com2005_0087en01.pdf;

accordance with Article 9. The aforementioned Article states that the court or tribunal determines the means of taking evidence and the extent of the evidence necessary for its judgment according to the rules applicable to the admissibility of evidence. This disposition indicates couple of possibilities for the court or tribunal like taking the evidence through written statements of witnesses, experts or the parties, or through video conference or other communication technology (if the technical means are available). The Regulation imposes the additional condition for taking the expert: the court or tribunal may use this evidence only if it is necessary for giving the judgment. Moreover the court or tribunal should take under the consideration the costs of this evidence. Article 9 paragraph 3 indicates the rule for taking the evidence – court or tribunal shall choose the simplest and the least burdensome method of taking the evidence, which corresponds with the main objectives of the Regulation: to simplify, to speed up and to reduce the costs of the procedure. In Poland the Code of Civil Procedure (Article 235 paragraph 2) statues the possibility for the court to take the evidence by using the technical means, which enables taking the evidence from a distance. In this case the court takes the evidence in the presence of the court which was asked to take the evidence or the judicial officer of that court. As we can see it still does not introduce the use of internet e.g. email for interrogating witnesses. This solution of Polish law may be used for all types of evidences and all types of proceedings including ESCP.

Finally the court or tribunal, instead of delivering the judgment, may summon the parties to an oral hearing, that should be held within 30 days of the summon. Due to the principal of speeding up the procedure, the oral hearing might be hold through video conference or other communication technology, if the technical means are available.

The judgment is given in 30 days of any oral hearing or after receiving all necessary information needed for giving the judgment. The judgment is dispatched in accordance with Article 13 of the Regulation.

COSTS

The costs of the proceedings are paid by the unsuccessful party with one exception to this rule – the court or tribunal does not award the costs to the successful party if they were unnecessary or in disproportion to the claim. Firstly, the Commission has proposed that the unsuccessful party will pay the costs of proceeding without the payment of the lawyer’s fee but the European Parliament deleted this exclusion with the motivation that successful party should not be disadvantaged from taking legal representation²³. The costs should be determined in accordance with national law²⁴. The

²³ Juan Pablo Cortes Dieguez, *Does the proposed European procedure enhance the resolution of small claims*, Civil Justice Quartely, 2008, p. 6;

costs of proceeding includes for example: the court fee, the translation costs, the lawyer's fee.

Chapter 3

APPEAL PROCEEDING

APPEAL

The ESCP regulation does not resolve whether the judgement issued in ESCP should or should not be subject to an appeal. This matter was highly discussed in the stage of creating the Act. Here we would like to present the basic issues mentioned in this discussion. One of the propositions, that appeared during the debate, was to totally exclude the right to appeal in the ESCP in order to reduce costs and render the proceeding significantly faster. The European Commission stressed that the right to appeal in civil procedure is not a fundamental right in international law and that there are substantial differences between the Member States in this field. Furthermore, some of the Countries have constitutional regulations guaranteeing the right to appeal in both civil and penal law matters. These Countries, like Poland for instance, might object to such a proposal. At the same time the Commission did not want to force the other Member States, who do not provide the right to appeal, to introduce one in their legal systems²⁵. However, such a solution might bring to a situation when Parties could not appeal even against the most serious mistakes of the court.

Because of the need to find a satisfactory solution to this problem an idea was presented to restrict the possible ground of an appeal to errors of law and procedural irregularities²⁶. Although this solution was not introduced to the Regulation No 861/2007, it exists in the Polish code of civil procedure. The Polish legislator referred in this area to the rules regarding our internal proceeding, which might be called a small claim track. According to these regulations, the appeal in ESCP could be based only on grounds of violation of substantial law by its erroneous interpretation or improper application or the violation of the procedural regulations if it could have affected the case result (Article 505²⁷ paragraph 1 and Article 505⁹ paragraph 1¹ of the polish code of civil procedure).

In order to reduce costs and speed up the proceeding, the Commission's proposal envisaged also that in an appeal procedure against a judgement rendered in ESCP, parties shall not be required to be represented by a lawyer or another legal professional and there shall be no further ordinary appeal or cassation. Eventually these provisions were removed by the European Parliament's

²⁴ According to No 29 of Preamble of Regulation 861/2007;

²⁵ House of Lords, European Union Committee, 23rd Report of Session 2005-06, European Small Claims Procedure, p. 42;

²⁶ Green Paper on a European Order of Payment procedure and on measures to simplify and speed up small claims litigation, Commission of the European Communities, Brussels 20.12.2002. COM (2002) 746 final, p. 72;

amendments²⁷.

Consequently, the ESPC leaves it to Member States to decide on the matter of availability of the appeal in ESCP. The Regulation No 861/2007 in its Article 17 paragraph 1 provides that Member States shall inform the Commission whether an appeal is available against a judgement given in the ESCP under their procedural law and within what time such an appeal shall be lodged. By now all the Member States (with the exception of Denmark) have delivered an information on whether the appeal is available under their procedural law and in which court it has to be lodged. According to this data 20 Member States provide the ordinary means of appeal in the ESCP (Austria, Belgium, Cyprus, Czech Republic, Finland, Spain, Ireland, Latvia, Lithuania, Malta, Germany, Poland, Romania Slovakia, Slovenia, Sweden, Hungary, Great Britain, Italy) and 3 Member States (Estonia, France, Bulgaria) also the extraordinary means of appeal. In 3 Member States (Greece, Luxembourg and Portugal) only the extraordinary means of appeal are available. This information and the other information required by the Article 25 paragraph 1 is available on the European Judicial Atlas in the Civil Matters website²⁸.

REVIEW

The Regulation No 861/2007, however, does provide in its Article 18 the minimum standard for the review of the judgement. According to this provision the defendant shall be entitled to apply for a review of the judgement given in the ESCP before the court or tribunal with jurisdiction of the Member State where the judgement was given- where the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 of Regulation No 805/2004 and service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part, or the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part.

First of all, it needs to be noted that Article 18 of the Regulation No 681/2007 do not provide an autonomous procedure concerning the review of the judgement- it only introduces a minimal standard for the defendants' protection²⁹.

Taking the abovementioned into the consideration, the judgement examination will be possible in two situations- when the service of documents (served by a method provided in Article 14 of Regulation No 605/2004) did not take place in sufficient time to enable the defendant to arrange his

²⁷ Article 15 of the Proposal for a regulation of the European Parliament and the Council establishing a European Small Claims Procedure (presented by the Commission), Brussels, 15.3.2005, COM(2005) 87 final;

²⁸ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm;

²⁹ J. Zatorska, Komentarz do rozporządzenia WE nr 1896/2006 Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. ustanawiające postępowanie w sprawie Europejskiego Nakazu Zapłaty, 2009, published in: LEX;

defence, provided that there was no fault on his side. This provision is the provision of special importance because it concerns the right to a defence, which is considered to be a fundamental right. The European Court of Justice acknowledged in its judgement that the rights of the defence, which derives from the right to a fair legal process, enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, requires specific protection intended to guarantee effective exercise of the defendant's rights³⁰.

The second situation is when the defendant was not able to object to the claim by reason of force majeure or due to extraordinary circumstances, also without any fault on his part. In both aforementioned cases it is required that the defendant acts promptly. Then, if the court or tribunal decides that the review is justified for one of the reasons mentioned above, the judgement given in the ESCP shall be null and void.

RECOGNITION AND ENFORCEMENT OF A JUDGEMENT IN ANOTHER MEMBER STATE

The main goal to achieve with the new European Small Claims Procedure was to simplify and speed up litigation concerning small claims and make it available to the litigants as an alternative to the procedures existing under the laws of the Member States which, when applied in cross-border cases, were completely ineffective. One of the concepts for attaining this goal was to facilitate to recognition and enforcement of the judgements. As it was stated in the preamble- the regulation should make it simpler to obtain the recognition and enforcement of a judgement given in the ESCP in another Member State. In connection with the above, in Article 1 phrase 2, the Regulation eliminates any intermediate proceeding necessary to enable recognition and enforcement, in other Member States, of judgements given in one Member State in the ESCP. Subsequently, Article 20 paragraph 1 stipulates that a judgement given in a Member State in the ESCP shall be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition. The aforementioned provision lifts the exequatur procedure established in the Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters³¹. This provision is a provision of particular significance, because it results in a situation where the judgement in the Member State of enforcement could never be controlled by its courts. The only way that the debtor can avoid the enforcement of a judgement, described in Article 22 of the Regulation, concerns the situation when there appears to be an earlier judgment given in any

³⁰ Judgment of the ECJ delivered on 14.12.2006, case C-283/05 ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS);

³¹ Official Journal of the European Union: L 012 , 16/01/2001 P. 0001 – 0023;

Member State or in a third country based on the same cause of action. The precise conditions of this Article will be described hereinafter. Other grounds to challenge the recognition and enforcement of an ESCP judgement are excluded.

Paragraph 2 of Article 20 also provides that, at the request of one of the parties, the court or tribunal shall issue a certificate concerning a judgement in the ESCP using standard Form D, as set out in Annex IV. The Member State of enforcement cannot demand an extra fee for issuing the Certificate.

Article 21 sets up the enforcement procedure. It introduces a principle of *lex fori processus*, i.e. that the enforcement procedures shall be governed by the law of the Member State of enforcement. Therefore, the Member State of enforcement individually regulates the issues such as: the authorities competent with the respect to the enforcement, the way of conducting an execution, the conditions on staying or discontinuing the proceeding, etc.³². Under Article 25 paragraph 1 subparagraph e Member States shall communicate to the Commission which authorities have competence with respect to enforcement. This information is also available on the Judicial Atlas in Civil Matters website³³.

The other important provision that has to be mentioned is that any judgement given in the European Small Claims Procedure shall be enforced under the same conditions as a judgement given in the Member State of enforcement.

The regulation also specifies the documents that the party seeking enforcement shall produce- an authentic copy of a judgement, a copy of the certificate mentioned in Article 20 paragraph 2, if necessary, translated to the language of the Member State or the place of enforcement, or to another language that the Member State is willing to accept. The certificate might also be translated into the official language or languages of the institutions of the European Union other than its own, indicated by the Member State, which it can accept for the ESCP. The information on the acceptable languages, according to the Article 25 paragraph 1 subparagraph d, is also available on the aforementioned website³⁴. It has to be noted that an authorised representative and a postal address in the Member State of enforcement are not necessary.

Furthermore, if a party in one Member State applies for enforcement of a ESCP judgement in another Member State, that party shall not be requested for a security, bond or deposit on the

³²J. Zatorska, Komentarz do art. Rozporządzenia Parlamentu Europejskiego i Rady (we) nr 861/2007 ustanawiającego europejskie postępowanie w sprawie drobnych roszczeń, published in: LEX;

³³ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm;

³⁴ *ibidem*;

grounds that he is a foreign national or that he is not domiciled or a resident in the Member State of enforcement.

The availability of making the execution contingent upon receiving in the Member State of execution the enforcement clause or other similar decision is a highly controversial issue under the discussed Article. There are two standpoints that have been presented in this matter. The first group claims that it is against the aim of the ESCP (speeding up and simplifying the procedure) for a Member State to require such an additional decision. In their opinion, the ESCP judgement, with the certificate mentioned in Article 20 paragraph 2, should be sufficient to conduct an enforcement procedure in any Member State. The opponents indicates that enforcing the ESCP judgement under the same conditions as a judgement given in the Member State of enforcement means that both judgements should be treated the same way. Therefore, if the Member States of execution judgement needs to be supplemented by the enforcement clause, the same requirement should be applied to the ESCP judgement³⁵. In our legal system, before initiating execution proceedings, based on all types of judgements issued by the domestic courts, the creditor needs to obtain an enforcement clause. Therefore, in Article 1153⁸ paragraph 1 of the code of civil procedure, the Polish legislator imposed an obligation to obtain an enforcement clause for the ESCP judgement as well.

REFUSAL OF ENFORCEMENT

As was mentioned above, the enforcement of the ESCP judgement can be refused only on the grounds established in Article 22. Pursuant to that Article, enforcement might be refused if the judgement given in the ESCP is irreconcilable with an earlier judgement given in any Member State or in a third country, provided that:

- (a) the earlier judgement involved the same cause of action and was between the same parties;
- (b) the earlier judgement was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and
- (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgement in the ESCP was given.

The abovementioned regulation was introduced to ensure that the judgements issued between the same parties, based on the same cause of action, would have homogeneous legal consequences. In this Article, however, it was highlighted that a judgement given in the ESCP under no circumstances may be reviewed as to its substance in the Member State of enforcement. Thus, the only thing that the Member States of execution court might examine under the Article 22 is whether

³⁵ W. Sadowski W. M. Taborowski, Wybrane problemy stosowania rozporządzenia Nr 805/2004 w sprawie utworzenia Europejskiego Tytułu Egzekucyjnego dla roszczeń bezspornych in: W. Czapliński, A. Wróbel, Współpraca sądowa w sprawach cywilnych i karnych, Warsaw 2007, p. 172- 173;

the judgement described in the application satisfies the required conditions.

STAY OR LIMITATION OF ENFORCEMENT

The suspension or limitation of enforcement of the ESCP judgement is possible under the following conditions. Firstly, it is admissible only when a party has challenged a judgement given in the ESCP or such a challenge is still possible or a party has made an application for review under the Article 18. Secondly, the applications needs to be filed by the party against whom enforcement is sought. As a result, the court or tribunal of the Member State of enforcement may limit the enforcement proceedings to protective measures; make enforcement conditional on the provision of such security as it shall determine or under exceptional circumstances or stay the enforcement proceedings.

In this context it has to be noted that the ESCP judgement is enforceable notwithstanding any possible appeal. The provision of a security is not required (Article 15). Therefore, the discussed Article provides the possibility of restraining the enforcement until the appeal or review proceeding ends or the time limit to file for such a measure elapses.

Chapter 3

EVALUATION

As was mentioned in the previous chapters the establishment of the ESCP was based on several specific assumptions. In the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation the European Commission stressed out that the costs, delays and vexation of judicial proceedings do not necessarily decrease proportionally with the amount of claim. These problems have led to the creation of simplified civil procedures for small claims in many countries. At the same time, the number of cross- border disputes is rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgement are clearly intensified in a cross-border context³⁶. This situation puts consumers and small business owners in a particularly difficult position. Thus the idea of the ESCP was to simplify and speed up small claims litigation especially for the groups of interests mentioned above.

The question that should be raised in this paper is whether the aims of the ESCP were implemented in practice. According to the statistic data the European Small Claims Procedure in

³⁶ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation COM 2002 (746) final, p. 49;

Poland is hardly ever used. Unfortunately, prior to the date of sending this paper, we did not receive the official data from the Polish Ministry of Justice. However, the informal research that we have conducted confirms that the application of the ESCP, both in Poland and in other Member States, is not satisfactory and it seems evident today that it did not turn out to be as successful a tool as was expected.

In this paper we would like to indicate the several reasons that, in our opinion, determined this situation and present possible remedies to this problem.

There are certain crucial issues that affected the fact that the ESCP is not widely used. In our view they can be divided into two groups— the social awareness of the ESCP and the costs and easiness of its application.

First of all, we think that the awareness of the ESCP in the Member States is low. In our opinion it might be considered to be the main weak point of the Regulation. For ESCP to be a successful tool, the knowledge of its existence and opportunities connected with its application have to be increased. It could be put into practice for example by imposing on the Member States an obligation to carry out a promotional campaign about the ESCP. The other idea in that field could be by imposing another obligation on Member States. They would have to introduce into their legal systems the provisions obliging the salesmen to place in the tax receipt or any other document confirming the sale transaction, the information about the ESCP, its availability, costs, etc. One could also add this information on a supplementary paper given with the receipt. In our opinion this way the States could reach to the large group of citizens, potential consumers in the common market, with the information about the ESCP.

Although the efforts were made to simplify the ESCP forms, they still contain open questions. It is in our view another weakness of the Regulation. Since the ESCP is directed towards the consumers and small business owners, the emphasis should be laid on the maximum simplification of these forms, in order to guarantee that the average consumer could fill them out without a need of the assistance of a lawyer or a translator. The use of the abovementioned professionals may in some cases raise the costs to such a level that the ESCP would become uneconomical and put the possible claimants off its use. The simplification should go this far that the average consumer could fill out the form by himself and translate it to the appropriate language of the another Member State. The forms are now available on the website³⁷, so one could, by reading the question in his language, find out and tick the appropriate box in another language version. But with the open questions this

³⁷ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm;

becomes impossible. In the most important Form A, there is one especially problematic open box-rubric 8.1, where a claimant should briefly describe the substance of his claim. In our opinion the fact that this box is an open question box makes it almost impossible to complete the form without professional help. However, there could be a possible solution to this matter. First of all the tick box system should be adjusted to the point of elimination of all of the open questions. Since that idea could be hard to fulfil, we have prepared another solution to this problem. The ESCP, because of the threshold applied is, in most cases, limited to certain types of disputes- concerning the sales contract, the conflicts on the travel services. In connection with the above, we propose that a set of the simple descriptions of the most common facts of the case, that appear in these types of disputes, could be published on the universally available website. The descriptions should be published in the languages of all Member States, so that a claimant could easily translate it to another language. Most certainly this system could not cover all the possible facts of the case, but it could facilitate filling out the form for the significant group of claimants.

The other idea on increasing the popularity of ESCP in our opinion is to raise the threshold introduced in the Regulation No 861/2007 from 2000 to 5000 EUR. As for now costs of the procedure in many cases might still outweigh the possible benefits. Here it should be indicated that, in most of the cases, the claimant needs to submit the translated documents to the court, where the costs of the translation could be higher than the value of the subject matter of the dispute. We are aware that a high threshold could be an obstacle for the introduction of significant procedural simplifications because of the considerations concerning an effective legal protection of the citizens³⁸. In our opinion however, one should not force the claimant to have his right protected on the highest possible level. It should be the claimants decision whether it is more important to him to achieve an easy and fast small claim judgement instead of dealing with the difficulties of taking part in the regular court proceeding in another Member State. To sum up the foregoing, in our opinion, the higher threshold could make the track significantly more popular and assure that the ESCP has a scope of application of sufficient practical significance.

The last proposal that we wish to introduce concerns the internet and ICT technologies in the ESCP. As for now, the Regulation No 861/2007 only encourages the Member States to use the information technology in the proceeding³⁹- in the submission of the forms, the oral hearing and the taking of evidence. In our opinion it would be necessary to impose on the Member States an obligation to accept the use of the modern communication technology, like e-mail, in the ESCP conducted in their Country. The Member States whose courts are not appropriately equipped could

³⁸ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation COM 2002 (746) final, p. 62;

³⁹ see Recitals No 20 and the Article 4, 8 and 9 of the ESCP.

designate one special court in the State to deal with the ESCP. Of course, the fulfilment of such obligations would require a certain period of time for adjustment of the domestic procedures, but the outcome would be worth it. The use of the internet and the ICT will significantly simplify the formalities, make the ESCP easy and available and also decrease the costs of the proceeding. It should be indicated that the ESCP is aimed mostly at people who travel, buy goods through the internet, therefore people who are almost certainly familiar with the modern communication technology. We believe that even only the possibility of lodging the claim and the subsequent writs in ESCP online would considerably contribute to the popularisation of the procedure.

In our opinion, the ESCP is a useful tool to resolve cross-border disputes in a fast and easy way. It has to be noted that by the 1st of January 2014, the Commission will present a detailed report reviewing the operation of the ESCP, including the limit of the value of the claim. The aforementioned report should initiate a widely- ranged discussion on the necessary amendments in the Regulation No 861/2007. We believe that with the several adjustments, such as the ones we presented above, the procedure could be used more often and it increases in effectiveness.