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Inga Kacevska, *Dr. iur, Assoc. Professor*
University of Latvia, Latvia

EUROPEAN SMALL CLAIMS PROCEDURE: IS IT SO SIMPLIFIED?

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Summary

The European Small Claims Procedure is an alternative to national similar procedures and intended to simplify and speed up the litigation in the cross-border cases. The Regulation has proven to have a potential in settling small claims' disputes within European Union. However, the more frequently the Regulation is applied in Member States, the more challenging issues are found, making application of Regulation not as simple as it might appear. This article analyses some of those issues arising from the practical application of the Regulation. Firstly, it is discussed whether the concept contained in Regulation "other claim" may also include a supplementary declaratory claim (not only the claim that can be expressed in money). Secondly, it is further argued that the Regulation should be amended to have a more uniform and autonomous character, as much as possible limiting the reference to the national procedural rules. For instance, in accordance to Regulation, the concept "clearly unfounded" claim shall be determined pursuant to national law. However, in some jurisdictions (i.e., Latvia) such concept is unknown. There is a need for further reform of the Regulation to introduce a new level to facilitate its popularity, effectiveness and uniform application in Member States.

Introduction

Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing European Small Claims Procedure (further – the Regulation)[1]

[1] Regulation (EC) No 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, pp. 1–22. The greater amendments were made by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure.

is applicable since 1 January 2009[2] to cross-border[3] civil and commercial cases, where the value of a claim does not exceed EUR 5000.[4] Denmark is not bound by the Regulation or subject to its application.[5] The procedure is conducted by means of four standard forms.[6] At this point of time, there are only two European Court of Justice cases interpreting this Regulation.[7]

The Regulation is intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs.[8] However, in practice, is it so simplified and cost effective?

In accordance with Art. 28 of the Regulation, by 15 July 2022 the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the operation of this Regulation. Thus, this is good time to ascertain how the Regulation operates in practice and whether there is a need for the further reform of the Regulation. The limits of the current article will not allow to discuss all the problematic issues regarding application of the Regulation, and thus the author has selected only a few of problems that may rise in practice.

1. Concept "Monetary claim and/or other claim"

In accordance with the Regulation the claimant may lodge the claim where the value does not exceed EUR 5000, excluding all interests, expenses and disbursements.[9] The Regulation does not define the concept of "claim", nor does it refer to the law of the Member States on the issue. According to the settled case law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the EU.[10] Thus, the concept "claim" shall be interpreted autonomously within the system of this Regulation. Still, as shown below, in some cases there might be difficulties to interpret this concept.

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2 Except Art. 25 – applicable as from 1 January 2008. See: Art. 29.

3 See: Art. 3.

4 Art. 2 of the Regulation.

5 Recital 38 of the Regulation's Preamble.

6 Form A – Claim form, Form B – Request by the court or tribunal to complete and/or rectify the claim form, Form C – Answer form, Form D – Certificate concerning a judgment in the European small claims procedure or a court settlement.

7 European Court of Justice judgment in the Case No. C-627/17 ZSE Energy, 22 November 2018 and judgment in the case No. Bo C-554/17, Jonsson, 14.02.2019.

8 Art. 1 of the Regulation.

9 Art. 2(1) of the Regulation.

10 European Court of Justice Judgment in the Case No. C-627/17 ZSE Energy, 22 November 2018, § 22 and the case law cited thereof.

The claimant shall commence the European Small Claims Procedure (hereinafter – the ESCP) by filling in a standard claim form A (Annex I of the Regulation). In the section 7 of this claim form, the claimant shall indicated whether she/he is "claiming money and/or something else (non-monetary claim)":

7. About your claim
☐ 7.1. Claim for money
7.1.1. Amount of principal (excluding interest and costs): _____
7.1.2. Currency

☐ 7.2. Other claim:
7.2.1. Please specify what you are claiming:
7.2.2. Estimated value of the claim: _____
Currency: _____

For example, if the defendant has a debt towards the claimant for the non-payment of the delivered goods, in the section 7.1 of the claim form the claimant indicates the principal amount. Section 7.2 of the claim form "other claim" requires to indicate what is claimed (for example, the delivery of goods, replacement of goods etc.) and what is the estimated value of such claim. In other words, it is not required that the case involved a monetary claim, although it is necessary that the claim can be valued in order to assess whether it falls within the scope of the Regulation.[11]

Notably, the online form A contains a mandatory requirement to also fill in section 7.2.2, it cannot be left blank, but the explanatory note of the section 7 provides that the claimant can "claim money and/or something else", thus, "other claim" can be both alternative or additional claim to "claim for money".

However, if the claimant claims not only debt in certain amount but also requests to terminate the contract with the defendant? In one court case, the court has established that the claim also requesting termination of the contract cannot be expressed in a specific amount of money, hence, the claim does not fall within the scope of the Regulation,[12] even though Art. 2(2) of the Regulation does not exclude such matters from its scope.

Therefore, the question arises, whether the concept "other claims" could also include declaratory claim (*actiones sine condemnatione*), not only the action for

[11] Kramer X. E. Small Claim, Simple Recovery? The European Small Claims Procedure and Its Implementation in the Member States, Spiringerlink.com, 22 March 2011, p. 121.

[12] Kurzeme District Court Decision in the case No ECLI:LV:KUAT:2019:0508.CA016919.4.L, 8 May 2019. See also: Jelgava Court Decision in the case of 6 July 2011, cited in Rudevska B., Kačevska I., Mizaras V., Brazdeikas A., Torga M. Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: The Experience in Baltic States. Ministry of Justice of the Republic of Latvia and European Commission, 2012, § 491. Available: http://petijumi.mk.gov.lv/sites/default/files/file/TM_Petij_ES_regulu_attiec_uz_ES_limena_proced_civillietas_pratiska_piemeros_Baltijas_pieredze_ENG.pdf [06.01.2022.].

performance (*actiones cum condemnatione*)?[13] Indeed, if in form A the claimant has indicated only a claim for termination of the contract, one could consider that such claim is not within the scope of the Regulation, whereas the two claims – monetary and for termination – are so closely connected and mutually related, shall it fall within the scope of the Regulation? In opinion of the author, the answer is affirmative.

There are situations when separate adjudication of claims is not appropriate, or the claims expressed in them conform to the respective substantive norm, i.e., action for performance goes hand in hand with declaratory action in accordance with the applicable material law. For example, a seller may request the buyer to pay the price of the delivered goods and declare the contract void[14] or a debtor may avoid the credit contract and request to pay the unduly transferred monies if the contract had been concluded by the creditor's fraudulent representation[15], or a consumer, to whom were delivered goods that did not conform with the provisions of a contract, should be entitled to request cancellation of the contract and repayment of the sums paid to the trader.[16]

Namely, there are situations where is no need to preserve the contract or if the contract is not acknowledged void, the party cannot request compensation. In such cases, there is a claim ancillary to, supplemented to or dependent from that of a principal claim, and both claims have common issues of law or fact. Thus, under the Regulation, the claimants should be allowed to submit such related claims in order to respect the rights to a fair trial[17] and the court cannot decide that this matter is outside the scope of the Regulation, if the claimant additionally has a declaratory claim.

2. Counterclaim

Pursuant to Art. 5(6) of the Regulation, the defendant can submit the counterclaim. The Regulation gives some guidance – that counterclaim "should be interpreted within the meaning of Article 8(3) of the Brussels Ibis Regulation[18]

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[13] See: Rudevska B., et al., 2012, § 487. Available: http://petijumi.mk.gov.lv/sites/default/files/file/TM_Petij_ES_regulu_attiec_uz_ES_limena_proced_civillietas_pratiska_piemeros_Baltijas_pieredze_ENG.pdf. [viewed 06.01.2022.].

[14] See, for example, Art. 64 of United Nations Convention on Contracts for the International Sale of Goods. United Nations, Treaty Series, Vol. 1489, p. 3.

[15] Art. 3.2.5 of the UNIDROIT Principles of International Commercial Contracts, 2016. See also: Kurzeme District Court Decision in Case No. ECLI:LV:KUAT:2019:0508.CA016919.4.L 8 May 2019.

[16] Rudevska B., et al., 2012, § 492–494.

[17] Recital 9 of the Regulation's Preamble.

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council (12 December 2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 351 Official Journal, 20.12.2012, pp. 1–32.

as arising from the same contract or facts on which the original claim was based."[19] However, if the counterclaim exceeds the limit of EUR 5000, that claim and counterclaim shall not proceed in the ESCP but instead shall be dealt with in the relevant national procedural law.

Let us consider: a consumer lodged the claim within the scope of the Regulation against the foreign bank, and the bank, in turn, submitted the counterclaim five times exceeding the principal amount of the consumer's claim. Thus, at the first sight, it falls outside the scope of the Regulation. However, in this case according to the Regulation, the court shall initially decide whether the counterclaim is not clearly unfounded and the application inadmissible. [20] If it is so, the counterclaim shall be dismissed.

The concepts of "clearly unfounded" in the context of the dismissal of a claim and of "inadmissible" in the context of the dismissal of an application should be determined in accordance with national law.[21] But what happens, if there are no such similar concepts in the national procedural law and it only allows to decide on the "validity or invalidity of the claim" in the final judgment?[22] Consequently, in practice it might lead to a situation when the court omits this step as provided in the Regulation, and moves on with considering of the case on merits in accordance with domestic national rules.[23] Thus, the apparently simplified case becomes very complicated indeed, especially for the weaker party. In this regard, it can be asked why the national legislator has not foreseen such situation[24] and allows an opportunity for the possible abuse of the proceedings.

Meanwhile, it also raises a question as to whether this European procedure is as an alternative to the procedures existing under the laws of the Member States[25] – could it be amended so that there were outstandingly minimal references to the national procedures[26], because the courts tend to refer to the Art. 19 of the Regulation[27] as a great excuse to apply more familiar – the national law?

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[19] Recital 16 of the Regulation's Preamble.

[20] Art. 4(4) of the Regulation.

[21] Recital 13 of the Regulation's Preamble.

[22] The Civil Procedure Law of the Republic of Latvia. See: Art. 193(5).

[23] Kurzeme Regional Court Judgment in the case ECLI:LV:KURT:2020:0925.C69339219.14.S, 25 September 2020. Moreover, in this case at hand the court proceeded right a way to the national procedure without requiring the claimant to submit the full statement of claim as provided in the Civil Procedure Law. Namely, pursuant to Art. 131(3) of the Civil Procedure Law of the Republic of Latvia, the court shall leave the case not proceed with and require to submit the statement of claim accompanied with all relevant documents and evidences.

[24] It must be noted that some Member States have enacted extensive implementations laws (Germany, France, etc.). See: Kramer X. E., 2011, p. 128.

[25] Art. 1 of the Regulation.

[26] For example, Art.17 provides that Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the ESCP, i.e., that means that the appeal shall be lodged in accordance with national rules, there are no uniform rules regarding appeal under the Regulation.

[27] Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedure law of the Member State in which the procedure is conducted.

For example, in one case the court dismissed the ESCP application because, in the opinion of judge, the claimant had to provide the law on which the claim was based as provided in the national civil procedure.[28] But the Regulation provides for autonomous claim form and its content.

Moreover, in according to Art. 12(1) of the Regulation, the court should not require the parties to make any legal assessment of the claim. This, in turn, may lead to the question, for example, how to establish the applicable law to the dispute on its merits,[29] if the parties have no agreement on the applicable law. In one ESCP case, the Latvian court established jurisdiction between a person domiciled in Latvia and a person domiciled in Italy regarding a ski-accident in Italy. Claimant – the injured person from Latvia – claimed the compensation.[30] By finding itself competent, the court did not consider that, firstly, it will have to determine the applicable law and, secondly, it may lead on application of the law of the other country.[31] Thirdly, in such case, the content of the foreign law should also be established. For instance, the Latvian Civil Procedure Law requires a party to submit a translation of the text of foreign law to the court.[32] The question is – shall one apply this rule also under the Regulation? Will the litigation be as simplified, cost-effective and speedy as provided for by the Regulation?

Interpretation of concepts "claim and/or other claim" and "clearly unfounded [counter]claim", excessive and often unnecessary filling of Regulation's gaps by national law and unusual active role of judge are just a few problematic matters in practical application of the Regulation. The case law shows that the use of state language of the court[33], translations, different bank accounts, systems, calculations and amounts of the court fees in each Member State do not fully facilitate a simplified and cost-effective application of the Regulation. Thus, this might be time to take the Regulation to a new level – completely independent from the national law.

Conclusion

The European Small Claims Procedure is intended for a simplified, speedy and cost-effective litigation in the cross-border cases. Over the years, the procedure has gained popularity, it is applied more often and it has its potential; however, the current case law shows that there is a need for additional reforms in the Regulation to reach the aims of the Regulation and to take the Regulation to a new, more uniform level.

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[28] Art. 128 of the Civil Procedure Law of the Republic of Latvia. Kurzeme District Court Decision in Case ECLI: LV:KUAT:2019:0628.CA023619.11.L, 28 June 2019.

[29] See also discussion in Rudevska B., et al., 2012, § 552–555.

[30] Zemgale Regional Court Case No. C73301118, unpublished.

[31] Art. 4 of European Parliament and Council Regulation (EC) No. 864/2007 (11 July 2007) on the law applicable to non-contractual obligations (Rome II). OJ L 199, 04/07./2008, pp. 40–49.

[32] Arts 654–655 of the Civil Procedure Law of the Republic of Latvia.

[33] Art. 6(1).

For example, some concepts within the Regulation should be interpreted in accordance with the national rules ("clearly unfounded", "inadmissible" claim), or with reference to other European civil procedure rules ("counterclaim") or autonomously ("claim"), however, such fragmentation does not facilitate a uniform interpretation of the Regulation. Moreover, the concept "claim" under the Regulation should be interpreted as including not only the claims that can be valued in money but also declaratory claims. However, they have to be closely connected and mutually related. Furthermore, the Regulation's co-existence with national procedural law is not always clear, and the reference to national procedural rules should be limited as much as possible in order to guarantee uniform and autonomous rules for cross-border litigation of the small claims. For instance, the Regulation could directly deal with the concept "clearly unfounded" or "inadmissible" claim/counterclaim to limit the possibility of abuse of the process in accordance with the national law. Also, at this stage, it could be reconsidered whether it is possible to set a single court fee in all Member States and to facilitate using not only the state's official language as the language of the court in these proceedings, but also permit, for example, English or another option as a language commonly spoken in Member States. Thus, making the procedure under the Regulation more predictable and hence, simplified and cost-effective.

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