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THE QUINTESSENCE OF THE EUROPEAN SMALL CLAIMS PROCEDURE

Introduction

Article 14 of the Treaty establishing the European Community of 25.03.1957 contains the principle of free movement of people, goods, services, and capital in the European Union [1]. This principle expands civil law relations in the relevant Member States of the European Union (EU Member States). This in turn has complicated for the proper protection of rights and freedoms out of court and in court. Reimbursement of small (insignificant) claims, especially in cross-border cases, often incurs disproportionately high costs, proceedings are lengthy, litigation is complicated by a foreign element, and there are significant differences between national procedures in EU Member States.

The smaller the amount of the claim, the more significant the above obstacles become in small¹ cases. Therefore, the legislatures of different countries have begun to apply simplified and/or accelerated procedures for dealing with small cases. 44 out of 47 EU Member States apply the simplified procedure in civil cases [2, p. 219]. However, the introduction of simplified procedures has not solved the problem of the transnational element and the associated time and money spent on legal costs. Therefore, the European Community takes various measures for the proper functioning of the internal market, including improving and simplifying the transmission of documents; cooperation in gathering evidence; recognition and execution of a judgment; removal of obstacles to the proper functioning of civil proceedings (for example, abuse of rights by a party to delay the trial).

Further harmonization of civil proceedings in the EU has led to the formation of an independent supranational mechanism for civil and commercial cases. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 established a European Small Claims Procedure (ESCP). This Regulation is the first document introducing a single autonomous European litigation procedure. This is an important step for the further development

¹ A small case is due to its nature - a small amount of the claim. In the civil proceedings of Ukraine, such cases are called insignificant or cases of insignificant complexity

of the European civil process and the effective protection of the rights of individuals.

The Association Agreement between Ukraine and the European Union, the European Atomic Energy Community and their Member States entered into force on 01.09.2017. According to this agreement, the Parties agreed to use international and bilateral documents for the development of judicial cooperation in civil matters, as well as for the development and efficiency of the judiciary [3]. Despite the development and improvement of the European Small Claims Procedure, several provisions of the Regulation No 861/2007 still seem problematic.

ESCP was studied by such foreign scientists as: A. E. Menendez, A. Stadler, X. Kramer, P. Stone, P. Cortes, E.A. Ontanu, M. Malczyk, E. Pannebakker, Z. Vernadaki. The following Ukrainian scholars have devoted their works to the issue of simplified litigation: I. O. Izarova, O. Yu. Zub, Yu. D. Prytyka, O. V. Kolisnyk, O. D. Korol, D. A. Korol, N. Yu. Panych, R. Yu. Khanyk-Pospolitak, I. S. Yaroshenko.

It is extremely important to introduce in Ukraine an additional procedural mechanism that will solve the problems of proportionality of costs and time of consideration of cases with a foreign element in court.

1. The essence of the European Small Claims Procedure

The European Small Claims Procedure is an international initiative aimed at ensuring judicial cooperation between the authorities of the EU Member States [4, p. 9]. This mechanism should simplify and speed up the resolution of disputes in small cases involving a foreign element by reducing costs, offering itself as an additional tool to the possibilities that exist in the legislation of the Member States [5]. The ESCP is introduced into national justice as an optional procedure that does not change or replace national small case procedures. If in the national proceedings of the EU member states there is a procedure for consideration of minor cases, the plaintiff has the right to choose a national or European procedure. For example, the Polish Code of Civil Procedure (CPC of Poland) enshrines two procedures for the consideration of small cases: Chapter 6 (Art. 505¹-505¹⁴)¹ of the CPC of Poland - simplified proceedings (postępowanie uproszczone); in Chapter 2 and Chapter 7 of the CPC of Poland (Art. 505²¹-505²⁷)²- the European Small Claims Procedure (europejskie

1 According to Art. 505¹ of the CPC of Poland, civil cases are considered in simplified proceedings if the value of the dispute does not exceed 20,000 Polish zlotys.

2 According to Art. 505²⁷ of CPC of Poland, the court considers the case under the European Small Claims Procedure, if the conditions of admission to the case

postępowanie w sprawie drobnych roszczeń) [6]. The court of Lodz (Poland) stating in the court decision No IC 1162/19 of 30.03.2020 (about reimbursed for the delayed flight of the aircraft), that the plaintiffs used the European Small Claims Procedure, although this claim could also be considered under the rules of national simplified procedure of Poland (postępowanie uproszczone) [7].

The ESCP is a fully autonomous mechanism for dealing with small cases, that expressed in a clear sequence of application of the procedure by national courts, the stages of which are enshrined in EU Regulation № 861/2007 [8, p. 34].

The subject of the claim is determined by using positive and negative criteria. The positive aspects include the spreading of the Regulations only to civil or commercial cases. Although the Regulation № 861/2007 does not explicitly state that the notion of a civil or commercial case should be understood in the light of Brussels I¹, and it gives autonomous meaning to these cases [9]. Thus, the court of the EU Member State will be decided whether a case falls under the jurisdiction of civil or commercial courts.

A necessary element for the application of the European Small Claims Procedure is the cross-border nature of the case [5]. In order for the ESCP to apply, at least one of the parties of the dispute is domiciled² or habitually resident in a Member State other than the Member State of the court. In this case, citizens residing in an EU Member State may bring claims against nationals not residing in an EU Member State. Thus, Regulation No 861/2007 can be applied to the citizens of Ukraine. In accordance with the Law of Ukraine «On Private International Law» a foreign element may consist of an event that occurred in another country (although the parties to the dispute from one state) [10]. The Regulation No 861/2007 will not apply if the parties of the case reside in one state, and the cross-border elements (damage, performance of the contract) are in another country [11, p.4].

To determine a case that can be considered as small for the purposes of the EU Regulation No 861/2007, a monetary threshold (amount of the claim) is set, which should not exceed 5,000 euros at the time the court receives the application in the prescribed form, excluding all interest, expenses and disbursements (Article 2 of the Regulation No 861/2007) [11]. In addition, complied with Regulation (EC) € 861/2007.

1 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2 Legally significant place of permanent or predominant stay or residence of a citizen. Pursuant to the provisions of Regulation № 1215/2012, a person is subject to the court of the Member State of his domicile and a person who is not a national of the Member State in which he resides must comply with the rules of that Member State.

since not all EU Member States officially use the euro currency to determine whether the claim meets the financial limit, the applicant must convert the currency of the claim into euros at the time the claim is filed in court [12, p. 10].

The negative criteria of the subject of the claim in the European Small Claims Procedure include the conditions which the case cannot be considered in the European procedure. These conditions are set in the EU Regulation No 861/2007. Thus, the norms do not apply, in particular, to revenue, customs or administrative cases, cases of state responsibility for the actions and omissions of public authorities (*acta jure imperii*). These Rules also do not apply to cases concerning: status or legal capacity of individuals; property rights arising from a marital relationship or from a relationship recognized by law as having consequences similar to a marital one; maintenance obligations arising from family relationships, paternity or maternity, marriage or kinship; will and inheritance; bankruptcy, procedures related to the recognition of insolvency of companies or other legal entities; social welfare; arbitration; labor relations [13, p. 159]. The exclusion of certain categories of cases from the scope of the European Small Claim Procedure is characterized by the peculiarities of national legislation in the field of regulation of the relevant relations (marriage, family, labor, etc.).

2. Application of the European Small Claims Procedure

a. The first stage of the procedure

To file a lawsuit, the applicant must complete a standard claim form (Form A provided by the court or posted on the court's official website). In Form A it is necessary to specify in detail the information about the claim (a subject and the basis of the claim), to define clearly the amount of the claim, to provide necessary proofs. Such a statement of claim shall be lodged with the competent court by any means of communication acceptable to the Member State of the court (postal, electronic). Standard forms play a special role, as the procedure is usually in writing, and the forms should facilitate the filing of a claim without the legal assistance of a lawyer [5].

The court notifies the claimant if the claim goes beyond the Rules. If the claimant does not drop the claim, the court will consider it in accordance with the relevant applicable procedural law of that Member State [5].

If the claimant does not provide sufficient information, the court will send him a Form B with a request for lack of information. The claim will be rejected if the claimant is unable to complete or correct the claim within the specified time or if it is unfounded or inadmissible. The court prepares a standard response form (Form C), after receiving a duly completed claim form. This

form (together with a copy of the claim) is sent to the defendant by mail within 14 days from the date of receipt of the documents by the court. The defendant must complete the response form (Form C) within 30 days. The court sends the claimant a copy of the defendant's response (Form C) with all relevant supporting documents within 14 days of receipt of the response by the court. The defendant has the right to file a counterclaim (using Form A) against the claimant, in a way just as the original claim is filed against the defendant. The claimant has 30 days to respond.

b. Consideration of the case by the court

Within 30 days after receiving the response of the defendant or the applicant, the court or the tribunal¹ shall take one of the following actions: 1) give a judgment; 2) requires additional details concerning the application from the parties within the established period, that not exceeding 30 days; 3) take evidence in accordance with the article 9 of the Regulation No 861/2007; 4) summon the parties to an oral hearing and appoint him within 30 days from the date of their summons [5].

The peculiarity of the European Small Claim Procedure is that it is primarily conducted in writing procedure [13, p. 147]. To guarantee the right to a fair trial within the meaning of Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (CFR), it is provided that the court holds an oral hearing if it deems it necessary or if a party so requests for it [14 p. 16]. An oral hearing can help both the court and the parties to resolve the dispute immediately, and it can also contribute to the peaceful settlement of the dispute. However, oral hearings are usually ineffective in cross-border cases, because it increases costs and delays the proceedings due to the need for translation, legal assistance and travel of the party to another country [15, p. 14]. According to the Regulations No 861/2007, the parties have the right, but not the obligation to represent their interests in court with the help of a barristers or other professional lawyer [5].

If the case cannot be resolved due to insufficient evidence, the court or the tribunal must determine the methods of obtaining and the amount of evidence required to make a decision in accordance with the rules of admissibility of

1 The Regulation No 861/2007 provides an opportunity to the EU Member State to set up special bodies to deal with minor cases. For example, in Malta there is the Small Claims Tribunal decides only small cases. The introduction of separate specialized institutions for the consideration of small, minor cases and the European Small Claims Procedure in Ukraine has solved the issue of court workload and access to justice.

evidence. It is necessary to use the simplest and least burdensome way to obtain evidence. This principle ensures the simplification and accessibility of pan-European procedures [5].

The court may determine that such evidence as written testimony of witnesses, experts or parties is admissible. If the evidence is the testimony of a person who wishes to be heard in court, the hearing must be held in accordance with the provisions of the articles of the Regulations No 861/2007. This person may be present at trial in oral form by videoconference, teleconference, or other appropriate means of communication at a distance provided for in Regulation (EC) No 1206/2001 . A party summoned by the court to be present (in person) at an oral hearing may request the use of telecommunications if the use of such technology is available in court on the grounds that the probable costs are related to her personal presence will be (disproportionate) to her stated requirements (Article 8 of the Regulation No 861/2007). The party summoned to court by remote means of communication may request the possibility of his personal presence at the hearing. The court must inform the parties of the possibility of reimbursement of any costs incurred by a party to ensure his personal presence at the hearing, at the request of the other party [5].

A court or tribunal may accept expert opinions or oral testimony only if it is not otherwise possible to reach a decision on the basis of other evidence. Requirements for the examination of a witness, expert opinion, etc. are not provided in the rules of the Regulation No 861/2007. So the provisions of the national procedural law of the Member State should be applied in the European Small Claims Procedure [16, p. 84].

c. Execution of the judgement and review of the case.

A judgment given by the court of the Member State under the ESCP should be recognized and enforced in another Member State without the need for enforcement and the need for an expiration of the term for appeal [15, p. 10-11].

The court or tribunal issues a certificate of the judgment taken in accordance with the European Small Claims Procedure. The court issues such a certificate using Form D at the request of one of the parties of the proceedings at no additional charge. The enforcement procedure must be governed by the law of the Member State of enforcement of the judgment. Any judgment taken under the European Small Claims Procedure must be enforced on the same terms as a judgment taken in the Member State of enforcement of the judgment. The party requesting the execution of the judgment must present: a copy of the court judgment, a copy of the certificate, if necessary, its translation into the official language of the Member State of execution [5].

The Regulation No 861/2007 does not contain a single rule on appeal. The review by the appellate court of the judgment made in the European Small Claims Procedure is possible if it is allowed by the national legislation of the court countries. The appeal procedure (if allowed) is governed exclusively by the national court.

The Regulation No 861/2007 provides minimum standards for the review of a judgment in the Member State where the judgment was given, even for countries that do not allow an appeal. Pursuant to Article 18 of the Rules of Procedure, the defendant has the right to file a request for review of the case by the court that rendered the decision in the presence of one of the conditions: 1) in case of improper service of the application of summons to the defendant, as provided in Art. 14 of the Regulation No 861/2007 and Art. 13-14 of the Regulation (EC) № 1896/2006 of 12 December 2006¹. And the defendant was notified of the hearing too late, which made it impossible to prepare for the proper protection of their rights; 2) the defendant could not provide protection against the claim due to force majeure [5]. In both cases, the defendant must act immediately [15, p. 25]. In contrast to the appeal, the review of the decision is carried out in the same court that gives a judgment ruled on the European Small Claims Procedure [9, p. 17].

3. Ukraine and the European Small Claims Procedure.

The European Court of Human Rights has repeatedly stated that one way to ensure the efficiency and credibility of the judiciary is to consider the case within a reasonable time. The introduction of the European Small Claims Procedure in Ukraine will resolve numerous issues of consideration small cases with a foreign element. It will ensure the principles of consideration of the case within a reasonable time, proportionality of court costs and the cost of the claim, access to justice, effective protection of rights in court. It will bring national principles of justice closer to international standards. Also, it will help to solve the problem of execution of the court decision. Ukraine is among the states against which the largest number of lawsuits have been filed to the European Court of Human Rights, (approximately 500 out of 10,000 cases) related primarily to the problem of non-compliance of the judgment [2, p. 162]. Adoption of a decision in the form of the ESCP will significantly increase the chances of guaranteed enforcement of the judgment, which in turn will raise the confidence of citizens of Ukraine and EU member states in the judicial process of Ukraine.

1 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

With regard to legal aid, it is to be hoped that the completion of standard forms and the conduct of proceedings are indeed simple and eliminate the need for professional legal aid. Although the standard forms are carefully designed and contain clear instructions, it can still be difficult for the ordinary person to complete these forms. It is important that free of charge practical assistance is well organized for the use of the ESCP in the Member States.

A survey conducted by ECC-Net in all EU member states found the main problem of the ESCP. It was the lack of awareness of judges, as well as consumers about the handling small case procedures. Unfortunately, in some EU Member States, there are courts that have never even heard of the European Small Claims Procedure. However, the most negative aspect is not the fact that almost half of the courts do not know about the procedure, but the fact that the other half - the one who is aware of it - does not sufficiently know the details and principles of the procedure [12, p. 17]. The low level of awareness of the procedure will lead to misleading information on the application of the European Small Claims Procedure. The best solution is to introduce a system of assistance that is widespread throughout the country and designed for consumer protection organizations. These organizations can provide applicants with forms, support to fill them, explanations and suggestions for procedural steps - even for all cross-border litigation, not just those that introduced by the Regulation No 861/2007. Ukraine needs to ensure free access to information for people who go to court. Create a trend whereby individuals and lawyers can access the information about the most important EU regulations related to them, the jurisdiction and peculiarities of the functioning of the courts, and the further course of proceedings. They can do this easily and for free over the Internet. Such assistance should be provided at free legal aid centers in Ukraine.

The language of the court proceedings may be a small barrier to the principle of proportionality of court costs and effective protection of rights. Although the language of the proceedings depends on the language of the Member State in which the trial takes place. The interested party is obliged to translate the certificate of decision (form D) by a qualified translator into the language of the Member State of enforcement. In addition, during the proceedings, a party may refuse to receive court documents (claim, response to the claim) if the documents are completed in a language that the person (plaintiff or defendant) does not understand, or in a language that is not official in the state domicile of one of the parties. Therefore, it is necessary to translate court documents into the appropriate language. Regulation No 861/2007 does not specify who is responsible for translating documents: a party or a court.

The problem of translation of documents can be a deterrent to filing a lawsuit or enforcing its execution [11, p.16].

Another problematic issue is oral hearing. Although the European Small Claims Procedure should, in principle, be a written procedure, the court may decide to hold a hearing if it deems it necessary or if one of the parties so requests.

When there is a need to oral hearing, this can lead to significant additional costs for the parties (for example travel, living expenses, etc.). But, even if Regulation No 861/2007 provides for the possibility of holding a hearing by videoconference or other communication technology, in practice this possibility is impossible in many courts of the Member States due to a lack of technical means. In addition, in some cases, a request for a hearing can also be a tactical tool for the party to put the opponent in the case in a difficult situation [12, p. 22].

Conclusions

The establishment of the ESCP is a step in the right direction to promote access to justice, as well as to speed up, simplify small claims proceedings and reduce the cost of litigating, following the principles of a fair trial. This ensures a strict balance between simple and relatively cheap proceedings, on the one hand, and the principles of a fair, adversarial procedure, on the other. The text of the Regulation No 861/2007 is generally well-drafted and the standard forms are quite thorough. European procedures are also progressive in the sense that they introduce several new procedural concepts and offer solutions that are not yet generally accepted in all EU Member States.

The introduction of the European Small Claims Procedure by Ukraine will be a positive step towards the harmonization of civil justice of the state and the EU, which in turn will bring the domestic principles of justice closer to world standards of justice. The advantage of this procedure is the flexibility in court proceedings. Regulation No 861/2007 offers the least burdensome opportunities for a party to a case, an expert, or a witness to participate in a court hearing. Priority is given to remote participation in litigation, via video conferencing and/or telephone. What is important for a cross-border case. The absence of mandatory representation of the interests of the party in court in addition to the introduction of simple forms for filing a lawsuit, response to the lawsuit will reduce the material costs of the party without losing the quality of legal protection in court. However, low public awareness of the European Small Claims Procedure may not result in full use of the simplified procedure. Therefore, it is advisable to provide for the possibility of free provision of legal information and assistance in filling out forms for the European Small

Claims Procedure in the centers of free legal aid. The court must play an active role in the application of the European mechanism. It is necessary to inform the parties about their rights and responsibilities, to provide an opportunity to take advantage of all the benefits of the procedure (participation in the case, if necessary, by telecommunication means). In addition, this procedure will partially resolve problematic issues related to the execution of judgment. After all, a judgment taken under the ESCP mechanism is enforceable regardless of the appeal (if allowed by the Member State) and the exequatur.

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Ostapyak M.M. The quintessence of the european small claims procedure

The article considers the essence, features of application, principles of the European Small Claims Procedure (ESCP). Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 established ESCP. This is the first autonomous supranational mechanism for considering small cross-border cases in the lawsuit proceedings. The purpose of this mechanism is to simplify proceedings with a foreign element in civil and commercial cases. An important aspect of this procedure is to preserve the basic principles of justice: access to justice, proportionality, reasonable timeliness of proceedings.

Particular attention is paid to the stages of consideration of the case under the European procedure from the completion of the application by the claimant to the possibility of appeal. The positive and negative aspects that may be encountered by the court and the parties during the consideration of the case were also analyzed. In particular, the advantages of this procedure include simplicity of procedure, priority of written proceedings (use of forms for filing a lawsuit, respond of a lawsuit), the participation of the parties in the proceedings without mandatory legal representation of lawyers, priority participation of a party in a court hearing through video or mobile means of communication (in case of oral hearing), execution of the judgment regardless of the expiration of the term for appeal and without additional court procedures (exequatur).

However, the European Small Claims Procedure has shortcomings. In particular, there were a lack of awareness and misunderstanding of the procedure by the citizens and court employees, disproportionate costs for translation of court documents, legal assistance, and travel to another country (in the case of an oral hearing). These shortcomings may reduce the effectiveness of the European Small Claims Procedure. Therefore, the state needs to increase public awareness about this procedure. Judges need to be active in the court trial. They must explain in detail the rights and obligations of the parties, the possibility of the procedure.

The introduction of the ESCP in Ukraine will have a positive impact on Ukraine's civil justice system, bring national principles of justice closer to world standards of justice, and increase the confidence of Ukrainian and EU citizens in judicial process of Ukraine.

Key words: European Small Claims Procedure, simplified proceedings, small cases, cross-border cases.