Vilniaus universiteto leidykla
Contents lists available at Vilnius University Press

Teisė
2020, Vol. 114, pp. 154–160
ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2020.114.11

The Value of the Case for the Applicant: A Criterion for the Differentiation of Case Proceedings or of Access to Justice?

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For the first time in Ukraine, the institute of small claims procedure has been introduced in the updated civil procedural legislation. The differentiation of cases, which can be considered in simplified or general proceedings, is carried out not only on the basis of the size of the claim, but on the basis of a number of criteria, for instance, the value of the case for the applicant, assessment of which is the main aim of this paper.
Keywords: civil procedure, small claims, value of the claim, claimant, administration of justice, case management.

Bylinėjimosi išlaidos ieškovui: teisenos tvarkos diferencijavimo ar prieigos prie teisingumo kriterijus?

Pirmą kartą Ukrainoje ieškinių dėl nedidelių sumų nagrinėjimo institutas buvo įtrauktas į atnaujintus civilinio proceso įstatymus. Bylų, kurios gali būti nagrinėjamos supaprastinta ar bendrąja tvarka, diferencijavimas atliekamas atsižvelgiant ne tik į ieškinio sumą, bet ir remiantis daugybe kriterijų, pavyzdžiui, atsižvelgiant į bylinėjimosi išlaidas ieškovui. Pastarojo kriterijaus įvertinimas yra pagrindinis šio darbo tikslas.
Pagrindiniai žodžiai: civilinis procesas, ieškiniai dėl nedidelių sumų, ieškinio suma, ieškovas, teisingumo vykdymas, bylos vadyba.

De minimis non curat praetor

Introduction

Quite traditionally simplified civil litigation procedures are prescribed by the legislator to resolve small claims, the limits of which are established by setting a limit on the size of claims[1]. It should be

[1] See a detailed report analyzing procedures for settling small disputes in different Council of Europe countries CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 120. URL: <https://rm.coe.int/cepej-report-on-european-judicial-systems-edition-2014-2012-data-effic/16807882a1>, also Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. *OL*, L199, 1–20.

Received: 01/10/2019. **Accepted:** 22/01/2020

noted that there is no single approach to its definition, as well as the reasons for its introduction; the difference in size ranges from about EUR 398 in the Czech Republic and more than EUR 45 000 in Romania[2]. During the implementation of the European Small Claims Procedure since 2007, the limit, previously set at EUR 2 000[3], has been proposed to be increased up to EUR 10 000 in order to provide easier and cheaper access to cross-border justice for small and medium-sized businesses in the EU and for their customers[4], but it was eventually raised up to EUR 5 000[5].

The Civil Procedure Code of Ukraine (hereinafter – the CPC) contains provisions on small claims, the limit of which does not exceed UAH 185 300 as of 1 January 2019, which is approximately EUR 5 800, and the upper limit for the amount of the claim that is not considered under a simplified procedure is UAH 926,500, which is approximately EUR 26,000.

It is noted in the literature that such a limitation amount is chosen for small claims, given that there are limits to the amount of the court fee, even if the price of the claim exceeds the specified amount, the applicant pays the highest limit of the fee set by law[6]. There is no detailed justification for such a size for the determination of small claims in the explanatory note to the draft law, and the established limit depends on the subsistence minimum for able-bodied persons defined in the State Budget of Ukraine[7].

According to the size of the claims, it is possible to distinguish at least two categories of cases that can be considered under simplified proceedings: 1) those that are classified as small by law, in accordance with Article 19, paragraph 6, and 2) those that can be classified as small by the court taking into account the requirements of Article 11, Part 2, Article 19, Parts 1-4, Article 274, Parts 1 and 2, Article 277 of the CPC.

At the same time, even small claims need not be considered under the rules of simplified proceedings, based on the provisions of Article 11 and Article 274 (3), i.e. based on the size of the claims. In our opinion, one of the main and most important criteria for resolving the issue of the case in the simplified procedure is the importance of the case to its parties, provided for in Article 274, part 3, item 2, since sometimes a claim of less than one euro may be important to the claimant [8]. This criterion was chosen as the object of our study.

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[2] CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 120.

[3] Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure. URL: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007R0861>.

[4] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, p. 5. URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0794:FIN:En:PDF>.

[5] 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. 1–13. URL:* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R2421>.

[6] IZAROVA, I.; FLEISZAR, R.; VEBRAITĖ, V. Access to Justice in Small Claims Procedure: Comparative Study of Civil Procedure in Lithuania, Poland and Ukraine *International Journal of Procedural Law*, Volume 9 (2019), No 1, pp. 97–117, and VEBRAITĖ, V. Special Procedures in Lithuanian Civil Procedure and Impact of EU Law on them. In *Ukraina na shliahu do Europy: reforma civil`nogo processual`nogo zakonodavstva*: zb. nauk. prac. Materialy mijnarod. nauk.-prakt. konf., Kyivв, 7 Jyly 2017. Ed. by I. O. Izarova, R. Yu. Khanyk-Pospolitak, Kyiv, Dakor, 2017, p. 70.

[7] Law of Ukraine On the State Budget of Ukraine for 2019. <https://zakon.rada.gov.ua/laws/show/2629-19>, стаття 7.

[8] See *Korolev v. Russia* (dec), no. 25551/05, 1 July 2010. URL: <https://hudoc.echr.coe.int/eng#{"appno":["25551/05"],"itemid":["001-99843"]}> and also DRISCOLL, B. G. *De Minimis Curat Lex* – Small Claims Courts in New York City, 2 *Fordham Urb. L.J.* 1973–1974, p. 479; PETERSON, M. What is a De Minimis Risk? *Risk Management*, 2002, 4 (2), pp. 47–55. URL: <https://doi.org/10.1057/palgrave.rm.8240118>.

1. Judicial Practice of Dealing with Cases that are Classified by the Court as being of Low Complexity

Case law research shows that courts differentiate small claims complexity and consider them under simplified procedure. At the same time, the criteria for differentiation and their comparison with the provisions of Article 11, Part 2 of Article 19, Part 1–4 of Article 274, Part 1 and Article 2 of Article 277 of the CPC are very rare in their decisions.

In doing so, caution should be exercised when considering the decisions of the courts, since the court of appeal may reverse the decision of the court of first instance if the latter had considered the case subject to review by the rules of general proceedings (in accordance with Paragraph 7, Part 3, Article 376 of the CPC). In particular, if the decision of the court of appeal does not state the reasons and the specific circumstances in which the court of first instance incorrectly referred the case to the category of small claims and considered in simplified proceedings [9].

The Court's position in the Kyiv Court of Appeal of July 25, 2019, according to which it is necessary to prejudice the grounds of appeal on the consideration of a case in simplified proceedings based solely on the cost of a claim in excess of one hundred subsistence minimums, and consider only the nature of the case and its complexity, should be supported[10].

At the same time, in our view, the courts do not always pay due attention and evaluate the importance of the case to the parties, which is of particular importance in civil proceedings, in order to deal with matters arising from family and marital relations, employment and housing, as well as cases that affect a person's non-proprietary rights, in particular as to his or her honour and dignity.

An example is the case of protection of honour, dignity, goodwill and moral damages between the head of the institution and five defendants. The dispute between the parties was personal in nature, as stated in the court ruling, that is, related to the personal, subjective perception of the claimant of the actions of defendants, with the nature and depth of relevant experiences and moral suffering[11].

One should support the position of the court that, by its specific nature, the proof of claims for the protection of the person's dignity and honour and for non-pecuniary damage is not covered by purely written evidence; first of all it is necessary to hear the claimant's explanations about the reasons of violation of honour and dignity, the nature and span of moral damage, the circumstances from which it proceeded in determining the value of non-pecuniary damage. So, the direct perception of the explanations of the claimant by the court is essential, and only under these conditions we can speak about the complete, comprehensive and objective establishment and clarification of the circumstances of the case[12].

In another example, the case of receiving a ransom in the amount of not less than the amount of the payments made, namely, in the amount of UAH 19 424,74, in case of early termination of the Voluntary Life Insurance by the court, was fully justified to those of exceptional importance for the applicant. Considering this, despite the fact that by the size of the claims, the case belongs to the category of small claims, it was considered in the general proceedings[13].

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[9] The decision of the Court of Appeal of Lugansk region from July 30, 2018. URL: <http://www.reyestr.court.gov.ua/Review/76709974>.

[10] The decision of the Kiev Court of Appeal from July 25, 2019. <http://www.reyestr.court.gov.ua/Review/83385891>.

[11] The decision of Transcarpathian Court of Appeal from July 17, 2019. URL: <http://www.reyestr.court.gov.ua/Review/83278750>.

[12] The decision of Transcarpathian Court of Appeal from July 17, 2019. URL: <http://www.reyestr.court.gov.ua/Review/83278750>.

[13] The decision of the Pechersk District Court of Kyiv in absentia from March 28, 2018. URL: <http://www.reyestr.court.gov.ua/Review/73405173>.

Another category of cases of paramount importance to applicants is the housing case, often the only one, in particular, eviction and mortgage foreclosure. Privatization cases of the State Housing Fund under Article 274, Paragraph 3, Part 4 of the CPC cannot be considered under the simplified procedure, and cases of recognition of the ownership of housing usually exceed the limit of the lawsuit for the cases that may be considered under the simplified procedure[14].

At the same time, it should be noted that, as a whole, the national courts have paid little attention to the value of the case to the parties when deciding on the order of the case. In our opinion, the use and exploration of the case-law of the European Court of Human Rights will be useful in this regard.

2. The Case-law and Approaches of the European Court of Human Rights in Determining the Question of the Value of the Case to the Applicant

The European Court of Human Rights (hereinafter – ECtHR) is guided by the provisions of the European Convention on Human Rights[15], the Article 35 of which sets out admissibility criteria. In particular, § 3 (b) states that the Court will not deal with an application if the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. The purpose of determining this admissibility criterion is to ensure a faster screening of unfounded complaints, thereby allowing the Court to focus on its primary task of ensuring the protection of human rights at European level[16].

The essence of this criterion is revealed in the Court's case-law. In particular, in one of its decisions, the ECtHR noted that the general principle of *de minimis non curat praetor* underlies the logic of Article 35 § 3 (b), which strives to warrant consideration by an international court of only those cases where violation of a right has reached a minimum level of severity. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case (Par. 18)[17].

Accordingly, in order to determine whether an appropriate minimum level of violation exists, the Court should examine whether the applicant suffered a significant disadvantage, whether respect for human rights would in any event require an examination of the case, and whether the case was duly considered by a domestic tribunal (Par. 16)[18].

The most important thing that has been repeatedly emphasized in the ECtHR's decisions is the independence of access to justice from the cost of the claim, which is extremely evident in the case of an amount not up to one euro at the time of its consideration. In this case the Court is conscious that the

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[14] The decision of the Supreme Court of Cassation from 7 August, 2019. URL: <http://www.reyestr.court.gov.ua/Review/83819768>.

[15] European Convention on Human Rights. URL: <https://www.echr.coe.int/Documents/Convention_ENG.pdf>.

[16] Action Plan adopted at the High Level Conference on the Future of the European Court of Human Rights in Interlaken on 19 February 2010, paragraph 9 (c), and the Study Report on the New Admissibility Criterion under Article 35 § 3 of the Convention: principles, development of precedent practice for two years. URL: <https://www.echr.coe.int/Documents/Research_report_admissibility_criterion_RUS.pdf>.

[17] See more in Giuran v. Romania No 24360/04, 21 September 2011. <https://hudoc.echr.coe.int/eng#{"appno":["24360/04"],"itemid":["001-105269"]}> and Shefer v. Russia (dec.), No 45175/04, 13 March 2012. URL: <https://hudoc.echr.coe.int/eng#{"appno":["45175/04"],"itemid":["001-109895"]}>.

[18] See Korolev v. Russia (dec), no. 25551/05, 1 July 2010; Rinck v. France (dec.), no. 18774/09, 19 October 2010; Kiousi v. Greece (dec.), no. 52036/09, 20 September 2011; Savu v. Romania (dec.), no. 29218/05, 11 October 2011.

impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person's specific condition and the economic situation of the country or region in which he or she lives. However, with all due respect for varying economic circumstances, the Court considers it to be beyond any doubt that the petty amount at stake in the present case was of minimal significance to the applicant[19].

The Court is mindful at the same time that the pecuniary interest involved is not the only element to determine whether the applicant has suffered a significant disadvantage. Indeed, a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest[20].

We also want to draw attention to the ECtHR decision in Litvinyuk vs Ukraine case, in which the Court noted that, in deciding the importance of the subject matter of the dispute, the applicant had taken into account that the applicant had suffered a serious injury and disability as a result of a traffic accident. Considering that the applicant was a single mother and had a child in the upbringing, reimbursement for the loss of earnings and the costs associated with poor health were of utmost importance to the applicant. The Court therefore considered that the subject-matter of the applicant's dispute required a speedy resolution of her complaints [21] (paragraph 47).

The decision of the ECtHR in Frydlender v. France ECtHR is also important for our study. In it, the Court notes that it is for the Contracting States to organize their legal systems in such a way that their courts can guarantee to everyone the right to a final decision within a reasonable time in the determination of his civil rights and obligations... It further reiterates that an employee who considers that he has been wrongly suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses his means of subsistence[22, 23].

Conclusions

Summarizing the study, it is worth noting the following. General and simplified civil litigation in Ukraine are designed to hear various cases, which, due to complexity or other circumstances, should be considered in the chosen order. One of the most important criteria for determining it is the value of the case to the applicant, for the assessment of which the ECtHR case-law is worth applying.

In particular, in determining whether the case is of exceptional importance to the applicant, which significantly influences the order of its decision and requires its consideration in the general proceed-

[19] *Korolev v. Russia* (dec), no. 25551/05, 1 July 2010. URL: <https://hudoc.echr.coe.int/eng#{"appno":["25551/05"],"itemid":["001-99843"]}>.

[20] *Korolev v. Russia* (dec), no. 25551/05, 1 July 2010. URL: <https://hudoc.echr.coe.int/eng#{"appno":["25551/05"],"itemid":["001-99843"]}>.

[21] Litvinyuk v. Ukraine Case No. 55109/08 of March 1, 2018. URL: <https://zakon.rada.gov.ua/laws/show/974_c38>.

[22] 45. The Court reiterates that the Contracting States must organize their legal systems so that their courts can guarantee everyone the right to a final judgment within a reasonable time when determining their civil rights and obligations (see Caillot v. France, no. 36932/97, § 27, June 4, 1999 (failing to appear) It also reiterates that an employee who believes that his/her employer has been wrongfully removed or fired has a personal interest in reaching a court decision as soon as possible because of labor disputes require a speedy decision, given that it is at stake for an interested person who, as a result of his/her release, loses his/her livelihood (see Obermeyer v. Austria, 28 June 1990, Series A No. 179, pp. 23–24 , § 72, and Caleffi v. Italy Order of 24 May 1991, Series A No. 206-B, p. 20, § 17).

[23] Frydlender v. France, N 30979/96, п. 43. URL: <https://hudoc.echr.coe.int/eng#{"itemid":["001-58762"]}>.

ings, it is necessary to determine the minimum necessary level of violation of the rights of the parties to the case, the importance of the changes in their lives, in particular, in employment and profit, place of residence requiring a court hearing in the case, and personal appearance of a person before the court to confirm their claims or objections.

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The Value of the Case for the Applicant: A Criterion for the Differentiation of Case Proceedings or of Access to Justice?

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S u m m a r y

For the first time in Ukraine, the institutes of small claims and the simplified civil litigation procedure have been introduced in the updated civil procedural legislation. These institutes, traditionally found in many other countries of the world, have been incorporated into the CPC of Ukraine in order to ensure the efficiency of the judiciary, to achieve a better quality of protection of the rights of persons who go to court. At the same time, the differentiation of cases, which can be considered in simplified or general proceedings, is carried out not only on the basis of the size of the claim, but on the basis of a number of criteria, one of which is the value of the case for the applicant. How can a court evaluate the value of a case for a person seeking protection of his rights? What is the case law of the European Court of Human Rights and can we apply it to the assessment of a particular case before a national court? Should such a criterion be used to select the procedure for the protection of rights? These questions are researched in this article, and the readers can find the answers to them, as well as their justification, in the conclusions.

Bylinėjimosi išlaidos ieškovui: teisenos tvarkos diferencijavimo ar prieigos prie teisingumo kriterijus?

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S a n t r a u k a

Pirmą kartą Ukrainoje ieškinių dėl nedidelių sumų nagrinėjimo institutas buvo įtrauktas į atnaujintus civilinio proceso įstatymus. Šie institutai, tradiciškai egzistuojantys daugelyje kitų pasaulio šalių, buvo įtraukti į Ukrainos CPK, siekiant užtikrinti teismų sistemos veiksmingumą, pasiekti geresnę asmenų, besikreipiančių į teismą, teisių apsaugos kokybę. Tuo pačiu metu bylų, kurios gali būti nagrinėjamos supaprastinta ar bendrąja tvarka, diferencijavimas atliekamas atsižvelgiant ne tik į ieškinio sumą, bet ir remiantis daugybe kriterijų, pavyzdžiui, atsižvelgiant į bylinėjimosi išlaidas ieškovui. Kaip teismas gali įvertinti bylinėjimosi išlaidas asmeniui, siekiančiam apginti savo teises? Kokia yra Europos Žmogaus Teisių Teismo praktika ir ar galime ją pritaikyti nagrinėjant konkrečią bylą nacionaliniame teisme? Ar toks kriterijus turėtų būti naudojamas renkantis teisių apsaugos tvarką? Šie klausimai nagrinėjami šiame straipsnyje, o atsakymus į juos ir jų pagrindimą galima rasti išvadose.