

European Small Claims Procedure

Set of Case Studies¹

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Case Scenario I

Ms Marta Jansen is a Dutch citizen living in Haarlem, a city close to Amsterdam. She has a keen interest in old cars and is always on the look for affordable cars to refurbish or car parts that she can use to refurbish cars. She lives in an old farm house where she has space for up to five cars. One of her friends with the same hobby helps out in refurbishing or co-financing the cars and sometimes they participate in exhibitions for old-timers. Every now and then she sells one of the cars to enable buying a new car.

In the early spring of 2022, Marta searches the internet for certain car parts for a Chevrolet vintage car, including engine parts, a car seat, a steering wheel, lights and hubcaps. A specialized trader – VintageCars GmbH – having its registered seat in Cologne, Germany offers the required items for sale. To secure these are matching for the particular type of car she has a phone call with one of the experienced employees, Mr. Georg Fahrer, who can provide further information about the items in English (as Marta has limited German language skills). She places the order using the English version of the online form and completes the payment online. The total amount of her order is €4,393, including €85,00 for the delivery. The car parts will be delivered to her house within 14 days.

The delivery takes place only after three weeks, but more importantly, certain parts are missing, the engine parts do not comply with the specific technical requirements, the steering wheel is the wrong size and one of the hubcaps is damaged. Marta contacts the trader to complain about the defects. VintageCars GmbH is only willing to send some of the missing parts within the next month, while denying the other products are not in conformity with the order and description provided.

Marta Jansen does not trust that VintageCars will send the correct missing parts and is highly dissatisfied by the denial of responsibility in relation to the defective and damaged parts. She wants to return the whole package and claims reimbursement of €4,393, plus an amount of €135 for expenses made, including those for the phone calls and the costs of returning the goods. She also claims interest and the costs of the procedure, which are estimated at €550.

Questions Case I

1. a) Which of the available European procedures is recommended in this case? In your answer pay attention to the scope of application of the European Small Claims Procedure.
 - b) Could Marta use the European Small Claims Procedure to claim the delivery of the damaged and defected parts, instead of asking for reimbursement of the amount paid?
 - c) What should the court do in case the claim is above the monetary upper limit of this procedure?
 - d) Suppose that Marta brings the claim in the Netherlands, can she still rely on the ordinary Dutch procedure for this type of claims if that would have her preference?

e)* Could Marta use the European Small Claims procedure had she been domiciled in Denmark and the delivery took place in Denmark (all other facts of the case remaining the same)?

2. + Returning to the original scenario, and assuming that the European Small Claims Procedure is applicable, and Marta wants to proceed using this procedure, which court(s) will have jurisdiction in relation to this claim?

3. Does Marta need legal representation to bring her claim?

4. Does Marta have to:

- a) specify the legal basis of the claim; and
- b) attach supporting evidence?

5. In case she would bring her claim in a German court, in which language should she complete the Claim Form?

For the next questions, assume Marta brings the claim in the competent sub-division of the Amsterdam District Court having jurisdiction for this claim.

6. How can she bring the claim in the Dutch court? Can she lodge the claim electronically?

7. Suppose that the Court finds that information in the Claim Form is missing or is unclear, how should it proceed?

8. How and within what timescale should the Court give notice to the defendant?

9. How much time does VintageCars have to respond to the claim?

10. + Can VintageCars lodge a counterclaim, and how would that affect (a) the applicability of the European Small Claims Regulation and (b) the time frame to answer the claim(s)?

Answers Case I

1. a) Which of the European procedures is recommended in this case? Brief summary of the ESCP and EOP (see also question 1 on the European Order for Payment):

The two European procedures that come into the picture are the European Small Claims Procedure and the European Order for Payment Procedure. These procedures are intended to simplify and speed up litigation and to reduce cost for the recovery of small claims or uncontested cases and they abolish the exequatur for the purpose of enforcement (see Art. 1 ESCP and EOP). Both are available to recover cross-border claims in civil and commercial matters and they are optional to available national procedures (see Arts. 1, 2 and 3 of the ESCP and EOP Regulation). This case is a civil case and not excluded from the scope (Art. 2, para 2). The two key differences are that:

- (1) The ESCP has a monetary limit – this is 5,000 EUR (Art. 2, para 1 ESCP). The EOP does not have a monetary limit;
- (2) The EOP is only available in uncontested pecuniary claims (Art. 1 EOP). The ESCP applies to both contested and uncontested claims.

As it is likely that VintageCars will oppose the claim (Arts. 16, 17 EOP) starting the EOP is not viable option.

A wizard to decide which procedures are available can be found on the e-justice portal, see https://e-justice.europa.eu/content_dynamic_forms-155-en.do.

The rules of the Regulations are binding and national law may not impose higher requirements, see Case C-215/11, *Iwona Szyrocka v SiGer Technologie GmbH*, ECLI:EU:C:2012:794, in relation to the EOP (but the same goes for the ESCP). National law does play a role in case the ESCP or EOP rules do not provide rules, see Art. 19 ESCP and Art. 26 EOP.

In this case Marta contacted VintageCars and it seems clear that VintageCars will contest the claim; the EOP would then not be the best option (see answer question 1), as it would result in either having to continue the procedure on the basis of the national civil procedure rules or as a European Small Claims Procedure (Art. 17, para 1 as amended). The ESCP is applicable to both contested and uncontested claims and is the better option in this case.

Scope

For the scope of applicability of the ESCP Regulation, the following points need to be considered. By reference to Articles 2 and 3 of the Regulation, the following elements would have to be considered:

- Art. 2: “The Regulation shall apply, in **cross-border cases**, to **civil and commercial matters**, whatever the nature of the court or tribunal, where the value of a claim does **not exceed EUR 5.000** at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in

particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta jure imperii).”

(a) **Civil and commercial matters:** This concept needs to be interpreted autonomously in accordance with the case law of the CJEU. In this case there is no doubt that this is a civil or commercial matter. In addition, none of the exceptions of Art. 2, para 2 apply in this case. This is an ordinary (consumer) sales contract.

(b) **The claim does not exceed 5,000 EUR:** Note that the limit has been raised from 2,000 to 5,000 EUR by Regulation 2015/2421, and this revised version applies as of 14 July 2017. According to Art. 2, para 2 the claim should not exceed 5,000 EUR, to be calculated excluding interest, expenses and disbursements, and at the time of receiving the claim form (the time factor is of particular relevance for the interest the amount of which will increase over time). In this case the claim is € 4,393 and is thus below the upper limit, even including the claimed expenses of € 135. The amount is without interests, expenses and disbursements, and even if the costs of the procedure and interest would be €550 or more, this would not affect the applicability of the European Small Claims Procedure.

(c) **Cross-border cases:** this is further defined in Art. 3 that reads “For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised.” Domicile is to be determined in accordance with Arts. 62 and 63 of the Brussels I Regulation (recast) (no 1215/2012) (Para 2) and the relevant moment is that of receiving the claims (Para 3). In this case this condition is met since parties have domicile in different countries (Netherlands and Germany), which implies that in any case the court having jurisdiction – to be determined on the basis of the Brussels I Regulation (recast) – will be a court other than the domicile of one of them.

Temporary and geographical scope: It should be noted that the amended version of the Regulation applies as of 14 July 2017 (the former version applied as of 1 January 2009). *Use the consolidated version that incorporates the amendments brought about by Regulation (EU) 2015/2421.*

The Regulation does not apply in Denmark (Preamble no 26) and no longer to the UK either since the end of the transition period following the UK leaving the EU.

b) Could Marta use the European Small Claims Procedure to claim the delivery of the damage and defected parts? The ESCP would also apply in this case. The Regulation does not distinguish between monetary and non-monetary claims. See also for instance the reference to non-monetary claims in Art. 5, para 5 ESCP. This is contrary to the EOP Regulation that applies to (uncontested) pecuniary claims only (Art. 1, para 1 EOP).

c) What should the court do in case the claim is above the monetary upper limit of this procedure? The ESCP only applies to claims, or counterclaims that do not exceed 5,000 EUR (see Art. 2 ESCP, and answer to question 1). In accordance with Art. 4, para 3, where a claim is outside the scope of this Regulation, the court of tribunal shall inform that claimant to that effect. Unless the claimant withdraws the claim, the court will proceed according to its domestic procedural rules. The case will then be a national (small) claims case and no longer be governed by the Regulation. As regards a non-monetary claims reference should be made to Art. 5, para 5.

d) Suppose that Marta brings the claim in the Netherlands, can she still rely on the ordinary Dutch procedure for this type of claims if that would have her preference? The ESCP (as is the EOP, and the EAPO – meaning all three uniform European civil procedures) is an optional procedure. This has to do with the proportionality and subsidiarity of EU law. This is clear from Art. 1, para 1 stating that the European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States. Marta could therefore still bring the claim under the national Dutch procedural rules, supposing that the Dutch court would have international jurisdiction (see the Brussels I Regulation (recast) and the answer to question 3). This would in this case mean that she can bring the claim in the sub-district court of Amsterdam. Some information on the national legal system and courts of the Netherlands is available at the e-justice portal here: https://e-justice.europa.eu/content_ordinary_courts-18-nl-en.do?member=1. More detailed information on small claims and national systems for the NL is available here: https://e-justice.europa.eu/content_small_claims-42-nl-en.do?member=1. Advantages of the ESCP is the simplicity and uniformity of the procedure throughout the EU, the forms being available in all EU languages, rules regarding translations and enforcement and the full abolition of exequatur (while the Brussels I Regulation (recast) – to be used for national procedures and enforcement – still has retained more grounds of refusal).

e)+ Could Marta use the European Small Claims procedure had she been domiciled in Denmark and the delivery took place in Denmark? Denmark is not a Member State for the purpose of the European Small Claims Procedure as it has a general opt out of the Regulation, see Preamble no. 26. (and see Art. 2, para 3 of the original version of the Regulation no 861/2007; after the amendment this para is not included anymore). This means that Marta cannot bring her claim under the ESCP in Denmark as Denmark does not apply the Regulation.

In another court of a Member State, the claim might proceed in the ESCP and the fact that she is domiciled in Denmark would generally not prohibit this. However, it is imperative that the cross-border requirement of Art. 3 is met (see answer question 2). This means that at least one of the parties should be domiciled or habitually resident in a MS other than the MS of the court or tribunal seized. See also Case C-627/17, *ZSE Enerģia a.s. v RG*, ECLI:EU:C:2018:941 in this regard ('parties' only covers those involved as applicant and defendant, not third parties involved, and they must be domiciled in a MS other than that of the court seized). Referring to the Brussels I Regulation (recast) (which, by the way, also applies in Denmark pursuant to the parallel agreement

between Denmark and the other EU Member States), she could also bring the claim in Germany against this German defendant (see answer to question 3). Referring to Case C-412/98, *Group Josi*, ECLI:EU:C:2000:399, it is clear that for the purpose of the Brussels I Regulation (recast) the domicile of the plaintiff is not relevant. However, as is clear from Recital 5, the Regulation only applies when one of the parties is domiciled or habitually resident *in a Member State bound by this Regulation* other than the court seized. As there is no other option than to seize the German court in this case, it means that she would not be able to use the ESCP. Note that this is different when another court of an EU Member State would have jurisdiction, e.g. – in a non-consumer case – because of the place of delivery being in another country, or flight delay or annulment cases when the country of departure or arrival is in another Member State (Case C-204/08, *Rehder v Air Baltic*, ECLI:EU:C:2009:439) or pursuant of a choice of court agreement valid under Art. 19 Brussels I Regulation (recast).

2.+ Assuming that the European Small Claims Procedure is applicable and Marta wants to proceed using this procedure, which court(s) will have jurisdiction in relation to this claim?

Art. 4, para 1 ESCP requires the Claim Form A to be lodged with the court having jurisdiction. The jurisdiction is not regulated in the ESCP Regulation and therefore the general jurisdiction rules of the Brussels I Regulation (recast) apply (see for a reference to this Regulation also Art. 3, para 2). Claim Form A, question 4 also refers to the issue of jurisdiction. In this case, looking at the grounds provided, one may easily conclude that checking 4.1. (domicile defendant) and 4.2 (domicile consumer) would lead to the jurisdiction of both the German and the Dutch courts (local jurisdiction to be decided by national rules, for information see also the e-Justice portal https://e-justice.europa.eu/content_small_claims-354-en.do?clang=en).

However, in particular the rules on consumer jurisdiction have additional requirements and case law of the CJEU is relevant to interpret these. See https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do (also referenced in Claim Form A, question 4). In this case, Arts. 17 and 19 of the Brussels I Regulation (recast) are relevant. It has to be determined whether the requirement of Art. 17, para 1, sub c is fulfilled for this contract to qualify as a consumer contract. It states that “(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.” Particularly important in the context of contracts concluded over the internet is Case C-585/08, *Pammer and Alpenhof*, ECLI:EU:C:2010:740. Requirements for directing activities at the MS of the consumer include the language used being other than that of the domicile of the business, whether directions are given for access to the business from the other State, the currency which can be used for transactions being other than that of the Member State of the business, telephone numbers with an international code, use of a top level domain name and other evidence indicating that the trader was directing activities also to other MS, including the MS of the consumer. This is a question of fact to be ascertained by the court. In this case, considering that

she called VintageCars (in English), that there was an English version of an order form and that the car parts were delivered in the Netherlands clearly evidence that activities were also directed at other MS, including the NL and it is a consumer contract.

Pursuant to Art. 18 Brussels I (recast) both the German and the Dutch court will have jurisdiction. Marta can opt for either one of these.

3. Does Marta need legal representation to bring her claim? One of the features of the ESCP is that legal representation is not required. See Art. 10 ESCP to this effect. This is regardless of what national civil procedure rules would require in such case and in that sense the rules on legal representation are harmonised by the ESCP (the same goes for the EOP – which applies regardless of the amount claimed). The reason for not requiring legal representation is to reduce costs and to simplify access. The standard forms, information items, the guidance of the e-justice portal including dynamic forms that can be filled out online should guide the user. In addition, Art. 11 requires Member States to offer practical assistance to the parties; information on that can be found on the e-justice portal. Such assistance can, for instance, be organised within the court, or through the local European Consumer Centre (ECC) or another legal aid organisation. In addition, a User Guide and a Practice Guide are available on the e-Justice portal, see https://e-justice.europa.eu/content_small_claims-42-en.do.

4. Does Marta have to:

a) specify the legal basis of the claim?

No, see Art. 12, para 1, the court cannot require a legal assessment of the claim. Looking at Claim Form A, in particular part 8, it is clear what details should be provided. In 8.1 she should give reasons for the claim, but these are of a factual nature. Should the court not find these clear, additional information can be requested using Form B, see Art. 4, para 4. The Regulation does not prohibit using more informal ways to obtain simple additional information (e.g. a missing address), e.g. by sending an email or a phone call. This is common practice by certain courts, for instance in the Netherlands.

b) attach supporting evidence?

The Claim Form should as a minimum provide a description of the evidence, see part 8.2 (written evidence, witnesses, other, to be specified). Where appropriate this evidence should also be attached, see also Art. 4, para 1. This can for instance be the order and/or delivery form, an email exchange, or a statement from a person who was present when Marta made the calls to the trader. Pursuant to Article 4, para 4, if the claim is clearly unfounded, inadmissible or the additional information is not provided within the specified time, the application shall be dismissed.

5. In case she would bring her claim in a German court, in which language should she complete the Claim Form? The language requirements are laid down in Art. 6 ESCP. The claim form must be submitted in the language of the Court, in German in this case. The e-justice portal

has forms available in all official languages of the EU and does provide for an automatic translation in case of filling in the form in another language. While It should be noted, however, that open fields may require a translation (in particular the factual description of the claim, part 8.1). The court is of course free to accept the Claim Form in another language that it understands. Other documents, such as supporting evidential documents, only need to be translated if this translation appears to be necessary for giving the judgment, according to Art. 6 . This is to avoid that unnecessary translation costs are made that will also delay proceedings.

For the next questions, assume Marta brings the claim in the competent sub-division of the Amsterdam District Court having jurisdiction for this claim.

6. How can she bring the claim in the Dutch court? Can she lodge the claim electronically?

Art. 4, para 1 prescribed Claim Form A (Annex I) to be filled out and to be lodged to the competent court directly, by post or by any other means of communication, including fax or e-mail acceptable to the MS in which the procedure is commenced. The Regulation, with a view to making the ESCP an easy accessible procedure, promotes the submission of documents electronically. However, it does not make it compulsory for the MS to enable electronic lodging of the claim (as this is intertwined with the court system and technological advancement). The MS have to inform which means are available (Art. 4, para 2; Art. 25, para 1, sub b) and the Commission shall make this information available to the public (Art. 25, para 2).

Turning to the e-Justice Portal, at https://e-justice.europa.eu/content_small_claims-354-nl-en.do?member=1#a_104, the following information is available for the Netherlands:

Article 25 1 (b) Means of communication

Under Article 33 of the Code of Civil Procedure as it stands, claim forms may be submitted electronically provided that this is allowed under the court's procedural rules. Forms may only be submitted as follows:

- by post;
- by submitting them to the court registry.

The information included on the e-justice portal (status May 2023) included this information “ In conjunction with legislation on the simplification and digitalisation of procedural law which is still in the pipeline (including a new Article 33 of the Code of Civil Procedure), the Implementing Act has incorporated rules on e-submission. These rules will probably enter into force at a later stage.

The new Article 30c of the Code of Civil Procedure states that proceedings must be instituted electronically. Pursuant to Article 30c(4), natural persons and associations whose constitutions are not set out in a notarial deed are not required to submit documents electronically unless they are represented by a third party providing professional legal assistance.

Direct e-submission of documents instituting proceedings from another Member State will not be possible for the time being. Parties from another Member State with a professional representative

in the Netherlands will be able to submit documents electronically. Foreign parties without a legal representative wishing to institute proceedings must follow the paper route.”

Note: this information is out of date (May 2023), as of yet there is not general possibility to file a claim electronically in either national cases before the District Courts (with some exceptions) or cross-border cases. Mind that at the EU level electronic communication is being introduced, which will at some point also affect the ESCP.

7. Suppose that the Court finds that information in the Claim Form is missing or is unclear, how should it proceed? In this case the court should, in accordance with Art. 4, para 4, give the claimant the opportunity to complete the claim, by sending standard Form B (Annex II) to obtain the missing information. It should do this where it finds that the information provided is inadequate or sufficiently clear, or if the form is not filled in properly. The claimant can complete or rectify the claim or provide supplementary document, or withdraw the claim. The court should specify a period within which the claim should be rectified or completed. Though Form B is prescribed, there seems no compulsory ground to obtain simple missing information through more informal means, e.g. by email or phone, as may be the case in some Member States (see also answer to question 5a).

Only where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the form within the time specified, shall the application be dismissed. In the present case, there seems no such case as the admissibility requirements (scope, etc.) are fulfilled and it appears that the delivered car parts were, at least in part, not compliant with what was ordered, and Marta contacted VintageCars to get a replacement delivery. If she describes this situation, without having to provide a legal context, there is certainly no reason to think the claim is clearly unfounded. In any case, also if her description is unclear or incomprehensive, the court should obtain further information to get sufficient clarity to proceed to serve the claim form to the defendant.

8. How and within what timescale should the Court give notice to the defendant? After reviewing that the claim is within the scope of the ESCP and the Claim Form is complete and properly filled in (Art. 4, paras 3, and 4), the court can proceed. The ESCP shall be a written procedure, unless an oral hearing is necessary for giving judgment (Art. 5, para 1 and 1a). The court will have to fill in part I of Answer Form C (Annex III), asking whether the defendant (partially) agrees with the claim or not, and asking the defendant about the evidence, whether a hearing is wanted, whether costs are claimed, whether the defendant makes a counterclaim and whether it agrees of electronic means of service and communications. In the European Small Claims section of the e-Justice Portal, the forms are available on the e-Justice portal in all official EU languages, going to the European Judicial Atlas – European Small Claims Procedure, see https://e-justice.europa.eu/content_small_claims-354-en.do, or the Online forms – small claims forms, see https://e-justice.europa.eu/content_small_claims_forms-177-en.do.

A copy of the Claim Form, including supporting documents, along with the Answer Form C (with filled in Part I), should be dispatched to the defendant within 14 days of receiving the properly filled in Claim Form, in accordance with Art. 5, para 2. The service of documents shall take place in accordance with Art. 13. This means that it shall be served by postal service or electronic means; the latter where this is technically available and admissible in the MS where it is to be served. This is in Germany.

Going to the e-justice portal, European Judicial Atlas - European Small Claims Procedure section, information on Germany (https://e-justice.europa.eu/content_small_claims-354-de-en.do?member=1), the following information is provided:

Article 25 1 (d) Means of electronic service and communication and methods for expressing consent for thereof

Under Section 174(1) and (2) of the Code of Civil Procedure, a procedural document may be served by fax, against acknowledgement of receipt, on a lawyer, a notary, a bailiff (*Gerichtsvollzieher*), a tax consultant or any other person who enjoys particular trust by reason of their profession, a public authority, a corporation, or a body governed by public law.

Under Section 174(3), electronic documents may also be served on the same persons. The same applies to other parties to legal proceedings, provided they have expressly consented to the documents being transmitted in electronic form. The document must be signed electronically and must be protected against its becoming known to unauthorised third parties. Documents may also be transmitted by De-Mail.

With effect from 1 January 2018, it will be possible to send electronic documents via a secure transmission channel (*sicherer Übermittlungsweg*) within the meaning of Section 130a of the Code of Civil Procedure, instead of using an electronic signature. The persons mentioned above will have to set up a secure transmission channel for the service of electronic documents. Proof of electronic service will be by electronic acknowledgement of receipt in a structured, machine-readable format. To this end the court will provide a data set when it serves the document. Acceptance pursuant to Article 13 and Section 174(3) of the Code of Civil Procedure can be expressed using the means described at point (b) above.

For more details see point (b).

Article 25 1 (b) Means of communication

The following means of communication are available everywhere: post including private courier, fax, delivery by hand, or lodging the claim at the court's claims filing office (*Rechtsantragstelle*). In addition, written claims can be lodged in electronic form in all federal states (*Länder*) at certain courts and at all Federal courts, in which case the person responsible for submitting the electronic document must attach an authorised electronic signature. This requires signature software and a signature card with the corresponding card reader. The participating courts can also be contacted from other Member States via the e-CODEX interface. Information about which courts allow

electronic access can be found at <http://www.justiz.de/> and <http://www.egvp.de/> or on the websites of the individual courts.

As of 1 January 2018, it will be possible to submit electronic documents to all *Land* and federal courts, pursuant to Section 130a of the revised Code of Civil Procedure, provided the electronic document bears the authorised electronic signature of the person responsible for it, or is signed by them and transmitted by secure means. ‘Secure means’ will be considered to be:

1. the German e-government service ‘De-Mail’ with authentication of sender (*absenderbestätigt*);
2. the special electronic mailbox for lawyers (‘beA’);
3. the special electronic mailbox for public authorities (‘beBPo’).

The technical parameters for the transmission of electronic documents are to be laid down in a Federal Government Regulation to enter into force by 1 January 2018.

Note that the Claim Form A, part 10, also includes an item on agreeing with electronic service and communication.

9. How much time does VintageCars have to respond to the claim?

According to Art. 5, para 3, the defendant shall submit his response within 30 days of service, using Form C and, where appropriate, accompanied by any relevant supporting documents, to the court. Alternatively, the defendant can respond in any other appropriate way, not using the standard form. The court should dispatch this to the claimant within 14 days of receipt (Art. 5, para 4).

Refer to Art. 14 on the time limits, requiring the court to inform parties of the time limits, the consequences of not complying, and on extending the time limits, if necessary to safeguard the rights of the parties. The time limits for the courts are regulated in para 3; only in exceptional cases may the court exceed the fixed deadlines of Art. 5.

10.* Can VintageCars lodge a counterclaim, and how would that affect (a) the applicability of the European Small Claims Regulation and (b) the time frame to answer the claim(s)?

The ESCP enables lodging a counterclaim, see also Art. 2. A counterclaim can be submitted, using Form A, and will be treated the same way as an original claim, see Art. 5, para 6.

(a) If this counterclaim exceeds the limit set out in Art. 2 (5,000 EUR), both the claim and the counterclaim shall not proceed in the ESCP, but will proceed as a claim to be dealt with under national procedural law. To counterclaims the scope rules of Art. 2 as well as the rules on commencement (Art. 4) and paras 3-5 of Art. 5 apply. See Art. 5, para 7.

(b) Should VintageCars lodge a counterclaim, using Form A, this should be served to the claimant on the basis of Art. 13, within 14 days (Art. 5, para 6). As it will be treated in the same way as an original claim, Marta will be considered the defendant for the purpose of the counter claim and will have 30 days to answer the counterclaim.

Case Scenario II

In December 2022, Ms Stephanie Dutronc, domiciled in Metz (France), books a flight to Zagreb, Croatia, with her family for the spring holidays of 2023. She will be accompanied by her husband, their three young children, and the two grandparents. She finds a good offer flying from Luxembourg airport to Zagreb, with a stopover in Vienna with an Austrian airline seated in Vienna, AirAustria. She books the accommodation using hotelbooking.com. However, the flight is delayed and they arrive having seven hours delay. They finally arrive in the middle of the night at the hotel. Her youngest son fell and got injured because of fatigue and had been crying for hours, while her father's weak health condition has also made the trip challenging.

They decide to request compensation of damages on the basis of Regulation 261/2004 on the cancellation and flight delays. The Austrian airline refuses to pay arguing that the delay was due to technical procedures. Stephanie looks up the relevant information online and concludes this is not a valid reason for the delay. She decides to claim damages for herself and her family against the airline, claiming € 250 per person in accordance with the mentioned Regulation, plus € 315 costs and interest, including the costs of the night fare for the taxi to the hotel.

Questions Case II

1. Which court(s) will have jurisdiction for this claim against the Austrian airline in case Stephanie Dutronc wants to commence a European Small Claims Procedure?
2. Where can Stephanie Dutronc find the relevant information on the approximate costs in the different Member States and how to pay the court fees, assuming she will not seek the advice of a lawyer?
- 3.[†] In how far are parties obliged to receive electronic communication or electronic service of documents, supporting this is the generally used in the Member State dealing with the claim or where service takes place?

Suppose for the next questions that the claim is brought in the competent court of Luxembourg.

3. Stephanie is driven to pursue this case and has indicated in the Claim Form (part 9.1) that she wants to have an oral hearing, providing as reasons that she wishes to appear in court to give a further explanation and because she is very disappointed that the airline denied the monetary compensation. How should the court assess this request?
4. Suppose that the court would require more information on the technical reasons for the delay as well as weather conditions imposed by AirAustria. How can it obtain this evidence?

5. What are the timeframes for the court to give a judgment?
6. * May a court order that only part of the costs of the procedure are to be reimbursed to the winning party, or that each party bears their own cost in certain situations?
7. Suppose that the court awards the claim and that the airline refuses to pay, how can enforcement be obtained in Austria?
8. Suppose that AirAustria would want to lodge an appeal. Is that possible?

Answers Case II

1. Which court(s) will have jurisdiction for this claim against the Austrian airline in case Stephanie Dutronc wants to commence a European Small Claims Procedure? The ESCP is particularly suitable for this type of case and available looking at the requirements set out in Art. 2 and 3. Art. 4, para 1 ESCP requires the Claim Form A to be lodged with the court having jurisdiction. The jurisdiction is not regulated in the ESCP Regulation and therefore the general jurisdiction rules of the Brussels I Regulation (recast) apply (see for a reference to this Regulation also Art. 3, para 2). Claim Form A, question 4 also refers to the issue of jurisdiction. In this case, looking at the grounds provided, one may easily conclude that checking 4.1. (domicile defendant) and 4.2 (domicile consumer) would lead to the jurisdiction of both the Austrian and the French courts (local jurisdiction to be decided by national rules, for information see also the e-Justice portal https://e-justice.europa.eu/content_small_claims-354-en.do?clang=en).

However, in particular the rules on consumer jurisdiction have limits and the rules of Brussels I (recast) need to be consulted as well as the case law of the CJEU. See also the reference in Claim Form A, question 4, to https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do. The protective consumer rules of this Regulation are not applicable to this case. See Art. 17, para 3, reading “This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.” The ordinary jurisdiction rules apply.

On the basis of Article 4 in conjunction with Art. 63 Brussels I Regulation (recast) the competent local court in Austria has jurisdiction. In addition, Art. 7(1)(b) second indent is relevant, on the basis of which the place of providing services is relevant. In Case C-204/08, *Rehder v Air Baltic*, ECLI:EU:C:2009:439 the CJEU interpreted this provision in relation to a contract with an airline. It ruled that

“in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having

jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.”

This means that beside the Austrian court on the basis of Art. 4, also the Luxembourg court as the place of arrival has jurisdiction. The claimant case choose between these two.

2. Where can Stephanie Dutronc find the relevant information on the approximate costs in the different Member States and how to pay the court fees, assuming she will not seek the advice of a lawyer? The ESCP Regulation aims to reduce the costs of the procedure (Art. 1) and although a fixed cost rule is not included, Art. 15(a) requires that the court fees for the ESCP not be disproportional and not be higher than the court fees for simplified national court procedures. In addition, MS shall ensure that the parties can pay the court fees by means of distant payment, be it by way of a (a) bank transfer; (b) credit or debit card payment; or (c) direct payment from the claimant's bank account. See also Art. 25, para 1, sub (f) requiring the MS to provide the relevant information on the costs to this effect. It requires that the court fees are provided or information on how to calculate it. The relevant information can be found on the e-Justice portal, European Judicial Atlas – European Small Claims Procedure: https://e-justice.europa.eu/content_small_claims-42-en.do.

There is also a dedicated section in the ‘Going to court’ section on the cost of the ESCP, see https://e-justice.europa.eu/content_court_fees_concerning_small_claims_procedure-306-en.do.

See also Art. 16, including the loser pays principle as regards the costs of the procedure, provided that the costs were proportionate. See C-554/17 *Rebecka Jonsson v Société du Journal L'Est Républicain*, ECLI:EU:C:2019:124 on the possibility of a different division of the costs. See also question

3.+ In how far are parties obliged to receive electronic communication or electronic service of documents, supporting this is the generally used in the Member State dealing with the claim or where service takes place? At this moment (May 2023), electronic exchange of documents and electronic service of documents is only enabled and encouraged, but not obligatory and subject to the availability in a Member State. If it is generally available and used in a Member State, it is subject to the consent, unless it is obligatory in the Member State where the addressee is domiciled. See Claim Form A, question 10 and information “Electronic means can be used only if the addressee expressly consents in advance to their use or if he/she is legally obliged to accept electronic service and/or other written communication from the court in accordance with the procedural rules of the Member State in which the addressee is domiciled.” Answer Form C provides the following information to this end: “Procedural documents, like your response and the judgment may be served upon the parties by post or by electronic means, if such means are

technically available to the court and admissible in accordance with the procedural law of the Member State in which the procedure is conducted. If the documents are to be served in a Member State other than the one in which the procedure is conducted, the procedural rules of the Member State where service is to be effected have to be observed as well. Electronic means could be used also for other written communications (e.g. a request to attend a court hearing). Electronic means can be used only if the addressee expressly consents in advance to their use or if he/she is legally obliged to accept electronic service and/or other written communication from the court in accordance with the procedural rules of the Member State in which the addressee is domiciled."

Note: rules and practice on electronic communication and service are evolving and the Forms may be adjusted from time to time.

4. Stephanie is driven to pursue this case and has indicated in the Claim Form (part 9.1) that she wants to have an oral hearing, providing as reasons that she wishes to appear in court to give a further explanation and because she is very disappointed that the airline denied the monetary compensation. How should the court assess this request? It is important to stress that in principle the ESCP is a written procedure, see Art. 5, para 1. To reduce the costs and duration of proceedings this is a focal point. Each of the parties may however (see Claim and Answer Form) ask for an oral hearing. The court shall only hold an oral hearing if it is not possible to give a judgment on the basis of the written documents, or if a party so requests. This request may be refused if it considers this not necessary for the fair conduct of proceedings and considering the circumstances. Such refusal may not be separately contested. This is in line with the case law of the European Court of Human Rights from which it is clear that in simple cases with a small value where oral hearings are not necessary the right to an oral hearing is not absolute.

In accordance with Art. 8, if an oral hearing will take place, it shall be held using distance communication technology, including video- or teleconference, where such technology is available (para 1). A party that is summoned to appear in person, may request a distance hearing if possible with reference to the costs (para 2), while a party may also request to appear in person (para 3). A refusal may not be separately contested (para 4).

In the present case, there seems to be no pressing need to have an oral hearing. These type of cases are fairly standard, and the personal disappointment of a party as such should not be the reason to have a hearing. If a hearing would take place this would in principle be a remote hearing. See also the information provided to question 9 of the Claim Form.

5. Suppose that the court would require more information on the technical reasons for the delay as well as weather conditions imposed by AirAustria. How can it obtain this evidence? Referring to Art. 9, the simplest and least burdensome method should be used (para 1). It can be done through written statements of witnesses, experts or parties (para 2). A hearing of one of these can be done using distance means as far as possible within the meaning of Art. 8 (para 3). In view

of the costs and burdens involved, expert evidence of oral testimony may only be taken if it is not possible to give the judgment on the basis of other evidence.

In this case, it should be fairly easy to have AirAustria provide the relevant information regarding the urgency of the technical procedure – there is even doubt this is relevant at all in view of the CJEU case law on flight delays (see joint Cases C-402/07 and C-432/07 *Sturgeon*, ECLI:EU:C:2009:716 as the primary case) – and the same goes for the weather conditions on that day.

6.+ What are the timeframes for the court to give a judgment? See Art. 7 on the conclusion of the procedure. The court should give a judgment within 30 days after receiving the response (to the claim or, where applicable, counterclaim), or it shall proceed to demand further details on the claim within a specified period, not exceeding 30 days (as regard the claim, reference can be made to Form B), take evidence in accordance with Art. 9, or summon an oral hearing (para 1). The court should give judgment within 30 days after taking evidence or the oral hearing (para 2).

This timeframe may only be deviated from in exceptional circumstances, see Art. 14, para 3. These would typically not include circumstances inherent to the court system, but refer the complexity of the case or other pressing circumstances. The purpose of the ESCP is to provide for a speedy procedure.

7. May a court order that only part of the costs or the procedure are to be reimbursed to the winning party, or that each party bears their own cost in certain situations? Art. 16 ESCP incorporates the ‘loser pays rule’, meaning that the party losing the procedure will bear the costs of the procedure. An exception included in art. 16 itself is that the court shall ‘not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.’ This can for instance refer to extraordinary lawyer fees for a relatively simple claim, or costs incurred by the winning party insisting on having a hearing in person rather than by video conferencing. See also Claim Form A, information to Question 9 on oral hearings. In a case where the party was only successful in part of the claim, the CJEU ruled that national legislation may provide that each party bears their own costs, see Case -554/17, *Jonsson*, ECLI:EU:C:2019:124. The CJEU ruled that

“Article 16 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure must be interpreted as not precluding national legislation under which, where a party succeeds only in part, the national court may order each of the parties to the proceedings to bear its own procedural costs or may apportion those costs between those parties. In such a situation, the national court remains, theoretically, free to apportion the amount of those costs, provided that the national procedural rules on the apportionment of procedural costs in small cross-border claims are not less favourable than the procedural rules governing similar situations subject to domestic law and that the procedural requirements relating to the apportionment of those procedural costs do not result in the persons

concerned foregoing the use of that European small claims procedure by requiring an applicant, when he has been largely successful, nonetheless to bear his own procedural costs or a substantial portion of those costs.”

In case Member States’ law provides that not the real costs, but a maximum fixed amount for lawyer costs should be reimbursed, it is questionable how this relates to the loser pays rule laid down in Art. 16. In any case such rule should be read in the light of the proportionality rule.

8. Suppose that the court awards the claim and that the airline refuses to pay, how can enforcement be obtained in Austria? On the basis of Art. 20 ESCP the judgment can be enforced without a declaration of enforceability. Enforcement itself is governed by the law of the MS where enforcement is sought, Austrian enforcement law in this case. The formal requirements are laid down in Art. 21: an authentic copy of the judgment should be provided, as well as the certificate of Art. 20, para 2 – the standard Form D (Annex IV). The language of this certificate is the language of the state of enforcement, but MS will have to indicate whether they accept other languages (Art. 21a), see also Art. 25, para 1, sub (i).

Austria has indicated to accept, see the e-Justice portal, European Judicial Atlas – small claims, Austria, https://e-justice.europa.eu/content_small_claims-354-at-en.do?member=1#a_111:

Article 25 1 (i) Accepted languages

The language accepted pursuant to Article 21a(1) is German.

In addition to the official language (German), Austrian nationals and nationals of countries that are party to the Agreement on the European Economic Area may use Hungarian before the district courts of Oberpullendorf and Oberwart, Slovenian before the district courts of Ferlach, Eisenkappel and Bleiburg, and Croatian before the district courts of Eisenstadt, Güssing, Mattersburg, Neusiedl am See, Oberpullendorf and Oberwart.

Refusal of enforcement may only take place in case of irreconcilably to judgments within the meaning of Art. 22.

9. Suppose that AirAustria would want to lodge an appeal. Is that possible? According to Art. 17 whether an appeal is possible is up to national law. As the rules of the MS differ substantially on this point, no uniform rule is included (apart from review in exceptional circumstances, see Art. 18 ESCP). The MS have to provide information, see Art. 25, para 1, sub g on appeals.

Austria has provided the following information, see the e-Justice portal, European Judicial Atlas – small claims, Austria, https://e-justice.europa.eu/content_small_claims-354-at-en.do?member=1#a_111

Article 25 1 (g) Appeal procedure and courts competent for an appeal

In a case brought under Regulation (EC) No 861/2007, as amended by Regulation (EC) No 2421/2015, establishing a European Small Claims Procedure, a judgment given at first instance

by a district court is open to appeal (*Berufung*). The appeal must be lodged in writing at the district court which handed down the judgment at first instance within four weeks of service of the judgment. It must be signed by a lawyer (*Rechtsanwalt*). The party must also be represented by a lawyer in the ensuing appeal proceedings.

The decision on costs may be contested by means of an appeal on costs (*Kostenrekurs*) even if the judgment itself is uncontested. Such an appeal must be lodged at the court which handed down the judgment within 14 days of service of the judgment.

Methodological advice

Training aims and approach

The aim is to get familiarised with the scope, the commencement, conduction and conclusion of the European Small Claims Procedure, and with the enforcement of the resulting judgment. The first case scenario is a consumer sales case and the second one a flight delay case. These are the type of cases in which this procedure is most useful and most used in current practice. In the first one the scope of applicability and the first part of the procedure is central, in the second one the second part of the procedure, including enforcement. Some more advanced questions (marked with a ‘+’ sign) have been added suitable for court staff/bailiffs that already have a basic comprehension of these European rules. The best way to approach it would be to divide the group in smaller groups that work on the case, while having online access to the various materials and in particular the e-Justice portal. The answers should then be discussed in plenary. The first case will probably take most time, though most of the questions should not be very difficult to answer on the basis of the rules.

Materials

Key materials are:

- The ESCP Regulation
- The Brussels I Regulation (recast)
- CJEU case law on these Regulations
- The EOP Regulation (only for question 1 of Case I)
- Access to the e-Justice Portal



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