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A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure

Accomplishments, New Features and Some Fundamental Questions of European Harmonization

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I Introduction

European civil procedural law has been in a constant state of flux since the coming into force of the Treaty of Amsterdam in 1999. The Treaty of Amsterdam introduced Article 65 of the EC Treaty, which empowers the Community to adopt measures in the field of judicial cooperation in civil matters having cross-border implications. The introduction of Article 65 EC Treaty was followed by numerous Community instruments in the field of civil procedure, mostly regulations that have direct binding force in the Member States. These have changed the face of litigation in the European Union.

Most EU-regulations that have been established on the basis of Article 65 EC Treaty are "classical" private international law regulations.[1] Their primary aim is to coordinate national procedures in cross-border disputes, and not to introduce harmonized procedures. A well-known example is Regulation no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), which replaced the Brussels Convention of 1968. Other examples are Regulation no 1348/2000 on the service of documents and Regulation no 1206/2001 on the taking of evidence. These Regulations do not fundamentally differ from traditional bilateral and unilateral conventions in the field of private international law *[254]* and international procedural law[2], except that they usually are a bit more progressive and systematic.

Two recent EU-regulations, however, take a different approach. These are Regulation no 1896/2006 creating a European Order for Payment Procedure, which was adopted on 12 December 2006[3], and Regulation no 861/2007 establishing a European Small Claims Procedure, adopted on 11 July 2007[4]. These are the first to create autonomous European procedures.[5] This is a major step in the development of European civil procedure, and in view of the initial political unwillingness to harmonize civil procedure it is also a remarkable step.[6] These new European procedures aim at simplifying, speeding up and reducing the costs of litigation.

This paper focuses on the recent developments in European procedural law, and more in particular the establishment of the first two European procedures. The emphasis will be put on the European Small Claims Procedure (abbreviated as ESCP), which as a full, adversarial procedure is more substantial than the primarily administrative European Order for Payment Procedure for uncontested claims (abbreviated as EOP). In section II attention will be paid to the harmonization of procedural law in Europe after the Treaty of Amsterdam and the current state of affairs. In section III the European Small Claims Procedure will be analyzed. Section IV contains some thoughts on the harmonization of procedural law in Europe. First, the accomplishments and innovative features are discussed. Second, some difficulties and fundamental issues of the harmonization of procedural law in Europe are presented.

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1 Private International Law in the broad sense, including questions of international jurisdiction, recognition and enforcement, other procedural issues (such as the service of documents, the taking of evidence and legal aid) and the conflict of laws.

2 For example those concluded by the Hague Conference on Private International Law.

3 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, O.J. 2006 L 399/1.

4 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 199/1.

5 See for a comprehensive study on the regulations in the context of the harmonization of procedural law: *Xandra Kramer*, Eenvormige Europese procedures voor de inning van vorderingen. De Europese betalingsbevelprocedure en de Europese procedure voor geringe vorderingen, Kluwer 2007.

6 See also the initial political neglect of the proposals of the Storme working group, presented to the Commission in 1993: *Marcel Storme* (ed.), Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union, Martinus Nijhoff Publishers 1994. See further section II.1 below.

[255] II Harmonization of Civil Procedure in Europe

Before the treaty of Amsterdam came into force, the competence in regard of civil procedure was limited. Except for the coming about of the successful Brussels Convention in 1968, civil procedural law was hardly touched upon. The attempt to promote harmonization by the extensive work of the Storme working group[7], which presented its report to the Commission in 1993, undeservedly received relatively little attention in literature and was initially ignored in Brussels.[8] In 1998 the Commission did its first attempt to introduce a procedure for unchallenged claims and for small claims, in the Directive combating late payment in commercial transactions.[9] These proposals were rejected by the Council due to (the alleged) lack of competence to prescribe certain procedures, at least on the basis of Article 95 EC Treaty.

1. *The Amsterdam Treaty and Onwards*

The political climate regarding the harmonization of civil procedure changed shortly after. The Treaty of Amsterdam introduced Article 65 of the EC Treaty, which allows for measures in the field of judicial cooperation in civil matters having cross-border implications, needed for the proper functioning of the international market.[10] According to Article 65 sub a) and sub b) these *[256]* measures include the cross-border service of documents, the taking of evidence, recognition and enforcement, the conflict of laws and jurisdiction. Sub c) includes measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure in the Member States. This Article 65 sub c provides the basis for both the EOP and ESCP.

The harmonization of European civil procedure has furthermore been boosted by the famous Conclusions of the European Council Tampere of October 1999.[11] These Conclusions emphasized the need to improve access to justice, the mutual recognition of judicial decisions and greater convergence in civil law, amongst others by preparing new procedural legislation in cross-border cases. The subsequent Programme of Mutual Recognition of 2000 is also relevant in this respect.[12] This singled out the abolition of exequatur for uncontested claims as one of the Community's priorities and furthermore referred to simplifying and speeding up the settlement of cross-border litigation in uncontested and small claims. At the end of 2002, the Commission adopted a Green Paper on a European order for payment procedure and on small claims.[13] In this Green Paper the Commission presented its two-tiered approach. The first was to abolish the *exequatur* for uncontested claims in the European Union. The second was the creation of a specific harmonized procedure for the recovery of uncontested claims. The Commission furthermore emphasized the disproportionate costs and duration of proceedings relating to small claims and launched a consultation on measures to simplify and to speed small claims litigation. In this Green Paper the Storme proposals finally got political recognition: the proposals regarding the payment order are appreciated as good reference and valuable source of inspiration for the creation of a European Order for payment. The Hague

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7 See previous footnote.

8 See on the harmonization of procedural law before the Treaty of Amsterdam *inter alia*: *Konstantinos Kerameus*, Procedural Unification: The Need and the Limitations, in: *Ian Scott* (ed.), International Perspectives on Civil Justice. Essays in honour of Sir Jack I.H. Jacob, Q.C., 1990, p. 47 ff; *Wolfgang Grunsky, Rolf Stürner, Gerhard Walter & Manfred Wolf* (eds.), Wege zu einem europäischen Zivilprozeßrecht, Tübinger Symposium, Zum 80. Geburtstag von Fritz Baur, 1992; *Marcel Storme*, Rechtsvereinheitlichung in Europa. Ein Plädoyer für ein einheitliches europäisches Prozeßrecht, RabelsZ 1992, p. 291 ff; *idem*, Procedural Consequences of a Common Private Law for Europe, in: Arthur Hartkamp (ed.) Towards a European Civil Code, 1994, p. 87 ff; *Eberhard Schilken*, Die Vorschläge der Kommission für ein europaïsches Zivilprozeßgesetzbuch, Zeitschrift für Zivilprozess (ZZP) 1996, p. 315 ff. See for an analysis of the impact of the Storme proposals amongst others *Jaap van Rijn van Alkemade*, Een Europees procesrecht of een storme in een glas water?, in: *Ewoud Hondius et al*. (ed.), Liber Amicorum Paul Meijknecht, Van Nederlands Naar Europees procesrecht?!, 2000, p. ff.

9 Proposal for a European Parliament and Council Directive combating late payment in commercial transactions, 23 April 1998, COM(1998) 126 final, see in particular Article 5 and 6.

10 See *Burkhard Heß*, Die „Europäisiering" des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren, Neue Juristische Wochenschrift (NJW) 2000, p. 23 ff; *Thomas Drappatz*, Die Überführung des internationalen Zivilverfahrensrechts in eine Gemeinschaftskompetenz nach Article 65 EGV, 2002. See for a full overview of the development of European procedural law in this regard: *Kramer* (fn. 5), p. 16 ff.

11 Tampere European Council, 15 and 16 October 1999, Presidency conclusions, no 28-39 (no 30).

12 Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, 30 November 2000, O.J. 2001 C 12/1.

13 Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, 20 December 2002, COM(2002) 746 final.

Programme of 2004 finally underlined the need to further enhance the creation of a Europe for citizens and the essential role of setting up a European Area for Justice in this regard.[14] Priorities for the coming years are furthering mutual recognition, approximation of law, including minimum *[257]* rules of procedural law, facilitating civil law procedure across borders and enhancing cooperation, amongst others through the European Judicial Network in civil matters.[15]

2. The Current State of Affairs in European Civil Procedure

The developments in private international law and international procedural law in the European Union have been stormy since the year 2000. One could say that the expansion of private international law has led to a new legal specialization: EU Private International Law.[16] The typical private international law regulations relating to procedural issues that are currently in force are: Regulation no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I); Regulation no 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels IIA)**,** which repealed Regulation no 1347/2000 (Brussels II); Regulation no 1346/2000 on insolvency proceedings (Insolvency Regulation); Regulation no 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service Regulation), which will as of 13 November 2008 be replaced by Regulation no 1393/2007; and Regulation no l206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation).

Furthermore, as the first layer of the two-tiered approach taken in the aforementioned Green Paper on a European order for payment procedure and on small claims[17], Regulation no 805/2004 creating a European Enforcement Order for uncontested claims (abbreviated as EEO) was established.[18] This Regulation marks the beginning of a new era for the recognition and enforcement of decisions as well as for European civil procedure. In the first place, it abolishes the *exequatur* for uncontested claims. Where a claim is uncontested within the meaning of Article 3 EEO Regulation, the court of origin may upon application certify its decision as European Enforcement *[258]* Order when certain minimum procedural requirements are fulfilled. A judgment which has been certified as EEO 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 (see Article 5 EEO). Traditional grounds of refusal, such as the public policy exception, are therefore no longer allowed.[19] In the second place, it establishes minimum requirements for the service of documents, the provision of due information to the debtor about the claim and for review (see Articles 12-19 EEO). These minimum standards do not oblige the Member States to adapt their procedural rules, but are compulsory for the certification as EEO. Especially the introduction of certain minimum standards for the service of documents and the introduction of review of decisions, which is unknown in many Member States, are new elements in European procedural law.[20]

The second layer of the Green Paper approach consisted of the bringing about of a European Order for Payment Procedure (EOP), and later on the European Small Claims Procedure (ESCP). The EOP Regulation shall apply from 12 December 2008[21]; the ESCP will be available from 1 January 2009.[22] They will be

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14 The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004, O.J. 2005 C 53/1 (in particular point 3).

15 See also section II.2 below.

16 See also the two recent handbooks on EU private international law: *Peter Stone*, EU Private International Law. Harmonization of Laws, Edward Elgar Publishing 2006; *Michael Bogdan*, Concise Introduction to EU Private International Law, Europa Law Publishing, 2006.

17 See section II.1 below.

18 Applicable as of 21 October 2005, see Article 33 EEO Regulation.

19 The EEO has been much criticized both for the abolishment of the public policy exception and its complicated rules. See on the EEO Regulation amongst others: *Thomas Rauscher*, Der Europaïsche Vollstreckungstitel für unbestrittene Forderungen, Sellier/Verlag Recht und Wirtschaft 2004; *Astrid Stadler*, Kritische Anmerkungen zum Europäischen Vollstreckungstitel, Recht der Internationalen Wirtschaft (RIW) 2004, p. 801 ff; *Stone* 2006 (fn. 16), p. 213, p. 250 ff; *Bogdan* 2006 (fn. 16), p. 83 ff; *Carla Baker*, Le titre exécutoire, Une avancée pour la libre circulation des décisions?, Juris-Classeur Periodique (JCP) 2003, p. 985 ff; *Carla Crifò*, First Steps towards the Harmonisation of Civil Procedure: the Regulation Creating a European Enforcement Order for Uncontested Claims, Civil Justice Quarterly (CJQ) 2005, p. 200 ff.; *Xandra Kramer*, De Europese Executoriale Titel: een nieuw instrument ter verwezenlijking van het Europees procesterritoir, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2005, p. 375 ff.

20 See further section IV.1 below.

21 See Article 33(2) EOP.

22 See Article 29(2) ESCP.

applicable in all Member States, except for Denmark.[23] These regulations clearly take a different approach from traditional private international law rules. They do not merely coordinate national procedures, but introduce autonomous European procedures. The EOP and ESCP are available as an optional instrument, besides the existing national procedures.[24] *[259]* The claimant can therefore choose. Furthermore, the European procedures are only available in cross-border cases.[25] These limitations follow from the principles of subsidiarity and proportionality, as well as Article 65 EC Treaty. Especially the limitation to cross-border cases has been much debated. The first Commission EOP proposal of 2004 and the ESCP proposal also extended to purely national cases. As a result of the Council negotiations and the legislative resolutions of the European Parliament, the scope has been limited to cross-border cases.[26]

The EOP Regulation provides for a simple procedure for the collection of uncontested pecuniary claims for a specific amount recovery.[27] The creditor can apply for a European Payment Order by filling out a standard form and lodging it (directly, by postal mail or electronically[28]) at the competent court (Article 7 EOP). If the (formal) requirements are fulfilled and the claim appears to be founded, the court will usually issue the EOP within 30 days (Articles 8-12). The defendant has 30 days to lodge a statement of opposition, by filling out the standard form attached to the EOP served to him according to the rules of Articles 13-15 EOP (Article 16). If he does not lodge a statement of opposition, the EOP will be declared enforceable (Article 18) and will be recognized and enforced in the other Member States without the need of an *exequatur* and without the possibility of opposition in the state of enforcement (Article 19). Review of the EOP in the state of origin is possible in exceptional circumstances (Article 20). The ESCP is as a full, adversarial procedure more substantial than the EOP and will be analyzed more thoroughly below in section III. After the EOP and ESCP, a third European procedure might result from the Green Paper on the attachment of bank accounts that is currently under deliberation.[29]

Furthermore, worth mentioning are several instruments that have been established in support of European litigation. In 2003 Directive 2003/8 on Access to Justice and Legal Aid in Cross-Border Cases was established, which provides for minimum standards of legal aid in cross-border litigation. A directive on mediation in civil and commercial matters was proposed in *[260]* 2004, and is likely to be finally adopted in 2008.[30] Also important in this regard is the establishment of the European Judicial Network in civil and commercial matters (abbreviated as: EJN) in 2001.[31] The website of EJN includes practical information on procedural law of the Member States in the official languages of the European Union.[32]

III The European Small Claims Procedure

The Regulation establishing a European Small Claims Procedure introduces the second autonomous European procedure, after the European Order for Payment Procedure. The Commission proposal for the European Small Claims of 15 March 2005[33] has been intensively debated and many amendments have been

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23 See Articles 2(3) EOP and 2(3) ESCP. Denmark, as well as the United Kingdom and Ireland have a special position in regard of regulations based on Title IV EC Treaty. Denmark opted out, as it did in regard of all other regulations based on Article 61 in conjunction with Article 65 EC Treaty.

24 See Articles 1(2) EOP and 1(2) ESCP.

25 See Articles 1(1) EOP and 1(1) ESCP.

26 See further Section III.2 and IV.2 below.

27 See on the EOP amongst others: *Kramer* 2007 (fn. 5), p. 57 ff; *Xandra Kramer & Bartosz Sujecki*, De Europese betalingsbevelprocedure. Een kritische beschouwing, Nederlands Internationaal Privaatrecht (NIPR) 2006, p. 365 ff; *Anne Röthel & Ingo Sparmann*, Das europäische Mahnverfahren, Zeitschrift für Wirtschafts- und Bankrecht (WM) 2007, p. 1101 ff.

28 If the competent court has electronic means available, see Article 7 EOP.

29 Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: the Attachment of Bank Accounts, 24 October 2006, COM(2006) 618 final.

30 Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 22 October 2004, COM(2004) 718 final.

31 Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, O.J. 2001 L 174/25. See for the website <http://ec.europa.eu/civiljustice/index_en.htm>.

32 It also includes a link to the European Judicial Atlas that provides user-friendly access to information relevant for judicial cooperation in civil matters, such as the competent courts, competent authorities in regard of service of documents and taking of evidence and the filling out of the standard forms attached to the regulations. For direct access to the Judicial Atlas see <http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm>.

33 Proposal for a Regulation of the European Parliament and of the council establishing a European Small Claims Procedure, COM(2005) 87 final, 15 March 2005. See *Georg Haibach*, The Commission Proposal for a Regulation Establishing a European Small Claims Procedure: An Analysis, European Review of Private Law (ERPL) 2005, p.

proposed by the Council and the European Parliament[34], but the core of the procedure remained intact. The ESCP is a simple procedure for claims not exceeding EUR 2000 to facilitate access to justice, by simplifying, speeding up and reducing costs of small claims litigation, while respecting the right to a fair trial.[35] Article 1 ESCP explicates its two folded aim. The Regulation is intended to simplify and speed up litigation concerning small claims, and to *[261]* reduce costs. Furthermore, it eliminates intermediate measures necessary to enable recognition and enforcement in other Member States.

1. Need for a European Small Claims Procedure

Most Member States have introduced simplified procedures for small claims. The requirements for these procedures, amongst others the quantitative threshold and the type of cases for which the procedure is available, as well as the procedure itself vary considerably. The Green Paper of 2002 provides some general features of existing small claims procedures in the (old 15) Member States, based upon a survey.[36] First of all, in all Member States there are quantitative thresholds, varying between EUR 600 (in Germany[37]) and £ 5000, currently around EUR 7.500 (in England/Wales[38]). The use of standard forms to initiate the procedure is quite common. Legal representation is not compulsory in any Member State. Several Member States have the possibility of a purely written procedure, without any oral hearing. In other countries, such as England, where a successful small claims procedure exists, an oral hearing is, however, essential.[39] In some Member States the small claims procedure is limited to pecuniary claims or other specific types of litigation. In all Member States several rules of procedure are relaxed, such as those concerning evidence. Several Member States have time limits for the delivery of the judgment. The rules concerning the recovery of costs differ considerably per Member State and the same goes for the possibility of appeal.

In the Green Paper the Commission explicated that costs, delays and vexation connected with judicial remedies do not necessarily decrease proportionally with the amount of the claim.[40] On the contrary, the weight of these obstacles increases in small claims litigation. At the same time, the number of cross-border disputes is rising, and the obstacles to obtaining a fast and inexpensive judgment in these cases are clearly intensified. The service of *[262]* documents, the taking of evidence and the enforcement of the judgment will inevitably take longer and cost more in cross-border cases. Practical implications of cross-border litigation are the extra need for legal aid due to unfamiliarity with foreign proceedings (even when representation by a lawyer is not obligatory), the costs of translations, and travelling expenses.[41]

The establishment of the ESCP, as the Recitals clarify, is justified by the requirement of the internal market[42], which also Article 65 mentions as prerequisite for taking measures in the field of judicial cooperation. The substantial differences amongst the national small claims procedures cause a distortion in competition within the internal market. The ESCP will help to eliminate obstacles to the free movement of goods, persons, services and capital. The objective of the ESCP – to simplify and speed up litigation in small claims procedures – cannot be sufficiently accomplished by the individual Member States, since they cannot guarantee the equivalence of the rules. There is no level playing field if some operators have access to efficient and effective procedures while others do not.

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593 ff. See for a review of the text of the political agreement of 1 June 2006: *Xandra Kramer*, The proposal for a European Small Claims Procedure, Int'l Lis 2006, p. 109 ff.

34 European Parliament, Legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure (COM(2005)0087), 14 June 2006.

35 Recitals nos. 7 and 8 ESCP. See on the European Small Claims Procedure amongst others: *Xandra Kramer*, The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation, Zeitschrift für Europäisches Recht (ZEuP) 2008, p. 355 ff; *Kramer* 2007 (fn. 5), p. 80 ff; *Pablo Cortés*, Does the Proposed European Procedure Enhance the Resolution of Small Claims?, 2007, section I.4, available at SSRN <http://ssrn.com/abstract=983527> (also published in CJQ 2008, p. 83 ff).

36 Explanatory Memorandum Commission proposal (fn. 33), p. 4-5; Green Paper 2002 (fn. 13), p. 51-58.

37 See Article 495a Code of Civil Procedure (Zivilprozessordnung) that provides that the court can determine its procedure in its reasonable discretion ('nach billigem Ermessen') for claims with a maximum value of EUR 600.

38 Regulated in Part 27 of the Civil Procedure Rules (CPR). The judge has discretionary power to allocate a case to the small claims track; for some cases the small track is excluded or limited.

39 See CPR 27.8 and Practice Directive (PD) 27, rule 5.5 and 5.6. See also *Neil Andrews*, English Civil Procedure. Fundamentals of the New Civil Justice System, 2003, 531.

40 Green Paper 2002 (fn. 13), p. 59.

41 See on practical obstacles in international litigation amongst others *Paulien van der Grinten, Paul Meijknecht & Frans van der Velden* (ed.), Practical obstacles in cross border litigation: speeches and presidency conclusions of the international conference organised by the Dutch Presidency on 8 and 9 November 2004 in the Hague, Kluwer 2005.

42 Recital no 7 ESCP. See also Explanatory Memorandum Commission proposal (fn. 33), p. 5.

The validity of the internal market argument is to some extent questionable. In relation to the harmonization of contract law it has been argued from an economical perspective that in case competitors in the same Member State are treated equally, there is a level playing field.[43] In this case only *between* Member States there is no level playing field, but that leads to healthy competition and is part of international trade. The validity of the internal market argument is undoubtedly weakened as a consequence of the limitation to cross-border cases, since this might very well lead to a different level of protection between operators from the same Member State on the national market and operators on the international EU-market.

Nonetheless, this leaves the fact unimpeded that international litigation is expensive and that this causes small claims to, in fact, be irrecoverable. Private international law rules can set some of the boundary conditions to simplify international litigation, but cannot solve the problems regarding the necessity of hiring two lawyers when litigating abroad, the inconveniences of unfamiliarity with foreign proceedings, translation costs etc. National small claims procedures are usually not designed for use in international cases. For *[263]* example in several Member States they mostly rely on physical presence of the parties at the court.[44] Many of these problems can be reduced by creating a simple, uniform procedure that contains effective provisions that contribute to reducing the costs and the duration of proceedings.

2. *Scope of Application*

Pursuant to Article 2 the Regulation shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal[45], where the value of a claim, excluding interest, expenses and outlays, does not exceed EUR 2000.

(a) Threshold of EUR 2000

The ESCP is only available as an optional tool in case the value of the claim does not exceed EUR 2000 at the time when the claim form is received by the court with jurisdiction, excluding all interest, expenses and disbursements. This threshold has been much debated during the negotiations on the proposal. Several Member States found it too low, and others – including many of the new EU Member States – found it too high.[46] The EESC expressed in its opinion on the proposal that the ceiling of EUR 2000 is clearly insufficient given the current value of goods and services, and that it should be at least EUR 5000 in order to contribute to a more-than-proportional *[264]* reduction in costs.[47] It remains to be seen whether this threshold will be enough to cover a substantial number of cases.[48]

In regard of this threshold, there has also been a discussion on dealing with counterclaims.[49] The Commission proposal provided that in case the value of the counterclaim exceeds EUR 2000, the counterclaim shall only be considered if it arises from the same legal relationship and if the court considers it appropriate to proceed in the ESCP.[50] This did not meet the approval of the Council and Article 5(7) ESCP

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[43] *Gerhard Wagner*, The Economics of Harmonization: The Case of Contract Law, Common Market Law Review (CMLR) 2002, p. 995 ff.

[44] See also *Cortés* (fn. 35), section I.4.

[45] The Regulation mentions “court or tribunal” in all relevant provisions. From hereon reference will only be made to the “court”.

[46] For example Germany, that has a threshold of EUR 600 for its national procedure, pleaded to lower the limit to a maximum of EUR 1000. See Deutscher Bundestag, Drucksache 16/1684, 31 May 2006, p. 4-5; Stellungnahme des Deutschen Anwaltvereins, Nr. 44/2005, August 2005, p. 8-9; Stellungnahme der Bundesrechtsanwaltskammer, June 2005, Nr. 15/2005, p. 3.
In the Netherlands, where the threshold is currently set at EUR 5000 (though this will be raised to EUR 10.000 shortly) it has been argued that the limit should be EUR 5000 in order for the ESCP to be effective. See Sociaal-Economische Raad, Commissie voor Consumentenaangelegenheden, Briefadvies small claims procedure, 13 January 2006, available at <http://www.ser.nl/nl/publicaties/adviezen.aspx>. A short English abstract of this advice is available at the same website.
For the United Kingdom the threshold was acceptable, though it should be allowed that parties should choose the ESCP should the value of the claim exceed EUR 2000. See House of Lords (European Union Committee), 15 February 2006, European Small Claims Procedure, Report with Evidence, p. 28-30. Also ideas to define minimum and maximum limits or to establish a maximum ceiling or minimum floor have been launched, see House of Lords Report, p. 28-30.

[47] Opinion EESC, O.J. 2006 C 88/61, comment 6.1.

[48] See also *Cortés* 2007 (fn. 35), section II.2.

[49] The concept of counterclaim should be interpreted within the meaning of Article 6(3) Brussels Regulation as arising from the same contract or facts on which the original claims was based, see Recital no. 16 ESCP.

[50] See Article 4(2) of the Commission proposal.

rules that if the counterclaim exceeds the limit of EUR 2000, the claim and counterclaim shall not proceed in the ESCP, but be dealt with in accordance with national law.

(b) Civil and Commercial Matters; Excluded Matters

According to Article 2, the ESCP is applicable in civil and commercial matters, whatever the nature of the court or tribunal. 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*"). This formulation is derived from Article 1 of the Brussels I Regulation and the case law of the European Court of Justice in relation to this provision.

In Article 2(2) the following matters are excluded: a) the status or legal capacity of natural persons, b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession, c) bankruptcy, d) social security, e) arbitration, f) employment law, g) tenancies of immovable property, with the exception of actions on monetary claims and h) violations of privacy and of rights relating to personality, including defamation. Sub a-e largely coincide with the exclusions in Article 1 Brussels I.[51] The other subject matters are excluded because some Member States have special procedures or even special courts for these cases.[52]

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(c) Cross-border Cases

The ESCP can only be opted in a cross-border case and is not applicable in a national case. The Commission proposal, as did the initial proposal for the European Order for Payment Procedure, also extended to purely national cases. According to the Commission, Article 65 EC Treaty – that provides that measures can be taken in civil matters 'having cross border implications' – should not be interpreted restrictively, since it would create new obstacles to access to justice.[53] It argued that procedural law, by nature, may have cross-border implications. However, 21 of the 25 Member States did not support the view of the Commission and neither did the European Parliament.[54] The scope of the ESCP is therefore limited to cross-border cases, as is the EOP.[55]According to Article 3 ESCP 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 seized. This definition coincides with the one in Article 3 EOP Regulation.

3. Key Elements of the Procedure

The Regulation provides the most important procedural rules and some minimum requirements for the ESCP, but is not exhaustive. According to Article 19, subject to the provisions of this Regulation, the ESCP shall be governed by the procedural law of the Member State in which the procedure is conducted. The Regulation thus upholds the principle of *lex fori processus*. The Recitals express that the court should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken.[56]

Special features and simplifications are that the procedure is in principle conducted in writing (Article 5), that on a necessary hearing the court may make use of video conferences or other communication technology if the *[266]* technical means are available (Article 8), that there are special rules for the taking of evidence (Article 9) and that representation by a lawyer or another legal professional is not mandatory (Article 10). There are time limits for conducting certain procedural acts and for giving judgment (Article 4, 5, 7 and 14). The Regulation is accompanied by four standard forms (Annexes I-IV). These are the claim form (A), a form to request completion or correction of the claim form (B), an answer form (C), and a certificate concerning a judgment in the ESCP (D).[57]

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[51] Except that maintenance cases are included in the Brussels Regulation.

[52] See also Council of the European Union Comments on the specific articles of the proposal, 21 March 2005, JUSTCIV 54, CODEC 177.

[53] Explanatory Memorandum Commission proposal (fn. 33), p. 5-6.

[54] See House of Lords Report (fn. 46), Minutes of Evidence, p. 2; European Parliament, Legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure (COM(2005)87), 14 June 2006. The EESC, on the contrary, supported the view of the Commission, see Opinion EESC (fn. 47), comment 2.4.

[55] See further on this issue section IV.2 below.

[56] Recital no. 9 ESCP.

[57] Some of these special features will be elaborated on in section IV, since they are common to both EOP and ESCP.

4. *Commencement, Conduct and Conclusion of the Procedure*

(a) Commencement

The ESCP is commenced by lodging the claim form A (Annex I) at the competent court, pursuant to Article 4(1). The claim form may be lodged directly, by post or by any other means of communication such as fax or e-mail, as long as this is acceptable to the Member State in which the procedure is commenced.[58] The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents.

The claim form has been developed with special care, since the claimant should be able to fill it in without help of a lawyer. It contains closed fields and uses a tick-box system where possible, and provides a short explanation per item. The claimant is instructed that the form should be filled out in the language of the court.[59] The form is (electronically) available in all official languages of the EU, which facilitates the claimant when filling in the form in the language of the court.[60] According to Article 11 Member States shall ensure that the parties can receive practical assistance in filling in the forms. The Recitals clarify that the practical assistance should include technical information concerning the availability and the filling in of the forms.[61] *[267]* Information about procedural questions can also be given by the court staff in accordance with national law.[62]

One of the debates during the negotiations on the proposal focused on the question whether evidence should be lodged to the court together with the claim form. The Commission proposal stated that the claim should be lodged together with any relevant additional document. In order to avoid unnecessary translation costs, however, the Regulation provides that the claim form shall include a description of the evidence, and only where appropriate be accompanied by supporting documents. It goes without saying that, if necessary, the court may request submission of written evidence or other evidence during the proceedings.[63]

Where a claim is outside the scope of the Regulation, the court shall inform the claimant, and the court will proceed in accordance with national law, unless the claimant withdraws the claim (Article 4(3). Where the court considers the information provided inadequate or insufficiently clear, or the form is not filled in properly, it will give the opportunity to complete or rectify the form (using standard form B of Annex II), unless the claim appears to be clearly unfounded or the application inadmissible (Article 4(4). 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. The Recitals state that the concepts "clearly unfounded" and "inadmissible" should be determined in accordance with national law.[64]

(b) International Jurisdiction

The ESCP does not contain jurisdiction rules, which means that the ordinary jurisdiction rules of Brussels I apply. The ESCP neither has an exclusive jurisdiction rule for consumers, contrary to Article 6(1) sub d of the European Enforcement Order Regulation (EEO) and Article 6(2) EOP, which contain a rule broader in scope than Article 15 Brussels I.[65] The background probably is that those Regulations concern uncontested claims while the ESCP, in principle, does not, so in this procedure it will be up to the consumer to contest jurisdiction. This, however, does not explain why the definition of "consumer" is broader under those regulations than under the ESCP. *[268]* Furthermore, contrary to what is the case under Brussels I, the decision in the ESCP is enforceable throughout the EU, which means that the consumer does not get any protection in the stage of recognition and enforcement.[66] Since small claims litigation mostly involves consumer cases, a similar protective rule for the ESCP would in my opinion have been appropriate.

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[58] Member States shall inform the Commission which means are acceptable and this will be made publicly available (Article 4(2). In view of accessibility and costs electronic communication is preferable, but since not all Member States are sufficiently equipped yet, it is not is not possible to oblige them to receive electronic claim forms.

[59] See also Article 6 ESCP on the language requirements.

[60] These will be made available on the website of the European Judicial Atlas (fn. 32).

[61] Recital no. 21 ESCP.

[62] Recital no. 22 ESCP.

[63] See Article 9 ESCP on the taking of evidence.

[64] Recital no. 13 ESCP.

[65] These include all natural persons, and do not contain the restrictions of Article 15 Brussels I Regulation.

[66] See Article 35(1) Brussels I Regulation.

(c) Conduct of the Procedure

Article 5(1) ESCP provides that the ESCP shall be a written procedure. During the negotiations the right to an oral hearing has been one of the debated issues.[67] The Commission proposal provided that an oral hearing may take place when the court deems it necessary, taking into account the demands of the parties. Article 5 ESCP, however, provides that the court shall hold an oral hearing if it considers this to be necessary or if a party so requests. This request may be refused if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the case. The reasons thereto shall be given in writing.

Within 14 days of receiving the properly filled in claim form, a copy of the claim form and possible supporting documents, together with standard answer form C (Annex III), shall be served on the defendant in accordance with Article 13 (Article 5(2). The defendant shall submit his response within 30 days of service by filling in standard answer form C, where appropriate accompanied by any relevant supporting documents, or in any other appropriate way, and returning it to the court (Article 5(3). Within 14 days of receipt of the response from the defendant, the court shall dispatch a copy thereof, together with any relevant supporting documents to the claimant (Article 5(4).[68] The claimant shall have 30 days from service to respond to any counterclaim (Article 5(6).

The language requirements are laid down in Article 6. These rules have received particular attention since the necessary translations may excessively increase the costs of proceedings.[69] The claim form, the response, the counterclaim and response thereto, and any description of relevant supporting documents shall be submitted in the language or one of the *[269]* languages of the court. The court may require a translation of documents received not in the language of the proceedings only if the translation appears to be necessary for giving the judgment. Furthermore, the rules of Article 8 of the (new) Service Regulation have been incorporated.[70] A party may refuse to accept a document when it is not in the official language of a) the country or place where service is to be effected or where the document is to be dispatched, or b) in a language which the addressee understands. The court shall inform the other party of a refusal with a view to that party providing a translation of the document.

Other procedural rules are laid down in Article 8-14 ESCP. An oral hearing may be held through video conference or other communication technology if the technical means are available (Article 8). The court shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the (national) rules applicable to the admissibility of evidence (Article 9). The court may admit the taking of evidence through written statements of witnesses, experts or parties. It may also admit the taking of evidence through video conference or other available technical means. In view of the costs, the court may take expert evidence or oral testimony only if it is necessary for giving the judgment. The court shall use the simplest and least burdensome method of taking evidence. The Recitals state that in the context of an oral hearing and the taking of evidence, the Member States should encourage the use of modern communication technology.[71] This is a fast and cheap way of hearing parties or witnesses, and will therefore promote the aims of the Regulation. As mentioned above, representation by a lawyer or another legal professional shall not be mandatory (Article 10), and practical assistance in filling in the forms should be made available (Article 11). Parties are not required to make any legal assessment of the claim, the court shall inform the parties about procedural questions, and whenever appropriate, the court shall seek to reach a settlement between the parties (Article 12). As to the time limits the court sets, the party concerned shall be informed of the consequences of not complying with these limits (Article 14). The fixed time limits provided for in Articles 4(4), 5(3), (5)6 and 7(1), may be extended in exceptional circumstances, if necessary to safeguard the rights of the parties. If in *[270]* exceptional circumstances the court cannot respect the time limits for the court, provided for in Articles 5(2-6) and 7, it shall take the steps required by those provisions as soon as possible.

(d) Conclusion of the Procedure

According to Article 7, within 30 days of receipt of the timely response from the defendant or claimant to the counterclaim the court shall give judgment, or demand further details within a maximum period of 30 days,

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[67] See also Council of the European Union, 29 November 2005, doc. no. 15054/05, JUSTCIV 221, CODEC 1107.

[68] If the defendant claims that the value of a non-monetary claim exceeds EUR 2000, the court shall within 30 days of dispatching the response to the claimant decide whether the claim is within the scope of the ESCP (Article 5(5).

[69] See also Cortés 2007 (fn. 35), section II.3.

[70] 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, O.J. 2007 L 324/79. This Regulation will as of 13 November 2008 replace Service Regulation No 1448/2000.

[71] Recital no. 20 ESCP.

or take evidence in accordance with Article 9, or summon the parties to an oral hearing to be held within 30 days of the summons. The court shall give judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment. If it has not received an answer from the relevant party within the set time limits, it shall give a judgment on the claim or the counterclaim. The Commission proposal provided for a 'final deadline' for the judgment of six months following the registration of the claim form. However, many delegations had doubts on a binding overall limit for the whole procedure besides the time limits for specific procedural phases, and it was therefore deleted.[72] In my opinion, this is regrettable. Though clear time limits per stage of the proceedings are more important, an additional overall limit of six months would have provided a good indication for the parties and guideline for the courts of the maximum duration of the proceedings.

5. Service of Documents

In order to reduce costs, the ESCP has an autonomous rule which provides for a simple means of service of documents. Article 13(1) ESCP provides that documents shall be served by postal service attested by acknowledgement of receipt, including the date of receipt. Not all Member States include this simple means of service in their national law, and for these States the ESCP introduces a new way of serving documents in cross-border cases covered by the ESCP. If service in accordance with Article 13(1) is not possible, service may be effected by any of the methods provided for in Articles 13 or 14 EEO. These articles include ten different methods of service of documents, which are relevant in the context of the EEO Regulation as minimum requirements *[271]* for the certification of a judgment as European title.[73] These methods are also prescribed under the EOP Regulation (Article 13 and 14 thereof).

6. Appeal and Review

The ESCP Regulation does not include a uniform rule on appeal. In view of the substantial differences in the Member States on this issue, taking up a uniform rule was regarded undesirable.[74] According to Article 17, Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the ESCP and within what time limit. The Commission shall make that information publicly available. In my view a uniform rule for appeal would have been preferable, in order to promote a standardized procedure.

The Regulation, however, does provide for minimum standards for review of the judgment. Pursuant to Article 18 the defendant shall be entitled to apply for a review before the court with jurisdiction of the Member State where judgment was given where a) the claim form or summons to an oral hearing were served by a method without proof of receipt by him personally as provided for in Article 14 EEO, ánd 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. In both cases the defendant should act promptly. It is not clear what exactly is to be understood by 'extraordinary circumstances'. What is clear is that it is required that the defendant was not able to defend his case without his fault. This rule is intended to guarantee a possibility of review in situations where the defendant was not able to contest the claim.[75] This provision is derived from Article 19 EEO[76] and partly coincides with the provision laid down in Article 20 EOP[77].

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7. Recognition and Enforcement

The judgment shall be enforceable notwithstanding any possible appeal, and without security required (Article 15). Enforcement in another Member State is regulated by Articles 20-23. These provisions for the most part duplicate the relevant rules of the EEO and EOP Regulations.[78] The judgment given in a Member State in the ESCP shall be recognized and enforced in another Member State without the need for a

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72 Council of the European Union, 29 November 2005, doc.no. 15054/05, JUSTCIV 221, CODEC 1107.

73 See for a comprehensive discussion of these methods *Rauscher* 2005 (fn. 19), p. 45 ff.

74 Commission staff working document, Comments on the specific articles of the proposal, COM(2005) 87 final, Article 15.

75 Recital no. 31 ESCP.

76 See on this provision *Rauscher* 2005 (fn. 19), p. 61 ff.

77 Article 19 EOP is broader since it also covers situations where the payment order was clearly wrongly issued (see Article 19(2) EOP. See further section IV.2.

78 See Article 20, 21 and 23 EEO and Article 19, 21, 22 and 23 EOP. See on these rules of the EEO: *Rauscher* 2005 (fn. 19), p. 66 ff; on the EOP see *Kramer & Sujecki* (fn. 27), p. 372.

declaration of enforceability or the possibility of opposing its recognition (Article 20). At the request of one of the parties a certificate concerning a judgment in the ESCP, using standard form D (Annex IV), will be issued. The enforcement shall be governed by the law of the Member State of enforcement, and the judgment shall be enforced under the same conditions as a judgment given in the State of enforcement (Article 21). Other grounds of refusal, including the public policy exception, are excluded.[79] The party seeking enforcement shall produce an authentic copy of the judgment, and a copy of the certificate mentioned in Article 20(2), where necessary with a translation thereof in the language of the Member State or place of enforcement, or into another language that the Member State has indicated to accept. An authorized representative and a postal address in the Member State of enforcement are not necessary.

Enforcement can only be refused, upon application of the person against whom recognition is sought, if the judgment in the ESCP is irreconcilable with an earlier judgment of an EU Member State, or of a third country, provided that it involves the same cause of action and that it was between the same parties, and that it is given by the Member State of enforcement or enforceable in that Member State, provided that the irreconcilability could not have been raised as an objection in the Member State where the judgment in the ESCP was given (Article 22). Where a party has challenged the judgment in the ESCP or where such a challenge is still possible, enforcement proceedings may be limited to protective measures, or be made conditional on the provision of security, or under exceptional circumstances be stayed (Article 23).

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8. Costs

In view of the accessibility of the ESCP the rule on the costs has also been debated. The Commission proposal provided that the unsuccessful party shall bear the costs of the proceedings unless where this would be unfair or unreasonable, and that when the unsuccessful party is a natural person and is not represented by a lawyer, he shall not be obliged to reimburse the lawyer's fee of the other party. This was meant to encourage parties not to employ a lawyer.[80] However, several delegations preferred to apply the principle that the losing party has to pay irrespective of whether he is a natural or legal person.[81] Article 16 ESCP therefore provides that the unsuccessful party shall bear the costs of the proceedings. The court shall, however, not award costs that were unnecessarily incurred or disproportionate to the claim.

As to the costs of the proceedings, the Recitals state that it should be necessary to have regard to the principles of simplicity, speed and proportionality when setting the costs of dealing with a claim under the ESCP.[82] It is appropriate that details of the costs to be charged be made public, and that the means of setting any such costs are transparent.

9. Evaluation

Some comments on specific rules of the ESCP have already been made in the foregoing. The question was raised whether the threshold of EUR 2000, which as a political compromise might be a good solution, will in view of the economic analysis by the EESC be enough to cover a substantial amount of cases, in order to outweigh the costs that are involved.[83] This shall be one of the issues to be taken into account when the operation of the Regulation is reviewed after five years pursuant to Article 28 ESCP, as this provision explicates. Another comment that has been made was that in my opinion a *[274]* special jurisdiction rule for consumers would have been in place. The consumer friendliness of the ESCP is further reduced by deleting the costs rule of the Commission proposal, stating that when the unsuccessful party is a consumer, he shall not be obliged to reimburse the lawyer's fee of the professional party, in case he was not represented by a lawyer himself. As for the time limits included in the Regulation, it would in my view have been preferable to include an additional time limit of six months for the whole procedure, as the Commission proposal provided.

Another weak point of the Regulation could be that many issues are left to be decided by national procedural law. The course of proceedings, the enforcement as well as the costs might therefore differ considerably per Member State. For example the possibility of appeal is to be determined by national law.

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79 See also the debate regarding the EEO in this context, section II.2 and fn. 17.

80 See Article 14 Commission proposal; Comments on the specific articles of the proposal, Article 14.

81 Council of the European Union, 21 November 2005, doc.no. 14638/05, JUSTCIV 208, CODEC 1037, 6.

82 Recital no. 7 ESCP.

83 The Extended Impact Assessment made in relation to the proposal (see Commission Staff Working Document, 15 March 2005, SEC(2005)351) showed that the potential impact of the Regulation is considerable, since it might involve 7 million citizens per year and have a "turnover" of at least EUR 8.000.000.000. It was estimated that the abolition of the enforcement procedure will reduce the costs and duration by 20%. In these numbers, however, domestic claims are included. The limitation to cross-border cases limits the impact considerably.

This will cause already considerable differences in the level of protection and have an impact on the duration and costs of the procedure. The fact that many issues are to be decided by national law, necessitates a careful implementation of this Regulation by the Member States. The implementation is essential for the success of the ESCP. It is a pity that no explanatory report or practical guide is available in order to facilitate the implementation and operation in practice. The implementation laws and the operation in practice of the ESCP in the various Member States shall be thoroughly evaluated. Article 28 ESCP provides that by 1 January 2014 the Commission shall present a detailed report reviewing the operation of the ESCP. To that end, and in order to ensure that best practice in the EU is duly taken into account and reflects the principles of better legislation, Member States shall provide the Commission with information relating to the cross-border operation of the ESCP.[84]

A last general remark concerns the prospected effectiveness of the ESCP in view of the costs. In practice especially the costs of legal aid and translations appear to be the most important expenses. As to legal aid, it is to be hoped that filling in of the standard forms and the conduct of the proceedings are indeed simple and make support of a lawyer in normal cases unnecessary. Though the standard forms are carefully developed and contain clear instructions, it may still be difficult for the average consumer to fill in these forms.[85] It is important that practical assistance in the Member States is well arranged. Another aim of the ESCP is to reduce the need, and consequently costs, of translations. The claim form and answer form should *[275]* be submitted in the language of the court. It is helpful that forms are available in all official languages of the Member States, so by reading the questions in his own language he knows what the question entails, and can find out which box to tick for the closed questions. But part of the forms consists of open questions. How many consumers will be able to answer these questions in another language? For most (educated) consumers English might, with a little help, still be possible, but how about Polish, Dutch or Greek? Of supporting documents the court may only require translation when this appears to be necessary for giving the judgment. The question is how many courts throughout the EU will be able to analyze for example a contract in other languages than their own language, except maybe for English, or German or French. It must be noted that in most cases a consumer will be able to litigate in his own country[86], and therefore not encounter language problems, at least not in his communication to the court. A (counter) party may refuse to accept a document if it is not in his official language or a language he understands. It might be that in practice consumers will more often be involved in this procedure as defendant than as claimant and that it especially benefits companies active in the consumer business, such as mail order companies and phone companies.[87]

Nonetheless, the establishment of the ESCP is a step in the right direction to promote access to justice[88], and to speed up, simplify and reduce costs of small claims litigation, while respecting the principles of a fair trial. It vouches for a careful balance between simple and relatively cheap proceedings on the one hand and the principles of a fair, adversarial procedure on the other hand.[89] Access to the court is facilitated by the use of simple standard forms, the possibility of electronic communication (if available at the court), the practical assistance that should be available at the courts, and the fact that representation by a lawyer is not compulsory. The time limits guarantee, as far as possible, a trial within a reasonable time, as required by Article 6 ECHR. Fairness of the procedure is promoted by the adversarial nature of the proceedings and several procedural checks and *[276]* balances. In my view the requirements for the service of documents guarantee sufficiently that the defendant has a possibility to defend himself, since in general service is attested by an acknowledgment of receipt. In case service has been effected without proof, and was not effected in sufficient time to enable him to arrange for his defence without his fault, he can request review of the decision.[90] The language requirements guarantee that a party is able to understand the relevant documents. Furthermore, a request for an oral hearing will be granted, unless an oral hearing is obviously not

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[84] This shall cover court fees, speed of the procedure, efficiency, ease of use and the internal small claims procedures of the Member States.

[85] For example to answer question 4 of the claim form on jurisdiction of the court.

[86] Pursuant to Article 15-17 Brussels I Regulation.

[87] The English small claims procedure is also criticized on this point. See recently *Lewis*, The Consumer's Court? Revisiting the Theory of the Small Claims Procedure, Civil Justice Quarterly (CJQ) 2006, p. 52 ff.

[88] As recognized in Article 6 European Convention on Human Rights. See also ECHR 21 February 1975, no 6289/73, Series A, No 18 (Golder v. United Kingdom). According to ECHR 9 October 1979, no 6289/73, Series A, No 32 (Airey v. Ireland) this also implies effective access to the court. This may entail the provision of legal aid or simplified procedures.

[89] See for a more detailed analysis in this regard: *Kramer* 2008 (fn. 35), p. 370-373.

[90] According to Article 18 ESCP.

necessary. This is in conformity with the case law of European Court of Human Rights on Article 6 ECHR.[91] Lastly, review of the decision is possible in case the defendant was prevented from objecting the claim by reason of *force majeure*. In my view these elements sufficiently guarantee the right to a fair trial.

Whether the ESCP will become successful in practice of course remains to be seen and will be evaluated after five years. The optional nature of the ESCP leads to multiplicity of procedures, which might as such not be preferable, but it also implies that it will really have to prove its value in competition with the existing national procedures. This may well benefit both national small claims procedures[92] and the ESCP.

IV Some thoughts on the Harmonization of Procedural Law in Europe

1. Accomplishments and New Features of Harmonized European Procedures

The bringing about of European procedures, and in particular the ESCP, is an accomplishment, especially in view of the scepticism that surrounded the harmonization of civil procedure until only recently.[93] Many (political) obstacles had to be removed, legal issues to be decided and practical problems inherent to international litigation to be solved. The text of the ESCP *[277]* Regulation is in general well-drafted, and the standard forms are carefully designed.[94] The European procedures are also progressive in the sense that they introduce several new procedural concepts and provide solutions that are not yet common in (all) the Member States and in the existing European instruments.

One of the new features is the use of standard forms to institute proceedings, for the answer of the defendant and for rendering the order or judgment. Most regulations in the field of European procedure also include standard forms, but these have a different nature and purpose.[95] The standard forms of the EOP and ESCP play a crucial – and sometimes exclusive – role in the procedures. Both procedures are (primarily) written procedures, and they are (mostly) to be used by the parties (businesses or consumers), who should be able to fill out the forms without help of a legal professional. The tick box system is implemented as far as possible, and – especially the forms of the ESCP[96] – are in general easy to use. Some Member States, such as the United Kingdom, also make use of standard forms to file (small) claims, but they are not as 'advanced' as the claim forms of the EOP and ESCP and are of course not (especially) equipped for cross-border cases.

Information technology also plays an important role in this regard. The use of information technology is promoted in both regulations.[97] ICT plays a role in the submission of the standard (claim and answer) forms in both the EOP and ESCP, in the examination of the application for a European order for payment (EOP), as well as in the context of oral hearings and the taking of evidence (ESCP).[98] Ideally the whole EOP should be conducted electronically. In the ESCP information technology is mostly supportive to the procedure. The use of ICT is not compulsory, since not all courts are yet sufficiently equipped, but its use should definitely be promoted and the exchange of technological and practical information between the (courts of) *[278]* the Member States should be supported. The use of ICT will further access to justice, simplify proceedings and reduce costs. Furthermore, it reduces language problems inherent to international litigation. Both the EOP and ESCP are in principal conducted in the language of the court, and language therefore remains to be a practical obstacle to international litigation.[99]

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91 In Dory v. Sweden, the Court ruled that a court could, having regard to the demands of efficiency and economy, abstain from holding a hearing if the case could be adequately resolved on the basis of the case-file and the parties' written observations. See ECHR 12 November 2002, no. 28394/95 (Dory v. Sweden), available at <http://www.echr.coe.int/echr/>.

92 In the Netherlands the ESCP has given inspiration for the development of a national small claims procedure. See *Xandra Kramer*, Vereenvoudiging van de geschillenbeslechting in consumentenzaken: de Europese small claims procedure en nationale initiatieven, Tijdschrift voor Consumentenrecht en Handelspraktijk (TvC) 2007, p. 111 ff.

93 See also section I above.

94 The EOP contains several flaws, amongst others in the standard forms.

95 E.g. Brussels I has standard forms including a certificate of the judgment or authentic instrument, the EEO Regulation for the certification of the judgment or authentic instrument, the Service Regulation for, amongst others, the request, acknowledgment of receipt, notification and certification of service, and the Evidence Regulation for, amongst others, the request, acknowledgment of receipt, notification and information.

96 The standard forms of the EOP are in my view less well-developed and have several errors and omissions.

97 See amongst others Recitals nos. 11 and 16, as well as Articles 7, 8 and 16 EOP; Recital no. 20, as well as Articles 4, 8 and 9 ESCP.

98 See on the role of ICT in the EOP: *Bartosz Sujecki*, Initial Steps Towards an Electronic European Order for Payment Procedure, Computer law review international (Cri) 2006, p. 111 ff; on the ESCP: *Cortés* 2007 (fn. 35), section II.4.

99 See also on language problems *Andrzej Ryng*, How to deal with language problems in cross-border litigation in civil matters?, in: *Paulien van der Grinten, Paul Meijknecht & Frans van der Velden* (ed.) 2005 (fn. 41), p. 5 ff;

Another feature of both the EOP and ESCP is that they are (primarily) conducted in writing. Especially in common law countries an oral hearing is essential in small claims proceedings, and also in several civil law countries oral hearings are of growing importance since it may help both the court and the parties to immediately get to the real issue of the dispute, and it may promote a settlement. In cross-border litigation oral hearings are, however, in general not efficient, since it increases costs and delays proceedings, due to the need for translations, legal aid and travelling. Though in view of the requirements of Article 6 ECHR in general an oral hearing is indicated if parties request so, the European Court also ruled by way of exception that a court could, having regard to the demands of efficiency and economy, abstain from holding a hearing if the case could be adequately resolved on the basis of the case-file and the parties' written observations.[100] The EOP is by definition a written procedure due to its uncontested nature. By simply lodging a statement of opposition, the procedure will be continued according to national law (see Article 17 EOP), including its rules on oral hearings. Under the ESCP a request for an oral hearing will usually be granted, unless an oral hearing is obviously not necessary (see Article 5 ESCP). In view of the low monetary value of the claim, in my view this rule is justified.

The introduction of time limits is another characteristic of the EOP and the ESCP. In most Member States such time limits are not common in civil procedure. In view of the aim to simplify, speed up and reduce costs of the recovery of uncontested debts and the resolution of small claims, these time limits are in my view an important asset. Many cases at the European Court of Human Rights have dealt with the requirement of a trial within a reasonable time, and many EU countries regularly violate this requirement in civil cases. The introduction of time limits in European litigation is therefore an important and daring step. The EOP and ESCP fixes a time limit of 30 days *[279]* for the completion of the procedure or for certain stages of the procedure. Though the 30 days-period seems to be randomly chosen and may in some cases be rather long, at least it seems to be acceptable as common ground to the Member States and it is consistently used in both the EOP and ESCP.

The last new feature to be discussed at this point is the review mechanism. With some variations this mechanism is to be found in the EEO Regulation, as well as the EOP and ESCP.[101] Several Member States, such as Germany and Austria, already had a similar system of review (in particular in the national order for payment procedure), but in most Member States a similar means of review at the same court that granted the order or judgment is not familiar. Though the review mechanism seems to rely on slightly different grounds in these three instruments, the overall justification seems to be the absence or – in case of the ESCP – possible absence of a possibility of appeal. Review serves as minimum guarantee that certain fundamental rules of procedure, especially. those relating to the right to be heard or the adversarial nature of the proceedings, are respected. In this regard it is important that Article 6 ECHR does not oblige states to create the possibility to lodge an appeal.[102] However, in general proceedings should be fair, and the defendant should be able to defend himself. The possibility of review relates to an ineffective service.[103] In the situations described in the relevant provisions, the defendant was not able to defend himself without any fault on his part or in case of *force majeure*. The EOP, however, is somewhat ambiguous since it also allows review where the order for payment was 'clearly wrongly issued' or in other 'exceptional circumstances'. The Recitals state that the possibility of review should not mean that the defendant is given a second opportunity to oppose the claim.[104] The exact nature and purpose of review is therefore not clear. A further explanation of what 'review' within the context of European procedural law entails, is desirable.

2. Some Difficulties and Fundamental Questions

In spite of the accomplishments in the process of the codification and harmonization of European procedural law, the recent developments also *[280]* pose difficulties and raise some fundamental questions. Some of the difficulties have already been touched upon in the foregoing sections. These mainly relate to the explanation and implementation of the EOP and ESCP, due to the fact that certain procedural concepts, such as 'review' are not well-developed yet and that procedural law and practice differ substantially per Member State. As has

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Astrid Stadler, Sprachprobleme im Europäischen Zivilprozessrecht, in: *Van der Grinten, Meijknecht & Van der Velden (ed.)* 2005 (fn. 41), p. 11 ff.

[100] ECHR 12 November 2002, no. 28394/95 (Dory v. Sweden), available at <http://www.echr.coe.int/echr/>.

[101] See Article 19 EEO, Article 20 EOP and Article 18 ESCP. See section III.6 above on Article 18 ESCP.

[102] See ECHR 17 January 1970, Series A, vol. 11 (Delcourt); this decision was repeated in several subsequent cases.

[103] See section III.6 for the ESCP; the EEO regulation is almost the same. See also Article 20, para 1 EOP.

[104] Recital no. 25 EOP.

been concluded before, it is a pity that there are no explanatory reports[105] or practical hand guides available (yet) for these new procedures.

Other difficulties follow from the limitations of European harmonization. These limitations primarily result from the principles of subsidiarity and proportionality, as laid down in Article 5 EC Treaty[106], as well as the (interpretation of) Article 65 EC Treaty.[107] The three main limitations are 1) the limitation to cross-border cases, 2) the optional nature of the European procedures and 3) the 'minimum' harmonization. These limitations also affect future harmonization, such as the European Attachment of Bank Accounts that is currently being prepared.[108]

The limitation to cross-border cases of the European procedures is in conformity with traditional private international law rules in the field of international procedural law. International jurisdiction rules, taking of evidence abroad, service of documents where a defendant is domiciled in another country, and enforcement of a foreign judgment naturally imply a cross-border element. Private international law rules simply do not come into the picture in a purely national case. For the European procedures this limitation is, however, not so self-evident. Community directives that regulate substantive matters, and more recent also instruments that include procedural rules, which are based on Article 95 EC Treaty also apply to national cases. For example the – much criticized – Directive on the enforcement of intellectual property rights[109] contains rules on evidence, *[281]* measures to preserve evidence, provisional and precautionary measures, procedures on the merits and legal costs. This directive had a big impact on (national) procedural law and necessitated substantial amendments of the procedural codes.[110] Why should procedural rules concerning, for example, small claims be limited to cross-border cases? In my view the wording of Article 65 EC Treaty does not allow measures that also apply to purely national disputes, and in the case of the EOP and the ESCP most Member States were not in favour of extending the scope of these procedures.[111] That is a reality we have to deal with in Europe. But nevertheless this issue deserves a fundamental debate that is not limited to a particular instrument or procedure, but that includes all (future) European procedures.[112]

The optional nature of the EOP and ESCP also poses difficulties.[113] If one has a protectionist view regarding (one's own) procedural law, such as the United Kingdom and several other Member States, the optional nature, in combination with the limitation to cross-border cases, of the European procedure seems least 'harmless'.[114] But this so-called 28th regime – or without Denmark 27th regime – has as disadvantages that it makes procedural law scattered and that it leads to multiplicity of procedures. Also the European procedures may remain to be a "*Fremdkörper*", since they do not require incorporation in the national procedural law system.[115] This also results from the choice for a regulation, instead of a directive. A directive has to be implemented in the national procedural law, and will – dependant on what is regulated in the directive and how detailed it is – usually result in more coherent procedural system.

The third limitation related thereto, which (partly) follows from the principles of proportionality and subsidiarity, is the 'minimum' harmonization that characterises the EOP and ESCP. Both the EOP and ESCP

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105 Explanatory reports used to be provided for the EU-conventions (Brussels Convention and Rome Convention), as is the case for e.g. conventions of the HCCH, but for EU-regulations this is not possible.

106 These indicate that the European Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and that the content or form of the action shall not exceed what is necessary to achieve the objectives of this treaty.

107 See also section II.2 and III.2.

108 See section II.2 and fn. 29.

109 Directive 2004/48/EC on measures and procedures to ensure the enforcement of intellectual property rights, O.J. L 157/45. See the 'Professor's Letter' (supported by 36 IP Professors): *William Cornish et al*., Procedures and Remedies for Enforcing IPRs: the European Commission's Proposed Directive, European Intellectual Property Review (EIPR) 2003, p. 447 ff.

110 In the Netherlands this Directive resulted in the introduction of a whole new Title in the Code of Civil Procedure. See also for example the Green Paper on Damages actions for breach of the EC antitrust rules, COM(2005)672, which also includes important procedural issues.

111 See also section II.2 and III.2 above. See for a discussion of Article 65 EC Treaty section II.1 above.

112 See amongst others on this issue *Paul Meijknecht*, Alleen voor grensoverschrijdende gevallen?, in: *René Flach*, Amice: Rutgers-bundel, Kluwer 2005, p. 223 ff.

113 Under national law orders for payment and small claims procedures are usually optional as well, but in the case of the EOP and ESCP also national order for payment and small claims procedures remain available, and not only the ordinary procedures.

114 See also *Paulien van der Grinten*, Vraagpunten in het Europees procesrecht, Tijdschrift voor civiele rechtspleging (TCR) 2007, p. 68.

115 Most Member States will not implement these procedures in their national procedural code, but through separate implementation laws.

[282] are not exhaustive. National law still plays an important role. One example from the ESCP was already mentioned in the previous section; the question whether or not appeal is allowed is to be decided upon national law, provided that review should be possible under certain exceptional circumstances. The reason provided for the absence of a uniform rule on appeal is that the national rules differ too much in this regard. But at the same time, it undermines the uniform application and effectiveness of the ESCP. The regulation of the service of documents is another example of minimum harmonization, especially that of the EOP. A range of more than ten different ways of service of documents is included, which allows Member States to stick to their own (maybe inefficient) system of service of documents, as long as it is in conformity with one of the ways described. The Recitals of the EOP even explicate that harmonization as such is not the aim of this Regulation.[116] This approach is, however, somewhat ambiguous. On the one hand European procedures are established to overcome the problems inherent to cross-border litigation and to guarantee a level playing field, which – according to the Recitals – cannot be accomplished by the individual Member States.[117] But on the other hand these regulations leave so many issues to be decided by national law, that one may question whether they go far enough to indeed guarantee equal standards and how 'European' these procedures really are.

Of course one should keep in mind that the EOP and ESCP are the first European procedures, and a lot of difficulties had to be overcome and compromises had to be made. Nevertheless, the limitations and new concepts in European procedural law necessitate further debate.

V Concluding Remarks

In the foregoing the stormy developments in European procedural law have been presented. Since 2000 many regulations in the field of private international law and international procedural law have been established, varying from international jurisdiction and recognition and enforcement, to cross-border service of documents, taking of evidence and insolvency. A landmark is the recent establishment of the first two European procedures, the European Order for Payment Procedure and the European Small Claims Procedure. The ESCP, that is contrary to the EOP an adversarial procedure, has been analyzed more in detail. Contrary to the EOP the ESCP is an adversarial procedure and is in that regard more remarkable and complex *[283]* than the EOP. Unlike several other regulations – some of which have already been or will be replaced –, both the EOP and ESCP Regulations have been carefully prepared and intensively negotiated. Many legal issues and practical problems have been tackled. A third European procedure, a European bank attachment that enables direct enforcement throughout the EU, is under consideration. Besides the accomplishments and several innovative features of these new European procedures, these also pose some difficulties and fundamental questions, amongst others those relating to the scope of these procedures.

The harmonization of procedural law is conducted in a 'piece meal' manner. This certainly has advantages and a step-by-step approach is probably the only (politically accepted) way to come to a further approximation of procedural laws in Europe. However, a disadvantage is that it endangers the coherence of (European) procedural law. To secure the coherence of European procedural law was also one of the priorities of the Hague Programme of 2004.[118] The ad hoc harmonization lacks coherent underlying concepts and it is not clear how and in what direction European procedural law should be further developed. In the Netherlands recently there have been calls for a more fundamental debate on where European procedural law should be heading.[119] I agree with this and suggest that this debate should be initiated and continued on a European, and when appropriate, on a world wide level.

[116] Recital no. 10 EOP.

[117] Recitals nos. 6-10 EOP and no. 7 ESCP.

[118] See footnote 13.

[119] See e.g. *Paul Meijknecht*, De moeizame geboorte van het Europees procesrecht, in: Paulien van der Grinten & Ton Heukels (ed.), Crossing borders: essays in European and private international law, nationality law and islamic law in honour of Frans van der Velden, Deventer 2006, p. 39 ff.; *Van der Grinten* 2007 (fn. 114).