TRAIN TO ENFORCE

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EDITORS

Casebook on European Order for Payment Procedure and European Small Claims Procedure

Train 2 EN4CE

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Faculty of Law

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Foreword

Tjaša Ivanc, Vesna Rijavec, Cocou Marius Mensah,
Denis Baghrizabehi, Kristjan Zahrastnik, Jasmina Klojčnik

This Casebook is the outcome of the Train 2 En4CE project, co-funded by the EU's Justice Program (Grant agreement no. 854038). The project conducted during 30 months, analysed available EU instruments for cross-border debt collection of civil claims in the EU, mainly focused on the EU Regulations creating euro-autonomous procedures: Regulation No. 1896/2006 of December 12, 2006, establishing a European order for payment procedure, as amended by Regulation No. 2017/1260, and Regulation No. 861/2007 of July 11, 2007, establishing a European small claims procedure, as amended by Regulation 2017/1259.

Through a series of training seminars (40 training seminars; 1 webinar, video recordings of the trainings, and online materials available on the official website of the project: https://www.pf.um.si/en/acj/projects/pr10-train2en4ce/), the project aimed to produce practitioners and trainees with a skillful grasp of the Regulations. For this purpose, the research and training consortium was made up of eight teams from the different Member States. The team from the Univesity of Maribor (Faculty of Law Maribor, Slovenia) coordinated the project and the other valuable partners were Leibniz University of Hannover (Germany), University of A Coruña (Spain),

University of Graz (Austria), University of Rijeka (Croatia), University of Tirana (Albania), University of Trieste, (Italy), Uppsala University (Sweden).

The overall problem that arises is the lack of awareness of these tools not only among most consumers but also among many workers in the legal sector. Namely, lawyers tend to prefer legal tools they are already familiar with to experimenting with new ones, and even there is a danger that the EU instruments are being applied from the perspective of national laws and legal traditions. Highly-qualified legal practitioners are of crucial importance in the effective functioning of national and EU justice. Given the ongoing integration of Member states in the EU legal system, being a highly-qualified legal practitioner nowadays means having a broad, in-depth and specific knowledge of EU legal instruments and being able to apply them accurately and appropriately. In addition, since those instruments are applicable in cross-border litigation, a well-performing practitioner needs to use legal terminology in more than one European official language and therefore has to possess good legal linguistic skills.

The Train 2 EN4CE project addressed these exact needs, providing legal practitioners in the capacity of trainees with the necessary understanding, knowledge, and skills on the Regulations. Training activities were specifically designed to ensure that trainees gained not only a theoretical grasp of the subject matter but also practical skills through workshops and interactive IT tools.

It is in this perspective that we can say that this book is a summary of the different practices encountered in the member countries of the Train to Enforce project, to improve the knowledge of EU instruments for cross-border collection of debt. Debt collection mechanisms already exist at the national level in each member country of the European Union. These mechanisms are very effective for internal procedures and are regulated by the civil code, the code of civil procedure, and other notarial or legal acts depending on the country. However, a common regional tool applicable to EU countries (except Denmark) is essential, and it presents a non-mandatory format, i.e. an alternative tool for EU member countries allowing disputes to be settled in civil and commercial matters at several levels. These regulations are designed for debts ranging (up to 5000 EUR for the European procedure for the settlement of small claims - ESCP) and more than 5000 euros for the European order for payment procedure - EOPP). In all the member states and the candidate

state, partners of this project, one remark was unanimous: the general lack of knowledge of the efficient use of the aforementioned tools. The project had the mission to promote the standards of debt collection in the EU and to train the specialists in the judicial sector: lawyers, judges, specialists in legal affairs, etc. Through the surveys used by the different teams, it was found that the European alternative methods of collection of debts are often used by the companies and the sums clearly exceed the EUR 5000, the threshold for the ESCP. However, individuals or small and medium-sized companies who use the ESCP are sometimes reluctant, because they prefer not to waste time claiming a debt of EUR 2000 for example, especially since they do not master the procedure and hiring lawyers or legal aid could turn out to be more than the sum requested. The use of alternative methods besides national ones to claim money from European partners is poorly mastered by specialists in the field and not very popular with the population. However, in the era of COVID-19 and remote working, several commercial activities are carried out online and claims or reimbursements worth – EUR 5000 or less are growing at a fast rate. The procedure, which does not require a lawyer, translator, or legal agency, is affordable and useful for any individual or company carrying out commercial activities with European partners.

According to the United Nations Conference on Trade and Development (UNCTAD), online shopping has increased by 6-10 percentage points in most product categories and the main gainers are ICT/electronics, gardening /do-it-yourself, pharmaceuticals, education, furniture /household products, and cosmetics/personal care categories.

The resurgence of online purchases, in companies belonging to different EU countries, will necessarily increase the number of claims, refunds, or products not received-synonymous with refunds.

Debt collection procedures then have an important role to play in regulating this flow, notwithstanding their optional nature.

The aim of gathering together within this publication extracts from Slovenian and European judgments that have applied these Regulations, along with translations into English, is to make them accessible to legal practitioners and international trade specialists who intend to launch such proceedings in the EU. As such, it will set out

a body of case law that should be useful in dealing with the main problems that have arisen in relation to the application of the regulations in Slovenian and in the European Union, thus increasing the scope for relying on them. There are challenges that need to be overcome, in order to make these procedures very successful, for instance, the lack of offices/services that can assist in identifying the competent court, difficulties in compiling and translating the forms required to launch proceedings, the low level of publicity given to such procedures on judicial websites, the fact that it is impossible to launch proceedings online, the optional nature of proceedings and the excessive reference to the *lex fori* in terms of aspects that are not governed by it, which entails difficulty in coordinating European and Member State laws.

Publishing this casebook to draw attention to these regulations and educate legal professionals and consumers alike is the purpose of the Train to Enforce project, which has been successfully conducted. This casebook is a valuable addition to the arsenal of legal literature on the subject of the regulation of debt collection and constitutes a big achievement that will be useful for consumers and legal specialists.

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Case Study 1

Wettsport-GmbH (EOPP)

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Facts: Mr Corleone, an Italian citizen domiciled in Italy, concluded a contract with the Austrian company *Wettsport-GmbH* (company headquarters in Innsbruck), which organises sport betting services. Mr Corleone was obliged by contract to set up and operate such betting services in Italy. In particular, he was required to collect bets from local betting offices and to send the corresponding sums to *Wettsport-GmbH*, after deduction of winnings paid to players.

Question 1: *Wettsport-GmbH* takes the view that Mr Corleone had failed to fulfil his contractual obligations and hence owns them an amount of 16.406 EUR. Therefore, *Wettsport-GmbH* wants to lodge an application for a European order for payment. Which court has the international jurisdiction? (read Art 6 of the Regulation No 1896/2006[1] and Art 7 Regulation No 1215/2012[2])

[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 (OJ L 399, 30.12.2006, p. 1).
[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

Answer: According to **Art 6 (1) of Regulation No 1896/2006** the jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation No 44/2001[3] (now Regulation No 1215/2012). Therefore, Art 7 (1) Nr 1 lit a and b of the Regulation No 1215/2012 are relevant: A person domiciled in a Member State may, in other Member States, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. For the purpose of this provision and unless otherwise agreed, the **place of performance** of the obligation in question shall be in the case of the provision of services, the place in a Member state where, under the contract, the services were provided or should have been provided. In the case regarded the place of performance is in Italy. Therefore, **Italian courts** have international jurisdiction.

Scenario II: The *Wettsport-GmbH* lodges its application for a European order for payment at the Bezirksgericht für Handelssachen Wien (Vienna District Court for Commercial Matters).

Question 2: Which requirements regarding the application need to be considered by *Wettsport-GmbH*? (read Art 7 of the Regulation No 1896/2006)

Answer: The *Wettsport-GmbH* has to consider the requirements stated in Art 7 of Regulation No 1896/2006. First of all, an application for a European order for payment shall be made using standard form A, which can be found as well in Annex I to the Regulation as on the e-justice portal of the European Union. Art 7 (2) of Regulation No 1896/2006 further states the mandatory content of the application. Furthermore, according to Art 7 (4) of the Regulation No 1896/2006 there is the possibility for the claimant to indicate in the Appendix to the application which proceeding in the meaning of Art 17 (1) lit a or b of the Regulation No 1896/2006 should be applied in the event of opposition by the defendant. Further leg cit states that the claimant is allowed to oppose a transfer to ordinary civil proceedings within the meaning of Art 17 of Regulation No 1896/2006 in the event of opposition by the defendant. The application shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin (Art7 (5) of Regulation No 1896/2006).

[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

Question 3: How can Mr Corleone defend himself? (read Art 12 and Art 16 of the Regulation No 1896/2006)

Answer: According to Art 16 (2) of Regulation No 1896/2006 the defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F within 30 days of service of the order to the defendant. In the statement of opposition, the defendant shall indicate that he contests the claim, without having to specify the reasons for this. The statement of opposition shall be submitted in paper form or by any other or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin (Art 16 (4) of the Regulation No 1896/2006). The defendant is not forced to lodge a statement of opposition. He can also pay the amount indicated in the order to the claimant (Art 12 (3) list A of Regulation No 1896/2006).

Scenario III: Mr Corleone lodged a statement of opposition within the prescribed time limit. The grounds for his opposition were that the claim was unfounded and that the sum claimed was not yet due. Therefore, the Vienna District Court for Commercial Matters referred the case to the Landesgericht Innsbruck (Innsbruck Regional Court), taking the view that the latter court was the competent court for the ordinary civil procedure within the meaning of Art 17 (1) of the Regulation No 1896/2006. At the Regional Court, Mr Corleone pleaded, for the first time, a lack of jurisdiction of the Austrian Courts on the ground that he was domiciled in Italy. *Wettsport-GmbH* on the other hand contended that the Court does have jurisdiction according to Art 7 (1) (a) of Regulation No 1215/2012. In any event, they submitted that the Regional Court had jurisdiction according to Art 26 of the Regulation No 1215/2012 since Mr Corleone having failed to plead lack of jurisdiction when he lodged a statement of opposition to the European order for payment in question, had entered an appearance within the meaning of that article.

Question 4: Does a statement of opposition to a European order for payment, in which the jurisdiction of the court of the Member State of origin is not contested, constitute the entering of an appearance according to Article 26 of Regulation No 1215/2012 where that statement of opposition is not coupled with arguments on the substance of the case?

Answer: According to the decision ECJ C-144/12 (Goldbet) it cannot be seen as the entering of an appearance within the meaning of Article 24 of Regulation No 44/2001 (now Art 26 of the Regulation No 1215/2012). The statement of opposition cannot produce other, in regard to the defendant, effects than those that flow from Art 17 (1) of Regulation No 1896/2006. Therefore, the only consequence can be that the European order for payment procedure is terminated and the procedure is continued as an ordinary civil proceeding (or a European Small Claim Procedure according to Art 17 (1) (a) of the Regulation No 1896/2006). Also, the standard form, which shall be used for the statement of opposition, does not provide any option for contesting the jurisdiction of the courts of the Member State of Origin. Consequently, a statement of opposition to the European order for payment which does not contain any challenge to the jurisdiction of the courts of the Member State of origin and which is not coupled with arguments on the substance of the case cannot be regarded as constituting the entering of an appearance within the meaning of Article 26 of Regulation No 1215/2012 (C-144/12 No 34).

Question 5: Would there be a difference if the statement of opposition was coupled with arguments on the substance of the case?

Answer: No. The Court of European Justice stated an interpretation of the statement of opposition as the first defence would lead to the conclusion, that the European order for payment procedure and the ordinary civil procedure are basically one procedure. However, such an interpretation would be difficult to reconcile with the fact that Regulation No 1896/2006 follows the rules laid down in Regulation No 1896/2006, whereas the ordinary proceeding follows the rules of the national civil procedure (Art 17 (1) (b)) or, if applicable, following the rules of the Regulation No 861/2007 on Small Claims.[4] Also, it is not necessary, that the Court of Origin has also the jurisdiction for the ordinary civil proceeding. An interpretation according to which the statement of opposition coupled with arguments on the substance of the case should be regarded as the first defence would, moreover, run counter to the objective of the statement of opposition to the European order for payment (C-144/12 No 40). Within the Regulation there is no provision stating that the defendant shall specify the reasons for his opposition; on the contrary, Art 16 (3)

[4] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1).

states that the defendant must not specify his reasons. Therefore, the statement of opposition intends to give the defendant a chance to contest the claim (since he is not heard before the release of the European order for payment) and not to serve as a framework for a defence on the merits.

Question 6: Under the assumption that Mr Corleone **did not lodge** a statement of opposition within the prescribed time limit with the court of origin, what would be the consequences? (read Art 18 and Art 19 of the Regulation No 1896/2006)

Answer: The court of origin has to declare the European order for payment enforceable without delay. For that purpose, a standard form (G) is provided by the EU. The court has to verify the date of service (Art 18 (1) of Regulation No 1896/2006). The formal requirements for enforceability shall be governed by the law of the Member State of origin (Art 18 (2) of Regulation No 1896/2006). The enforceable order for payment shall be sent to the claimant (Art 18 (3) of Regulation No 1896/2006). Such an enforceable European order for payment shall be recognised and enforced in every other Member State without the need for a declaration of enforceability (Art 19 of Regulation No 1896/2006).

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Case Study 2

To Be or Not to Be (Served) (EOPP)

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Facts: Mr Huber, a German citizen domiciled in Munich, concluded a contract with Mrs Müller, another German citizen domiciled in Graz (Austria) who owns a law firm there. According to the contract, Mrs Müller is obliged to pay € 150.000 for a modern designer kitchen for her law firm. Mr Huber delivers the kitchen to Graz but Mrs Müller does not pay. Therefore, Mr Huber wants to file an application for a European order for payment against Mrs Müller.

Question 1: Which court has international jurisdiction for his application?

Answer: According to **Art 6 (1) of Regulation No 1896/2006** the jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular, Regulation No 44/2001 (now: Regulation 1215/2012). Therefore, Art 7 (1) Nr 1 lit a and b Regulation No 1215/2012 are relevant: A person domiciled in a Member State may, in other Member States, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. Since the performance of the obligation took place in Graz, Austria, the **Austrian courts** have international jurisdiction.

Question 2: Under the assumption that Mrs Müller concludes the contract with Mr Huber for her private flat (in that regard, she is a consumer), which court has international jurisdiction?

Answer: According to **Art 6 (2) of Regulation No 1896/2006** only the courts in the Member State in which the defendant is domiciled (within the meaning of Art 62 Reg No 1215/2012) shall have jurisdiction. Since Mrs Müller is domiciled, the Austrian Courts (again) have international jurisdiction.

Question 3: Under the assumption that Austrian courts have international jurisdiction: Which national court does have the jurisdiction for the European order for payment proceedings? (read § 252 (2) of the Austrian Civil Procedure Code)

Answer: Paragraph 252 (2) of the Code of Civil Procedure (Zivilprozessordnung) states: The Bezirksgericht für Handelssachen Wien (Vienna District Court for Commercial Matters) shall have **exclusive jurisdiction** over the implementation of the European order for payment procedure.

Scenario II: Subsequently, the Austrian court issues a European order for payment according to Art 12 of Regulation No 1896/2006. However, Mrs Müller was on vacation during the service of the order, therefore it was served on her secretary, Mr Meyer. Unfortunately, Mr Meyer forgot to hand the order to Mrs Müller when she came, hence, she was not able to lodge a statement of opposition within the time limit of 30 days.

Question 4: Was the service of the European order for payment on Mrs Müller's secretary legally compliant with Regulation No 1896/2006? (read Art 13 and 14 of the Regulation No 1896/2006)

Answer: Yes, according to Art 14 (1) (b) of Regulation No 1896/2006 the service of a European order for payment can also be effected to a person who is employed by the defendant.

Question 5: Under which circumstances would Mrs Müller be able to apply for a review of her case? (read Art 20 of Regulation No 1896/2006).

Answer: According to Art 20 of the Regulation No 1896/2006, the defendant shall be entitled to apply for a review where the European order for payment was served by one of the methods provided in Art 14 and the service was not effected in sufficient time to enable him/her to arrange for his defence, without any fault on his/her party (case 1) or the defendant was prevented from objecting to the claim because of force majeure or due to extraordinary circumstances without any fault on his part (case 2). In the case of Mrs Müller, only case 1 could possibly give her a chance to an application for a review. According to the doctrine, the deficient office organisation can be seen as a fault of the defendant (*Kodek* in *Fasching/Konecny*, Kommentar zu den Zivilprozessgesetzen Art 20 EuMahnVO Rz 17).

Scenario III: The court rejects Mrs Müller's application for a review according to Art 20 (3) Subparagraph 1 of Regulation No 1896/2006. Nevertheless, Mrs Müller refuses to pay.

Question 6: What happens if Mrs Müller does not fulfil the European order for payment? How can it be enforced?

Answer: Since the European order for payment is an enforcement title which does not need to be declared enforceable by any other Member State (Art 19 of Regulation No 1896/2006), Mr Huber, can directly apply for enforcement. The enforcement procedure is governed by the law of the Member State of enforcement (Art 21 (1) of Regulation No 1896/2006). Therefore, if Mr Huber wants to enforce his European order for payment in Austria, Austrian enforcement law is applicable.

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Case Study 3

Interaction of the European Payment Order and Other Legal Instruments: the Brussels I bis Regulation and the Directive on Unfair Contract Terms (EOPP)

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Facts: Mr Balbi, an Italian national, domiciled in Trieste decided to spend his holidays in Croatia in 2018. He booked a stay at the holiday resort on the Island of Cres owned by the company Gold Sun d.o.o. which advertised itself via website and newspaper ads in the various Member States including Italy. Unsatisfied with the service, he left the resort without paying. Gold Sun d.o.o. lodged an application with the Municipal Court in Rijeka for a European Order for Payment against Mr Balbi. As a part of Section 10 of Form A, Gold Sun d.o.o. submitted the contract concluded with Mr Balbi which contained a prorogation clause conferring jurisdiction to the Municipal Court in Rijeka for all claims arising out of the contract.

The Municipal Court requested from Gold Sun d.o.o. to submit additional documentation relating to the contract, particularly its Terms and Conditions to which the contract referred to with the aim of exercising control over contractual terms in accordance with the provisions of the Consumer Protection Act by which the Directive 93/13/EEC[5] on unfair terms in consumer contracts was transposed into Croatian law.

Question 1: Does the Municipal Court in Rijeka have jurisdiction to decide the case?

Answer: The issue of jurisdiction for the European Payment Order proceedings is not within the scope of the Regulation No 1896/2006 (hereinafter EOP Regulation). Instead, the EOP refers to the Brussels I regime for determining the jurisdiction.

The EOP Regulation, Art. 6

1. For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001.

2. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction.

Art. 6 of the EOP Regulation refers to the application of the Regulation No 44/2001 (hereinafter Brussels I Regulation). Nevertheless, the Brussels I Regulation was replaced by the Regulation No 1215/2012 (hereinafter the Brussels I bis Regulation). The temporal scope of application of the Brussels I bis Regulation depends on the day when the proceedings were commenced. In order for the Brussels I bis Regulation to be applicable, the proceedings have to be commenced on or after 10 January 2015. Given that the proceedings instituted by the Gold Sun d.o.o. were commenced in 2018, the referral to the Regulation Brussels I in Art. 6 of the EOP Regulation should be understood as a referral to the Brussels I bis Regulation.

[5] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

Paragraph 2 of Art. 6. of the EOP Regulation contains the only jurisdictional rule in the EOP Regulation which concerns consumer contracts. It represents a derogation of rules prescribed in the Brussels I bis Regulation which apply when the contract at issue is concluded with the consumer. Art. 18 of the Brussels I bis Regulation contains jurisdictional rules for consumer contracts. If the consumer sues the trader, she/he may choose between two forums: the trader's domicile or her/his own. If the procedural positions are reversed, the trader may institute the proceedings before the court of the Member State in which the consumer is domiciled.

The Brussels I bis Regulation, Art. 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

The wordings of the provisions of Art. 6(2) of the EOP Regulation and Art. 18(2) of the Brussels I bis Regulation may suggest that Art. 6(2) merely mirrors Art. 18(2) and that the situation is the same in the EOP proceedings and any other consumer case captured by section 4 of the Brussels I bis Regulation. However, Art. 18 is not the only jurisdictional ground under the Brussels I bis Regulation that may be applied to the protected consumer contracts. Apart from Art. 18, provisions on prorogation of jurisdiction (Art. 19 and 25) and submission to jurisdiction (Art. 26) may also be used for establishing jurisdiction. Since Art. 6(2) of the EOP Regulation prescribes that "only the courts in the Member State in which the defendant is domiciled" are competent, it follows that the respective provision excludes the possibility of applying either Arts. 19 and 25 or Art. 26 of the Brussels I bis Regulation.[6]

[6] See European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, 2011, p. 12.

In the presented hypothetical case, jurisdiction would lie with the Italian court based on Art. 6(2) of the EOP Regulation, since Mr Balbi is domiciled in Italy. The contract between Mr Balbi and Gold Sun d.o.o. contains a prorogation clause conferring jurisdiction to the Croatian court. However, the EOP Regulation excludes the possibility of any other court being competent in consumer disputes where the consumer is a defendant, including the court chosen by the parties. Therefore, the Croatian court would have to dismiss the action for not having the competence to decide it based on the above grounds.

Question 2: How to solve the question of the supply of documents for the purpose of *ex officio* control of contractual terms?

Answer: Application for an EOP is made by submitting the filled-in Form A from the EOP Regulation Annex. Article 7(2) of the EOP Regulation prescribes the list of information that has to be provided when submitting such an application.

The EOP Regulation, Art. 7

1. An application for a European order for payment shall be made using standard form A as set out in Annex I.

2. The application shall state:

(a) the names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made;
(b) the amount of the claim, including the principal and, where applicable, interest, contractual penalties and costs;
(c) if interest on the claim is demanded, the interest rate and the period of time for which that interest is demanded unless statutory interest is automatically added to the principal under the law of the Member State of origin;
(d) the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded;
(e) a description of evidence supporting the claim;
(f) the grounds for jurisdiction;
and
(g) the cross-border nature of the case within the meaning of Article 3.

3. In the application, the claimant shall declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin.

In one of its most recent cases on the EOP Regulation, *Bondora*, the CJEU explained whether points (d) and (e) read in conjunction with the Directive 93/13/EEC on unfair terms in consumer contracts allow the national court to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to *ex officio* test the (un)fairness of the terms.

Judgment of 19 December 2019, Bondora, C-453/18 and C-494/18, EU:C:2019:1118

Bondora, a company with a registered office in Estonia concluded a loan agreement with consumers, Mr Carlos V.C. and XY, both domiciled in Spain. Bondora lodged an application for a European order for payment with the Court of First Instance No 11, Vigo, Spain and Court of First Instance No 20, Barcelona, Spain, respectively. The referring court asked Bondora to provide the documents supporting the claim, in order to be able to ascertain whether the contractual terms contained in that agreement were unfair. Bondora refused arguing that it is not necessary to provide the documents supporting the claim and that neither Art. 8 nor Art. 12 of the EOP Regulation make reference to any submission of documents for the issue of an EOP.

In its reasoning, the CJEU indicated that the information listed in standard form A is necessary for the national court to be able to assess whether the application is well-founded. As for Directive 93/13/EEC, the CJEU reminded that it is based on the notion that a consumer is in a weak position compared to the other contracting party. For that reason, Art. 6(1) of Directive 93/13/EEC, requires the Member States to make sure that unfair terms used in a contract concluded with a consumer are not binding on the consumer, whereas under Art. 7(1) of Directive 93/13/EEC, the Member States have to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts. In its previous case-law, the CJEU established that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13/EEC is unfair (C-240/98, *Océano Grupo Editorial and Salvat Editores*, EU:C:2000:346, affirmed

in the subsequent line of cases). In a view of the above, the CJEU gave the following interpretation in *Bondora.*

Judgment of 19 December 2019, Bondora, C-453/18 and C-494/18, EU:C:2019:1118.

Art. 7(2)(d) and (e) of the EOP Regulation and Arts. 6(1) and 7(1) of the Council Directive on Unfair Terms, as interpreted by the Court and read in the light of Art. 38 of the Charter of Fundamental Rights of the European Union, must be interpreted as allowing a 'court', within the meaning of the EOP Regulation, seised in the context of an EOP procedure, to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an ex officio review of the possible unfairness of those terms and, consequently, that they preclude national legislation which declares the additional documents provided for that purpose to be inadmissible.

Therefore, in the hypothetical case, any national court seised with the application under the EOP Regulation, is allowed to require the company Gold Sun d.o.o. to submit the Terms and Conditions so that it may exercise the *ex officio* control over the contractual terms in a consumer contract. No national rules may prevent the court from doing so.

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Case Study 4

European Payment Order and Review for Lack of Jurisdiction (EOPP)

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Facts: Mrs Pelič, a Slovenian national, domiciled in Slovenia, has entered into a contract with the German company Sterne Hause GmbH regarding the renovation of her holiday apartment complex in Slovenia which she rents to tourists. In February 2019, Sterne Hause GmbH applied to the German court to issue a European order for payment against Mrs Pelič stating that it has provided the renovation service to her at her holiday complex located in Slovenia. The court issued the European order for payment and served it to Mrs Pelič on 12 September 2019. On 7 November 2019, the German court declared the order to be enforceable. Two months later, Mrs Pelič applied for a review of the order issued against her on the grounds that the court issuing the order lacked competence.

Question 1: Do German courts have jurisdiction to decide the case?

Answer: The Regulation No 1896/2006 (hereinafter EOP Regulation), contains only one jurisdictional rule which is applicable to consumer contracts. For all other cases, the issue of international jurisdiction for European Payment Order (EOP) proceedings is governed by the Regulation No 1215/2012 (hereinafter Brussels I bis Regulation), which entered into force on 10 January 2015 whereby replacing the Regulation No 44/2001.

The EOP Regulation, Art. 6

1. For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001.

2. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction.

The application of Art. 6(2) of the EOP Regulation depends on whether the case is based on the consumer contract. The contract in the hypothetical case at hand cannot be characterised as a consumer contracts since Mrs. Pelič did not conclude it for her private purposes, but the professional activity which generates income (for a definition of the consumer contract see Art. 17(1) of the Brussels I bis Regulation; C-27/02, *Engler*, EU:C:2005:33; C-96/00, *Gabriel*, EU:C:2002:436). The jurisdiction over premises renovation contracts other than consumer contracts is governed, *inter alia*, by Art. 7(1) and Art. 4(1) of the Brussels I bis Regulation.

The Brussels I bis Regulation, Art. 7(1)

A person domiciled in a Member State may be sued in another Member State:

(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply then point (a) applies;

The Brussels I Regulation, Art. 4(1)

Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

The application of Art. 7(1), subparagraphs (a) or (b) and further down the line, depends on the type of contract at hand. The contract between Mrs Pelič and the company Sterne Hause GmbH falls under the notion of the contract for the "provision of services" (see C-533/07, *Falco Privatstiftung and Rabitsch*, EU:C:2009:257). Therefore, the competent courts under Art. 7(1) should be the Slovenian Courts since the company provided its services in Slovenia where they renovated Mrs Pelič's holiday apartment complex. The special jurisdiction rule in Art. 7(1) of the Brussels I bis Regulation is supplemented by general jurisdiction rule in Art. 4 of the Brussels I bis Regulation which confers jurisdiction to the court of the Member State in which the defendant is domiciled. The application of the rule of general jurisdiction would also lead to the jurisdiction of the Slovenian courts because Mrs Pelič is the defendant and her domicile is in Slovenia (it is possible that the courts in Slovenia competent under Art. 7(1) and 4(1) are not the same, as the place of domicile and the place where the services were provided may be different places in Slovenia which lead to Slovenian national courts of different territorial jurisdiction).

Question 2: May the party object to the jurisdiction in the EOP proceedings and when and under what conditions?

Answer: The EOP Regulation does not contain a specific provision based on which the defendant could object to lack of jurisdiction of the courts seised. However, under Art. 16 thereof, the defendant may oppose the EOP without specifying the reasons for opposition.

The EOP Regulation, Art. 16(1-3)

1. The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI, which shall be supplied to him together with the European order for payment.

2. The statement of opposition shall be sent within 30 days of service of the order on the defendant.

3. The defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this.

The option provided in Art. 16(1) of the EOP Regulation includes *inter alia* the right to raise the objection as to the lack of jurisdiction. Otherwise, the rules on jurisdiction in Art. 6 of the EUP Regulation would be rendered meaningless.

By Art. 16(2), the right to oppose the EOP is limited to 30 days after the service of the EOP. In the above hypothetical case, Mrs Pelič did not oppose the EOP within the specified time frame. The questions may then be posed as to whether she may do that at a later stage. In general, if the defendant does not oppose the EOP under Art. 16 of the EOP Regulation, she/he has an additional option of applying for a review of the EOP in exceptional cases prescribed in Art. 20 of the EOP Regulation.

The EOP Regulation, Art. 20

1. After the expiry of the time limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a)
(i) the order for payment was served by one of the methods provided for in Article 14,
and
(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,
or

(b) 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, provided in either case that he acts promptly.

2. After expiry of the time limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant's application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force.

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.

In *Thomas Cook Belgium* (C-245/14, EU:C:2015:715), the CJEU discussed the possibility of reviewing the EOP under Art. 20 on grounds that the court issuing the EOP did not have jurisdiction.

Judgment of 22 October 2015, *Thomas Cook Belgium*, C-245/14, EU:C:2015:715

The travel agency, Thomas Cook, concluded a contract with Thurner Hotel for the provision of hotel accommodation. Thurner Hotel applied to the District Court for Commercial Matters, Vienna, for an EOP against Thomas Cook. Thurner Hotel claimed that the Austrian court has jurisdiction since the services were provided in Austria. The EOP was served on Thomas Cook and it lodged a statement of opposition after the expiry of the time limit of 30 days and applied for the review of the EOP in accordance with Art. 20(2). Thomas Cook claimed that the jurisdiction lies with the Belgian court based on the contract conferring jurisdiction on the Belgian courts.

The CJEU established that under the respective circumstances there could be two separate levels of assessment whether Thomas Cook has the right to a review under Art. 20 of EOP Regulation: The first is whether the EOP was "clearly wrongly issued

having regard to the requirements laid down in the EOP Regulation". In its judgment, the CJEU reasoned that this was not the case since the national court seised should examine the application, including the issue of jurisdiction and the description of the evidence, on the basis of the information provided in the application form. Therefore, where the defendant wishes to raise an objection to the jurisdiction of the court stating that the information provided by the claimant in the application form was false, it has to do so within the time limit for contesting the claim in Art. 16 of the EOP Regulation. The second level of assessment was the EOP "clearly wrongly issued due to other exceptional circumstances". The CJEU states that, although in principle "other exceptional circumstances" could include a situation where the EOP was based on false information provided by the claimant in the application form, this was not the case in *Thomas Cook Belgium*. Namely, once Thomas Cook had been served with the EOP in accordance with the provisions of the EOP Regulation, it must have had been aware of both the jurisdiction clause and the grounds on which the court of origin established its jurisdiction. Hence, it was able to oppose the EOP on the basis of Art. 16 of the EOP Regulation already at the opposition stage of the proceedings. The CJEU then invoked Rec. 25 of the EOP Regulation which prohibits Art. 20 of the EOP Regulation from becoming the second opportunity to oppose the claim. For that reason, it decided that under the concrete circumstances in *Thomas Cook Belgium*, the EOP cannot be reviewed under Art. 20 of the EOP Regulation due to the fact that the court of origin lacked jurisdiction.

Judgment of 22 October 2015, *Thomas Cook Belgium*, C-245/14, EU:C:2015:715.

Art. 20(2) of the EOP Regulation, must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, a defendant on whom a EOP has been served in accordance with that Regulation from being entitled to apply for a review of that order by claiming that the court of origin incorrectly held that it had jurisdiction on the basis of allegedly false information provided by the claimant in the application form.

Therefore, to ascertain whether Mrs Pelič can challenge the German court's jurisdiction in the review stage under Art. 20 of the EOP Regulation, it is necessary to assess the actual facts of the hypothetical case at hand. The main criteria deriving from the *Thomas Cook Belgium* are whether EOP was clearly wrongly issued "having

regard to the requirements" in EOP Regulation or, alternatively, due to "other exceptional circumstances" within the meaning of Art. 20(2) of the EOP Regulation. The two cases, *Thomas Cook Belgium* and the hypothetical case may be distinguished based on the fact that, unlike in the former, there is no forum selection clause in the latter. To what extent may this affect the outcome of the assessment depends on whether it the EOP was "clearly wrongly issued having regard to the requirements laid down in the EOP Regulation".

Was it "clearly wrong" for a German court to issue against Mrs. Pelič the challenged EOP on the basis of the information provided in the Sterne Hause's application form, needs to be assessed on the particular facts of that case. In the context of the alleged lack of jurisdiction of the court seised with the EOP proceedings, Mrs. Pelič could argue that the EOP was "clearly wrongly issued having regard to the requirements" in the EOP Regulation, in particular the requirement in Art. 8. Under that provision, the German court was to examine on the basis of the application form, *inter alia* whether its jurisdiction can be determined in accordance with the relevant rules of EU law, especially in the Brussels I bis Regulation. Turning back to the facts of the case, one may see that the Sterne Hause's application form specifically mentioned the services performed at the Slovenian location as the basis for the claim. But this fact is at the same time the basis for the special jurisdiction under Art. 7(1)(b) of Brussels I Regulation, which the German court should have assessed given that it was clear to it that it was not competent on the grounds of general jurisdiction under Art. 4(1) of the Brussels I Regulation because the defendant's address for delivery was stated to be in Slovenia (pursuant to Art. 6(2)(a) of the EOP Regulation).

Thus, unlike in the situation where the forum jurisdiction clause if brought to the attention of the seised court in *Thomas Cook Belgium* might have made the EOP "clearly wrongly issued under the requirements", in the hypothetical case the facts on the which the special jurisdiction is depending on under Art. 7(1)(b) of Brussels I Regulation was in fact clearly stated in the application form – it specifically mentioned the services performed at the Slovenian location. In such a situation, Mrs Pelič would be able to rely on Art. 20 of the EOP Regulation in order to be allowed review over the EOP issued against her on the grounds that the court issuing the EOP lacked jurisdiction.

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Case Study 5

Interaction of the Legal Concept of 'Consumer' and the European Payment Order (EOPP)

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Facts: In January 2017, the international association Amigos de lo ajeno, with a registered address in the city of A Coruña (Spain), decided to renovate an office property belonging to the association in the city of Dortmund (Germany). After considering different quotes for the work, the association decided to award the contract for the work to a French company, Demolombe, SARL, which has a long track record in the building sector. The contract for the work did not include the flooring materials required, which were obtained directly from an Italian company, 'Cavi di Titanus, SRL'. Now that the work is finished, the association has outstanding invoices for payments to both companies in the amount of €5000 each. The companies are considering legal action to demand their respective unpaid debts using the European payment order procedure.

Question 1: Which court has jurisdiction to decide the case?

Answer: Article 6 of Regulation No 1896/2006 (hereinafter EOP Regulation) states that jurisdiction shall, for the most part, be determined in accordance with Regulation No 44/2001 (hereinafter Brussels I Regulation), and subsequently in accordance with recast Regulation No 1215/2012 (hereinafter Brussels I bis Regulation).

Notwithstanding, Article 6, section 2 also provides for cases in which the claim relates to a contract concluded by a consumer and the defendant is the consumer. In such cases, jurisdiction corresponds to the courts in the Member State in which the defendant is domiciled.

EOP Regulation, Art. 6

1. For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation (EC) No 44/2001.

2. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction

While the issue of legal jurisdiction may seem relatively straight forward in this instance, the concept of consumer varies across the EU, owing to the different country-specific definitions used in EU law for each Member State. The question in this instance, therefore, is how to define the concept of consumer and whether an association – a legal entity – may be considered such under Article 6 of the EOP Regulation.

The answer to this question has significant practical implications. If the association Amigos de lo ajeno may be considered a 'consumer' according to the Regulation, then only the court of first instance where the defendant is domiciled (A Coruña) will have jurisdiction to hear any claims made against it by Demolombe, SARL and Cavi di Titanus, SRL, in accordance with Article. 813 Civil Procedure Act 1/2000 (7 January). If the association is not considered a consumer, then, in accordance with

Article 6 of the EOP Regulation, Article 7(1) of Brussels I bis Regulation will apply and the court with jurisdiction to hear any claims in relation to the sale of goods and/or the delivery of services will be in accordance with the legal procedures in force in Germany, as the country in which the goods were delivered and the contracted renovation services were carried out.

Brussels I bis Regulation, Art. 7 (1)

A person domiciled in a Member State may be sued in another Member State:

(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply, then point (a) applies;

From the point of view of the Spanish legal system, legal entities, including associations, are explicitly included in the *prima facie* legal definition of a consumer, under Article 3, paragraph 2, Legislative Royal Decree 1/2007 (16 November) approving the recast text of the General Consumer and User Protection Act and supplementary laws (TRLGDCU, BOE 287, 30.11.2007). The fact that Spanish law establishes that only a natural person may be considered a consumer in certain matters, such as real estate credit contracts, is a separate issue (cf. Art. 2.1 Real Estate Credit Regulation Act 5/2019, 15 March; LCCI, BOE 65, 16.03.2019).

TRLGDCU, Art. 3

General definition of consumer and user

For the purposes of this regulation and without prejudice to the provisions stated in Books Three and Four, a consumer or user is defined as a natural person acting for

a purpose which may be regarded as being outside of his or her trade, profession or business or commercial activities.

For the purposes of this regulation, the legal definition of the consumer also includes legal entities and non-business, non-commercial unincorporated non-profit organisations.

LCCI, Art. 2 (1) Scope of application

1. This Act will apply to credit agreements concluded by a natural person or legal entity acting in accordance with his trade or profession when the borrower or guarantor is a natural person and the purpose of the contract is: […]

It could, therefore, be argued that the protections provided in law for natural persons in their capacity as consumers could be extended to legal entities and unincorporated organisations at a European level, albeit with certain restrictions and safeguards. CJEU case law in relation to the concept of consumer, for example, has shown a positive evolution in this direction, from an initially more restrictive definition (C-269/95, *Benincasa*, EU:C:1997:337), to one more focused on the objective context of the operation than on the legal personality or subjective conditions of the contracting party (C-110/14, *Costea*, EU:C:2015:538; C-630/17, *Milivojević*, EU:C:2019:123).

Judgement of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538

[…] a natural person who practises as a lawyer and concludes a credit agreement with a bank, in which the purpose of the credit is not specified, may be regarded as a 'consumer' within the meaning of that provision, where that agreement is not linked to that lawyer's profession. The fact that the debt arising out of the same contract is secured by a mortgage taken out by that person in his capacity as representative of his law firm and involving goods intended for the exercise of that person's profession, such as a building belonging to that firm, is not relevant in that regard.

Judgement of 14 February 2019, *Milivojević*, C-630/17, EU:C:2019:123

Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a debtor who has entered into a credit agreement in order to have renovation work carried out in an immovable property which is his domicile with the intention, in particular, of providing tourist accommodation services cannot be regarded as a 'consumer' within the meaning of that provision, unless, **in the light of the context of the transaction, regarded as a whole**, for which the contract has been concluded, **that contract has such a tenuous link to that professional activity that it appears clear that the contract is essentially for private purposes, which is a matter for the referring court to ascertain**.

The CJEU has also made it clear that there is nothing to prevent the Member States from expanding the partial harmonisation of consumer rights in some areas to other subjects (legal entities and even unincorporated organisations), provided the spirit of the European system of consumer protection is not compromised (C-329/19, *Condominio di Milano, via Meda*, EU:C:2020:263).

Judgement of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263

Article 1(1) and Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national case law which interprets legislation intended to transpose that directive into national law in such a way that its protective rules of consumer law also apply to a contract between a seller or supplier and a subject of the law such as the *condominio* in Italian law, notwithstanding that such a subject of the law does not fall within the scope of that directive.

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Case Study 6

Jurisdiction and Service (EOPP)

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Facts: María, a Spanish national resident in Zamora, agrees to sell her Audi A4 to Manuel, a Portuguese national resident in Oporto. The two meet each year during the holidays in the Portuguese town of Viana do Castelo, where Manuel's parents live and María rents a holiday apartment. In the summer of 2018, María mentions to Manuel that she is trying to sell her car and Manuel expresses an interest in buying it. They agree on a price there and then (€3500) and sign a purchase agreement for the car in August 2018 in Viana do Castelo, whereupon María delivers the vehicle to Manuel and Manuel pays an initial instalment of the agreed purchase price (€2000), with a commitment to pay the remainder (€1500) in December of the same year.
In September, Manuel loses his job and is consequently unable to make the remaining payment on the vehicle he purchased. Following several payment requests for the outstanding amount, María decides to apply for a European payment order in the court of the first instance in Zamora, including in her application Manuel's parents' address in Viana de Castelo, where she knows Manuel to be living at the time. The court issues a payment order in Manuel's name without acknowledgement of receipt.

Question 1: Which court has jurisdiction to decide the case?

Answer: Regulation 1896/2006 establishes the forum for resolving disputes in favour of the consumer. The forum selection clause in Article 6 protects the consumer-defendant by assigning jurisdiction to the courts in his/her place of residence. The provision does not apply in this case, however, since María is a private individual, not a trader, and the agreement between her and Manuel is a civil purchase agreement, not a consumer contract.

If the purchase had been covered by a consumer contract, jurisdiction to hear María's claim would have corresponded to the court in Oporto.

EOP Regulation, Art. 6

1. For the purposes of applying this Regulation, the jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular, Regulation (EC) No 44/2001.

2. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of Regulation (EC) No 44/2001, shall have jurisdiction.

According to Article 4 of Regulation 44/2001, jurisdiction in civil and commercial matters lies in the place in which the goods are delivered, which in this case was Viana do Castelo, so jurisdiction to hear María's claim would correspond to the court of Viana do Castelo.

Regulation (EC) No 44/2001, Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Under no circumstances would jurisdiction ever correspond to the court of the first instance in Zamora, where María made her application.

Question 2: Place and method of service.

Answer: The way in which the payment order was served (ordinary letter post delivered straight to the defendant's letter box without acknowledgement of receipt) is one of the methods accepted under Regulation 1896/2006 in the interests of speed and efficiency. To ensure the defendant receives the order, however, it should be delivered to his/her home address.

This is not the case in this instance, because the defendant is domiciled in Oporto, not Viana. There is no way to prove that he has received the order, much less to adduce as evidence of receipt the fact that it was not returned (Supreme Court Ruling, No 565/2015 (9 October), Civil Court, Section 1).

In this instance, therefore, the order could have been served with acknowledgement of receipt in Viana or without acknowledgement of receipt in Oporto. The place and method of service of payment orders are provided in Articles 13 and 14 of Regulation 1896/2006.

Regulation (CE) No 1896/2006, Article 13. Service with proof of receipt by the defendant

The European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods:

(a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant;

(b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of service;
(c) postal service attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant;
(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant.

Article 14. Service without proof of receipt by the defendant

1. The European order for payment may also be served on the defendant in accordance with the national law of the State in which service is to be effected, by one of the following methods:

(a) personal service at the defendant's personal address on persons who are living in the same household as the defendant or are employed there;
(b) in the case of a self-employed defendant or a legal person, personal service at the defendant's business premises on persons who are employed by the defendant;
(c) deposit of the order in the defendant's mailbox;
(d) deposit of the order at a post office or with competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;
(e) postal service without proof pursuant to paragraph 3 where the defendant has his address in the Member State of origin;
(f) electronic means attested by an automatic confirmation of delivery provided that the defendant has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty.

3. Service pursuant to paragraphs 1(a), (b), (c) and (d) shall be attested by:

(a) a document signed by the competent person who effected the service, indicating:

(i) the method of service used; and (ii) the date of service; and (iii) where the order has been served on a person other than the defendant, the name of that person and his relation to the defendant;
or
(b) an acknowledgement of receipt by the person served, for the purposes of paragraphs (1)(a) and (b).

Because the method of service provided in Article 14 (without acknowledgement of receipt) is less reliable, EU law also provides measures for defendants served in this way where service is not effected in time, allowing the defendant in such cases to apply for a review of the order procedure in accordance with the time frame and conditions provided in Article 20. To initiate the review process, the defendant is not required to show proof that he/she was not served, only that the order was served using the method provided in Article 14.

There is no right of appeal in the European payment order procedure, but the defendant may apply for a review of the order for payment as a separate extraordinary procedural measure.

Regulation (CE) 1896/2006, Article 20. Review in exceptional cases

1. After the expiry of the time limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a) (i) the order for payment was served by one of the methods provided for in Article 14, and (ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,
or
(b) 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, provided in either case that he acts promptly.

2. After expiry of the time limit laid down in Article 16 (2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was

clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant's application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.

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Case Study 7

Article 11 – Rejection of the Application (EOPP)

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Facts: A, residing in Italy, enters into a consumer credit loan agreement for the sum of EUR 30.000 with B, a Slovenian bank, in order to purchase a vehicle. When A fails some monthly repayments, B deems the contract expired and applies before the competent Italian court for the issuance of a European order of payment against A for the reimbursement of the capital, plus interests. The court rejects the application, issuing Form D.

Scenario I: Suppose that the court rejects the application but fails to specify the grounds for the rejection.

Question 1: Can B lodge an appeal against the decision before the Italian court?

Answer: No: in Italy, this is not possible. Other countries, however, might allow the appeal. See preamble (17) of the Regulation No 1896/2006 (hereinafter EOPP Regulation): "There is to be no right of appeal against the rejection of the application. This does not preclude, however, a possible review of the decision

rejecting the application at the same level of jurisdiction in accordance with national law".

Scenario II: Suppose that the court rejects the application because the rate of interest on late payment was fixed in the contract is equal to 29% of the sum due. Deeming the clause unfair under Directive 93/13/EEC, the Italian court refuses to issue the order.

Question 2: Is the decision legitimate?

Answer: Yes: see art. 11(1), letter (d), EOPP Regulation; Court of Justice of the European Union, Banco Español de Crédito, SA v Joaquín Calderón Camino, Case C-618/10.

Scenario III: Suppose that the court rejects the application under Art. 11, letter (d), id est, because the original application was not complete with all the information required under Art. 7 of the EOPP Regulation, and, despite the court's request to complete the application under Art. 9 of the EOPP Regulation, B did not send the missing information within the deadline set out by the court.

Question 3: Can B lodge a new application?

Answer: Yes: see art. 11(3) of EOPP Regulation.

On all the above, see also X. E. Kramer, European Procedures on Debt Collection: Nothing or Noting? Experiences Future Prospects, in: B. Hess, M. Bergström, E. Storskrubb (eds.), EU Civil Justice, Current Issues and Future Outlook, 2016, Hart, pp.97-122.

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Case Study 8

Article 14 – Service Without Proof of Receipt by the Defendant and Article 15 – Service on a Representative (EOPP)

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Facts: Using form A of the EOPP Regulation, A, a resident in Italy, applies before an Italian court for the issuance of a European order of payment against B, who has his domicile/its seat in France. The competent Italian court grants the European order of payment against B, issuing form E.
Since in Italy it is upon the requesting party to serve judicial documents to the other party, A serves forms A and E to B.

Scenario I: Suppose that A serves the two forms to B as they stand, that is, in the Italian language.

Question 1: Is the service effective?

Answer: No: art. 27 of the Regulation No 1896/2006 (hereinafter EOPP Regulation) expressly states that "this Regulation shall not affect the application of Council Regulation (EC) No 1348/2000[7]", now replaced by Regulation No 1393/2007.[8] Under Art. 8 of the Regulation No 1393/2007, when serving a judicial act which is not written in or accompanied by a translation into the language of the addressee or the official language of the Member State addressed, the serving authority should inform the addressee that he may refuse to accept the document. See also Court of Justice of the European Union, Catlin Europe SE v O. K. Trans Praha spol. s r. o., 6 September 2018, case C-21/17.

Scenario II: Suppose that B is a natural person and:

(i) the documents are personally served to B in the place where A knows he is domiciled. However, unknown to A, B is no longer domiciled at that address.

Question 2: Is the service effective?

Answer: No: see art. 14(1) of EOPP Regulation; Judgment of the Court (Third Chamber), 4 September 2014, Eco cosmetics GmbH & Co. KG and Raiffeisenbank St. Georgen reg. Gen. mbH v Virginie Laetitia Barbara Dupuy and Tetyana Bonchyk, Joined Cases C-119/13 and C-120/13.

(ii) the documents are personally served to the B's partner, in the place where B is domiciled.

Question 3: Is the service effective?

Answer: Yes, provided that requirements of art. 14(3) of EOPP Regulation are complied with: see art. 14(1)(b) and 14(3) of EOPP Regulation.

(iii) the documents are served through email at B's email address, with automatic confirmation of delivery.

[7] Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 160, 30.6.2000, p. 37).
[8] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007, p. 79).

Question 4: Is the service effective?

Answer: No, unless B "has expressly accepted this method of service in advance": see art. 14(1)(f) of EOPP Regulation.

(iv) the documents are personally served to the B's lawyer, who is known to A.

Question 5: Is the service effective?

Answer: Yes: see art. 15 of EOPP Regulation.

Scenario III: Suppose that B is a legal person and:

(i) the documents are sent by ordinary postal service to the company's address at its official seat.

Question 6: Is the service effective?

Answer: No: see art. 14(1)(e) of EOPP Regulation.

(ii) the documents are sent to the PO box of company B.

Question 7: Is the service effective?

Answer: No, unless a written notification is also sent to the debtor's mailbox informing about the deposit of a document which is a court document: see art. 14(1)(d) of EOPP Regulation.

(iii) the documents are personally served to the CEO of company B.

Question 8: Is the service effective?

Answer: Yes, provided that requirements of art. 14(3) of EOPP Regulation are complied with: see art. 14(1)(b) and (3) of EOPP Regulation.

(iv) the documents are personally served to the CEO of company B, but the CEO refuses to receive the service.

Question 9: Is the service effective?

Answer: No: see preamble 21 of EOPP Regulation.

(v) the documents are personally served to the sales manager of company B, who is A's main contact.

Question 10: Is the service effective?

Answer: Yes, provided that requirements of art. 14(3) of EOPP Regulation are complied with: see art. 14(1)(b) and (3) of EOPP Regulation; see also District Court The Hague, 24 January 2012, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2012:BV2920.

(vi) the documents are personally served to the law firm usually representing company B, who is known to A.

Question 11: Is the service effective?

Answer: Yes: see art. 15 of Regulation EEOP.

On all the above, see also C. Crifò, Cross-Border Enforcement of Debts in the European Union, Default judgments, Summary Judgments and Orders for Payment, 2009, Kluwer, pp. 74-82.

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Case Study 9

Article 16 – Opposition to the European Order for Payment (EOPP)

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The facts: Z, who has his domicile/its seat in France applied before the competent German court for the issuance of a European order for payment in the sum of EUR 10.000 against Y, residing in Hannover, Germany. The court in Germany granted the European order for payment against Y, issuing form E.

The court served Y forms A and E as the order for payment together with form F, the opposition form to the European order for payment.

Scenario I: Y rejected the European order for payment without using form F but instead…

(i) with an informal letter addressed to the court.

Question 1: Is this an effective opposition against the European order for payment?

Answer: Yes: in accordance with Recital No. 23 of Regulation No 1896/2006 (hereinafter EOPP), the defendant may use another written form to submit the opposition if it is specific enough.

(ii) used electronic communication systems?

Question 2: Is this an effective opposition against the European order for payment?

Answer: Yes: provided that the requirements of Article 16(4) and (5) EOPP are met.

Scenario II: Y sent his opposition within 30 days of service of the court order…

(i) and addressed it only to Z.

Question 3: Is this an effective opposition against the European order for payment?

Answer: No: German law requires you need to send your opposition to the court that distributes it to the claimant. The competent court is the local court ("Amtsgericht") Berlin Wedding, § 1087 ZPO (German Civil Procedural Code). In other countries, this may be different, see Article 16(2) EOPP.

(ii) electronically. The receipt of the opposition lies within the 30 days limit, the moment of printing is after said deadline.

Question 4: Is this an effective opposition against the European order for payment?

Answer: Yes: in German law, the moment of receipt is decisive for meeting the deadline, § 1088 ZPO and § 130a V s. 1 ZPO.

Scenario III: Y sent his opposition without specifying the reasons for the opposition.

Question 5: Is this an effective opposition against the European order for payment?

Answer: Yes: see Article 16(3) EOPP. The opposition is effective without any reasoning if it states that the defendant contests the claim.

Scenario IV: Y sent the opposition. Regarding the signature…

(i) Y forgot to sign the opposition completely.

Question 6: Is this an effective opposition against the European order for payment?

Answer: No: according to Article 16(5) EOPP, the defendant shall sign the opposition.

(ii) the legal representative of Y signed the opposition, not Y himself.

Question 7: Is this an effective opposition against the European order for payment?

Answer: Yes: the defendant is explicitly not obliged to engage legal representation, Art. 24(b) EOPP. This means that a legal representative may, if in accordance with national law (§ 79 II ZPO), sign the opposition and make it effective for his client, Art. 16(5) EOPP.

(iii) Y signed the opposition using a pre-scanned signature.

Question 8: Is this an effective opposition against the European order for payment?

Answer: No: according to Article 16(5) EOPP and national regulations, the signature either has to be hand-written when using a printed form or in accordance with Article 2(2) of Directive 1999/93/EC[9] when using the electronic form.

(iv) Y signed the opposition personally.

Question 9: Is this an effective opposition against the European order for payment?

[9] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12).

Answer: Yes: when using the non-electronic submission without legal representation, the defendant needs to sign the opposition personally, Article 16(5) EOPP.

(v) Y signed the opposition, which is submitted in electronic form with an electronic signature.

Question 10: Is this an effective opposition against the European order for payment?

Answer: Yes: according to Article 16(5) EOPP, when using the electronic submission, the defendant needs to sign the opposition in electronic form in accordance with Article 2(2) of Directive 1999/93/EC.

Scenario V: Y misses the deadline for submitting his opposition, because…

(i) Y was in the hospital due to an externally caused car accident.

Question 11: Is this an effective opposition although send beyond the set deadline?

Answer: Yes: according to Article 20(1)(b) EOPP, Y was prevented from objecting to the claim by reason of force majeure without any fault on its part, see also § 1092 ZPO.

(ii) Y forgot to mail it in time. Later, Y found out that one of the documents used by claimant Z to prove its claim was false.

Question 12: Is this an effective opposition although send beyond the set deadline?

Answer: Yes: according to Recital No. 25 EOPP, the defendant may be entitled to apply for a review of the EOP in exceptional cases. However, this should not give the defendant a second opportunity to oppose the claim. An exceptional circumstance could include a situation where the EOP was based on false information provided in the application form.

(iii) within form E of the EOP, there was no information about the consequences of leaving the claim uncontested as the expression 'the order will become enforceable unless a statement of opposition has been lodged with the court in accordance with Article 16' was not visible.

Question 13: Is this an effective opposition although send beyond the set deadline?

Answer: Yes: according to Recital No. 18 and Article 16(1) EOPP the defendant shall be provided with full information concerning the claim as supplied by the claimant and should be advised of the legal significance of the EOP and the consequences of leaving the claim uncontested.

(iv) the last day of the deadline is a public holiday in the state of domicile of Y. Therefore, Y submits its statement of opposition the next working business day.

Question 14: Is this an effective opposition although send beyond the set deadline?

Answer: Yes: according to Recital No. 28 and Article 3(4) of Regulation No 1182/71 of the,[10] if the same date is a public holiday in the Member State of origin, the statement of opposition is effective.

Scenario VI: After the time of serving the EOP, Y has transferred its domicile to Albania.

Question 15: Can Y exercise the right of opposition according to Article 16 EOPP?

Answer: Yes: according to Article 3(3) EOPP, the relevant moment for determining whether there is a cross-border case shall be the time when the application for an EOP is submitted in accordance with the EOPP.

Question 16: Can Y submit the Statement of opposition electronically?

[10] Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).

Answer: Yes: if Germany has accepted the use of electronic communications and such means are available to the competent German court, see § 130a and §§ 1087-1096 ZPO. According to Article 16(5) EOPP, the statement of opposition shall be signed in accordance with Article 2(2) of Directive 1999/93/EC. The signature shall be recognised in Germany and may not be made subject to additional requirements. Exceptionally, such electronic signature shall not be required if and to the extent that an alternative electronic communications system exists in the German courts, which is available to a certain group of pre-registered authenticated users.

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Case Study 10

Article 17: Effects of the Lodging of a Statement of Opposition (EOPP)

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Facts: Same facts as for Case study 9: Article 16 – Opposition to the European Order for Payment. Additionally, Y lodged an effective opposition against the European order for payment.

Scenario I: Z, the claimant, explicitly requested that…

(i) it does not wish to continue to trial but to terminate proceedings when the defendant opposes the order.

Question 1: Will proceedings continue?

Answer: No: according to Article 17(1) of Regulation No 1896/2006 (hereinafter EOPP), proceedings are to be terminated in that event.

(ii) it does wish to continue to trial immediately after the EOP was issued.

Question 2: Will proceedings continue?

Answer: Yes: under Article 7(4) EOPP, the claimant can make such a request at any time until the EOP is issued.

(iii) it does wish to continue to trial and makes this request by a simple written letter.

Question 3: Will this letter be taken into consideration when assessing the request?

Answer: Yes: the EOP does not provide any other form.

Scenario II: Z has designated the court, which in his view is competent for the adversary proceedings.

(i) Z has designated the district court ("Landgericht") Berlin as the one competent for the adversary proceedings.

Question 4: Do the adversary proceedings start at the district court Berlin?

Answer: Yes: according to Article 17(2) EOPP, German law governs the transfer to ordinary civil proceedings. *Local* jurisdiction may be established if Y enters into discussions about the merits of the case without objection and there is no exclusive jurisdiction, §§ 39, 40 II No. 2 ZPO. Additionally, according to § 78 I ZPO, legal representation is required in front of the district court, therefore Y and Z need to be represented by a lawyer.

(ii) Z has designated the local court ("Amtsgericht") Hannover as the one competent for the adversary proceedings.

Question 5: Do the adversary proceedings start at the local court in Hannover?

Answer: No: according to Article 17(2) EOPP, German law governs the transfer to ordinary civil proceedings. Competent court is the district court ("Landgericht") Hannover, § 13 ZPO, § 71 GVG. *Substantive* jurisdiction cannot be established by entering into discussions about the merits of the case. The local court Hannover would refer the matter ex officio to the district court ("Landgericht") Hannover. Additionally, Y and Z are required to be represented by a lawyer in front of a district court, § 78 I ZPO.

(iii) Z has designated the competent court for the EOPP in Germany (local court ("Amtsgericht") Berlin Wedding) as the one competent for the adversary proceedings.

Question 6: Do the adversary proceedings start at the local court Berlin Wedding?

Answer: No: according to Article 17(2) EOPP, German law governs the transfer to ordinary civil proceedings. As Z wrongly identified not only the local (Berlin instead of Hannover) but also the substantive (local court instead of the district court) jurisdiction, the local court Berlin Wedding would refer the matter ex officio to the district court Hannover. Additionally, Y and Z are required to be represented by a lawyer in front of a district court, § 78 I ZPO.

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Case Study 11

The German Office Furniture (EOPP)

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Facts: Mr Grönlund, a Swedish national, domiciled in the picturesque Medieval town of Sigtuna (in the vicinity of Stockholm) is a legal consultant with his own firm (Grönlund Juridik AB, hereinafter Grönlund). Usually, Mr Grönlund works in his office in the city centre of Sigtuna. Socially distancing himself during the Corona pandemic he works from his summer home in the archipelago of Stockholm since March 2020. Shortly before relocating he orders some exclusive office furniture for his firm from the German manufacturer Schmittil Büromöbel Produktions- und Vertriebs GmbH in Düsseldorf, Nordrhein-Westfalen. The grand total is € 24 000 to be paid after delivery. The furniture is duly delivered. However, Mr Grönlund forgets all about the German invoice. After two months, the German company submits an application for a European order for payment with a court in Düsseldorf. The court issues a European order for payment.

Question 1: Can the European order for payment be enforced in Sweden against Grönlund Juridik AB (Grönlund)? If so, how? If not, why?

Answer: The issue of enforceability is regulated in Regulation No 1896/2006 (hereinafter EOP Regulation). This Regulation is an alternative to procedures provided by national law or procedures provided by the Regulation No 1215/2012 (hereinafter Brussels I Regulation).

According to Arts. 2, 3 and 4 of the EOP Regulation is a cross-border civil and commercial claim for a specific amount that has fallen due at the time when the application for a European order for payment is submitted. Concerning the temporal issue, Art. 33-second paragraph of the EOP Regulation states that it applies from 12 December 2008.

The perspective of the German court of origin. Unless Grönlund lodges a statement of opposition pursuant to Art. 16(1) (using standard form F as set out in Annex VI to the Regulation) within the time limit laid down in Art. 16(2) of the EOP Regulation, taking into account an appropriate period of time to allow a statement to arrive, the German court of origin shall, without delay, declare the European order for payment enforceable according to Art. 18(1) of the EOP Regulation. The formal requirements for enforceability are governed by German law, as the law of the Member State of origin. The German court declares the European order for payment enforceable by using Form G (as set out in Annex VII to the Regulation).

Form G, annexed to the EOP Regulation (excerpt)

Declaration of enforceability

The Court (with contact details), Case number, Date and place of the declaration, Signature and/or stamp
The Parties (Claimant and Defendant), their representative (e.g. parent, guardian, managing director) and their legally authorised representative (e.g. lawyer) of each (with contact details).
The court hereby declares that the attached European order for payment, issued on [date] against [the name of the defendant] and served on [date] is enforceable in accordance with Article 18 of [the EOP Regulation].

Important information

This European order for payment is automatically enforceable in all Member States of the European Union except Denmark, without the need for an additional declaration of enforceability in the Member State where enforcement is sought and without any possibility of opposing its recognition. The enforcement procedures are governed by the law of the Member State of enforcement, except where the Regulation provides otherwise.

The German company does not have to apply for a declaration of enforceability to get it. Under Art. 18(3) of the EOP Regulation, the court shall send the enforceable European order for payment to the claimant, the German company. The Regulation does not contain any provisions that the enforceable European order for payment is also sent to the defendant Grönlund. This may, however, occur under national law, i.e. under the law of the Member State of origin = German law.

A decision to declare a European order for payment enforceable cannot be appealed or re-opened.

As made clear in Art. 16(2) of the EOP Regulation, the opposition shall be sent within 30 days of service of the order on the defendant Grönlund. Art. 18(1) of the EOP Regulation explicitly states that the court shall verify the date of service and take into account an appropriate period of time to allow a statement to arrive, before the court can conclude that no statement of opposition was entered within the time limit.

The EOP Regulation, Art. 18

Enforceability

1. If within the time limit laid down in Article 16(2), taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition has been lodged with the court of origin, the court of origin shall without delay declares the European order for payment enforceable using standard form G as set out in Annex VII. The court shall verify the date of service.

2. Without prejudice to paragraph 1, the formal requirements for enforceability shall be governed by the law of the Member State of origin.

3. The court shall send the enforceable European order for payment to the claimant.

The perspective of the enforcing Member State(s). After the German court has declared the European order for payment enforceable it shall be recognised and enforced in Sweden, or in any other Member State for that matter, without a need for a declaration of enforceability and without any possibility of opposing its recognition according to Art. 19 of the EOP Regulation. Hence, the Regulation abolishes exequatur for European payment orders declared enforceable in the Member State of origin under Art. 18 of the EOP Regulation. The simplified way of enforcement is a token of European mutual trust.

The EOP Regulation, Art. 19

Abolition of exequatur

A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

The perspective of the German applicant. In order to enforce the European order for payment in Sweden, the German company must apply to Swedish enforcement authorities, cf. Art. 21(1). (In Sweden, there is only one enforcement authority, Kronofogden) Art. 21(2) of the EOP Regulation specifies that the applicant must produce a copy of the European order for payment, declared enforceable by the German court of origin, which satisfies the conditions necessary to establish its authenticity. Where necessary, the European order for payment shall be translated into a language/s accepted in Sweden. The Swedish enforcement authority will accept translations into Swedish or English. No security, bond or deposit can be required in Sweden of the German claimant just because it is foreign, see Art. 21(3). At this point, the EU principle of non-discrimination is perceptible.

The perspective of the competent enforcement authority. The actual enforcement of the European order for payment is regulated by the law of the enforcing Member State, i.e. by Swedish law, according to Art. 21(1) first paragraph. However, national Swedish rules may not be contrary to the enforcement procedure in the Regulation (cf. Arts. 22 and 23 of the EOP Regulation). Art. 21(1) second paragraph of the EOP Regulation underlines the fact that a European order for payment, which has become enforceable, shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement, i.e. the European order for payment shall be enforced in the same way as a domestic Swedish decision. This signifies the principle of equivalence: the same remedies and procedural rules should be available to claims based on EU law as are extended to analogous claims of a purely domestic nature.

The EOP Regulation, Art. 21

Enforcement

1. Without prejudice to the provisions of this Regulation, enforcement procedures shall be governed by the law of the Member State of enforcement.

A European order for payment which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement.

2. For enforcement in another Member State, the claimant shall provide the competent enforcement authorities of that Member State with:

(a) a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity;
and
(b) where necessary, a translation of the European order for payment into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or

languages of the institutions of the European Union other than its own which it can accept for the European order for payment. The translation shall be certified by a person qualified to do so in one of the Member States.

3. No security, bond or deposit, however, described, shall be required of a claimant who in one Member State applies for enforcement of a European order for payment issued in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

The answer to, and the point of departure in, the first question is thus that the European order for payment can be enforced in Sweden.

RELEVANT ARTICLES: Arts. 2, 3, 4, 18, 19, 21 and 33 of the EOP Regulation.

RELEVANT RECITALS: (27), (31) and (32).

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, 2011, available at: https://e-justice.europa.eu/content_ejn_s_publications-287-en.do (hereinafter Practice Guide).

N.B.: The participants can be asked about the national enforcement rules and procedures in their own Member State.

Scenario I: Grönlund also has assets in Denmark.

Question 2: Can the European order for payment be enforced in Denmark against Grönlund under the EOP Regulation?

Answer: The Regulation applies to all Member States of the European Union, save Denmark. According to Art. 2(3) of the EOP Regulation, the term "Member State" shall mean the Member States with the exception of Denmark. The reason is explained in recital 32 to the Preamble of the EOP Regulation.

The EOP Regulation, recital 32 to the Preamble

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application.

This means that a European order for payment cannot be enforced against Grönlund in Denmark under the EOP Regulation. Denmark is regarded as a third country in the eyes of the EOP Regulation.

In general, when it comes to the enforcement of judgments in Denmark, other ways must be employed, either by using Danish national law or most notably by using the Brussels I Regulation.

However, as Denmark does not participate in the instruments adopted under European civil cooperation, the Brussels regime is not directly applicable in Denmark. This situation is unfortunate. Therefore, the Union (EC) and Denmark concluded an international agreement in 2005 concerning the 2001 Brussels Regulation (the Denmark agreement). The legal consequence of the agreement is that Denmark is bound by the 2001 Brussels I Regulation, and is subject to its application. Under the Denmark agreement, Denmark also has the possibility to declare that it will apply the changes following the 2012 Brussels I Regulation. Denmark has made such a declaration (OJ L 79, 21.3.2013, p. 4). Therefore, albeit under public international law, and not union law, Denmark is bound by and subject to the application of the 2012 Brussels I Regulation.

RELEVANT ARTICLES: Art. 2 of the EOP Regulation.

RELEVANT RECITALS: (32).

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, 2011, p. 10.

Scenario II: At the time when the European order for payment is served on Grönlund the invoice is already paid.

Question 3: Shall the European order for payment still be enforced in Sweden against Grönlund?

Answer: A European order for payment which has been declared enforceable can be refused enforcement in the Member State of enforcement under limited circumstances. The grounds for refusal are laid down in Art. 22 of the EOP Regulation. These grounds are mainly the same as the grounds of refusal in Art. 21 of the Regulation No 805/2004[11] and Art. 22 of the Regulation No 861/2007.

According to Art. 22(2) of the EOP Regulation enforcement shall, upon application by the defendant, be refused by the competent court in the Member State of enforcement if and to the extent the defendant has paid the claimant the amount awarded in the European order for payment. As the invoice is paid, the European order for payment shall be refused enforcement in Sweden under Art. 22(2).

The Regulation does not contain any provisions on how the defendant shall proceed in order to oppose enforcement. This question is left for national law, in this case, Swedish law, cf. Art. 21(1).

In this context, it may be also appropriate to note Art. 5(3). Pursuant to this provision, a court means "any authority in a Member State with competence regarding European orders for payment or any other related matters". The concept "court" also includes other authorities involved in enforcement within the framework of the EOP Regulation. In certain Member States, such as Sweden, this means that an application may have to be submitted to an enforcement authority instead of a court.

RELEVANT ARTICLES: Arts. 5(3), 21(1) and 22(2) of the EOP Regulation.

[11] 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 (OJ L 143, 30.4.2004, p. 15).

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, 2011, pp. 17, 27 and 28.

N.B.: It can be noted that payment is a common bar to enforcement under several Member States' national laws. The participants can be asked what objections to enforcement are provided in their own national laws.

Scenario III: Grönlund has instituted proceedings against the German company in Denmark to safeguard the assets located there. A Danish court has delivered a declaratory judgment before the German company submits the application for a European order for payment. According to the Danish judgment, Grönlund is not liable to pay the invoice to the German company.

Question 4: In this situation, can the European order for payment still be enforced in Sweden?

Answer: This is a difficult question, potentially involving two irreconcilable decisions. Art. 22(1) of the EOP Regulation addresses the issue.

The EOP Regulation, Art. 22

Refusal of enforcement

1. Enforcement shall, upon application by the defendant, be refused by the competent court in the Member State of enforcement if the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third country, provided that:

(a) the earlier decision or order involved the same cause of action between the same parties;
and
(b) the earlier decision or order fulfils the conditions necessary for its recognition in the Member State of enforcement;
and

(c) the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.

2. Enforcement shall, upon application, also be refused if and to the extent that the defendant has paid the claimant the amount awarded in the European order for payment.

3. Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement.

The European order for payment can be refused enforcement in Sweden if it is irreconcilable with an earlier decision or order previously given in another Member State or in a third country (which Denmark is as regards the EOP Regulation) involving the same cause of action between the same parties. The expression "decision or order" must be understood to include all forms of judgments, judicial decisions, etc., as long as they fulfil the conditions necessary for recognition in the Member State of enforcement = Sweden.

The ground of refusal presupposes three conditions for its application: the Danish judgment must concern the same cause of action between the same parties, the Danish judgment must fulfil the conditions necessary for its recognition in Sweden (the Member State of enforcement) and, the irreconcilability could not have been raised as an objection in the court proceedings in Germany (the Member State of origin).

The same cause of action between the same parties

The concepts "the same cause of action" and "the same parties" are relevant also in the Brussels I Regulation. Here it is proposed to employ the point of view established in the Brussels I Regulation when interpreting the same concepts of the EOP Regulation. It has the advantage of predictability and foreseeability concerning common EU concepts

Case law of the European Court of Justice concerning irreconcilable judgements, see for example Case C-157/12, Salzgitter Mannesmann Handel v Laminorul SA, ECLI:EU:C:2013:597; case 145/86, Horst Ludwig Martin Hoffmann v Adelheid Krieg, European Court reports 1988, p. 645; and case C-80/00, Italian Leather SpA and WECO Polstermöbel GmbH & Co., ECLI:EU:C:2002:342.

In summary, the following has been established under the Brussels I Regulation. The same cause of action refers to the same object (fr. *même objet*), the same factual circumstances and rules pleaded. In the current situation, the European order for payment and the Danish judgment includes the same cause of action and it involves the same parties. The fact that Grönlund is the defendant in one case, and the claimant in the other case is not decisive.

The earlier judgment fulfils the necessary requirements for recognition in Sweden

The second condition that needs to be established in this case is whether the earlier Danish judgment can be recognized in Sweden. Grönlund can oppose enforcement of the European order for payment only if there is another earlier judgment concerning the same cause and the same parties, which is enforceable in Sweden. In this case, the Danish judgment is most likely to be recognized in Sweden under the 2005 Danish agreement and the Brussels regime.

The irreconcilability could not have been raised in the German court proceedings

The final condition that needs to be met is that the irreconcilability could not have been raised during the latter German proceedings. In order to fulfil this condition, the defendant Grönlund must have been prevented to plead the existence of the earlier Danish judgment during the latter German proceedings. This is an objective assessment and could be argued to be the case as the Danish judgment was delivered prior in time to the submission of the application for a European order for payment with the German court.

If all the conditions in Art. 22(1) of the EOP Regulation are fulfilled, Grönlund can object successfully to the enforcement of the European order for payment in Sweden.

In summary, the scope of application of Art. 22(1) of the EOP Regulation is very narrow and is likely to play a marginal role in legal practice.

RELEVANT ARTICLES: Art. 22(1) of the EOP Regulation.

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, 2011, pp. 28–29.

N.B.: This question could be extended by discussing case law of the European Court of Justice on irreconcilable judgements.

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Case Study 12

The Closed Gates of the Garden of Edén (EOPP)

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Facts: Mrs Edén, a Swedish national, is the proprietress of an outstanding garden in the east of Skåne, the southernmost province of Sweden. People are coming from far and near to visit *The Garden of Edén*. For a long time, the Horticultural Society of Northern Poland (hereinafter HSNP) has planned a tour to Skåne, including a full day in the famous garden. However, when they arrive on April 12, 2020, the gates are closed. Despite paying € 11 500 in advance for entrance fees, three different guided tours, lunches, floral masterclass workshops, and nice dinners, no one has told them the garden has closed due to the Corona pandemic. This message is only brought to them by a small notice card by the gates. Mrs Edén doesn't answer phone calls or e-mails from HSNP. Four weeks after returning to Poland, HSNP applies to a court in Gdańsk for a European order for payment to retrieve the fees. The court issues a European order for payment against Mrs Edén. She doesn't make any objections to it. After two months, the Polish court declares the European order for payment enforceable.

Scenario I: When the European order for payment is served on Mrs Edén, she claims that she was prevented from objecting to the claim due to the Corona situation.

Question 1: What can Mrs Edén do?

Answer: The decision by the court in Gdańsk, Poland, to declare the European order for payment enforceable cannot be appealed or re-opened. However, a right of review is provided for in Art. 20 of the Regulation No 1896/2006 (hereinafter EOP Regulation) in exceptional cases.

The EOP Regulation, Art. 20

Review in exceptional cases

1. After the expiry of the time limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a) (i) the order for payment was served by one of the methods provided for in Article 14,
and
(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,
or
(b) 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,
provided in either case that he acts promptly.

2. After expiry of the time limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant's application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force.

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.

According to this Article, Mrs Edén as the defendant has the right to apply for a review in the Polish court of origin, even after the time limit in Art. 16(2) of the EOP Regulation has expired. However, already the heading of the article indicates that this possibility is only available under exceptional circumstances. The intention of the provision is not to provide the defendant with a "second chance" to contest the claim, see recital (25) to the Preamble of the EOP Regulation.

The EOP Regulation, recital 25 to the Preamble

After the expiry of the time limit for submitting the statement of opposition, in certain exceptional cases the defendant should be entitled to apply for a review of the European order for payment. Review in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim. During the review procedure the merits of the claim should not be evaluated beyond the grounds resulting from the exceptional circumstances invoked by the defendant. The other exceptional circumstances could include a situation where the European order for payment was based on false information provided in the application form.

The restrictive application of Art. 20 of the EOP Regulation is due to the fact that it is a derogation from the principles of mutual recognition of judgments and the free circulation of judgments in the European Union. Hence, the case-law of the European Court of Justice confirms that Art. 20 of the EOP Regulation is to be applied restrictively.

Judgment of the European Court of Justice, Case C-245/14, Thomas Cook Belgium, p. 31

Since the EU legislature intended to limit the review procedure to exceptional circumstances, the provision must necessarily be interpreted strictly (see, by analogy, judgment in Commission v Council, C 111/10, EU:C:2013:785, paragraph 39 and the case-law cited)

Mrs Edén could invoke Art. 20(1)(b) of the EOP Regulation, and plead that she was prevented from objecting to the claim by reason of the Corona pandemic, and argue that it constitutes force majeure or extraordinary circumstances without any fault on her part.

According to the European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, p. 24, examples of such circumstances are "if the defendant was in hospital, on holiday, away on business, etc." Depending on the specific impact, the Corona pandemic and State measures in response could qualify as an extraordinary circumstance. At least Mrs Edén can try to put forward such an argument.

For comparison, European Court of Justice's case C-324/12, Novontech-Zala

The Court of Justice ruled that a failure to observe the time limit for lodging a statement of opposition to a European order for payment, by reason of the negligence of the defendant's representative, does not justify a review of that order for payment pursuant to Art. 20 of the EOP Regulation, since such a failure to observe the time limit, does not constitute extraordinary or exceptional circumstances within the meaning of that article.

A further condition for the application of Art. 20(1)(b) of the EOP Regulation is that Mrs Edén acts promptly, i.e. that she applies for a review of the EOP before the competent court in Poland (the Member State of origin) as soon as possible.

RELEVANT ARTICLES: Art. 20 of the EOP Regulation.

RELEVANT RECITALS: (25).

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, pp. 24–25.

Question 2: What are the legal consequences for Mrs Edén if the Polish court decides that a review is justified, alternatively if the Polish court rejects the application for a review?

Answer: If the Polish court decides that the review is justified for one of the reasons laid down Art. 20(1) or Art. 20(2), the European order for payment shall be null and void pursuant to Art. 20(3) second paragraph of the EOP Regulation. The result is that the European order for payment cannot be enforced against Mrs Edén in Sweden.

If, on the other hand, the Polish court rejects Mrs Edén's application on the basis that none of the grounds for review is referred to in Art. 20(1) or Art. 20(2) of the EOP Regulation apply, the European order for payment shall remain in force. The result is that the European order for payment can be enforced against Mrs Edén in Sweden.

RELEVANT ARTICLES: Art. 20 of the EOP Regulation.

RELEVANT RECITAL: (25).

READINGS: European Commission, Directorate-General for Justice, Practice guide for the application of the Regulation on the European Order for Payment, pp. 24–25.

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Case Study 13

Articles 24-33 (EOPP)

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Facts: To recover his claim of 25.000 EUR, plaintiff A from Spain filed before a Court in Maribor (Slovenia) an application for a European order for payment against defendant B from Slovenia.

Scenario I: In Slovenia is jurisdiction *ratione materiae* determined regarding to the value of the dispute. Local courts have jurisdiction to adjudicate in disputes on property claims when the value of the item in question does not exceed 20.000 EUR. District courts have jurisdiction to adjudicate in disputes on property claims when the value of the item in question exceeds 20.000 EUR.

In accordance with the Article 29 of Regulation No 1896/2006: "Member States shall communicate to the Commission which courts have jurisdiction to issue a European order for payment. The Commission shall make the information notified in accordance with paragraph 1 publicly available through publication in the Official Journal of the European Union and through any other appropriate means." Slovenian Ministry of Justice communicated to the Commission that local courts in Slovenia have jurisdiction to issue a European order for payment.

Question 1: Which court in Maribor has jurisdiction? Local or District?

Answer: Notification of Slovenian Ministry of Justice communicated to the Commission which court has jurisdiction was incorrect. Even if notification was published in the non-normative part of the Official Journal of the European Union, Slovenian judges should apply the Slovenian civil procedure act to determine which court is competent. Therefore, the district court has jurisdiction.

Scenario II: The European order for payment was served to defendant B on 10 July 2019. In Slovenia, according to article 83 of Courts Act "in the period between 15 July and 15 August (judicial vacation), courts shall hold hearings and shall take decisions only in urgent matters."

Question 2: To which date the defendant shall send the statement of opposition to a European order for payment?

Answer:

The second paragraph of article 16 of the Regulation No 1896/2006:

The statement of opposition shall be sent within 30 days of service of the European order for payment on the defendant.

Recital 28 of the Regulation No 1896/2006:

For the purposes of calculating time limits, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits should apply.

According to this regulation, judicial vacation does not affect the running of periods.

Article 3 of Regulation No 1182/71:

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Therefore, the defendant has time to send the statement of opposition until 9 August 2019.

Scenario III: Defendant B from Slovenia intends to send the statement of opposition to a European order for payment with the help of a lawyer or another legal professional. According to the Slovenian civil procedure act, in the proceedings conducted by district courts, only a practicing lawyer or another person who has passed the state judicial examination may act as an attorney.

Question 3: Should the representative of defendant B from Slovenia be a practicing lawyer or another person who has passed the state judicial examination, or does that contravene the provisions of Regulation No 1896/2006?

Answer: Slovenian civil procedure act does not contravene Article 24 of Regulation No 1896/2006. Representation by a lawyer or another legal professional is still not mandatory. This provision only determines who can be representatives before the court.

Scenario IV: The defendant B from Slovenia finally got his/hers attorney.

Question 4: How should the defendant submit a special power of attorney to the court? Should national law apply?

Answer: Neither Regulation No 1896/2006 nor form A of Regulation No 1896/2006 does not regulate how to submit a special power of attorney to the court. Information about representatives of the parties should be specified in form A. Therefore, this is not a case when Article 26 - all procedural issues not specifically dealt with in Regulation No 1896/2006 shall be governed by national law - should apply.

Scenario V: European order for payment has been declared enforceable. Defendant B thinks that the order has not been served in a manner that complies with the minimum standards of Regulation No 1896/2006.

Question 5: Does B have any options to raise the irregularity of this order?

Answer:

The judgment of the Court in Joined Cases C-119/13 and C-120/13, eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy (C-119/13), and Raiffeisenbank St. Georgen reg. Gen. mbH v Tetyana Bonchyk (C-120/13), ECLI:EU:C:2014:2144, paragraph 45-48:

In any event, it must be pointed out that, under Article 26 of Regulation No 1896/2006, any procedural issues not specifically dealt with in the regulation 'shall be governed by national law'. Where that is the case, an application by analogy of the regulation is accordingly precluded. In the present case, Regulation No 1896/2006 is silent as to the possible remedies available to the defendant if it only becomes apparent after a European order for payment has been declared enforceable that order has not been served in a manner which complies with the minimum standards laid down in Articles 13 to 15 of that regulation. It follows that, in such a case, those procedural issues are governed by national law in accordance with Article 26 of Regulation No 1896/2006.

In any event, it should be noted, that where a European order for payment has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of Regulation No 1896/2006, it cannot benefit from the application of the enforcement procedure laid down in Article 18 thereof. It follows that the declaration of enforceability of such an order for payment must be regarded as invalid.

Question 6: Which regulation does apply regarding the service of the European order for payment in cross-border cases?

Answer:

Article 27 of Regulation No 1896/2006:

This Regulation shall not affect the application of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters.

The second paragraph of Article 25 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000:

References made to the repealed Regulation shall be construed as being made to this Regulation and should be read in accordance with the correlation table in Annex III.

The judgment of the court 6 September 2018 in Case C-21/17, Catlin Europe SE v O.K. Trans Praha spol. s r.o., ECLI:EU:C:2018:675, paragraph 39 and 40:

It should be noted that Article 27 of that regulation explicitly states that it is without prejudice to the application of Regulation No 1348/2000. Regulation No 1348/2000 was repealed and replaced by Regulation No 1393/2007, Article 25(2) of which provides that 'references made to [Regulation No 1348/2000] shall be construed as being made to [Regulation No 1393/2007]'. Questions not regulated by Regulation No 1896/2006 concerning service of a European order for payment together with the application for the order must, therefore, be decided, if necessary, in accordance with Regulation No 1393/2007.

On all the above, see A. Galič, N. Betetto, Evropsko civilno procesno pravo, 2011, GV Založba Ljubljana, 169-206.

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Case Study 14

Articles 24-33 (EOPP)

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Facts: Last month, A who resides in Slovenia translated a document to B who resides in Hannover, Germany. The total cost of the work is estimated at 7.500 Euros. A has sent the invoice but got no answer from B.

Scenario I: A is considering lodging a European order for payment (Form A) but is afraid as she does not speak German, has no money to pay a lawyer, nor court fees.

Question 1: Does A need a lawyer or can she lodge herself Form A?

Answer: A does not need a lawyer. She can lodge herself Form A.

Article 24 of Regulation No 1896/2006 (Legal representation)

Representation by a lawyer or another legal professional shall not be mandatory:
(a) for the claimant in respect of the application for a European order for payment;
(b) for the defendant in respect of the statement of opposition to a European order for payment.

To start the procedure, Form A must be filled in, giving all the details of the parties and the nature and amount of the claim. The Court will examine the application, and if the form is correctly filled in, the Court should issue the European Payment Order within 30 days. it is advisable to check in the European Judicial Atlas which method is accepted by a particular Member State (Article 29(1)(c) - Means of communication - of Regulation No 1896/2006).

The application for a European order for payment may be submitted to the Court by post or by electronic means.

Question 2: What if A cannot proceed with the Court fees? Can someone pay for her?

Answer:

Article 25 (2) of Regulation No 1896/2006

For the purposes of this Regulation, court fees shall comprise fees and charges to be paid to the Court, the amount of which is fixed in accordance with national law.

In Slovenia, Court Fees are regulated in the Court Fees Act. As stipulated in Article 3 of the Court Fees Act (ZST-1), it is indeed the taxpayer who pays the court fee for proposing the initiation of proceedings or performing a single procedural act (civil case). However, this provision is not to be interpreted so narrowly that only such a taxpayer can pay the fee itself; that is, it cannot be paid by another. Article 105.a of the Civil Procedure act (ZPP), does not explicitly stipulate that the taxpayer had to pay the fee. **There is, therefore, no obstacle that a third party would not be able to pay the court fee** for such a taxpayer and that such payment would be deemed to have paid the taxpayer a certain fee due.

See case: VSL Decision II Cp 4908/2010 ; Record number: VSL0068243

In the impugned order, the Court of First Instance terminated the civil proceedings because it considered the action to be withdrawn on the ground that the applicant had not paid her court fees even after she had been given a payment order.

The applicant appealed against the order within the time limit, on the ground that it had erroneously established the facts, which suggested that the Court of appeal should set aside the decision. It alleges that the plaintiff, through his proxy, received a payment order to pay the court fee on October 27, 2010 and for him, the company N. O. d.o.o. paid this court fee on 10/11/2010, as a result of the account turnover review. The invoice and the reference contained in the order for payment thereof were given when paying this court fee.

The appeal is well-founded.

There is no doubt that in the present case the court fee was paid in the amount of EUR 348.00 and with reference (reference) 11 42170-7110006-30010710 after the order of the Court of first instance under ref. no. P 107/2010 of 15.10.2010, except that the fee as such was not paid by the plaintiff V. K., but by the company N. O. d.o.o., which is established from the inquiry of the Court of first instance of 16.11.2010 on the sheet. no. 7 in the file and from the complaint attached to the U. B. Traffic Review dated 25.11.2010 (Gazette No 38 in the file).

As stipulated in Article 3 of the Court Fees Act (ZST-1), it is indeed the taxpayer who pays the court fee for proposing the initiation of proceedings or performing a single procedural act, that is, in this civil case, the plaintiff as the plaintiff. However, this provision is not to be interpreted so narrowly that only such a taxpayer can pay the fee itself; that is, it cannot be paid by another. However, deciding that the payment of the fee is decisive and not who actually pays the fee is also to be inferred from the diction of Article 105a of the Code of Civil Procedure (ZPP), where the condition for the continuation of the procedure is that a certain fee is paid, but it is not explicitly stipulated that the taxpayer had to pay the fee. Therefore, there is no obstacle that a third party would not be able to pay the court fee for such a taxpayer and that such payment would be deemed to have paid the taxpayer a certain fee due.

For the reasons explained above, the Court of Appeal upheld the applicant's appeal and quashed the impugned order of the Court of First Instance (Article 365 CPC 3), so that the Court of First Instance could proceed with this litigation, of course, having regard to the above.

Question 3: How can A deal with the language barrier?

Answer: The claimant may be required to provide a copy of the EOP in a different language from that used by the Court of origin. As a general rule the EOP should be provided in the official language, or one of the official languages, of the Member State of enforcement unless that Member State has indicated that it will accept orders in another official language or languages of the European Union. Any translation shall be certified by a person qualified to do so in one of the Member States (Translation Article 21(2)(b)).

Article 29 of Regulation No 1896/2006

All Member States shall communicate to the Commission:

(c) the means of communication accepted for the purposes of the European order for payment procedure and available to the courts;
(d) languages accepted pursuant to Article 21(2)(b) of Regulation No 1896/2006.

See VSL Decision II Cpg 693/2018 Record number: VSL00017435

In the absence of the defendant's explanations as to what criteria the lawyer evaluated the composition of the opposition to the European order for payment, the trial court correctly assessed that the costs of opposing the European order of payment were recognized under heading 39/4 OT. The opposition was lodged on a form which did not contain a specific statement of reasons and the form was served on the defendant together with the European order for payment issued. Also, Article 16, point 3 of Regulation (EC) No. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 instituting a European order for payment procedure provides that the opposition shall state only that the application is opposed, without giving reasons for the opposition. This, however, means that this

service is not large-scale and professionally demanding, and is, therefore (easily) comparable to the composition of a short letter.

The defendant, by declaring the costs of translating the documents in the final amount in the bill of lading, as evidence, by providing an invoice which can be seen to which translations the documents relate, sufficed both the claim and the burden of proof in respect of that part of the cost claim.

See VSL Decision II Ip 3527/2017

In an objection to an enforcement order, the debtor cannot successfully challenge the correctness of the service of the European order for payment (as an enforcement title) or to invoke reasons for which he never became aware of the European order for payment before receiving the enforcement order. The procedures for issuing a European order for payment use specific standard forms, which are published on the European Union's websites in all the official languages of the Member States of the European Union. Due to the standardized format of these forms, in most cases there is no need for additional verification of the contents therein or, as a rule, **there is no requirement for qualified translation of the forms.**

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Case Study 15

Articles 24-33 (EOPP)

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Facts: A Slovenian company issued an EOP (Form A) of an amount of 22.000 Euros to a Swedish company that was opposed to paying (Form F). After the civil proceedings, the District Court which has issued the EOP (Form E) charged A higher than ordinary civil proceedings due to the stress and difficulty related to the case.

Question 1: Is the decision of the Court to highly charge A for the combined court fees of the European order for payment procedure and the ordinary civil proceedings due to Form F correct?

Answer: The decision of the Court is not correct.

Article 25 of Regulation No 1896/2006 (Court fees)

1. The combined court fees of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of opposition to a European order for payment in a Member State shall not exceed the court fees of ordinary civil proceedings without a preceding European order for payment procedure in that Member State.

Question 2: Can A refuse to pay after the civil proceedings (in Slovenia)?

Answer: A can refuse to pay. In accordance with the provision of the fifth paragraph of" The Law on Court Fees" (hereinafter ZST-1) there can be an objection to a payment order for two reasons, namely that the fee has already been paid or that **the Court has wrongly assessed the fee.**

Related case: Case C - 215/11, Iwona Szyrocka v SiGer Technologie GmbH

On 23 February 2011, Mr Szyrocka, resident in Poland, brought an application for a European order for payment against SiGer Technologie GmbH, established in Tangermünd (Germany), before the referring Court.

In examining the application, the referring Court found that it did not fulfill certain formal conditions laid down by Polish law, in particular, that it did not specify the value of the object at issue in Polish currency, as required by Polish law, in order to calculate the court fee. It is apparent from the file submitted to the Court that Mr Szyrocka stated in the European Payment Order form the principal amount in euro. The referring Court further points out that Ms Szyrocka stated in the form that she was demanding payment of interest from a certain day until the date of payment of the principal. In those circumstances, Sąd Okręgowy we Wrocławiu decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Is Article 7 [of Regulation No 40/94] compulsory? 1896/2006] should be interpreted as:

a) it comprehensively regulates all the conditions to be fulfilled in relation to an application for a European order for payment, or that
b) it only sets out the minimum conditions for such an application and should questions of formal application conditions which are not covered by this provision be subject to the provisions of national law?

2. If the answer to point (b) of the first question is in the affirmative, is it necessary for the party to do so if the application does not meet the formal conditions laid down in the law of the Member State (for example, if a transcript of the application for the counterparty was not attached or not the value of the subject-matter of the dispute), to invite it to complete the application under the provisions of national law in accordance **with Article 26 of Regulation** [No. 1896/2006] or in accordance with Article 9 of this Regulation? "

On those grounds, the Court (First Chamber) ruled:

"**Under Article 25** (of Regulation No. Regulation (EC) No 1896/2006) and under the conditions laid down in that article, a national court may only determine the amount of the court fee under the rules laid down by national law, provided that those rules are not less favorable than those governing similar situations in national law, and if they do not in practice impede or unduly impede the exercise of the rights conferred by Union law".

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Case Study 16

A Swedish Artist in Germany (ESCP)

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Facts: Mrs. Vänster is the CEO of one of the major banks in Sweden. She has a vivid art interest and likes to visit auction sites online. At the website of AuctionHaus Max & Moritz, seated in Hannover, Germany, she finds an etching by one of Sweden's foremost artists, Anders Zorn (1860-1920). According to the AuctionHaus' online description of the etching it was made prior to 1891, is 19,5 x 14 cm, and is marked and signed by the artist. She wins the auction by bidding EUR 4 300 and pays the amount online. When the etching arrives at her house in Stockholm it turns out that the etching lacks the artist's signature. Now she wants to return the etching and get a refund of her purchase.

Scenario I: If the parties cannot come to an amicable solution, Mrs. Vänster considers suing AuctionHaus Max & Moritz in court to get a refund. However, she feels uncertain of her legal options as the claim is rather small compared to the costs for litigation.

Question 1a: What procedures are available to Mrs. Vänster? How should the choice between legal schemes be made?

Answer: Many Member States have introduced simplified national civil procedures for small claims as costs, delays and complexities connected with litigation do not necessarily decrease proportionally with the value of the claim. However, the difficulties in obtaining a fast and inexpensive judgment are aggravated in cross-border cases. A European Procedure for Small Claims has therefore been established in Regulation No 861/2007 (hereinafter EPSC Regulation). The procedure is intended to be speedy and less costly, and legal representation is not required.

The ESCP Regulation has been amended by Regulation 2015/2421.[12] One important amendment is the increase of the maximum value of a claim from EUR 2 000 to EUR 5 000.

The ESCP Regulation is an optional *alternative* to procedures under the national laws of the the Member States. It is for Mrs. Vänster to decide whether she wants to rely on the procedure and rules in the ESCP Regulation or depend on the procedure and rules concerning small claims available under the laws of the Member State where an action is brought.

What's important is that the ESCP Regulation can be used for monetary and non-monetary claims and defended as well as undefended claims. In the present case the claim is monetary. But the ESCP Regulation would also apply if, let's say, the etching was not delivered and Mrs. Vänster sought delivery instead of monetary compensation. Moreover, the ESCP Regulation can be applied whether AuctionHaus Max & Moritz has defended the claim or not.

[12] 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 (OJ L 341, 24.12.2015, p. 1).

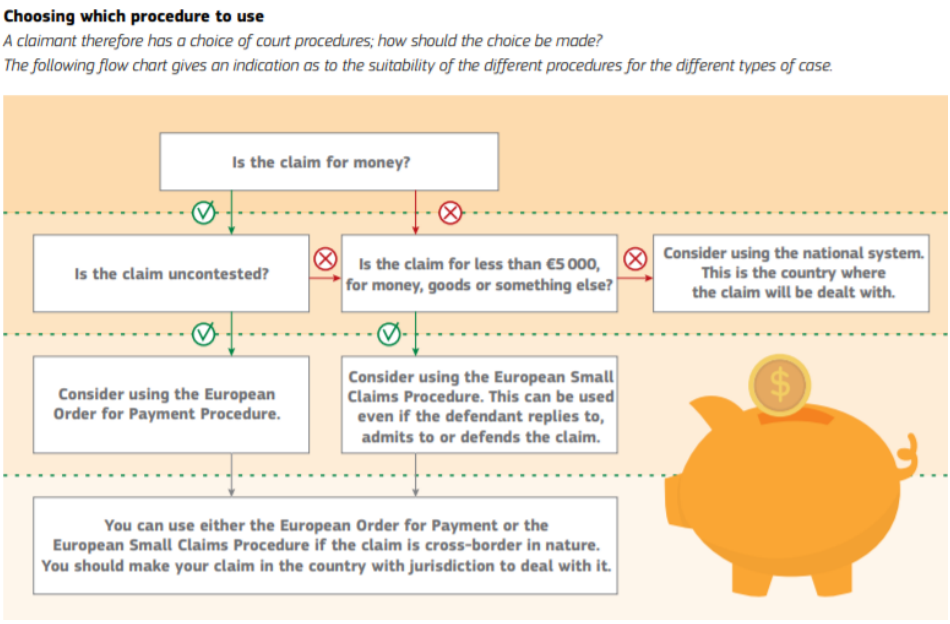

Figure 1 The flow chart provides guidance as to the suitability of the different procedures for different types of cases.

Source: European Commission, A Guide for Users to the European Small Claims Procedure: A short introduction to the main practical aspects of the use of the procedure based on the Regulation, Publications Office of European Union, p. 7.

Question 1b: Can Mrs Vänster rely on the procedure in the ESCP Regulation? *I.e.* what are the prerequisites for the application of the ESCP Regulation?

Answer: If she decides to rely on the ESCP Regulation, the provisions for the ESCP Regulation's substantive and formal applicability are laid down in Arts. 2, 3 and 29.

Jursidictional rules are found in the Regulation No 1215/2012 (hereinafter Brussels I bis Regulation). It seems to be the case that the courts where Mrs. Vänster is domiciled has jurisdiction pursuant to Art. 18 read together with Art. 17, as the case concerns a claim by a consumer against a business.

According to Art. 2.1 of the ESCP Regulation, the Regulation applies if the following (main) criteria are fulfilled: a) the case must be of a cross-border nature, b) it must concern civil and commercial matters, and c) the claim must not exceed EUR 5 000.

Art. 2 of the ESCP Regulation – Scope

1. This Regulation shall apply, in cross-border cases as defined in Article 3, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 5 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta jure imperii).

2. This Regulation shall not apply to matters concerning:
(a) the status or legal capacity of natural persons;
(b) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
(c) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
(d) wills and succession, including maintenance obligations arising by reason of death;
(e) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(f) social security;
(g) arbitration;
(h) employment law;
(i) tenancies of immovable property, with the exception of actions on monetary claims; or
(j) violations of privacy and of rights relating to personality, including defamation.

Art. 3.1 defines cross-border cases as 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. To determine domicile, the ESCP Regulation makes a cross-reference in Art. 3.2 to the Art. 62 and 63 of the Brussel I bis Regulation.

Art. 3 of the ESCP Regulation

Cross-border cases

1. For the purposes of this Regulation, 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 seised.

2. Domicile shall be determined in accordance with Articles 62 and 63 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council.

3. The relevant moment for determining whether a case is a crossborder case is the date on which the claim form is received by the court or tribunal with jurisdiction.

To determine whether a party is domiciled in the Member State whose courts are seised of a matter the court shall apply its internal law according to Art. 62(1) of the Brussels 1 bis Regulation. If a party is not domiciled in the Member State whose courts are seised of the matter then the the court shall apply the law of another Member State in order to determine whether the party is domiciled in that Member State according to Art. 62(2). A company, other legal persons or associations of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business according to Art. 63(1). In the present case, a cross-border connection is at hand as Mrs. Vänster is habitually resident in Sweden, and AuctionHaus Max & Moritz is seated in Germany.

According to Art. 3.3 of the ESCP Regulation, the relevant moment for determining whether it is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction. This means that a purely domestic case could turn into a cross-border case if one of the parties change their domicile before a claim has been received by the relevant court or tribunal.

Moreover, the claim must fall within the scope of civil and commercial matters pursuant to Art. 2(1) of the ESCP Regulation. The expression is not defined in the ESCP Regulation, but it is generally understood that there is a distinction between civil and commercial matters on the one hand and public law matters on the other hand. The Court of Justice of the European Union (CJEU) has delivered several

preliminary rulings concerning this concept with reference to the Brussels I Regulation.

See for example C-406/09, Realchemie Nederland BV v Bayer CropScience AG; C-172/91, Sonntag v Waidmann, C-167/00, Verein für Konsumenteninformation: C-271/00 Gemeente Steenbergen v. Baten; C-265/02, Frahuil SA v Assitalia and C-420/07, Apostolides v Orams.

In essence, the CJEU has ruled that it is the cause of action – the obligation which the defendant has allegedly failed to fulfil – and the parties and the nature of the legal relationship that determines whether a claim falls within the scope of civil and commercial matters or not.

Moreover, the concept of civil and commercial matters is an autonomous of EU law which is to be given the same interpretation in all Member States. In order to achieve a harmonious interpretation of the two EU instruments, the CJEU's interpretation of the concept should be determinative for the very same concept in the ESCP Regulation. This conclusion can of course be discussed, as the CJEU does not always give concepts in different EU acts or treaties the same interpretation.

As to the material scope of the ESCP Regulation, it applies to the case at hand. In this case the underlying cause of action is not of a public law character or an excluded matter as determined in Art. 2.2, but the rather an alleged defect in sold goods, which falls under the concept of civil and commercial matters.

Furthermore, Mrs. Vänster's claim does not exceed EUR 5 000, excluding interest, expenses and disbursements, at the time when the claim form is received by the court or tribunal with jurisdiction.

An application under the ESCP Regulation is commenced by Mrs. Vänster filling in standard claim Form A, set out in Annex I, see Art. 4.1. Information about the means of transmission should be available on the e-Justice Portal and may also be available on local websites.

Art. 4.1 of the ESCP Regulation

The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents.

With reference to the formal requirements of the ESCP Regulation this is regulated in Art. 29.

Art. 29 of the ESCP Regulation

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2009, with the exception of Article 25, which shall apply from 1 January 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Art. 3 of Regulation No 2015/2421, states that the changes following the Regulation of 2015 apply as of 14 July 2017, with the exception of the new Art. 25, that applies from 14 January 2017.

Question 1c: Would the solution be different if the claimant was a State authority? Why?

Answer: In that case, the solution would not change by the fact that the buyer/claimant is a State authority. Regardless of the fact that according to Art. 2.1 of the ESCP Regulation, the Regulation does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*). On the contrary, the current situation is covered by the scope of civil and commercial matters as it is an

act *acta jure gestionis*, an act taken by an official authority that could be taken by anyone (as opposed to *acta jure imperii*: acts that can only be taken by State authorities).

See for example the following preliminary rules from the Court of Justice of the European Union (CJEU) that mainly concern the division between civil and commercial matters and public law matters: C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, EU:C:2002:555; C-266/01, Préservatrice foncière TIARD SA v Staat der Nederlanden, EU:C:2003:282; C-645/11, Land Berlin mot Ellen Mirjam Sapir m.fl., EU:C:2013:228; C-579/17, BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o., EU:C:2019:162; C 73/19, Belgische Staat, Directur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie, Algemene Directie Economische Inspectie v. Movic BV, Events Belgium BV, Leisure Tickets & Activities International BV, EU:C:2020:568; 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, EU:C:1976:137; C-814/79, Netherlands State v Reinhold Rüffer, EU:C:1980:291.

Scenario II: Mrs. Vänster has difficulties in understanding how to calculate the value of the claim under the ESCP Regulation, considering how costly it will be to send back the etching, including interest, court fees and lawyers' fees.

Question 2: How is the value of Mrs. Vänster's claim calculated under the ESCP Regulation?

Answer: Claims over the threshold of EUR 5 000 fall outside the scope of the ESCP Regulation. Hence, the value of the claim is an important aspect in determining whether the ESCP Regulation is applicable.

The threshold of EUR 5 000 is determined in Art. 2.1. And as the claim is that of a monetary sum, the value will be that sum.

Art. 2.1 of the ESCP Regulation

This Regulation shall apply, in cross-border cases as defined in Article 3, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 5 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements.

First, it is the value of a claim at the time when the claim form is received by the court or tribunal which has jurisdiction. Second, the value excludes all interest, expenses and disbursements from the main claim. However, a main claim that only relates to interest on a debt, already paid, is included.

The financial value of the claim must be stated in the currency of the forum state. If the currency of the court is not the currency in which the claimant has formulated the claim the value of the claim will have to be stated in the appropriate currency. For example, if Mrs. Vänster has formulated the claim in euros, but the currency of the Swedish court is SEK, it would be necessary to convert the amount claimed in EUR into SEK. See part 7 of the claim form.

Member States may have specific procedures for currency conversion. If a conversion is necessary, Mrs. Vänster should contact the court for further information on the arrangements that apply.

The ESCP Regulation is not only applicable to monetary claims, but also to other claims, if such a claim can be quantified in money and information about this is provided in the plaintiff's application. If we alter the scenario and Mrs. Vänster's claim would not be for the payment of a monetary sum, it is necessary to determine a value for such a non-monetary claim.

In box 6 of claim Form A, the arrangements for payment of court fees need to be set out by the claimant. If a lawyer is instructed, Mrs. Vänster must bear in mind the possibility that even if the claim is successful, she may not be awarded the costs of legal advice. Moreover, Mrs. Vänster should be aware that there are expense implications if the defendant requests a hearing, and the court agrees to this. In such a case, the parties can expect to pay the costs of any expert or witness, the costs of

translation of documents and of any special procedure used for the hearing, for example video-conferencing.[13]

If there are several elements in the principal claim these should be stated separately (SEK 9 000x18 months)

RELEVANT ARTICLES: Arts. 1–4 and 29 of the ESCP Regulation.

RELEVANT RECITALS: (5), (7), (8), (10), (25) and (26).

READINGS: European Commission, A Guide for Users to the European Small Claims Procedure: A short introduction to the main practical aspects of the use of the procedure based on the Regulation, Publications Office of European Union.

OTHERS: European e-Justice Portal,
http://ec.europa.eu/civiljustice/index_eng.htm.

European Civil Judicial Network, Citizen's Guide to Cross-border Civil Litigation in the European Union, available at:
https://e-justice.europa.eu/287/EN/ejn_s_publications.

[13] European Commission, A Guide for Users to the European Small Claims Procedure: A short introduction to the main practical aspects of the use of the procedure based on the Regulation, Publications Office of European Union, p. 13.

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Case Study 17

Cancelled Flight (ESCP)

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Facts: Loreto and Jorge are a married couple and have their permanent residence in Lleida. They purchase Ryanair flights online from Girona to Palma de Mallorca with the intention of spending the weekend away. When they arrive at the airport, they discover that their flight has been cancelled owing to a flight scheduling change. The company offers them an alternative flight two days later, which they reject. They make a claim for the cost of the flights (€124) and for the expenses of the trip: €84 for two return train tickets, Lleida-Girona; €230 for the prepaid nights in the hotel that they were unable to use; and €68 for living expenses.

Question 1: Claim and support documentation.

Answer: As in other European procedures, the European small claims procedure uses a system of forms. In this instance, the claimants should commence their claim using Form A.

In addition to the form, the claimants should also provide documentary evidence of all expenses incurred: tickets, proof of payment for living expenses, etc. All proof of expenses will be relayed to the defendant. For claims of this type, the claimants' statement and proof of expenses are usually sufficient for the court to make its decision.

As legal representation is not mandatory in this process, applicants may present the claim themselves, rather than through a lawyer or procurator.

Art. 7 Regulation (EC) No 861/2007: Conclusion of the procedure

1. Within 30 days of receipt of the response from the defendant or the claimant within the time limits laid down in Article 5(3) or (6), the court or tribunal shall give a judgement, or:

(a) demand further details concerning the claim from the parties within a specified period of time, not exceeding 30 days;
(b) take evidence in accordance with Article 9; or
(c) summon the parties to an oral hearing to be held within 30 days of the summons.

Art. 10 Regulation (EC) No 861/2007: Representation of parties

Representation by a lawyer or another legal professional shall not be mandatory.

Question 2: Claim options in European and national law.

Answer: In the case in question, involving a consumer claim for €506, the claimants have a number of legal options available to them, at both a European and a national level. Art. 3 of Regulation No 861/2007 states that jurisdiction will be determined in accordance with Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. In accordance with Art. 18 of Regulation No 1215/2012, because the claim involves consumers and the claimants are consumers, Loreto and Jorge may choose to bring proceedings against the defendant either in the courts of the Member State in which the latter is domiciled or in the courts for the place where they themselves are domiciled. The

second option is obviously more advantageous to them and is the one we will assume for the analysis of their case.

Art. 3 Regulation (EC) No 861/2007: Cross-border cases

1. For the purposes of this Regulation, 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 seised.
2. Domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Art 18(1) and (2) Regulation (EU) 1215/2012

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled. (…)

In view of the different options available, the claimant should assess the pros and cons of each one in terms of complexity, expense (representation, proof, etc.), the likelihood of an appeal, etc.

The options available to claimants under Spanish law are as follows:

a) Ordinary oral proceedings

The parties may request an oral hearing. Since the case in question relates to matters of transport, jurisdiction would lie with the Commercial Court (Art. 86 ter Judicial Power Act). One disadvantage of this process is that there is no right of appeal in oral hearings for claims of less than €3000 (Art. 455(1) Civil Procedure Act).

AAP Valencia, 27 November 2019:

Ms A.'s procedural representative files an appeal against the ruling of Commercial Court No 4 of Valencia (14 June 2019) to dismiss the ordinary proceedings taken by her against RYANAIR DAC on the grounds of lack of objective jurisdiction, against the report of the Attorney General's Office.

Based on the terms of the claim, the judge determines that transport law does not apply and, therefore, that the case does not fall within the scope of the jurisdiction of the Commercial Court provided in Art. 86 ter 2(b) of the Judicial Power Act ('Claims presented under the law in relation to matters of national or international transport').

The claimant appeals to a higher court for the ruling to be revoked on the grounds that her claim refers to injuries acquired on the runway during boarding of a flight managed by the defendant.

The appeal should be accepted, as the claimant's action is based on the carrier's responsibility under the Aerial Navigation Act 48/1960 and the Montreal Convention and its regulation in EU law.

Art. 86 ter 2(b) Judicial Power Act

2. The Commercial Court will have jurisdiction in all matters of civil law related to:

b) Claims presented under the law in relation to matters of national or international transport. (…)

Art. 455(1) Civil Procedure Act: Right of appeal. Jurisdiction and preferential proceedings.

1. Judgements in proceedings of all kinds, definitive court orders and other types of judicial decisions provided in law will be subject to appeal, with the exception of judgements related to oral hearings for claims of less than EUR 3 000.

b) Payment order procedure

As creditors (Art. 812 Civil Procedure Act), Loreto and Jorge may also initiate a payment order procedure before a Court of First Instance (Art. 813 Civil Procedure Act). While theoretically the quickest option, the debtor may choose to oppose the claim, in which event the case would be transferred to ordinary civil proceedings, as outlined in the previous point (Art. 818(3) Civil Procedure Act).

Art. 812 Civil Procedure Act: Cases in which a small claims procedure is appropriate

1. A small claims procedure may be used by a party seeking payment from another party of any specific, liquid, overdue and payable monetary debt when evidence of the debt is provided in any of the following forms:

(a) By documents of all types, formats and media, containing the debtor's signature, seal, stamp or mark, or any other physical or electronic means of identification.
(b) By invoices, delivery notes, certifications, telegrams, faxes or any other documents commonly used as a record of loans and debts between creditors and debtors, including those created unilaterally by the creditor. (…)

Art. 813 Civil Procedure Act: Competence

The Court of First Instance of the place of domicile or residence of the debtor or, if unknown, of the place where the debtor may be found for the purposes of the court order for payment, will have exclusive jurisdiction in payment order proceedings (…)

Art. 818(3) Civil Procedure Act: Opposition by the defendant

1. If the debtor lodges a statement of opposition within the prescribed time limit, the matter will be transferred to the appropriate civil proceedings, where the judgement will be subject to res judicata.

In European law, the following two types of procedures may be used:

a) European small claims procedure

The European small claims procedure is an alternative to existing national procedures for claims not in excess of €5000, as in the case presented here. Representation by a lawyer or procurator is not required. As in the payment order procedure in Spanish law, in the event of opposition by the defendant, the claim is transferred to ordinary civil proceedings in the corresponding Member State. Measures to facilitate the application of the European small claims procedure in Spain are provided in FP 24 of the Spanish Civil Procedure Act. In the event of opposition by the defendant, Spanish procedural law applies, meaning that the matter is referred to as an oral hearing.

Art. 2 Regulation (EC) No 861/2007: Scope

1. This Regulation shall apply, in 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 2 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. (…)

FP 24 Civil Procedure Act: Measures to facilitate the application in Spain of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

1. Depending on the object of the claim, first instance jurisdiction over the European small claims procedure, regulated by Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, will correspond to the Court of First Instance or the Commercial Court.
Territorial jurisdiction will be determined in accordance with the provisions of Council Regulation EC 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. All jurisdictional issues not covered by these provisions will be subject to Spanish procedural law.

2. European small claims procedures will be initiated and processed in accordance with the provisions of Regulation (EC) No 861/2007 and the forms provided in the annexes thereof.

All procedural issues not covered by Regulation (EC) No 861/2007 will be subject to the provisions of this Act in respect of oral proceedings.

Time frames and deadlines will be calculated in accordance with Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, and will include non-working days.

3. The matters referred to in Art. 4(3) and (4) of Regulation (EC) No 861/2007 will be decided by order of the Court Clerk, except where the decision adopted involves the dismissal of the claim, in which case the matter will be decided by a court order. In both instances, the claimant will be given a period of ten days to rectify his/her application in accordance with the provisions of the aforementioned article.

4. If the defendant opposes the procedure on the grounds that the claim amount exceeds the financial limit established by Art. 2(1) of Regulation (EC) No 861/2007, the judge will issue a ruling, within 30 days of notification to the claimant of the defendant's response, determining whether to continue proceedings or transfer the claim to the appropriate civil proceedings in accordance with Spanish procedural law. The ruling of the court is not subject to appeal, without prejudice to the defendant's right to present the same objections in separate proceedings against the decision.

In the event of a counterclaim by the defendant in excess of the financial limit provided in Art. 2(1) of Regulation (EC) No 861/2007, the judge will issue a court order for the matter to be transferred to the appropriate civil proceedings in accordance with Spanish procedural law.

5. The service of documents related to the European small claims procedure will be carried out in accordance with the provisions of this Act, using the methods of service provided in Regulation (EC) No 861/2007. Documents will be served primarily by electronic means, or any other method of service which may be attested by an acknowledgement of receipt by the defendant.

6. The final judgement in relation to European small claims procedures will be subject to appeal in accordance with this Act.

7. Jurisdiction over the enforcement in Spain of a final judgement in a European small claims procedure passed in a different Member State of the European Union will correspond to the Court of First Instance of the place of domicile of the defendant.

Upon application by the defendant, the court with jurisdiction may also refuse to enforce a judgement, and likewise limit enforcement, provide some form of security as a condition of enforcement or stay enforcement proceedings, as provided in Arts 22 and 23 of Regulation (EC) No 861/2007.

8. Enforcement proceedings in Spain of a final judgement in a European small claims procedure passed in a different Member State of the European Union will be subject to the provisions of this Act.
The refusal to enforce a judgement, limitation of enforcement, stay of enforcement and provision of security as a condition of enforcement will be decided in accordance with the provisions of Arts 556 et seq. of this Act by a ruling not subject to appeal, though under no circumstances may the judgement be reviewed as to its substance.

9. For the enforcement in Spain of a final judgement in a European small claims procedure passed in a different Member State of the European Union, the defendant will provide the court with jurisdiction with an official translation in Spanish or in the official language of the autonomous region in which the proceedings are conducted of the certificate of judgement, certified in accordance with the provisions of Art. 21(2) of Regulation (EC) No 861/2007.

10. The proceedings will include original copies of the forms contained in the annexes of Regulation (EC) No 861/2007, both when Spain is the Member State in which the European small claims procedure is conducted and when it has jurisdiction over its enforcement. Certified copies will be issued as requested or required.

b) European order for payment procedure

Another alternative available to the claimants in this instance is the European order for payment procedure, which applies in civil and commercial claims of a cross-border nature. The special conditions of jurisdiction for consumer contracts provided in Regulation No 1896/2006 do not apply in this case because the

consumer is the claimant, not the defendant. In Spanish law, the measures to facilitate the application of the European order of payment procedure in Spain are provided in FP 23 of the Civil Procedure Act. If the defendant rejects the order for payment, national law will apply and the case will be transferred to the appropriate ordinary civil proceedings, once again in the form of an oral hearing.

Art. 2(1) Regulation (EC) No 1896/2006: Scope

1. This Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ('acta iure imperii'). (…)

Art. 3 Regulation (EC) No 1896/2006: Cross-border cases

1. For the purposes of this Regulation, 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 seised.

2. Domicile shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (…)

FP 23 Civil Procedure Act: Measures to facilitate the application in Spain of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

1. The Court of First Instance will have sole and exclusive jurisdiction over the European order for payment procedure, regulated by Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006.
Territorial jurisdiction will be determined in accordance with the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. All jurisdictional issues not covered by these provisions will be subject to Spanish procedural law.

2. Applications for a European order for payment procedure will be made using Form A in Annex I of Regulation (EC) No 1896/2006. Additional documentation is not required and will be disregarded if submitted.

3. After the application has been made, the Court Clerk may issue an order using Form B in Annex II of Regulation (EC) No 1896/2006 requesting the claimant to complete or rectify the original application, unless the claim is clearly unfounded or the application is inadmissible, in accordance with Art. 9 of the aforementioned Regulation, in which event the claim will be dismissed by a court order.

4. If the requirements provided in Arts 2, 3, 4, 6 and 7 of Regulation (EC) No 1896/2006 are met for only part of the claim, the Court Clerk will refer the matter to the judge, who will issue an order using Form C in Annex III inviting the claimant to accept or refuse a proposal for a European order for payment for an amount specified by the court, in accordance with Art. 10 of the Regulation.
The proposal issued by the court should advise claimants that rejection of or failure to reply to the proposal will result in the dismissal of their application for a European order for payment in its entirety, without prejudice to their right to pursue the claim through the appropriate civil proceedings provided in Spanish and European procedural law.

The claimant will reply by returning Form C sent by the court within the prescribed time limit. If he/she accepts the proposal for a European order for payment for part of the claim, the remainder of the original claim amount may be sought through the appropriate civil proceedings provided in Spanish and European procedural law.

5. The decision to reject an application for a European order for payment will be recorded in a court order, in accordance with Art. 11. The claimant will also be informed of the grounds for the rejection by means of Form D in Annex IV of Regulation (EC) No 1896/2006. The court's decision to reject the application will not be subject to appeal.

6. The decision to issue a European order for payment will be adopted by decree within 30 days of the lodging of the application using Form E in Annex V of Regulation (EC) No 1896/2006, in accordance with Art. 12 of the Regulation.

The 30-day period will not include the time taken by the claimant to complete, rectify or modify the application.

7. The defendant will be given 30 days as from service of the order to lodge a statement of opposition by means of Form F in Annex VI of Regulation (EC) No 1896/2006 and in accordance with the conditions provided in Art. 16 thereof.
The order of payment served on the defendant should state that time frames and deadlines will be calculated in accordance with Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, and will include non-working days.

8. If a statement of opposition is lodged within the prescribed time limit, the Court Clerk will inform the claimant that the proceedings will be transferred to the corresponding Court of First Instance, Commercial Court or Labour Court in accordance with the rules of Spanish procedural law, unless the claimant has explicitly requested that the proceedings be terminated in that event.
If within the prescribed time limit no statement of opposition is lodged and the debt is not paid, the Court Clerk will issue a decree declaring the European order for payment enforceable using Form G in Annex VII of Regulation (EC) No 1896/2006, in accordance with Art. 18 thereof.
The claimant will receive the European order for payment (original or copy), certified by the Court Clerk as declared enforceable.

9. Jurisdiction over the process of review of the European order for payment will lie with the court that issued the order. Review of a European order for payment on the grounds provided in Art. 20(1) of Regulation (EC) No 1896/2006 will be conducted and determined in accordance with the conditions provided in Art. 501 and related provisions of this Act for the setting aside of judgements at the request of the litigant in default.
The process of review provided in Art. 20(2) of Regulation (EC) No 1896/2006 will be conducted in accordance with the appeal for annulment of judicial decisions provided in Art. 241 of the Judicial Power Act 6/1985 (1 July).

10. The service of documents related to the processing and issue of a European order for payment will be carried out in accordance with the provisions of this Act, using the methods of service provided in Regulation (EC) No 1896/2006. Documents will

be served primarily by electronic means, or any other method of service which may be attested by an acknowledgement of receipt by the defendant.

11. All procedural issues concerning the issue of a European order for payment not covered by Regulation (EC) No 1896/2006 will be subject to the provisions of this Act in respect of payment order proceedings.

12. The proceedings will include original copies of the forms contained in the annexes of Regulation (EC) No 1896/2006, both when Spain is the Member State in which the European order for payment is issued and when it has jurisdiction over its enforcement. Certified copies will be issued as requested or required.

13. Jurisdiction over the enforcement in Spain of an enforceable European order for payment will correspond to the Court of First Instance of the place of domicile of the defendant.
Upon application by the defendant, the court with jurisdiction may also refuse to enforce a European order for payment, and likewise limit enforcement, provide some form of security as a condition of enforcement or stay enforcement proceedings, as provided in Arts 22 and 23 of Regulation (EC) No 1896/2006.

14. Without prejudice to the enforcement rules provided in Regulation (EC) No 1896/2006, the process of enforcement in Spain of European orders for payment issued in other Member States will be subject to the provisions of this Act.
The refusal to enforce a European order for payment, limitation of enforcement, stay of enforcement and provision of security as a condition of enforcement will be decided in accordance with the provisions of Arts 556 et seq. of this Act and recorded in a court order not subject to appeal.

15. For the enforcement in Spain of a European order for payment, the defendant will provide the court with jurisdiction with an official translation in Spanish or in the official language of the autonomous region in which the proceedings are conducted of the order, certified in accordance with the provisions of Art. 21 of Regulation (EC) No 1896/2006.

As this survey of the different processes shows, the options available to Loreto and José are more apparent than real, since, in each of the three payment order procedures (Spanish payment order proceedings, European order for payment procedure and European small claims procedure), the case is transferred to oral proceedings in the event of opposition by the defendant. The claimant's decision will therefore be determined less by the complexity of the procedure itself than by how he/she may benefit from aspects such as court jurisdiction, territorial jurisdiction, documentation required, etc.

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Case Study 18

The "Intervener" (ECJ C-627/17) (ESCP)

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Facts: ZSE Energia a.s., established in Bratislava (Slovak Republic), operates an energy supply company and had concluded an energy supply contract with Mr R, an Italian citizen domiciled in Graz, Austria. ZSE Energia a.s. is of the opinion that R has not fulfilled his contractual obligations and intends to bring in an action concerning a claim amounting to EUR 423.74, plus late-payment interest, pursuant to the European Small Claims Procedure Regulation No 861/2007 (hereinafter: ESCP-Regulation).

Question 1: Which court has international jurisdiction?

Answer: In the absence of special provisions in the ESCP-Regulation, international jurisdiction is governed by Regulation No 1215/2012 (hereinafter: Brussels Ia-Regulation). In the decision *Group Josi Reinsurance Company SA vs Universal General Insurance Company (UGIC)* (C-412/98) the ECJ stated that the ESCP-Regulation (or the Brussels Ia-Regulation) applies if the defendant is domiciled or has its seat in a Contracting State. According to Art 4 (1) Brussels Ia Regulation the general

jurisdiction of the defendant is applicable. Since R is domiciled in Graz, Austrian courts have international jurisdiction.

Question 2: Does this case fall within the scope of the ESCP-Regulation?

Answer: The case is a civil and commercial matter within the meaning of Art 2 (1) ESCP-Regulation; the scope of the ESCP-Regulation coincides with the one of the Brussels Ia-Regulation.

A case is considered a cross-border case according to Art 3 (1) ESCP-Regulation if 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. In the present case, the claimant has its seat in the Slovak Republic, the court seized has its seat in Austria, therefore the case can be considered a cross-border case.

Since the amount in dispute of EUR 423.74 does not exceed the limit of EUR 5,000.00, the case falls within the scope of the ESCP-Regulation (Art 2 (1) ESCP-Regulation).

Question 3: Which formal requirements does the claimant have to take into account when filing its lawsuit?

Answer: The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents. Electronic transmission is also possible, whereby the claimant must meet the requirements of Art 2 of Signature Directive (1999/93/EC).

According to Art 4 (5) ESCP-Regulation, the Member States shall ensure that the standard claim Form A is available at all courts and tribunals before which the ESCP can be commenced, and that it is accessible through relevant national websites.

Scenario I: Mr R, the defendant, is not domiciled in Austria, but in the Slovak Republic; ZSE Energia a.s. and the court seized are also domiciled in the Slovak Republic. ZSE Energia a.s. filed its application to the court using Form A in Annex I indicating itself as "claimant 1". On that form, furthermore, ZSE Energia CZ, s.r.o., established in the Czech Republic, was indicated as "claimant 2". ZSE Energia CZ, s.r.o. affirmed to the court, in a separate document appended to the claim form, that it is taking part in the pending proceedings as an "intervener" since it has a legal interest in the outcome of the proceedings.

Note: In Slowak law, an "intervener" is defined in Paragraph 81 of the Code of Contentious Civil Procedure as a person who participates in the proceedings together with the applicant or the defendant and has a legal interest in the outcome of the proceedings.

Question 4: How should the court proceed if, according to the information in Form A, the claim is to be settled only against ZSE Energia a.s. as "claimant 1", but the present application contains information about two claimants?

Answer: Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies. The court or tribunal shall use standard Form B, as set out in Annex II, for this purpose.

Accordingly, the claimant would have to

- either list only ZSE Energia a.s. as "claimant 1"
- or specify in the Form which claims the respondent was required to pay to "claimant 2".

Scenario II: In response to that request, ZSE Energia a.s. submitted a duly corrected Form A to the court that mentioned ZSE Energia a.s. alone as "claimant" while ZSE Energia CZ, s.r.o. was listed only as an "intervener".

Question 5: Does a procedure commenced using Form A between a claimant (applicant) and a respondent (defendant) come within the scope of ESCP-Regulation under Art 2 (1) of that regulation (in conjunction with Art 3 (1) ESCP-Regulation), if the parties are domiciled in the same Member State as the Member State in which the court or tribunal seized is located, and only the "intervener" is domiciled in a different Member State?

Answer: In that regard, it must be noted, first, that Art 3 (1) ESCP-Regulation does not define the concept of "parties", nor does it refer to the law of the Member States on that issue. In order to fulfil the need for uniform application of EU law and the principle of equality, the meaning and scope of this term have to be autonomously interpreted.

The ESCP-Regulation provides solely for the rights and obligations of the applicant and defendant in the main proceedings. It follows that Forms A and C in Annexes I and III to that regulation must be filled in respectively by the applicant, that is, the "claimant", as regards Form A, and by the defendant, that is, the "respondent", as regards Form C.

The ECJ stated in *ZSE Energia a.s. vs RG* (C-627/17) that the term "parties" only includes the claimant and the defendant in the main proceedings; in this case, therefore, ZSE Energia a.s. as claimant and Mr R as the defendant, but not ZSE Energia CZ, s.r.o. as "intervener".

Art 2 (1) ESCP-Regulation explicitly limits the scope to cross-border cases. According to Art 3 (1) ESCP-Regulation 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 explained, an "intervener" does not qualify as a party in the sense of Art 3 (1) ESCP-Regulation. Both the claimant and the defendant are domiciled in the same Member State as the court seized, which is why the case does not fall within the scope of the ESCP-Regulation. The fact that only the "intervener" has its seat in another Member State than the court seized is not sufficient to affirm the scope of the Small Claims Regulation.

It can be deduced from the general scheme of ESCP-Regulation that the **participation of parties intervening** in the disputes covered by that regulation **was not envisaged.** This assessment is confirmed by the very objective of ESCP. Recitals 7 and 8 and Article 1 of that regulation underline the fact that the purpose of the European procedure, which is optional, is three-fold. Its aim is to allow for the resolution of small claims in cross-border cases in a simpler and faster manner whilst reducing costs. Such an objective could not, however, be achieved if the procedure established were to allow for the participation of a third person, such as an "intervener" (ECJ, *ZSE Energia a.s. vs RG* [C-627/17] p. 26-27).

Question 6: How should the court proceed if the action does not fall within the scope of the ESCP-Regulation?

Answer: According to Art 4 (3) ESCP-Regulation, where a claim is outside the scope of this Regulation, the court or tribunal shall inform the claimant to that effect. Unless the claimant withdraws the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted. If the claimant does not withdraw his claim, it has to be dealt with according to the applicable national procedural law.

In Austria, the claim – after the claimant has been informed accordingly – would be reinterpreted as a claim under national law and, if necessary, an order for correction would be issued. If the order for correction remains unanswered, the claim would have to be rejected.

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Case Study 19

Scope of Application of the European Small Claims Procedure (ESCP)

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Facts: Mr Martič is a Slovenian national, domiciled and habitually resident in Maribor, Slovenia. In August 2017, he came across the webpage of a company Homeostasis d.o.o. with its registered seat in Rijeka, Croatia, offering various wellness-at home products. He ordered a portable oxygen device for home use manufactured by the acclaimed manufacturer Life balance d.o.o. with its registered seat in Pula, Croatia. He paid the price of 2.340 EUR via internet banking and after 2 weeks, he received the device. However, the device did not function properly. In October 2017, Mr Martič decides to sue before the Slovenian court.

Question 1: Considering the type of the claim, can Mr Martič seek a replacement of the device from Homeostasis d.o.o. relying procedurally on the provisions of the Regulation on European Small Claim Procedure (ESCP)?

Answer: Yes, Mr Martič could seek replacement of the device from Homeostasis d.o.o. relying on the provisions on European Small Claims Procedure (ESCP). The material scope of application of the ESCP rules is determined by Art. 2(1) of the Regulation 2015/2421 of the European Parliament and of the Council of 16 December 2015 (hereinafter: Regulation 2015/2421) amending Regulation No 861/2007 (hereinafter: ESCP Regulation) and Regulation No 1896/2006 (hereinafter: EOPP Regulation).

Regulation 2015/2421, Art. 2(1)

This Regulation shall apply, in cross-border cases as defined in Article 3, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 5 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*).

Unlike the EOPP Regulation which is limited solely to uncontested monetary claims, the ESCP may be used both for monetary and non-monetary claims. Therefore, apart from the replacement, provided applicable national law allows for it, Mr Martič may seek repair of the device, reduction of the price, rescission of the contract and/or damages from Homeostasis d.o.o. relying procedurally on the ESCP Regulation.

Question 2: Would the ESCP Regulation still be applicable if the factual circumstances took place a year earlier and Mr Martič decided to sue in October 2016?

Answer: Under the ESCP, when the claim is a non-monetary one, the claimant must determine the value of the claim. According to Regulation 861/2007, the value of the claim could not exceed 2.000 EUR (Art. 2(1) of the Regulation 861/2007). However, after the amendments of the ESCP which entered into force with Regulation 2015/2421 on 14 July 2017 (Art. 3 of the Regulation 2015/2421), the threshold was raised to 5.000 EUR. It follows that in October 2016, Mr Martič cannot rely on the provisions of ESCP for his claim of replacement against

Homeostasis d.o.o., provided that the value of the claim was determined in line with the value of the product, i.e. exceeding 2.000 EUR.

Question 3: Imagine that Mr Martič ordered the product from Homeostasis Slovenia d.o.o. with its central seat in Ljubljana, a subsidiary of the Croatian company Homeostasis d.o.o. In the proceedings instituted by Mr Martič against Homeostasis Slovenia d.o.o., Homeostasis d.o.o. appears as an intervener. Would Mr Martič be able to seek replacement of the device from Homeostasis d.o.o. Slovenia relying procedurally on the provisions of the ESCP Regulation?

Answer: In order for a particular case to fall into the ambit of application of the ESCP Regulation, there has to be a cross-border element to the case. Unlike the majority of other instruments of European private international law, Regulation 861/2007 contains a definition of a cross-element, which is the equivalent of the one contained in Regulation 1896/2006 (Art. 3(1)).

Regulation 861/2007, Art. 3(1)

For the purposes of this Regulation, 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 seised.

For the rules of the ESCP Regulation to be applicable, a cross-border element has to appear on the side of one of the parties who has to have a domicile or habitual residence in a Member State other than the one in which the proceedings are instituted.[14] For the purposes of determining the domicile, the ESCP Regulation 861/2007 refers to the Brussels I Regulation or Brussels I bis Regulation, as the case may be.

Regulation 861/2007, Art. 3(2)

Domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

[14] See X. Kramer, European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects, 2014, available at SSRN: https://ssrn.com/abstract=2507006.

Since the Regulation No 44/2001 (hereinafter: the Brussels I Regulation) was replaced by the Regulation No 1215/2012 (hereinafter: the Brussels I bis Regulation), the reference from Art. 3(2) of Regulation 861/2007 should be understood as the reference to Arts. 62 and 63 of the Brussels I bis Regulation. Under Art. 63 of the Brussels I bis Regulation, a legal person has its domicile in the Member State in which its statutory seat, central administration or principal place of business is located. In this particular case, Homeostasis Slovenia d.o.o. would therefore be domiciled in Ljubljana. Under these circumstances, both parties would be domiciled in the same Member State before whose courts the proceedings were instituted. Therefore, the ESCP Regulation would not be applicable.

The fact that the Homeostasis d.o.o. (parent company of Homeostasis Slovenia d.o.o.), the intervener in the proceedings, is domiciled in Croatia, would not suffice for the presence of the cross-border element.

CJEU, judgment of 22 November 2018, ZSE Energia, a.s., C-627/17, EU:C:2018:941

In ZSE Energia, a.s., the CJEU explained that a dispute, in which the applicant and the defendant have their domicile or their habitual residence in the same Member State as the court or tribunal seised, does not come within the scope of the ESCP Regulation, even if the intervener has its domicile or habitual residence in a different Member State. The CJEU recalled that under recital 8 of the ESCP Regulation, ESCP is an optional tool in addition to the possibilities existing under the laws of the Member States, which may be used by the parties..

Question 4: If Mr Martič decided to sue the manufacturer of the device, the company Life Balance d.o.o. for damages, could he do so relying on the provisions of the ESCP Regulation?

Answer: Whereas the relationship between Mr Martič and Homeostasis d.o.o. is a contractual one, the relationship between Mr Martič and Life Balance d.o.o. should be characterised as a non-contractual one. The CJEU provided for the autonomous interpretation of the notions of "matters relating to contracts" and "matter relating to torts, delict and quasi-delict" for the purposes of the Brussels I bis Regulation. Given that both the ESCP Regulation and EOPP Regulation complement the

Brussels I bis regime, the definitions of the respective terms may be borrowed therefrom. These notions are autonomously defined in the Brussels I bis Regulation thus they are independent of any definition in a particular national law. In addition, they have "inter-European definitions" entailing consistency among different legal instruments, such as the Brussels I bis Regulation, the Rome I Regulation, the Rome II Regulation[15] and other regulations mentioned in this case study. The matter related to contracts should be understood as "an obligation freely assumed by one party towards another".[16] Matters related to tort, delict and quasi-delict should be understood to cover "all actions which seek to establish the liability of a defendant and which are not related to a contract". These two notions are said to complement each other to create a system in which an obligation in "civil and commercial matters" under the Brussels I bis Regulation must fall under one or the other. Since there is no freely assumed obligation of one party towards the other in the relationship between Mr Martič and Homeostasis d.o.o., and the claim seeks to establish liability of the defendant, the relationship should be qualified as a matter related to tort, delict and quasi-delict.

While the EOPP Regulation excludes non-contractual liability from its scope of application, with a few exceptions (Art. 2 of the EOPP Regulation), this is not the case with the ESCP Regulation. The only category of non-contractual disputes which remain outside of the ESCP Regulation's scope is violations of personality and privacy (Art. 2 of the Regulation 2015/2421). Therefore, Mr Martič may rely on the rules of the ESCP Regulation when suing for damages the manufacturer of the device, the company Life Balance d.o.o.

[15] A.-L. Calvo Caravaca & J. Carrascosa Gonzalez, in: U. Magnus & p. Mankowski, Rome I Regulation, 2017, Sellier, p. 62.
[16] CJEU, judgment of 17 June 1992, *Handte*, C-26/91, EU:C:1992:268, para. 15; CJEU, judgment of 20 January 2005, *Engler*, C-27/02, EU:C:2005:33, para. 50.

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Case Study 20

Online Retail (ESCP)

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Facts: Amazonia.de is an online retail company. Its registered address is in Berlin (Germany), but it provides goods and services to customers in all of the member states of the European Monetary Union through its website, which is available in several different EU languages. Andrés, a Spanish national resident in A Coruña, uses the website to buy a personal computer, a printer and a high-resolution screen costing €2499, €899 and €995, respectively.

Scenario I: Following the delivery of the three items, Andrés tests them out for 15 days and confirms that they do not meet his expectations. He, therefore, decides to return the items, cancel the agreed payment and request that the cost of return be borne by the seller. The company considers that the reason for the return stated by the customer is not covered by the terms of sale accepted by Andrés when he bought the items and intends to sue him for the agreed sale price or, alternatively, for return of the products and compensation in the amount of 30% of the total retail price, in accordance with the contractual terms accepted by Andrés, which included this penalty for unjustified refusal of goods delivered.

Question 1: Can Amazonia.de use the European Small Claims Procedure to make a claim against Andrés?

Answer: Only in part. There are a number of different issues to be considered. The first relates to the alternative form of compensation referred to in the claim. Regulation No 861/2007 (hereinafter ESCP) in its current wording does not include the possibility of establishing alternative forms of compensation and the form provided in Annex I makes no mention of any such alternative; neither, however, does it preclude the possibility explicitly. In view of the subsidiary nature of national procedural law in such cases, if an alternative form of compensation is allowed by the procedural legislation of the Member State of enforcement, it should also be allowed by the ESCP, provided it meets the requirements of an ESCP.

In the case of the claim in question, only one of the proposed forms of compensation may be claimed through an ESCP owing to the quantities involved. The primary claim is perfectly admissible under the existing regulation, since the amount sued for is less than €5000, not counting possible interests and costs. However, in the case of the alternative form of compensation proposed, the value of the returned items plus the value of the penalty for the refusal of goods delivered for reasons other than those stated in the contract is in excess of €5000.

This conclusion is not affected by the fact that the claim is non-monetary. Unlike the European Order for Payment Procedure, the ESCP is not limited to monetary claims but may also refer to goods or even services, as reflected in Annex I.

The court of origin should therefore reject the claim, pending its modification by the claimant to meet the financial limit established by the ESCP.

Question 2: In which Member State should Amazonia.de present its claim?

Answer: Jurisdiction over the ESCP is determined according to the rules provided in Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter Brussels I bis). In the case of the claim in question, the special terms of jurisdiction over consumer contracts provided in Brussels I bis apply since, in accordance with Art. 17(1)(c), claims involving consumers are subject to special jurisdictional rules 'when the contract has

been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State and the contract falls within the scope of such activities. This condition is met in this instance because the trader company website is designed to promote and offer sales throughout the European Monetary Union.

Art. 18(2) Brussels I bis states that 'proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled. For this reason, the initial request for an ESCP must be made before the Spanish courts. If presented before the courts of any other Member State, the claim will be rejected by the court *ex officio* in accordance with the powers of control provided in Art. 4(4) ESCP: 'Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed.'

See also Judgements of the European Court of Justice: 7 December 2010, C-585/08 and C-144/09 (Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG; Hotel Alpenhof GesmbH v Oliver Heller); 6 September 2012, C-190/11 (Daniela Mühlleitnerv v Ahmad Yusufi and Wadat Yusufi).

Question 3: Does the court have the power to examine *ex officio* the possible unfairness of the terms of the contract at issue, specifically in relation to the refusal of return or refund and the penalty clause against the consumer for unjustified refusal of goods delivered?

Answer: There is no explicit legal answer or case law on this question with respect to the ESCP. Nevertheless, by analogy with the judgement of the European Court of Justice in relation to civil proceedings in general and to the European Order for Payment Procedure in particular, the court may indicate the unfairness of contract terms to the detriment of the consumer in its assessment of the claim as part of its power to inform the claimant of any possible errors or omissions in the claim commencement form (Art. 4(4) ESCP). Should the claimant fail to rectify the point, the presence of unfair contractual terms may be used as grounds for the rejection (or 'dismissal', as it is termed in ESCP) of the claim.

In the case of the claim in question, the claimant's application for the alternative form of compensation would be rejected on the grounds that it exceeds the financial limit established by the ESCP. The second part of the compensation terms would not be subjected to examination by the court, therefore, but the refusal of return of the items purchased would be.

See also Judgements of the European Court of Justice: 4 June 2009, C-243/08 (Pannon); 19 December 2019, Joined Cases C-453/18 and C-494/18 (Bondora)

Scenario II: Given the circumstances and the problem of recovering the trade price of the items from Andrés, Amazonia.de decides to adopt the usual course of action at the company of assigning the credit claim to the debt collection management company, WeRecover Inc., headquartered in Spain.

Question 4: Can the debt collection management company apply for an ESCP to enforce the debt?

Answer: This issue has been settled by the judgement pronounced by the European Court of Justice (22 November 2018, C-627/17) in the matter of ZSE Energia, a.s., in which it ruled that Art. 3(1) ESCP should be interpreted as meaning that the concept of 'parties' refers only to the claimant and the defendant in the main proceedings, and therefore excludes other persons who may be involved in the dispute, including individuals intervening in the proceedings in support of the main claimant. According to Arts 2(1) and 3(1) ESCP, disputes in which both the claimant and the defendant have their domicile or habitual residence in the same Member State as the court seised of the proceedings do not come within the scope of the regulation. In the scenario in question, the main claimant, WeRecover Inc., the defendant, Andrés, and the seised court are all domiciled in Spain, so ESCP does not apply and the claim should be dealt with in accordance with national law.

See also Judgement of the European Court of Justice: 22 November 2018, C-627/17 (ZSE Energia, a.s.)

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Case Study 21

The Wine Tasting (ESCP)

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Facts: Ms A (domiciled in Vienna) spends her summer vacation in Torbole (Italy) and books an exquisite wine tasting with the company Vino-S.r.l. (established in Torbole, Italy). Because Ms A comes to the conclusion at the end of the tasting that hardly any of the wines were enjoyable, she leaves the wine cellar without paying. Vino-S.r.l. now demands payment of EUR 330 plus late-payment interest from Ms A and initiates the European Small Claims Procedure on 14.10.2020 by means of Form A, which is duly sent to the competent court in Vienna.

Question 1: What formal requirements does the court have to take into account after receiving the claim form?

Answer: After receiving the properly filled in claim form, the court or tribunal shall fill in Part I of the standard answer Form C, as set out in Annex III. A copy of the claim form, and, where applicable, of the supporting documents, together with the answer form thus filled in, shall be served on the defendant in accordance with Art 13 of Regulation No 861/2007 (hereinafter ESCP-Regulation). These documents shall be dispatched within 14 days of receiving the properly filled in claim form (Art 5 (2) ESCP-Regulation).

Scenario I: Ms A requests that an oral hearing be held.

Question 2: Is the court obliged to schedule an oral hearing?

Answer: In principle, according to Art 5 (1) ESCP-Regulation, the ESCP shall be a written procedure.

The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests. The court or tribunal may refuse such a request if it considers that, with regard to the circumstances of the case, an oral hearing is not necessary for the fair conduct of the proceedings. The reasons for the refusal shall be given in writing. The refusal may not be contested separately from a challenge to the judgment itself (Art 5 (1a) ESCP-Regulation).

However, the provisions of Art 6 ECHR and Art 47 of the Charter of Fundamental Rights have to be taken into consideration here: According to the case-law of the European Court of Human Rights, an oral hearing can only be dispensed with in certain constellations; this has been affirmed, for example, if the parties have waived an oral hearing (ECHR 21.9.1993, Zumtobel v. Austria, No. 12235/86) or if only such questions of fact and law are raised which can also be adequately answered in a merely written procedure (ECHR 12.11.2002, *Döry v. Sweden*, No. 28394/95).

It is rather doubtful whether a written procedure is sufficient to adequately answer the factual and legal questions in the case at hand; since the omission of requested oral hearings can and should only have an absolute exceptional character, an oral hearing must therefore be scheduled.

Scenario II: Ms A is served with the court's standard answer Form C on 27.10.2020. Because she has a lot on her plate at the moment at work, she puts off answering the Answer Form C for the time being. Only on 7.12.2020 does she fill it out and returns it to the competent court.

Question 3: How will the court proceed after the 30 days has expired?

Answer: Pursuant to Art 7 (3) ESCP-Regulation, the court shall give a judgment, if no response is received from the defendant within the time limit for responding to the claim (30 days from the date of service). The date of posting is sufficient to comply with the time limit for responding to the claim; the date of receipt by the court is not relevant.

The details of the form in which a judgment is to be rendered due to the default of the defendant shall be governed by the national law of the respective procedural state pursuant to Art 19 ESCP-Regulation.

In Austria, according to § 548 (4) ZPO, the court has to issue a default judgment ex officio according to § 396 ZPO, if the requirements of Art 7 (3) ESCP-Regulation are met.

Question 4: Does the defendant have the possibility to appeal against the default judgment?

Answer: The question of the extent to which legal action is to be taken against legal acts that have been taken on the basis of procedural acts that have been omitted is also governed by the national law of the respective procedural state pursuant to Art 19 ESCP-Regulation.

In Austria, pursuant to §§ 548 (4), 397a ZPO, an objection against the default judgment is admissible (14 days from service of the default judgment); also the defendant can file an appeal within 4 weeks of service.

A review of the judgment in exceptional cases pursuant to Art 18 ESCP-Regulation is not possible due to Ms A's negligent behaviour.

Scenario III: Ms A is served with the court's standard answer Form C on 27.10.2020. Because she is hospitalized for two months due to an accident, she does not learn of the default judgment issued on 24.11.2021 until the day of her discharge, 3.1.2021.

Question 5: Does the defendant have an opportunity to appeal the default judgment?

Answer: In this case, a review of the judgment in exceptional cases is possible pursuant to Art 18 ESCP-Regulation, because the defendant was prevented from contesting the claim due to extraordinary circumstances without any fault on its part.

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Case Study 22

The Online Shopper (Art 6 ESCP; ECJ C-14/07) (ESCP)

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Facts: Mateja (M) lives in Bleiburg (Austria) and made numerous purchases over the Internet during the Corona crisis lockdown in March 2020. Among other things, she purchased a mountain bike for 1,400 EUR from the Slovenian company Dravabike d.o.o. (D) and diving equipment for 800 EUR from the Croatian Splitdive d.d. (S). Both companies delivered on time, but M does not pay because she believes that she has received inferior products. Both D and S, therefore, initiate a European Small Claims Proceeding via standard claim Form A; D submits the claim form in Slovenian language, S in Croatian language. As a Carinthian-Slovenian, M speaks both German and Slovenian, whereby her Slovenian language skills are to be placed at approximately B2 level; M understands Croatian (BCS) at A2 level. At the Bleiburg District Court, proceedings can be conducted in the German language as well as in the Slovenian language.

Question 1: Which court has jurisdiction for these two small claims proceedings?

Answer: Since the Regulation No 861/2007 (hereinafter ESCP-Regulation) does not contain its own provisions on the jurisdiction, jurisdiction is basically based on the Regulation No 1215/2012 (hereinafter Brussels Ia Regulation); the substantive jurisdiction is based on national law. Since this is a claim arising from a contract, the court of the place of performance is to be seized pursuant to Art 7 (1) (a) Brussels Ia Regulation. In the case of the sale of goods, this is the place of delivery; therefore, the District Court Bleiburg has jurisdiction.

Question 2: How does the District Court Bleiburg have to deal with the claim forms?

Answer: Slovenian language is one of the two official languages at the District Court of Bleiburg, therefore the claim form can be submitted in Slovenian language pursuant to Art 6 (1) ESCP-Regulation. Pursuant to Art 5 (2) ESCP-Regulation the court shall fill in Part I of the standard answer Form C, as set out in Annex III. A copy of the claim form, and, where applicable, of the supporting documents, together with the answer form thus filled in, shall be served on the defendant in accordance with Article 13 ESCP-Regulation.

Croatian language, however, is not an official language at the District Court of Bleiburg. Therefore, the court has to initiate an improvement procedure according to Art 4 (4) ESCP-Regulation by using standard Form B.

Scenario I: The contract between M and S was concluded in Croatian language, also the GTC (general terms and conditions) of S are only accessible in the Croatian language on the Internet. S attached both the purchase agreement and the GTC to the claim in Croatian only. The competent judge of the District Court of Bleiburg speaks the Croatian language fluently. S has improved the claim form in accordance with the court's instructions (submission in Slovenian).

Question 3: How should the court deal with the means of taking evidence in the Croatian language?

Answer: According to Art 6 (2) ESCP-Regulation, the court may require a translation of documents other than those mentioned in Art 6 (1) only if the translation appears to be necessary for giving the judgment. Since the competent judge is fluent in Croatian (BCS), he may not request a translation of the documents.

Question 4: Can M refuse to accept the documents jointly served on her (claim Form A in Slovenian as well as contract and GTC in Croatian) in the procedure against S?

Answer: According to Art 6 (3) ESCP-Regulation, a party may refuse to accept a document because it is not in the official language of the Member State addressed, or in a language which the addressee understands. According to the prevailing opinion (at least in Austrian and German literature), the interpretation of this provision is based on Art 8 of the Regulation on the Service of Documents (No 1348/2000).

However, according to the prevailing opinion, the word "document" in Art 6 (3) ESCP-Regulation refers only to documents within the meaning of Art 6 (1) ESCP-Regulation (e.g. the claim form), not to other documents within the meaning of Art 6 (2) ESCP-Regulation (e.g. evidence). Following this doctrine, since the claim form was delivered in one of the official languages in Bleiburg (the improvement order was complied with), M cannot refuse to accept it.

Scenario II: M herself does not live in Bleiburg but in Vienna. She bought the mountain bike and the diving equipment for her sister Ana (A) who lives in Bleiburg and has also had it delivered there. Neither Slovenian nor Croatian is an official language in Vienna. The contract between M and D was concluded in Slovenian language, also the GTC of S are only accessible in Slovenian on the Internet.

Question 5: Can M refuse to accept the claim form served on her – now in Vienna – in the proceedings against D?

Answer: Since Slovenian is not an official language of the place of service (Vienna), it is necessary to clarify how good M's knowledge of Slovenian must be in order to exclude a refusal of acceptance (Art 6 (3) ESCP-Regulation). Now, M has concluded the contract with D in Slovenian language, of which M has a B2-level command.

However, in the case *Ingenieurbüro Michael Weiss und Partner GbR v. Berlin Chamber of Industry and Commerce* (C-14/07), the ECJ stated that the level of language proficiency required for private correspondence does not necessarily correspond to the level that is indispensable for a defence in court. Rather, what is relevant is whether the recipient of a served document is able to understand the document in such a way that he or she can assert his or her rights (p. 87). Therefore, it is to be assumed in the case at hand that M can refuse acceptance. M has to be informed about the abstract possibility to refuse acceptance (Art 8 (1) of the Regulation on the Service of Documents).

Question 6: How should the court in Bleiburg proceed if D refuses to accept the documents?

Answer: If M exercises her right to refuse to accept a document, then the court has to assess whether the conditions for the refusal of acceptance by the addressee actually existed (ECJ C-14/07); if the refusal of acceptance was lawful, the service is deemed not to have been effective. According to Art 6 (3) ESCP-Regulation, the court has to inform the other party with a view to that party providing a translation of the document. According to the decision of the ECJ *Götz Leffler/Berlin Chemie AG* (C-443/03), such a translation must be provided as soon as possible, whereby the setting of a deadline is at the discretion of the trial court. As a rule, a period of one month is reasonable, although in individual cases (e.g. unusually long texts, unusual language combination for the translation, etc.) a longer period may be set.

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Case Study 23

European Small Claims Procedure and International Jurisdiction (ESCP)

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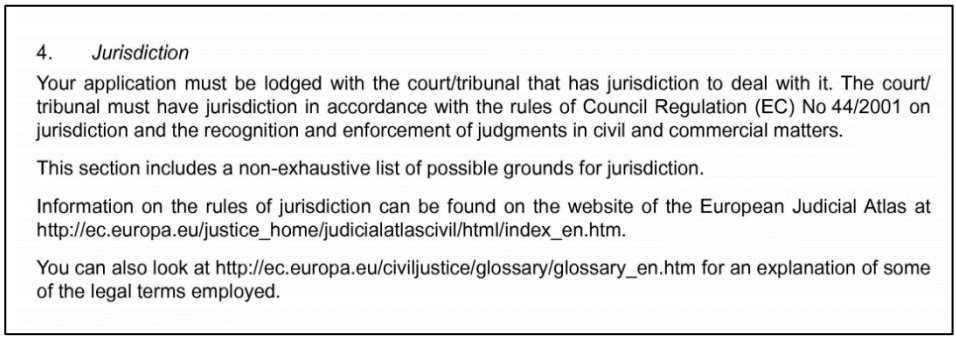
Facts: Sala de Arte S.L. is a Spanish company, located in Valencia, Spain, selling art pieces such as paintings and vases. The company's buyers are located all around Europe. Mrs Novak, a Croatian businesswoman came across the ad of Sala de Artes S.L. in one of the Croatian magazines on interior design. In May 2020, after Mrs Novak contacted it, the company entered into a contract with Mrs Novak and provided her with seven art pieces. The art pieces were delivered in Rijeka and their total price amounted to 1,200 euros. The contract stated that the deadline for the payment is 25 June 2020. As Mrs Novak did not pay the price even after additional pleas and warnings, the company decided to institute the European Small Claims Procedure (ESCP) in Spain.

Scenario I: Art pieces were intended for Mrs Novak's coffee shop located in Rijeka, where she resides.

Question 1: Do the Spanish courts have jurisdiction to decide the case?

Answer: The Regulation No 861/2007 of The European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure does not contain any international jurisdiction rules. Point 4 of the claim form specifies that the court/tribunal must have jurisdiction in accordance with the rules of the Regulation No 44/2001 of (hereinafter: the Brussels I Regulation). As the Brussels I Regulation was replaced by the Regulation No 1215/2012 (hereinafter: the Brussels I bis Regulation), the issue of jurisdiction will be governed by the most recent Brussels I bis Regulation, provided that the case falls into its ambit of application.

FORM A – CLAIM FORM:



4. *Jurisdiction*

Your application must be lodged with the court/tribunal that has jurisdiction to deal with it. The court/ tribunal must have jurisdiction in accordance with the rules of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

This section includes a non-exhaustive list of possible grounds for jurisdiction.

Information on the rules of jurisdiction can be found on the website of the European Judicial Atlas at http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm.

You can also look at http://ec.europa.eu/civiljustice/glossary/glossary_en.htm for an explanation of some of the legal terms employed.

Figure 2: European small claims procedure, form A, paragraph 4.
Source: Annex I, Regulation No 861/2007

In order to determine whether the Spanish courts have jurisdiction, the applicable jurisdictional criterion should be identified. For the purposes of the Brussels I bis Regulation, a dispute should be characterised as a contractual one whenever there is a freely assumed obligation of one party towards the other (Judgment of 20 January 2005, *Engler*, C-27/02, EU:C:2005:33, para. 50). Since the relationship between Sala de Arte S.L. and Mrs Novak falls into the respective definition, it should be characterised as a matter related to the contract. The special jurisdiction rule in Art. 7(1) of the Brussels I bis Regulation is applicable.

The Brussels I bis Regulation, Art. 7(1)

A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
— in the case of the sale of goods, the place in a Member State where, under the contract, the
goods were delivered or should have been delivered,
— in the case of the provision of services, the place in a Member State where, under the contract, the
services were provided or should have been provided;
(c) if point (b) does not apply then point (a) applies.

As the type of contract between Mrs Novak and Sala de Arte S.L. falls under the category of the sale of goods pursuant to Article 7(1) of the Brussels I Regulation the competent courts are Croatian courts, as the art pieces were delivered in Rijeka, Croatia.

Rule on general jurisdiction prescribed by Art. 4(1) of the Brussels I bis Regulation is complementary to the special jurisdiction rule.

The Brussels I bis Regulation, Art. 4(1)

Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

According to the general jurisdiction rule in Art. 4. of the Brussels I bis Regulation, persons domiciled in a Member State shall be sued in the courts of that Member State. As Mrs Novak is domiciled in Croatia, Croatian courts also have general jurisdiction under the Regulation.

Scenario IIA: Mrs Novak ordered the art pieces for her family home in Rijeka.

Question 2: Do the Spanish courts have jurisdiction to decide the case?

Answer: The fact that Mrs Novak ordered art pieces for her family home, would affect the characterisation of the dispute. Under these circumstances Section 4 of the Brussels I bis Regulation becomes applicable.[17] In order for the Section 4 to be applicable, conditions are provided in Art. 17(1) have to be fulfilled.

The Brussels I bis Regulation, Art. 17(1)

In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;
(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

Mrs Novak, as a natural person, enters into the contract for her private purposes with Sala de Arte S.L., as the trader. Apart from that, additional condition from either point (a), (b) or (c) has to be fulfilled. In a view of the fact that Mrs Novak became aware of the trader through the ad published in a Croatian magazine, the condition of trader directing its activity to the Member State of the consumer's domicile from point (c) is fulfilled. It is also evident from the facts of the case that the sales contract Mrs Novak concluded with Sala de Arte S.L. falls within the scope of such activities.

The applicable jurisdictional rule in consumer disputes depends on whether the consumer is the plaintiff or the defendant. Since in the case at hand Mrs Novak is the defendant, Art. 18(2) of the Brussels I bis Regulation is applicable.

[17] see more e.g. V. Lazić, Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis, in: V. Lazić, S. Stuij (eds.), Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme, 2017, Springer, pp. 51-70.

The Regulation Brussels I bis, Art. 18(2)

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled

As stated in Art. 18 (2), proceedings against the consumer, Mrs Novak, can be brought only in the courts of the Member State in which she is domiciled. Her domicile is in Rijeka, Croatia. Therefore, Croatian courts have jurisdiction in this case.

Scenario IIB: Mrs Novak ordered the art pieces for her family home in Rijeka. When the Spanish court delivered her the copy of the claim form, the supporting documents and the answer form, she submitted her response stating that she was not satisfied with the art pieces she was given as they were different from the ones she saw on the company's web page. However, she did not contest the jurisdiction of the Spanish court.

Question 3: Do the Spanish courts have jurisdiction to decide the case?

Answer: Mrs Novak did not object to the jurisdiction of the Spanish court; she only submitted the claim on the substance of the matter. Under these circumstances, the Spanish court may become competent according to Art. 26 of the Brussels I bis Regulation.

The Brussels I bis Regulation, Art. 26

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.
2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

Art. 26(2) of the Brussels I bis Regulation, imposes an obligation upon the court to inform the weaker party of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance. This obligation was introduced after the CJEU ruled in *Bilas* that the absence of this provision in Brussels I Regulation goes to the detriment of the weaker parties who do not have proper access to legal advice (CJEU, judgment of 20 May 2010, *Bilas*, C-111/09, EU:C:210:290). In order to remedy such situations and provide adequate protection to the weaker parties, the European legislator inserted the rule in Article 26(2) of the Brussels I bis Regulation.[18]

If the Spanish court provided information in accordance with Art. 26(2) and Mrs Novak still would not object to its jurisdiction, *prorogatio tacita* would provide a basis for the Spanish court to establish jurisdiction to hear the case. However, if following the information provided to Mrs Novak by the Spanish court as required under the cited provision, Mrs Novak would object to the jurisdiction of the Spanish courts, the court seised would have no other option but to decline its jurisdiction pursuant to Art. 26(2) of the Brussels I bis Regulation, regardless of the fact that previously Mrs Novak entered an appearance by making statements on the merits.

[18] A. Galič, Jurisdiction over Consumer, Employment, and Insurance Contracts under the Brussels I Regulation Recast Enhancing the Protection of the Weaker Party, Austrian Law Journal, No. 2, 2016, available at: https://alj.uni-graz.at/index.php/alj/article/view/67, p. 131.

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Case Study 24

Assistance for the Parties (ESCP)

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Facts: X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees.

X seeks assistance with the filing of Form A ESCP.

Question 1: Can X file form A via the recording of Form A ESCP at the registry of the competent authority?

Answer: No. Although §§ 129, 129a ZPO generally enable a filing via a recording at the registry of the competent authority, the German legislator made it clear in BT-Drs. 16/8839 p. 26, that these provisions do not apply for compulsory legal forms.

Question 2: Does X gets assistance filling out Form A ESCP from German institutions?

Answer: No. Although Art. 11 ESCP states:

Article 11 ESCP - Assistance for the parties

The Member States shall ensure that the parties can receive practical assistance in filling in the forms.

the German legislator has not taken any steps to implement the requirements of Art. 11 ESCP in §§ 1097 ff. ZPO.

Question 3: What assistance will Y get with filing Form A from German institutions?

Answer: All competent courts are obliged to provide ESCP forms and in line with

Preamble No. 21 ESCP

The practical assistance to be made available to the parties should include technical information concerning the availability and the filling in of the forms.

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Case Study 25

Remit of the Court or Tribunal (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees.

X is not represented by a lawyer, whereas Y is.

Scenario I: In front of the court, X is asked by the judge to present their understanding of the legal grounds of his claim to the court.

Question 1: Is the question of the court in accordance with the ESCP?

Answer: No. According to Art. 12(1) ESCP, the parties are not obliged to contribute statements of law, only statements of fact (iuria novit curia). This paragraph is therefore in line with the substance theory (Substantiierungstheorie) applicable in Germany.

Article 12 ESCP - Remit of the court or tribunal

(1) The court or tribunal shall not require the parties to make any legal assessment of the claim.
(2) – (3) […]

Even though the wording is less specific in the German translation (referring to the procedural action and not the claim itself), not only the grounds of the claim are included in this paragraph, but also the legal appreciation.

Scenario II: X wants to state the legal grounds for the claims but the court dismisses his argumentation with reference to Art. 12(1) ESCP.

Question 2: Is the action of the court in accordance with the ESCP?

Answer: No. Art. 12(1) ESCP has no (negative) influence on the right to be heard.[19]

Scenario III: The court wants X to explain the content of Swedish legal norms that it sees relevant to the case.

Question 3: Is the question of the court in accordance with the ESCP?

Answer: No, at least not in German law, even if those norms would be relevant to the decision. The explanation and recitation of foreign legal norms is not evaluated as a recitation of facts but as a recitation of law.[20] There might be room for discussion within other legal systems, such as the Anglo-Saxon, because of Art. 12(2) ESCP would have a much bigger impact on those national procedural laws.[21]

[19] W. Hau, in: T. Rauscher, W. Krüger, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, 5. ed., 2017, C.H. Beck München, Art. 12 ESCP Para. 1.
[20] Ibidem, Art. 12 ESCP Para. 2.
[21] J. Wolber, in: V. Vorwerk, C. Wolf, BeckOK ZPO, 39. ed. (1. 12. 2020), C.H. Beck München, Art. 12 ESCP Para. 3.

Nevertheless, the purpose of Art. 12(2) ESCP, especially in regards to Art. 11 ESCP is the protection of unrepresented persons in front of the court to enforce a cross-border claim.

Article 12 ESCP - Remit of the court or tribunal

(1) […]
(2) If necessary, the court or tribunal shall inform the parties about procedural questions.
(3) […]

Scenario IV: The judge feels a power imbalance because the lawyer of Y indicates a procedural ground of refusal from which he offers a way out with a more favourable solution for his client.

Question 4: May the judge step in?

Answer: Yes, according to Art. 12(2) ESCP "the court or tribunal shall inform the parties about procedural questions." Additionally, preamble no. 22 ESCP allows the judge to give procedural information according to lex fori. In Germany, Art. 19 ESCP in conjunction with § 139 ZPO are applicable.

Preamble No. 22 ESCP

The information about procedural questions can also be given by the court or tribunal staff in accordance with national law.

Scenario V: The court tries to persuade the parties to agree to a settlement and implies negative consequences in the judgment if one party is not willing to accept its proposal.

Question 5: Is the action of the court in accordance with the ESCP?

Answer: No, Art. 12(3) ESCP encourages the court to seek to reach a settlement, but at no means at all costs.

Article 12 ESCP - Remit of the court or tribunal

(1) – (2) […]
(3) Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

This paragraph is therefore in line with § 278(1) ZPO applicable in Germany.
If the parties mutually agree to a settlement, Art. 23(a) ESCP is applicable for the recognition and enforcement in another member state.

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Case Study 26

Time Limits (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates.

Scenario I: X already filed a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees. X did forget to fill in the form properly, which is why, using Form B, the court requests X to complete Form A, giving X 14 days to do so.

However, X remains in the hospital during 12 of those 14 days and thus cannot complete Form A within the set time limit.

Question 1: Does X need to apply for an extension of the deadline?

Answer: Yes, the court may extend the time limits given due to Art. 4(4) ESCP, according to Art. 14(2) ESCP.

Article 14 ESCP - Time Limits

(1) […]
(2) The court or tribunal may extend the time limits provided for in Article 4(4), Article 5(3) and (6) and Article 7(1), in exceptional circumstances, if necessary in order to safeguard the rights of the parties.
(3) […]

However, because even a conscientious party may be prevented from complying with the time limit in individual cases and because of the general intention of the ESCP to accelerate proceedings, a request for an extension of the time limit is necessary.[22]

Scenario II: X already filed a claim, using Form A ESCP, for payment of the outstanding 1.000€ plus interests and court fees.

Y only responded to the claim, filling in Part II of standard answer Form C. Y sent the form via a post on the 30th day of the time limit.

Question 2: Does the court need to inform Y about the consequences of not complying with the 30-day response time limit?

Answer: No, according to Art. 14(1) ESCP, the court does only need to inform the party about time limits the court sets itself.

Article 14 ESCP - Time Limits

(1) Where the court or tribunal sets a time limit, the party concerned shall be informed of the consequences of not complying with it.
(2) – (3) […]

Question 3: Does the response of Y comply with the time limit of Art. 5(3) ESCP, when sent on the 30th day of the time limit?

[22] W. Hau, in: T. Rauscher, W. Krüger, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, 5. ed., 2017, C.H. Beck München, Art. 14 ESCP Para. 3.

Answer: Yes, generally the different and irregular postal delivery times within the EU, as well as the partly short time limits (§ 1098 ZPO), speak in favour of keeping the time limit by sending the procedural statement within the set period. Otherwise, the time limits granted to the parties would sometimes be very different. Moreover, the instructions contained in the forms are not worded so clearly that a consumer can undoubtedly assume that the document must be received by the court within the respective time limit (e.g. Form C: "returning it […] within 30 days").

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Case Study 27

Enforceability of the Judgment (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees.

X is not represented by a lawyer, whereas Y is.

Scenario I: The court decides in the favour of Y. Y wishes to enforce the judgment.

Question 1: Does Y need an order of provisional enforceability ("Anordnung der vorläufigen Vollstreckbarkeit") under § 708 ZPO?

Answer: No, in accordance with Art. 15(1) ESCP, the judgment is enforceable:

Article 15 ESCP - Enforceability of the judgment

(1) The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall not be required.
(2) […]

Therefore, national German law (§ 708 ZPO) is not applicable to judgments in ESCP. Additionally, §§ 709 s. 1, 710-714 ZPO are not applicable due to the regulation in Art. 15(1) s. 2 ESCP where it is stated that the provision of a security shall not be required.

Scenario II: The court decides in the favour of Y. Y wishes to enforce the judgment in Germany, where X now resides.

Question 2: Are national enforcement regulations, such as protective measures, applicable to the enforcement within Germany?

Answer: No, according to Art. 15(2) ESCP, Art. 23 ESCP applies if the judgment is to be enforced in the same member state where the judgment was given (here: Germany):

Article 15 ESCP - Enforceability of the judgment

(1) […]
(2) Article 23 shall also apply in the event that the judgment is to be enforced in the

Member State where the judgment was given.

Article 23 - Stay or limitation of enforcement

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;
(b) make enforcement conditional on the provision of such security as it shall determine; or
(c) under exceptional circumstances, stay the enforcement proceedings.

Therefore, national provisions, such as §§ 712, 719(1), 707 ZPO, are superseded by the ESCP.

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Case Study 28

Costs (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees.

Because X was unsure if the claim was adequately substantiated, X paid 200€ for a notarially certified account statement and 800€ for an investigator that could prove that Y was not in Sweden when it was obliged to pay the outstanding sum.

Question: Does Y have to bear the cost of the proceedings, including the 1.000€ for the account statement and investigator?

Answer: No, according to Art. 16 ESCP, the unsuccessful party does not need to bear expenses that are disproportionate to the claim:

Article 16 ESCP

Costs

The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

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Case Study 29

Appeal (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A of Regulation No 861/2007 (hereinafter ESCP), for payment of the outstanding 1.000€ plus interests and court fees.

Scenario I: The court decides in the favour of Y. X wishes to overturn the decision.

Question 1: What remedies are open for X to challenge the judgment?

Answer: As stated in Art. 17(1) ESCP, the Member States are free to install an appeal within the Small Claims Procedure:

Article 17 ESCP – Appeal

(1) Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged. The Commission shall make that information publicly available.
(2) […]

Germany however has not used its right to do so. Therefore, national law is applicable with the effect that national remedies of the civil procedural law are open for X. An appeal against a judgment of the first instance is admissible pursuant to § 511 ff. ZPO (German Civil Procedural Code). The **appeal** must exceed the amount of 600€ according to § 511(2) No. 1 ZPO, which would pose no problem for X as it amounts to more than 1.000€. The Regional Court (Landgericht) is generally responsible for the appeal, whereas the Local Court (Amtsgericht) is responsible in the first instance due to the amount in dispute. [23] According to § 543(1) No. 1 ZPO, a **revision** against a judgment is only admissible if the court of appeal has allowed it.[24] The **appeal against non-admission** pursuant to section § 544 ZPO is not admissible because of the required amount of appeal of 20.000€ cannot be reached in view of the scope of the ESCP, which is limited to an amount in dispute of 5.000€.[25]

Question 2: What provisions are applicable to the remedies against the judgment of the ESCP?

Answer: As Art. 17(2) ESCP states, only Art. 15a and 16 ESCP apply to appeals and therefore solely the costs and court fees and methods of payment are governed by the ESCP. Conversely, none of the other provisions apply to appeal proceedings and national law fills this gap.[26]

[23] J. Wolber, in: V. Vorwerk, C. Wolf, BeckOK ZPO, 39. ed. (1. 12. 2020), C.H. Beck München, Art. 17 ESCP Para. 5.
[24] Iidem, Art. 17 ESCP Para. 5.
[25] J. Wolber, in: V. Vorwerk, C. Wolf, BeckOK ZPO, 39. ed. (1. 12. 2020), C.H. Beck München, Art. 17 ESCP Para. 2.
[26] J. Wolber, in: V. Vorwerk, C. Wolf, BeckOK ZPO, 39. ed. (1. 12. 2020), C.H. Beck München, Art. 17 ESCP Para. 3.

Article 17 ESCP – Appeal

(1) […]
(2) Articles 15a and 16 shall apply to any appeal.

Scenario II: The court decides in the favour of X. Y appeals against this decision but the court dismisses the appeal.

Question 3: How is the judgment to be enforced?

Answer: As the appeal is dismissed, the first judgment shall have legal effect. As this judgment was pronounced as a part of the ESCP, the enforcement provisions shall apply.

Scenario III: The court decides in the favour of Y. X appeals against this decision and the court allows the appeal and awards a new judgment in favour of X.

Question 4: How is the judgment to be enforced?

Answer: There is no certain answer to the enforcement of an appealed judgment in the ESCP. One could argue that due to the fact that it is issued within national remedy proceedings, regular (international) enforcement measures are to apply. Following this, the Regulation No 1215/2012 (Brussels Ia Regulation) would apply.

On the other hand, even the appeal is issued based on the ESCP and its own regulations and provisions. Additionally, it would be left to chance according to which rules a judgment initiated on the ESCP would be enforced. As this would not be in line with the sole purpose of the ESCP, to simplify and unify proceedings, one has to assume that even though national procedural rules have had been adhered to, the judgment itself shall be governed unitedly by the ESCP enforcement regulations.

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Case Study 30

Minimum Standards for Review of the Judgment (ESCP)

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Facts (same as in Case Study 24: Assistance for the Parties): X is a Swedish national and wants to sell his car. German tourist Y agrees to buy the car for the price of 1.500€. Because Y does not have as much money on them, they agree that Y pays in instalments. Y pays the first rate of 500€ but forgot to pay the second and third rates. X wishes to file a claim, using Form A ESCP, for payment of the outstanding 1.000€ plus interests and court fees.

Scenario I: Y did not receive the claim form in time to respond to it. Thus, the court rewarded X with a judgment in its favour.

Question 1: What are the possibilities of Y regarding the issued judgment?

Answer: According to Art. 18(1)(a) ESCP, Y can apply for a review of the judgment due to the no-serving of the claim form. To do this, Y has to apply for such review within 30 days after Y received the judgment, Art. 18(2) ESCP. This provision grants the defendant its right to be heard.[27] If the requirements are met, the proceedings shall be restored to the state in which they were before the judgment was reviewed, § 1104(1) ZPO.[28]

Article 18 ESCP - Minimum standards for review of the judgment

(1) A defendant who did not enter an appearance shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the competent court or tribunal of the Member State in which the judgment was given, where:

(a) the defendant was not served with the claim form, or, in the event of an oral hearing, was not summoned to that hearing, in sufficient time and in such a way as to enable him to arrange for his defence; or
(b) the defendant was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,
unless the defendant failed to challenge the judgment when it was possible for him to do so.

(2) The time limit for applying for a review shall be 30 days. It shall run from the day the defendant was effectively acquainted with the contents of the judgment and was able to react, at the latest from the date of the first enforcement measure having the effect of making the property of the defendant non-disposable in whole or in part. No extension of the time limit may be granted.

(3) […]

Question 2: Do Y and X have to be represented by a lawyer within the review proceedings?

[27] F. Netzer, in: J. Kindl, C. Meller-Hannich, Gesamtes Recht der Zwangsvollstreckung, 4. ed., 2021, Nomos, Art. 18 ESCP para. 1.
[28] J. Wolber, in: V. Vorwerk, C. Wolf, BeckOK ZPO, 39. ed. (1. 12. 2020), C.H. Beck München, Art. 18 ESCP para. 27.

Answer: No. The review proceedings belong to the ESCP and therefore there has to be no legal representation, Art. 10 ESCP. Regarding any voluntary legal representation, German law has clarified that the review proceedings belongs to the ESCP in terms of costs, § 19(1) s. 2 No. 5c RVG.

Article 10 ESCP - Representation of parties

Representation by a lawyer or another legal professional shall not be mandatory.

Scenario II: Y applied for a review of the judgment on the grounds of Art. 18(1)(a) ESCP. The review is justified and therefore the court decides the first judgment is null and void.

Question 3: Assuming, the regular prescription period to claim for the outstanding amount of payment has ended during the review proceedings, does X have a chance to file another claim?

Answer: Yes. According to Art. 18(3) subpara. 2 ESCP, the prescription period would be interrupted in accordance with German national law. Therefore, X could file the claim until the regular prescription period and the time of the review proceedings have passed.

Article 18 ESCP - Minimum standards for review of the judgment

(1) – (2) […]
(3) If the court rejects the application for a review referred to in paragraph 1 on the basis that none of the grounds for a review set out in that paragraph apply, the judgment shall remain in force.

If the court decides that a review is justified on any of the grounds set out in paragraph 1, the judgment given in the European Small Claims Procedure shall be null and void. However, the claimant shall not lose the benefit of any interruption of prescription or limitation periods where such an interruption applies under national law.

Scenario III: Y files a counterclaim and reacts to the claim of X within the procedural order of the ESCP. X was in hospital during the time of the receipt of the counterclaim and during the answer period and therefore could not contest the counterclaim. Hence, the court awards Y with a judgment regarding its counterclaim.

Question 4: Can Y as the main claimant apply for a review of the judgment?

Answer: Yes. As X filed a counterclaim, Y is regarded as the defendant of the said claim. Therefore, Y is protected by the same rights granted in Art. 18(1)(b) ESCP as the main defendant.

Article 18 ESCP - Minimum standards for review of the judgment

(1) A defendant who did not enter an appearance shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the competent court or tribunal of the Member State in which the judgment was given, where:

(a) the defendant was not served with the claim form, or, in the event of an oral hearing, was not summoned to that hearing, insufficient time and in such a way as to enable him to arrange for his defence; or
(b) the defendant was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,
unless the defendant failed to challenge the judgment when it was possible for him to do so.

(2) - (3) […]

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Case Study 31

Costs, Applicable Procedural Law (ESCP)

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Facts: R, a Swedish resident, took photographs of a thunderstorm over the Baltic Sea. The French private newspaper company L printed these photos of R on its website. R files a claim under ESCP for infringement of her exclusive right of disposal in relation to the images and sought an order that the newspaper pays her damages of 1.500€, consisting of compensation for the editorial use of the images (100€), compensation for not mentioning her name as the author of the images (200€), and damages for copyright infringement, editing and manipulation of the images (200€). Additionally, she sought reimbursement of her legal costs totalling 1.000€.

L countered the claim in its entirety and filed a counterclaim for reimbursement of translation fees of 1.100€.

The court issues a judgment awarding R with 500€ for her infringement claims. The court further decided that each party shall bear its own costs.

Question 1: Is Art. 16 of Regulation No 861/2007 (hereinafter ESCP) to be interpreted as precluding national rules under which, where a party only partially prevails, the national court orders each party to bear its own costs or orders the parties to share the costs equally?

Answer: Art. 16 ESCP does refer to the costs of the unsuccessful party. This could preclude any national procedural laws referring to the distribution of costs.

The Court (EU), *Rebecka Jonsson v Société du Journal L'Est Républicain*, 14.02.2019, C-554/17, [ECLI:EU:C:2019:124]

»Article 16 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure must be interpreted as not precluding national legislation under which, where a party succeeds only in part, the national court may order each of the parties to the proceedings to bear its own procedural costs or may apportion those costs between those parties. In such a situation, the national court remains, theoretically, free to apportion the amount of those costs, provided that the national procedural rules on the apportionment of procedural costs in small cross-border claims are not less favourable than the procedural rules governing similar situations subject to domestic law and that the procedural requirements relating to the apportionment of those procedural costs do not result in the persons concerned foregoing the use of that European small claims procedure by requiring an applicant, when he has been largely successful, nonetheless to bear his own procedural costs or a substantial portion of those costs.«

As Art. 16 ESCP does not preclude cost-specific national procedural laws, as long as they do not result in a practical preclusion of ESCP, Art. 19 ESCP is applicable:

Article 19 ESCP - Applicable procedural law

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

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Case Study 32

Articles 10-19 (ESCP)

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Facts: Bea, a German national, books for her and her family, composed of seven people, a flight with Alitalia from Frankfurt to Rome Fiumicino. The flight lands three hours and eleven minutes later than the expected landing time. As a consequence, Bea, on her behalf and on behalf of her relatives, files a claim by using Form A of Regulation No 861/2007 (hereinafter ESCP Regulation) with the Justice of the Peace of Rome, where Alitalia has its seat, for compensation in accordance with Regulation 261/2004[29] for an amount of € 250 each, for a total of € 1.750, plus interests, court fees and other disbursements.

Scenario I: Suppose Bea stands trial personally.

Question 1: Should the Justice of the Peace of Rome reject the request because under Italian law Bea should be represented by a lawyer?

[29] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement (OJ L 46, 17.2.2004, p. 1).

Answer: Under the ESCP Regulation, the representation of a lawyer is not necessary.

Article 10 of the ESCP Regulation
Representation by a lawyer or another legal professional shall not be mandatory.

The above rule however does not correspond to principles of Italian civil procedure. Under Article 82 of the Italian Code of Civil Procedure (CCP), enacted in 1940, representation by a lawyer is always mandatory before Italian courts, except in cases brought before the Justice of the Peace.[30] Before the Justice of the Peace, a party can always stand trial personally in disputes whose economic value does not exceed 1.100 euro. In disputes of higher economic value, a person can stand trial personally only if authorized by the Justice of the Peace.

Article 82 of the Italian CCP

1. Before the Justice of the Peace litigants can stand trial personally if the economic value of the dispute does not exceed 1.100 euro.

2. In all other cases, parties cannot stand trial without the representation or assistance of a lawyer. However, taking into consideration the nature and value of the dispute, the Justice of the Peace, upon request, might authorize a party to stand trial personally.

3. Except in cases provided by law, before the Tribunal and the Court of Appeal parties can stand trial only if represented by a lawyer; before the Court of Cassation, parties can stand trial only if represented by a lawyer admitted before the Court.

Article 82 of the Italian CCP is therefore partially conflicting with Article 10 of the ESCP Regulation. The issue of the relationship between the ESCP Regulation and national civil procedure rules is partially dealt with in Article 19 of the ESCP Regulation.

[30] A further exception is provided by Article 86 of the Italian CCP, according to which a party who is qualified as a lawyer can stand trial personally.

Article 19 of the ESCP Regulation

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

Article 19 of the ESCP Regulation makes it clear that national procedural law applies to all the matters not covered by the Regulation. By contrast, in matters covered by the ESCP, the Regulation prevails. Therefore, Bea can stand trial personally, no matter what the Italian CCP provides.[31]

It should be further noted that, under Article 113(2) of the Italian CCP, Justices of the Peace are obliged to decide cases according to equity (rather than legal norms) in disputes whose economic value does not exceed € 1.100, unless the dispute concerns contractual relationships based on standard form contracts.[32]

Article 113 of the Italian CCP

1. In deciding a case, the court must follow the rules of law, except when the law grants her the power to decide in accordance with equity.

2. The Justice of the Peace decides on an equitable basis claims not exceeding € 1.100, provided that they do not relate to contracts governed by uniform standard terms and conditions.

Even if Article 113 CCP does not apply to the scenario outlined above, it is worth noting that, according to Italian commentators, Article 113 CCP remains applicable in the context of the ESCP Regulation, insofar as the latter does not regulate the issue of the applicable law.[33] This means that, in Italy, claims brought under the

[31] It should be noted that, if the standard form contracts signed by Bea forbid the assignment of claims to a third party, Bea cannot assign her claim to a third party, the clause not being unfair according to Directive 93/13/EEC: see District Court of Eastern Brabant, 28 June 2018, ECLI:NL:RBOBR:2018:3169, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBOBR:2018:3169.

[32] The Legislative Decree 13 July 2017, no 116 modified the threshold of € 1.100 mentioned by Article 113(2); from October 31, 2025 the threshold will be raised to € 2.500.

[33] See P. Chiara Ruggieri, La European Small Claims Procedure (Reg. CE 861/2007) in Italia: un (rimediabile?) insuccesso, in Federalismi.it, 8 luglio 2020, no. 21, 270-289, pp. 283, available at: https://www.sipotra.it/wp-content/uploads/2020/07/La-European-Small-Claims-Procedure-Reg.-CE-8612007-in-Italia-un-rimediabile-insuccesso.pdf; A. Leandro, Il procedimento europeo per le controversie di modesta entità, in Rivista di diritto

ESCP Regulation will be decided by Justices of the Peace on an equitable basis, provided that the claim has an economic value not exceeding € 1.100 and does not stem from relationships based on standard form contracts.

Scenario II: Suppose that Bea does not ask for an oral hearing and Alitalia does not submit its response. The Justice of the Peace delivers a judgment based on the statement of the claim and on the documents attached to the claim. Alitalia then lodges an appeal against the decision, claiming that the Justice of the Peace failed to determine the circumstances relevant to the claim and to correctly evaluate evidence.

Question 2: Is the appeal well-founded, as to both the procedure and the merit?

Answer: The ESCP Regulation does not determine whether a decision adopted under the ESCP Regulation should be open to appeal, leaving the issue to the determination of Member States. In this regard, Article 25 of the ESCP Regulation obliges the Member States to inform the European Commission about the solution applicable in their legal system.

Article 17 of the ESCP Regulation

1. Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged. The Commission shall make that information publicly available.

Article 25 of the ESCP Regulation

1. By 13 January 2017, the Member States shall communicate to the Commission: […]

(g) any appeal available under their procedural law in accordance with Article 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged […].

internazionale, 2009, 65-85, p. 79; Cristina Asprella, Il "procedimento europeo per le controversie di modesta entità", in Giurisprudenza di merito, 2008, 29-42, p. 40.

In its communication concerning Article 25(1), letter (g), Italy stated that "[t]he decisions of the justices of the peace can be challenged before the ordinary courts […] The time-limit for lodging a challenge is 30 days from notification of the judgment (Article 325 of Italy CCP) or six months from its publication in the event of the judgment not being notified (Article 327 CCP)".[34]

The communication makes it clear that parties under Italian law can lodge an appeal against a decision issued under the ESCP Regulation.

This means that Alitalia's appeal if lodged within the prescribed time limit, is admissible.[35]

As to the merit of the appeal, one should consider that, under Articles 5 and 9 of the ESCP Regulation, the decision as to whether an oral hearing should be held (in the absence of parties' requests) and as to how evidence should be evaluated is left to the determination of the judge.

Article 5 of the ESCP Regulation

1. The European Small Claims Procedure shall be a written procedure.

1a. The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests. […]

Article 9 of the ESCP Regulation

1. The court or tribunal shall determine the means of taking evidence, and the extent of the evidence necessary for its judgment, under the rules applicable to the admissibility of evidence. It shall use the simplest and least burdensome method of taking evidence. […].

[34] European e-Justice Portal, Small claims, Italy, available at: https://e-justice.europa.eu/content_small_claims-354-it-en.do?init=true&member=1.
[35] See also Tribunal of Rome, 18 November 2013, no. 23097, available at: https://ic2be.uantwerpen.be (judging on an appeal from a Justice of the Peace's decision on ESCP Regulation).

The fact that the judge issued its decision without holding an oral hearing and only on the basis of the documents presented by the claimant is not, in itself, a ground for appealing the decision under Article 17 of the ESCP Regulation. Alitalia's appeal is therefore unfounded in the merit.[36]
It should be noted that Alitalia is also precluded from applying for the review of the decision by the Justice of the Peace since Article 18 of the ESCP Regulation entitles a defendant who did not submit a response to apply for review only if the defendant can prove that she was not served with the claim or was prevented from contesting the claim by reasons of force majeure not attributable to her.

Scenario III: Suppose that Bea is represented by a lawyer and that her claim is upheld by the Justice of the Peace. In its decision, the Justice of the Peace awards € 75 to the lawyer for her service, notwithstanding the request to award € 500 for the lawyer's service. Bea challenges the decision by lodging an appeal before the Tribunal of Rome.

Question 3: Is the appeal well-founded?

Answer: From a procedural point of view, as said above under question no 2, under Italian law Bea can appeal the decision before the Tribunal of Rome.

As to the merit of the claim, the only relevant provision in the ESCP Regulation concerning legal fees is Article 16, which prohibits awarding fees that are unnecessary and disproportionate.

Article 16 of the ESCP Regulation

The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

[36] See Lodz Regional Court, XIII Ga 728/13, of 5 June 2014, available at: https://ic2be.uantwerpen.be/ (on appeal from a first instance decision); Court of Appeal of Barcelona, SAP B 15507/2012, of 26 September 2012, ECLI: ES:APB:2012:15507, available at: https://ic2be.uantwerpen.be/ (on appeal from a first instance decision).

The ESCP Regulation leaves any other issue concerning the award of the costs of the proceedings to national law.

In Italy, lawyers' fees are determined by the Decree of the Ministry of Justice of 10 March 2014, no 55, according to which remuneration for lawyers' services should be proportionated to the value of the dispute and the amount of work performed. Under the Decree, no 55/2014, the average remuneration for representation in a proceeding before the Justice of the Peace whose economic value is € 1.750 should be comprised between € 600 and € 2.200.

Bea's claim is therefore well-founded because the award by the Justice of the Peace as to the fees of Bea's lawyer is consistently lower than the average value of such fees. In a similar case, the Tribunal of Rome – on appeal from a decision by a Justice of the Peace awarding to a lawyer € 75 as remuneration – held that the sum awarded to the lawyer was trifling and offensive to the professional dignity of the lawyer, and quashed the decision[37].

Scenario IV: Suppose that Bea is represented by a lawyer and that her claim is upheld by the Justice of the Peace. The Justice of the Peace however decides that each party has to bear their own court fees. Bea challenges the decision by lodging an appeal before the Tribunal of Rome.

Question 4: Is the appeal well-founded?

Answer: From a procedural point of view, as said above under question no 2, under Italian law Bea can appeal the decision before the Tribunal of Rome.

As to the merit of the claim, the relevant provision in the ESCP Regulation concerning costs is Article 16, under which "the unsuccessful party shall bear the costs of the proceedings". The Article should be read in light of the interpretive guidelines provided by the Court of Justice of the European Union (CJEU) in the Rebecka Jonsson case.[38]

[37] See also Tribunal of Rome, 18 November 2013, no. 23097, available at https://ic2be.uantwerpen.be/ (judging on an appeal from a Justice of the Peace's decision about legal fees).
[38] Court of Justice of the European Union, 14 February 2019, C 554/17 Rebecka Jonsson.

In the Rebecka Jonsson case, Ms Jonsson, domiciled in Sweden, brought a proceeding against a French-incorporated company for copyright infringement before the Tribunal of First Instance of Attunda in Sweden. This Tribunal made a partial award in favour of Ms Jonsson and determined that each party had to pay their own court fees. Upon Ms Jonsson's appeal of the decision before the Court of Appeals of Stockholm, the Court made a preliminary reference to the Court of Justice of the European Union (CJEU), requesting the CJEU to determine whether Article 16 of the ESCP Regulation allows for national provisions under which the costs of proceedings may be set off or adjusted depending on whether the parties were in part successful and in part unsuccessful. The CJEU answered the question in the affirmative.

Court of Justice of the European Union, 14 February 2019, C 554/17 Rebecka Jonsson, point 30

"Article 16 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure must be interpreted as not precluding national legislation under which, where a party succeeds only in part, the national court may order each of the parties to the proceedings to bear its own procedural costs or may apportion those costs between those parties. In such a situation, the national court remains, theoretically, free to apportion the amount of those costs, provided that the national procedural rules on the apportionment of procedural costs in small cross-border claims are not less favourable than the procedural rules governing similar situations subject to domestic law and that the procedural requirements relating to the apportionment of those procedural costs do not result in the persons concerned foregoing the use of that European small claims procedure by requiring an applicant, when he has been largely successful, nonetheless to bear his own procedural costs or a substantial portion of those costs."

According to the CJEU, Article 16 of the ESCP Regulation should be read as allowing courts to apportion costs between the parties in case of the partial success of the claim if national rules so provide. By contrast, Article 16 cannot be read as allowing the apportionment of legal costs when the claim is fully upheld.

Going back to the scenario outlined above, the Justice of the Peace upheld Bea's claim in its entirety and yet ordered to set off parties' legal costs. The decision, therefore, does not conform to the CJEU's interpretation. Bea's claim is well-founded.

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Case Study 33

Articles 10-19 (ESCP)

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Facts: Paola, an Italian national, purchases online two luxury bags from Rianka, a French national domiciled and residing in Amsterdam. Upon delivery, however, Paola realizes that she received two bags that are different, and substantially of lower value than those she ordered. With the help of an online automatic translator, Paola, therefore, files a claim in Dutch by using Form A of the Regulation No 861/2007 (hereinafter ESCP Regulation) with the Amsterdam District Court, claiming € 2.000 as the difference between the price she paid and the actual value of the bags. The court fills out Part I of Form C, which is then served upon Rianka.

Scenario I: Suppose that, upon being served Form C together with a copy of Form A, Rianka refuses to receive the documents, indicating that both forms are written in Dutch and that she does not understand it, since she only speaks French and English.

Question 1: Is Rianka allowed to do so? In the affirmative, what the Amsterdam District Court and/or Rianka should do?

Answer: Issues of language and of service are covered by Article 6 of the ESCP Regulation.

Article 6 of the ESCP Regulation

1. The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal.

2. If any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment.

3. Where a party has refused to accept a document because it is not in either of the following languages:
(a) the official language of the Member State addressed, or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched; or
(b) a language which the addressee understands,
the court or tribunal shall so inform the other party with a view to that party providing a translation of the document.

The provision is in line with the solution already provided by Regulation No 1393/2007 (the so-called service Regulation). Article 8(1), letter (a), of the Service Regulation, allows the addressee of a document to be served to refuse the service of the document if the latter is not written in, or accompanied by a translation into a language which the addressee understands.

Article 8 of the Regulation No 1393/2007

1. The receiving agency shall inform the addressee, using the standard form set out in Annex II, that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is

not written in, or accompanied by a translation into, either of the following languages:

(a) a language which the addressee understands; or
(b) the official language of the Member State addressed […].

In the present case, therefore, Paola rightfully presented her claim in Dutch, which is the language of the court under Article 6(1) of the ESCP Regulation. However, Rianka's request is legitimate under both Article 6(3) of the ESCP Regulation and Article 8(1) of the Service Regulation.

The Amsterdam District Court will therefore handle Rianka's refusal by requiring Paola to submit a translation of both Forms A and C and then serve them to Rianka again[39].

Scenario II: Suppose that, upon being served Form C together with a copy of Form A, Rianka does not submit a response.

Question 2: What the Amsterdam District Court and/or Rianka should do?

Answer: The defendant is obviously free to decide whether to defend herself or not. If the defendant does not submit her answer to the claim within thirty days from the moment in which Part I of Form C has been served to her, as provided by Article 5(3) of the ESCP Regulation, the court is allowed to proceed with the procedure in the absence of the defendant. As specified by Article 7(3) of the ESCP Regulation, after the expiry of the time-limit of thirty days, the court shall adopt its decision.

[39] For a case in which the Hungarian defendant refused to receive the documents in Dutch which were served to her, since she only understood Hungarian and English, and the court ordered the claimant to provide an English translation of the document and then served them again to the defendant, see District Court of Hertogenbosch, 13 October 2011, ECLI:NL:RBSHE:2012:BY8206, available at: https://ic2be.uantwerpen.be/. On issues relating to language and service requirements, see also X. E. Kramer, The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections, in Nederlands Internationaal Privaatrecht, 2013(3), 319-329, pp. 323-327.

Article 5 of the ESCP Regulation

3. The defendant shall submit his response within 30 days of service of the claim form and answer form, by filling in Part II of standard answer Form C, accompanied, where appropriate, by any relevant supporting documents, and returning it to the court or tribunal, or in any other appropriate way not using the answer form.

Article 7 of the ESCP Regulation

3. If the court or tribunal has not received an answer from the relevant party within the time limits laid down in Article 5(3) or (6), it shall give a judgment on the claim or counterclaim.

If no answer from the defendant reaches the court within the time-limit provided by Article 5(3) of the ESCP Regulation, the court might go further with the procedure[40]. If the court finds for the claimant, the defendant will not be allowed to ask for a review of the decision, unless she proves, as provided by Article 18 of the Regulation, that she did not enter in the proceedings because she was not regularly served with the claim or was prevented from contesting it because of reasons of force majeure not attributable to her.

Article 18 of the ESCP Regulation

1. A defendant who did not enter an appearance shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the competent court or tribunal of the Member State in which the judgment was given, where:

(a) the defendant was not served with the claim form, or, in the event of an oral hearing, was not summoned to that hearing, in sufficient time and in such a way as to enable him to arrange for his defence; or

[40] For a case in which the defendant submitted no defence in time, notwithstanding the fact that the claim was regularly served upon her, and the judge then found for the claimant, see District Court of Eindhoven, 19 February 2015, ECLI:NL:RBOBR:2015:1036, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBOBR:2015:1036.

(b) the defendant was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part, unless the defendant failed to challenge the judgment when it was possible for him to do so.

2. The time limit for applying for a review shall be 30 days. It shall run from the day the defendant was effectively acquainted with the contents of the judgment and was able to react, at the latest from the date of the first enforcement measure having the effect of making the property of the defendant non-disposable in whole or in part. No extension of the time limit may be granted. […]

No review is allowed outside the circumstances mentioned by Article 18 of the ESCP Regulation. Case-law on the ESCP Regulation made it clear, for instance, that a defendant who did not answer to the claim within the time limit set forth by Article 5(3) of the ESCP Regulation cannot, upon service of the judgment, ask for a review of the judgment arguing that she did not know whom to address to present her defences[41] or that the documents were communicated to her in a language she did not understand[42].

In light of the above, if no response from Rianka is received within thirty days from the service of the Forms to her, the Amsterdam District Court should proceed with the evaluation of the claim and with the decision. The latter will not be challengeable by Rianka, unless she can prove the circumstances mentioned by Article 18 of the ESCP Regulation.

Scenario III: Suppose that, upon service of Part I of Form C together with a copy of Form A, Rianka fills out Part II of Form C. Rianka in particular alleges that she already submitted before the Tribunal of Trieste a request for a European order for payment against Paola since the latter did not pay the price of the bags in full.

[41] Justice of the Peace of Luxembourg, 20 December 2016, no 4803, RPL 84/16, available at: https://ic2be.uantwerpen.be/.

[42] Justice of the Peace of Luxembourg, 13 June 2017, no 2296, RPL 231/16, available at: https://ic2be.uantwerpen.be/; Justice of the Peace of Luxembourg, 3 April 2015, no 1553, available at: https://ic2be.uantwerpen.be/. On service requirements under the ESCP Regulation, see X. E. Kramer, The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections, in Nederlands Internationaal Privaatrecht, 2013(3), 319-329, pp. 323-327.

Question 3: What the Amsterdam District Court should do?

Answer: Neither the ESCP Regulation nor the Regulation No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (the so-called EOP Regulation) deal with the issue of lis pendens. The main provision of European civil procedure concerned with lis pendens is Article 29 of the Regulation No 1215/2012 (the so-called Brussels I bis Regulation), according to which the first European court seized on a given matter has jurisdiction, while subsequent courts should stay the proceedings or decline jurisdiction in favor of the first court seized.

Article 29 of the Regulation No 1215/2012

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Under circumstances similar to the ones outlined above, the Court of Appeal of Barcelona held that a claim under the ESCP Regulation should be rejected whenever the judge becomes aware of a concurrent situation of lis pendens with respect to a request between the same parties for a European Order for Payment brought before another court and arising out from the same relationship. The Court of Appeal of Barcelona, therefore, held that the decision by the first instance court to dismiss the action under the ESCP Regulation was correct and rejected the appeal under Article 17 of the ESCP Regulation[43].

[43] Court of Appeal of Barcelona, 21 May 2014, SAP B 5840/2014, ECLI:ES:APB:2014:5840, available at: https://ic2be.uantwerpen.be/.

In the case above, the Amsterdam District Court will therefore legitimately dismiss the action once the existence of an EOP procedure pending before another court is confirmed.

Scenario IV: Suppose that, upon service of Part I of Form C together with a copy of Form A, Rianka does not answer and the Amsterdam District Court issues a judgment in favour of Paola. The judgment is then served to Rianka. Rianka files a request for review of the decision within the time-limit set forth by Article 18(2) of ESCP Regulation arguing that she never received the documents of the proceeding. It comes out that Part I of Form C was served by the court to the wrong address, insofar as the claimant did not fill in the correct address in Form A.

Question 4: Should the review be allowed?

Answer: The grounds for a request of review are set forth by Article 18(1) of the ESCP Regulation, under which a defendant who did not answer to the claim can apply for a review if she can prove that she was not correctly served with the claim.

Under similar circumstances, the District Court of Den Bosch argued that, since the claimant's mistake substantially deprived the defendant of the possibility to respond to the claim, the defendant's request for review was well-founded. Consequently, the Court set aside the challenged decision and fixed an oral hearing.[44]

[44] District Court of Den Bosch, 13 October 2011, ECLI:NL:RBSHE:2011:BY8209, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSHE:2011:BY8209.

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Case Study 34

Recognition and Enforcement of a Judgment Given in the European Small Claims Procedure (ESCP)

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Facts: At the beginning of the 2021 a Slovenian consumer named A bought a television from a German online store for a 4.000 EUR. A paid the whole amount after the delivery. However, the television was not working properly. A contacted the German online store with an attempt to secure a refund but did not get any answer from them. In order to get the refund of the paid amount, A fills out "European small claims procedure, form A, claim form" set out in Annex I of Regulation No 861/2007 and submitted it together with evidence supporting the claim to the court in Slovenia.

Scenario I: The court decides that the German online store must refund Slovenian consumer A.

Question 1: Does the court automatically issue a judgment with the form of the certificate concerning a judgment in the European small claims procedure (form D)?

Answer: According to Article 20 of Regulation No 861/2007 the court or tribunal shall issue a certificate concerning a judgment at the request of one of the parties.

Paragraph 2 of Article 20 of the Regulation No 861/2007 - Recognition and enforcement

2. At the request of one of the parties, the court or tribunal shall issue a certificate concerning a judgment given in the European Small Claims Procedure using the standard Form D, as set out in Annex IV, at no extra cost. Upon request, the court or tribunal shall provide that party with the certificate in any other official language of the institutions of the Union by making use of the multilingual dynamic standard form available on the European e-Justice Portal. Nothing in this Regulation shall oblige the court or tribunal to provide a translation and/or transliteration of the text entered in the free-text fields of that certificate.

Question 2: When can A make a request to issue a certificate concerning a judgment?

Answer: A or in general, one of the parties can made a request to issue a certificate concerning a judgement at the outset of the procedure as there is space for such request provided in form A, paragraph 11.

11. *Certificate*

A judgment given in a Member State in the European Small Claims Procedure can be recognised and enforced in another Member State. If you intend to ask for recognition and enforcement in a Member State other than that of the court/tribunal, you can request in this form that the court/tribunal, after having made a decision in your favour, issue a certificate concerning that judgment.

11.1. *Certificate*

I ask the court/tribunal to issue a certificate concerning the judgment

Yes ☐

No ☐

Figure 3: European small claims procedure, form A, paragraph 11.
Source: Annex I, Regulation No 861/2007

Although Regulation No 861/2007 does not explicitly express, the request to issue a certificate concerning a judgment can be made at any stage after the judgment has been issued. Only the court which gave the judgment under the European small claim procedure can issue the certificate concerning a judgment. It is in A interest to request as early as possible from the court to issue a certificate concerning a judgment.[45]

Question 3: In which language(s) other than the language of the court proceedings should A ask the court to issue a certificate?

Answer:

Upon your request the court may provide you with the certificate in another language, by making use of the dynamic forms available through the European e-Justice Portal. This may be helpful in enforcement of the judgment in another Member State. Please note, that the court is not obliged to provide any translation or transliteration of a text entered in the free-text fields of the certificate.

11.2.

I ask the court/tribunal to issue a certificate in another language than the language of the court proceedings, in particular:

BG ☐	ES ☐	CS ☐	DE ☐	ET ☐	EL ☐	EN ☐	FR ☐	HR ☐	IT ☐
LV ☐	LT ☐	HU ☐	MT ☐	NL ☐	PL ☐	PT ☐	RO ☐	SK ☐	SL ☐
FI ☐	SV ☐								

Figure 4: European small claims procedure, form A, paragraph 11.2.
Source: Annex I, Regulation No 861/2007

Upon request with multilingual dynamic standard, the court shall provide the party with the certificate in any other official language of the EU institutions. The court is not obliged to provide translation or transliteration of text entered in the free-text fields of the certificate; it is a duty of the party to ensure such translation.[46] Translation shall be done by person qualified to carry out translations in one of the Member States (Paragraph 2 of Article 21a of the Regulation No 861/2007).

[45] European Commission, Directorate-General for Justice, Practice guide for the application of the European small claims procedure: under Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 2014, Publications Office, p. 62.
[46] European Commission, A Guide for Users to the European Small Claims Procedure: A short introduction to the main practical aspects of the use of the procedure based on the Regulation, Publications Office of European Union, p. 31.

Article 21a of the Regulation No 861/2007 - Language of the certificate

1. Each Member State may indicate the official language or languages of the institutions of the Union, other than its own, which it can accept for the certificate referred to in Article 20(2).

2. Any translation of the information on the substance of a judgment provided in a certificate as referred to in Article 20(2) shall be done by a person qualified to carry out translations in one of the Member States.

European judicial atlas for civil matters describes accepted languages in Germany (Article 25 1 (i)) states: "Only the German language may be used. In the homeland districts of the Sorbian population, Sorbs have the right to speak Sorbian in court."[47] Therefore, A should ensure that the certificate concerning a judgment is translated in the German language.

Question 4: What should A provide in order to begin the process that could lead to enforcement of the Slovenian judgment given in European small claim procedure in Germany?

Answer: A or in general, the party seeking the enforcement should, according to Paragraph 2 of Article 21 of the Regulation No 861/2007 provide:

1. a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
2. the certificate referred to in Article 20(2) (at the request of one of the parties, the court or tribunal shall issue a certificate concerning a judgment given in the European Small Claims Procedure using the standard Form D, as set out in Annex IV, at no extra cost);
3. where necessary, the translation into the official language of the Member State of enforcement.

[47] European e-Justice Portal, Small claims, Germany, Available at: https://e-justice.europa.eu/content_small_claims-354-de-en.do?member=1#a_111.

According to Article 20 of the Regulation No 861/2007 A does not need to provide a declaration of enforceability for a judgment given in a Member State in the European Small Claims Procedure to be recognized and enforced in another Member State.

Article 20 of the Regulation No 861/2007 - Recognition and enforcement

1. A judgment given in a Member State in the European Small Claims Procedure 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.

A who is seeking the enforcement of a Slovenian judgment given in the European Small Claims Procedure is not required to have (a) an authorized representative; or (b) a postal address in the Member State of enforcement, other than with agents having competence for the enforcement procedure (Paragraph 3 of Article 21 of the Regulation No 861/2007).

Article 21 of the Regulation No 861/2007 - Enforcement procedure

1. Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

Any judgment given in the European Small Claims Procedure shall be enforced under the same conditions as a judgment given in the Member State of enforcement.

2. The party seeking enforcement shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
(b) the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept.

3. The party seeking the enforcement of a judgment given in the European Small Claims Procedure in another Member State shall not be required to have:

(a) an authorised representative; or
(b) a postal address

in the Member State of enforcement, other than with agents having competence for the enforcement procedure.

4. No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in the European Small Claims Procedure in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Question 5: Can a judgment given in Slovenia in the European Small Claims Procedure be reviewed as to its substance in Germany?

Answer:

Paragraph 2 of Article 22 of the Regulation No 861/2007

2. Under no circumstances may a judgment given in the European Small Claims Procedure be reviewed as to its substance in the Member State of enforcement.

Review as to its substance of a Slovenian judgment is not allowed. Slovenian judgment is enforceable, notwithstanding any possible appeal.

25 Recital of the Regulation No 861/2007

In order to speed up the recovery of small claims, the judgment should be enforceable notwithstanding any possible appeal and without the condition of the provision of a security except as provided for in this Regulation.

First paragraph of Article 15 - Enforceability of the judgment

1. The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall not be required.

Question 6: Under which circumstances can a German company successfully object to the enforcement of the Slovenian judgment in the European Small Claims Procedure in Germany?

Answer: German company can object to the enforcement with reasons for:

- refusal of enforcement in Article 22 of the Regulation No 861/2007; and
- stay or limitation of enforcement in Article 23 of the Regulation No 861/2007.

The German court shall refuse the enforcement if the Slovenian judgment is irreconcilable with an earlier judgment given in any Member State or a third country, provided that:

- (a) the earlier judgment involved the same cause of action and was between the same parties;
- (b) the earlier judgment was given in Germany or fulfils the conditions necessary for its recognition in Germany; 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 judgment in the European Small Claims Procedure was given.

Paragraph 1 of Article 22 of the Regulation No 861/2007 - Refusal of enforcement

1. Enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties;

(b) the earlier judgment 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 judgment in the European Small Claims Procedure was given.

Opinion of advocate general Wahl, Case C-157/12, Salzgitter Mannesmann Handel GmbH v SC Laminorul SA, paragraph 47

Article 21(1) of Regulation (EC) No 805/2004, Article 22(1) of Regulation (EC) No 1896/2006 as well as Article 22(1) of Regulation (EC) No 861/2007, all provide that enforcement may be refused in respect of an earlier judgment given in any Member State. However, these grounds for refusal are all subject to the proviso that the irreconcilability was not and could not have been raised as an objection in the judicial proceedings in the Member State of origin. Therefore, it seems clear that the grounds for refusal under those provisions do not apply to situations where the irreconcilability could have been dealt with internally in the Member State of origin, as in the case before the referring court.

Procedure for an application to the court challenging the enforcement of the Slovenian judgment on the ground of irreconcilability is regulated under the procedural law of Member State (Germany).[48]

[48] European Commission, Directorate-General for Justice, Practice guide for the application of the European small claims procedure: under Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 2014, Publications Office, p. 63.

German court shall stay or limit the enforcement according to Article 23 of the Regulation, which states:

Article 23 of the Regulation No 861/2007 - Stay or limitation of enforcement

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures (e.g. "freezing" of a bank account or of wages and salaries)[49];

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings (further procedure are suspended for a specified or limited period)[50].

The meaning of the word 'challenge' in Article 23 of the Regulation No 861/2007 includes an appeal against the judgment, if such an appeal is possible under the law of the Member State (where the court is situated and which issued the judgment), and a challenge on the ground of irreconcilability. Review under Article 18 is expressly mentioned in the aforementioned Article and therefore exceeds the meaning of the word 'challenge'.[51]

Scenario II: Prior to the enforcement of the judgment given in Slovenia in the European Small Claims Procedure German company paid A the awarded sum.

Question 7: How can the German company challenge the enforcement of the judgment?

[49] Ibidem.
[50] Ibidem.
[51] Ibidem.

Answer: The Regulation No 861/2007 does not provide paying the awarded sum in a judgment given in Member State in the European Small Claims Procedure as a reason for refusal of enforcement (e.g. Regulation No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure states in the second paragraph of 23 Article: "Enforcement shall, upon application, also be refused if and to the extent that the defendant has paid the claimant the amount awarded in the European order for payment."). Nevertheless, the German court can, under the national law, refuse or stop enforcement if, and to the extent, the sum awarded in the Slovenian judgment has been paid.[52]

Scenario III: A and German company did conclude before a Slovenian court in the course of the European Small Claims Procedure a court settlement.

Question 8: Is concluded court settlement recognized and enforced in Germany under the same conditions as would have been Slovenian judgment given in the European Small Claims Procedure?

Answer:

Third paragraph of Article 12 of the Regulation No 861/2007 - Remit of the court or tribunal

3. Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.

Recognition and enforcement of court settlement are regulated by Article 23a of Regulation No 861/2007:

Article 23a of the Regulation No 861/2007 - Court settlements

A court settlement approved by or concluded before a court or tribunal in the course of the European Small Claims Procedure and that is enforceable in the Member State in which the procedure was conducted shall be recognised and

[52] Ibidem.

enforced in another Member State under the same conditions as a judgment given in the European Small Claims Procedure.

The provisions of Chapter III shall apply, mutatis mutandis, to court settlements.

Since a court settlement concluded before a Slovenian court is enforceable in Slovenia, it is also recognized and enforced in Germany under the same conditions as would have been Slovenian judgment given in the European Small Claims Procedure.

For more on recognition and enforcement of European Small Claim Procedure, see chapter eight of European Commission, Directorate-General for Justice, Practice guide for the application of the European small claims procedure: under Regulation No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 2014, Publications Office and part six of European Commission, A Guide for Users to the European Small Claims Procedure: A short introduction to the main practical aspects of the use of the procedure based on the Regulation, Publications Office of European Union (part six), both available at: https://e-justice.europa.eu/content_small_claims-42-en.do?init=true.

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Case Study 35

Recognition and Enforcement (ESCP)

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Facts: On January 30, 2020, the World Health Organization declared the COVID-19 outbreak a 'public health emergency of international concern' and, on March 11, 2020, characterized it as a pandemic. The COVID-19 pandemic has resulted in national travel bans as well as warnings or restrictions at borders. This severe consequence impacted international and domestic travel, which has led to a vast number of cancellations and many citizens being unable to travel.

In September 2019, Maria planned the family trip to Spain from March 13 until March 20ty, 2020. The trip was organized by a German travel agency, »Miracle Island, «but the reservation was made at Slovenian travel agency »Big dreams. «

Because Slovenia has declared a pandemic on March 12, Maria, a consumer called the Slovenian agency, inquired whether the travel will still be possible. The agency replied that the trip is scheduled as planned, and if Maria decides to cancel the journey at the last minute, she will not be entitled to a refund of the paid sum for the trip.

The family's arrival at the holiday location coincided with strict containment measures, which came into force only one day after their arrival. The army also monitored compliance with the measures.

Given how fast things were escalating, the young family decided to return early as a precaution. Both the Slovenian and German tourist agencies advised the family that at a given moment, it is best to wait for an already booked flight home, as it should not be possible to arrange an immediate return with another flight. However, Maria decides not to listen to this advice, as the family was condemned to a room in the hotel and bought the tickets to return to Slovenia.

Concerning the complaint and the request for reimbursement of costs, Maria had to turn to the German agency, which, in the return message, distanced itself from unforeseen circumstances for which the agency did not feel responsible. Maria has spent 3.325. EUR for return tickets for three people. After three months of unsuccessful claims in e-mails to the agency Miracle Island, Maria downloads and fills in Claim Form A from the Dynamic Forms section of the e-Justice Portal and submits it to a court in Slovenia along with the receipt for the tickets and e-mail exchanges with the agency. Within 14 days, the court sends a copy of the form to the agency, giving it 30 days to respond. The agency responds, using Answer Form C. The court orders the agency to refund the consumer and reimburse legal costs and serve the judgment to the parties.

Question 1: Can the judgment issued in the European small claims procedure be enforced in Germany against the agency Miracle Island and how?

Answer: The enforceability issue is regulated in Regulation No 861/2007 (hereinafter ESCP Regulation) - consolidated text of June 14, 2017. This Regulation is an alternative to procedures provided by national law.

The party in whose favour the judgment has been granted can take steps to enforce the judgment. To that end, the judgment can be enforced in another EU Member State:

- as if it had been given in that State;
- with no special procedure being required;

- with no need for a declaration of enforceability;
- irrespective of whether there is the possibility of an appeal;
- with no need for a postal address or an authorized representative in that State, and;
- without any security being required.[53]

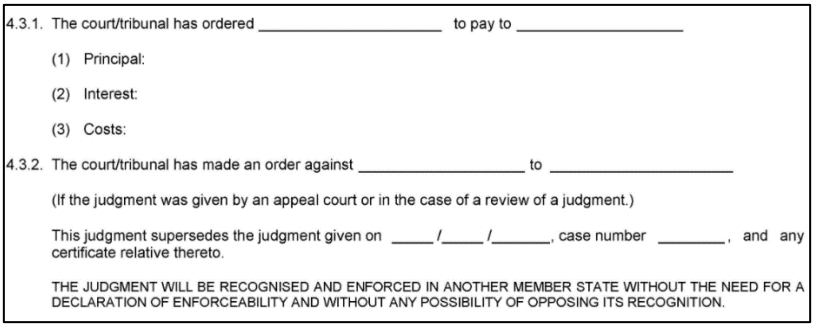
Paragraph 1 of Art. 20 of ESCP

A judgment given in a Member State in the European Small Claims Procedure shall be recognized and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

The court issues a certificate **using the standard Form D, at no extra cost at the party's request.**

Upon request, the court or tribunal shall provide that party with the certificate in any other official language of the institutions of the Union by making use of the multilingual dynamic standard form available on the European e-Justice Portal.

Form D certificate concerning a judgment in the european small claims procedure



4.3.1. The court/tribunal has ordered _____ to pay to _____

(1) Principal:

(2) Interest:

(3) Costs:

4.3.2. The court/tribunal has made an order against _____ to _____

(If the judgment was given by an appeal court or in the case of a review of a judgment.)

This judgment supersedes the judgment given on ____/____/_____, case number _____, and any certificate relative thereto.

THE JUDGMENT WILL BE RECOGNISED AND ENFORCED IN ANOTHER MEMBER STATE WITHOUT THE NEED FOR A DECLARATION OF ENFORCEABILITY AND WITHOUT ANY POSSIBILITY OF OPPOSING ITS RECOGNITION.

Figure 5: European small claims procedure, Form D, paragraph 4.3.
Source: Annex IV, Regulation No 861/2007

[53] European Commission: A Guide for Users to the European Small Claims Procedure.

One Member State's judgment will be enforced in another Member State notwithstanding any possible appeal (Art. 15 ESCP).

The court shall send the judgment to the parties. Upon the party's request, the court in the Member State of the origin will issue the certificate on standard form D. The certification has no constitutive effect. It proves only the existence and enforceability of the judgment. The certified judgment is directly enforceable in all Member States.

Maria does not have to apply for a declaration of enforceability in Germany. The Slovenian court that issued the judgment will issue the certificate.

According to Art. 20(2) Maria may let the court know that she will start the enforcement procedure in Germany and ask the court to provide her with the certificate in other official languages by using the multilingual dynamic standard form available on the European e-Justice Portal. However, the court is not obliged to provide a translation of the text entered in the free-text fields of that certificate; it is a duty of the party seeking the enforcement to ensure such translation or transliteration.

The certificate has to be in or accompanied by a translation into the State's appropriate official language where enforcement is being sought, or another language that State has indicated is acceptable to it (Art. 21a ESCP).

Paragraph 2 of Art. 21a ESCP

Any translation of the information on the substance of a judgment provided in a certificate as referred to in Article 20(2) shall be done by a person qualified to carry out translations in one of the Member States.

After the Slovenian court has issued the certificate, Maria has to apply to German enforcement authorities.

Paragraph 2 of Art. 21 of the ESCP Regulation specifies that the applicant must produce:

Paragraph 2 of Art. 21 of the ESCP Regulation

2. The party seeking enforcement shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
(b) the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept.

No security, bond, or deposit can be required in Germany from Maria as a foreign claimant just because it is foreign or because she is not domiciled or a resident in the Member State of enforcement, see Art. 21(4).

Paragraph 3 of Art. 21 of the ESCP Regulation

The party seeking the enforcement of a judgment given in the European Small Claims Procedure in another Member State shall not be required to have:

(a) an authorised representative; or

(b) a postal address.

According to Art. 21 ESCP Regulation, the actual enforcement of the European Small Claims Procedure's judgment is regulated by the law of the enforcing Member State, i.e. by German law. Art. 21(1) second paragraph of the ESCP Regulation underlines that a judgment given in the European Small Claims Procedure shall be enforced under the same conditions as a judgment given in the Member State of enforcement, i.e., Slovenian court's judgment shall be enforced in the same way as a German domestic judgment.

Paragraph 2 of Art. 22 of the ESCP Regulation

2. Under no circumstances may a judgment given in the European Small Claims Procedure be reviewed as to its substance in the Member State of enforcement.

Scenario I: German agency Miracle Island challenged the judgment issued in the European Small Claims Procedure by the Slovenian court in Slovenia.

Question 2: What possibilities does the German party have to influence Germany's enforcement procedure because the judgment is challenged in Slovenia?

Answer: The appeal applied against the judgment issued in the European Small Claims Procedure in the Member state of origin has no suspensive effect.

Art. 23 of the ESCP Regulation

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;
(b) make enforcement conditional on the provision of such security as it shall determine; or
(c) under exceptional circumstances, stay the enforcement proceedings.

The German agency may request the German enforcement authority to limit or delay enforcement or make enforcement subject to security, since the party has challenged the judgment in Slovenia.

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Case Study 36

Recognition and Enforcement of a Judgment Given in the European Small Claims Procedure (ESCP)

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Facts: Jernej, a Slovenian citizen, went to visit his friends in France. At the airport, he used the services of Magic Rent, a French car rental company situated in Paris. After five days, he returned the car as scheduled at 11 am, but was forced to pay the sum of 485 euros for a so-called mismanagement of the vehicle. Jernej disputed the facts but gave up and paid as his plane was waiting for him.

Back in Slovenia, Jernej received a phone call from Magic Rent explaining that he would have to pay an additional 950 euros for unseen damages to the car. The company, however, did not provide any proof of the damages. Unfortunately, Jernej contracted COVID-19 during his trip and was bedridden in the hospital of Maribor for 10 days.

Scenario I: During his illness, Jernej received Form C and D of the European small claims procedure in his letterbox.

Question 1: Since Jernej was ill and in hospital for a long period, what can he do?

Answer: Article 18 of the Regulation No 861/2007 (hereinafter ESCP Regulation) mentions the minimum **standards for review of the judgment.** In point 1b it states force majeure or due to extraordinary circumstances among cases when the court can reconsider or review the judgement. Covid-19 with its impact on every country and the fact that Jernej was ill at the hospital and not at home is enough to declare this situation a force majeure or extraordinary circumstances which did not depend on the defendant.

Point b of Paragraph 1 of Article 18 of ESCP Regulation

b. 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.

Paragraph 3 of Article 18 of ESCP Regulation

If the court or tribunal rejects the review on the basis that none of the grounds referred to in paragraph 1 apply, the judgment shall remain in force.

If the court or tribunal decides that the review is justified for one of the reasons laid down in paragraph 1, the judgment given in the European Small Claims Procedure shall be null and void.

Question 2: What are the possible actions the court can take?

Answer: Apart from article 18, the court can decide upon an application by the party to apply article 23 on **" Stay or limitation of enforcement." The article states that:**

Article 23 of ESCP Regulation

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with

jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;
(b) make enforcement conditional on the provision of such security as it shall determine; or
(c) under exceptional circumstances, stay the enforcement proceedings.

Question 3: Can the court stay the enforcement?

Answer: Yes. Point c of Article 23 of ESCP Regulation states: "under exceptional circumstances, stay the enforcement proceedings."

The circumstances, in this case, are exceptional and due to the fact that the defendant has not either got access to his mailbox, the court can decide to stay the enforcement or not.

Scenario II: Magic Rent 7 days after the court reviewed the judgment, informed Jernej by email that another application was in progress against him for the sum of 700 euros for other additional negligence and irreparable damages done to the car.

Question 4: Can the competent court grant Magic Rent its claims?

Answer: No. Article 22 about the Refusal of enforcement states that

Paragraph 1 of Article 22 of ESCP Regulation

1. Enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties;

(b) the earlier judgment 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 judgment in the European Small Claims Procedure was given.

Question 5: Can Magic Rent lodge in the same application in another EU country he thinks will be friendlier to his claim?

Answer: No. See article 22 of ESCP Regulation.

Scenario III: Jernej, during his research, discovered the manipulations of Magic Rent and its pressure on customers to extract money from them. With supporting evidence, he decided to challenge Magic Rent version of facts and lodged a counterclaim to demand reimbursement of the 485 Euros he paid in Paris.

Question 6: In case his application is granted judgement by the court will he need representatives in Paris to enforce the judgment?

Answer: No.

Paragraph 3 of Article 21 of ESCP Regulation

3. The party seeking the enforcement of a judgment given in the European Small Claims Procedure in another Member State shall not be required to have:

(a) an authorised representative; or
(b) a postal address.

Question 7: Since he is not domiciled in France, will he need to pay a deposit for the enforcement of his judgement?

Answer:

Paragraph 4 of Article 21 of ESCP Regulation

4. No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in the European Small Claims Procedure in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

Similar Cases: David Moore vs. Goldcar Rental Malta.[54]

[54] Available at: https://ecourts.gov.mt/onlineservices/CivilCases/Detail/358323.

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Case Study 37

Surfers in Paradise (ESCP)

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Facts: Pierre Mignoneau, a French national, was a postdoctoral student at Uppsala University 2019–2021. At one of the student nations (originally an association of students from one particular region in Sweden, now a second home for students) he meets Lisa Karlsson, a Swedish national from Slöinge at the south west coast. They fall in love and move in together in an apartment in the city centre of Uppsala. As Lisa finances is poor (she only has student loan incomes), Pierre offers to pay the rent of SEK 9 000 (appr. EUR 900). He starts paying the rent as of August 2019. During the spring 2020, Pierre and Lisa starts planning for summer vacation at the Swedish west coast. Pierre and Lisa are both dedicated surfers. One morning in May 2020 Lisa asks Pierre: "Can I borrow SEK 35 000 [appr. EUR 3 500] from you? I need to buy a new surfing board." Reluctantly, Pierre agrees.

During the summer vacation, they spend a lot of time on the beach. One day, Lisa and Pierre runs into Kent, her former high school sweetheart. After the encounter with Kent, their relationship deteriorates. In January 2021 they decide to separate, and Pierre moves out of the apartment and back to France.

Scenario I: After his return to France, Pierre wants the money he lent to Lisa back. Lisa claims that the money for the surfing board was a gift from Pierre to her, and not a loan. He wants to commence court proceedings in Sweden. Is it necessary for Pierre to decide at the outset which procedure is best to use? Such a decision will depend on the actual circumstances of the case, in particular whether it is likely that the claim will be defended or not, and of course the value of the claim concerned.

Question 1: What procedural options are available to Pierre to retrieve the loan to Lisa, and where can he find information on available Swedish procedures?

Answer: The first question that arises is if this is a cross-border case at all, as almost all the relevant facts are connected to Sweden. However, as laid down in Arts. 2.1 and 3.1 of the Regulation No 861/2007 (hereinafter ESCP Regulation), a case in which one of the parties is not based in the same Member State as the court dealing with the claim is of a cross-border nature. The time at which this is determined is the date when the claim is received by the competent Swedish court. In the case a Swedish court would have jurisdiction, as the defendant is habitually resident in Sweden.

From the facts of the case it is clear that the dispute is of a cross-border nature, as Pierre is a French national, habitually resident in France at the date when the claim is lodged. The claim is for less than EUR 5 000 and concerns a civil and commercial matter as payment is sought of an alleged monetary loan. The ESCP Regulation applies also to defended claims, regardless of the fact that Lisa objects to the claim.

Art. 24 of the ESCP Regulation states that the Member States shall provide information to the general public and professionals on the European Small Claims Procedure, in particular by way of the European Judicial Network: https://e-justice.europa.eu/public_html/index_en.htm. Hence, by virtue of Art. 24, the Member States are enjoined to cooperate with each other and by way of the European Civil Judicial Network for the purpose of providing the public and professionals with information about the ESCP Regulation.

Art. 24 of the ESCP Regulation

Information

The Member States shall cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, including costs, in particular by way of the European Judicial Network in Civil and Commercial Matters established in accordance with Decision 2001/470/EC.

Under Art. 25 the Member States shall provide information to the European Commission about various (national) procedural aspects relating to the ESCP regulation. This means that Art. 25 addresses several issues concerning information to be provided by the Member States to the Commission that are relevant to Pierre. Information about the small claims procedures in the different Member States is available on the website: e-justice.europa.eu/content_small_claims-42-en.do. If Pierre clicks the Swedish blue and yellow flag to the left, he will accesss information about Sweden: https://e-justice.europa.eu/content_small_claims-42-se-en.do?member=1.

At this European Portal, Pierre will find answers to *inter alia* questions concerning the competent Swedish courts, how to communicate with the competent court (in Sweden mail or email are the accepted means of communication), the authorities or organisations competent to provide practical assistance (in Sweden information regarding this is available on http://www.domstol.se/), means of electronic service and communication technically available and admissible (under Swedish law service must be appropriate with regard to the content and nature of the document served), fees to be paid to the court (in Sweden the application fee is SEK 900, appr. EUR 90), the possibilities to appeal and which court is competent for that purpose, and also which authorities that have the competence to enforce a decision (in Sweden it is the Swedish Enforcement Authority).

Art. 25 of the ESCP Regulation

Information to be provided by Member States

1. By 13 January 2017, the Member States shall communicate to the Commission:

(a) the courts or tribunals competent to give a judgment in the European Small Claims Procedure;
(b) the means of communication accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Article 4(1);
(c) the authorities or organisations competent to provide practical assistance in accordance with Article 11;
(d) the means of electronic service and communication technically available and admissible under their procedural rules in accordance with Article 13(1), (2) and (3), and the means, if any, for expressing acceptance in advance of the use of electronic means as required by Article 13(1) and (2) available under their national law;
(e) the persons or types of professions, if any, under a legal obligation to accept service of documents or other written communications by electronic means in accordance with Article 13(1) and (2);
(f) the court fees of the European Small Claims Procedure or how they are calculated, as well as the methods of payment accepted for the payment of court fees in accordance with Article 15a;
(g) any appeal available under their procedural law in accordance with Article 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged; (h) the procedures for applying for a review as provided for in Article 18 and the competent courts or tribunals for such a review;
(i) the languages they accept pursuant to Article 21a(1); and
(j) the authorities competent with respect to enforcement and the authorities competent for the purposes of the application of Article 23.

Member States shall inform the Commission of any subsequent changes to that information.

2. The Commission shall make the information communicated in accordance with paragraph 1 publicly available by any appropriate means, such as the European e-Justice Portal.

N.B.: The participants can be asked how to find information about Small Claims Procedures in their Member States.

Question 2: If the rules of the ESCP Regulation or annexed forms are changed, who is obliged to act and how?

Answer: Under Art. 26, the Commission is empowered to adopt delegated acts in accordance with Art. 27.

Art. 26 ESCP Regulation

Amendment of the Annexes

The Commission shall be empowered to adopt delegated acts in accordance with Article 27 concerning the amendment of Annexes I to IV.

According to indents (34) and (35), the measures necessary for the implementation of the ESCP Regulation should be adopted in accordance with Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.[55]

Powers are conferred on the Commission to adopt measures necessary to update or make technical amendments to the forms set out in the Annexes. Such measures are of a general scope, and designed to amend non-essential elements of the ESCP Regulation and/or to supplement it by the addition of new non-essential elements. They should be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

Art. 27 of the ESCP Regulation

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

[55] 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23).

2. The power to adopt delegated acts referred to in Article 26 shall be conferred on the Commission for an indeterminate period of time from 13 January 2016.

3. The delegation of power referred to in Article 26 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 26 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. A

Scenario II: In order to finance the rent of the apartment in Uppsala, Pierre sold off shares he inherited from his grandmother. Pierre now wants his money back. He comes to the conclusion that Lisa must repay him half of the rent during their relationship. The total sum for rent Lisa should pay according to Pierre is EUR 8 100.

Question 3: Can Pierre split the total sum for rent so as to "fit" the threshold of EUR 5 000 of the ESCP Regulation? Or can the claim be divide into several claims so as to benefit from the simplified procedures in the ESCP Regulation?

Answer: This question is how to determine a case including a claim that *per se* exceeds the value threshold of the ESCP Regulation according to Art. 2.

To our knowledge this question has not yet been solved. At the outset, the answer seems to be that such measures are contrary to the aim of the ESCP Regulation. If the claim is for EUR 8 100, it falls outside the scope of the ESCP Regulation. If a court finds that the claim is outside the scope of the ESCP Regulation because the value of the claim is too high, the court informs the parties within 30 days of the receipt of the defendant's response.

However, we believe there is plenty of room for argumentation regarding this question. For example, if Pierre decides only to claim rent for a limited number of months, for example EUR 5 000, the claim would potentially fall within the scope of the ESCP Regulation.

RELEVANT ARTICLES: Arts. 24–27

RELEVANT INDENTS: (34) and (35).

OTHERS: e-justice.europa.eu/content_small_claims-42-en.do AND European e-Justice Portal - Small claims (europa.eu)

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CASEBOOK ON EUROPEAN ORDER FOR PAYMENT PROCEDURE AND EUROPEAN SMALL CLAIMS PROCEDURE

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Abstract Publication Case studies on European order for payment procedure and European small claims procedure was created as part of the Train to Enforce project and is the result of the collaboration of eight faculties of law across Europe. The publication contains numerous case studies focusing on European order for payment procedure (Regulation No. 1896/2006) and European small claims procedure (Regulation No. 861/2007). Case studies focus on both the practical and theoretical aspects of the European order for payment procedure and European small claims procedure. They will promote self-learning on cross-border debt collection in the EU.

Keywords:
case study, European order for payment procedure, European small claims procedure, cross-border debt colletion, civil and commercial matters

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