

NEW TYPES OF EUROPEAN CIVIL PROCEEDINGS IN THE SLOVAK REPUBLIC*

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Abstract

The article deals with two new European summary proceedings established by the Regulation (EC) No. 1896/2006 and Regulation (EC) No. 861/2007. The European order for payment procedure and small claims procedure shall offer to the parties, beside the national proceedings of particular Member States, alternative possibility for enforcing the cross-border claims. The article also analyzes the impact of the above mentioned Regulations on the Slovak procedural law and their future application in the conditions of the Slovak Republic.

Key words

European Law – Judicial cooperation in civil matters – Civil Procedure – cross-border cases – European order for payment – European Small Claims Procedure – Conflict of Jurisdictions

Introduction

One of the key prerequisites for developing and maintaining the European Union the area of freedom, security and justice is providing the speed and smooth recognition of foreign judgments between the EU Member States.¹ For this purpose and in order to provide the parties of the cross-border disputes better access to justice with regard to “*cross-border*” claims, two regulations have been recently adopted: Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as “Regulation on order for payment”) and Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter referred to as “Regulation on Small Claims Procedure”, together hereinafter referred to as “Regulations”).

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¹ Conclusions of European Council Meeting in Tampere on 15 and 16 October 1999

The above-stated Regulations establish the special procedures for uncontested claims, or for low value claims with cross-border implications (so-called “small claims”). The judgments rendered in these procedures, unified for all Member States except from Denmark, should fully comply with the requirement of mutual trust in the administration of justice and, as such, these judgments can be enforced without exequatur. However, the Regulations include only basic framework of the procedure. The questions not stipulated in the Regulations shall be governed by the national procedural law of the Member States. This concept is based on the presumption that legal orders of Member States include similar simplified (summary) proceedings concerning the uncontested pecuniary claims or small claims.

In this article, we would like to deal with how the application of the Regulations will look like in the legal environment of the Slovak Republic. We would also like to analyze, whether and to what extent the application of Regulations in question would require the amendments of Slovak procedural law. At the same time, we would try to confront our findings with the draft amendment of the Slovak Code of Civil Procedure, currently being prepared and discussed in the Slovak Republic.

I.

The Regulations provide, beside the national procedural measures, alternative possibility for enforcing claims of the parties before the courts of Member States. The choice between these two alternatives of enforcing claims is up to the claimant. The regulation provided by the given Regulations, therefore, does not mean the harmonization of the national procedural orders of the Member States, but the special procedure available for the parties of the cross-border disputes. The benefit of such procedure shall consist in smooth recognition and enforcement of the judgment in any other EU Member State without exequatur. At the same time, when drafting these Regulations, it was often pointed out that, in comparison to similar national proceedings, the costs of cross-border disputes are disproportionately higher (legal services, interpreting, translation of documents, etc.). These impediments should be dismantled by the unified formalized European proceedings.²

² Explanatory memorandum to Draft Regulation on European order for payment.COM (2004) 173 final, point 2.2.1.

The cross-border dispute (case) is defined identically in both Regulations, as the one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. The Regulations do not require this party to be a defendant. Therefore, it is sufficient if the claimant has his/her residence in one Member State and the defendant has his/her property in different Member State, or if there is any other circumstance establishing the jurisdiction of the court of another Member State. It should be pointed out that in the original draft of the Regulation on order for payment, there has been no reference on cross-border cases. However, Commission has then taken into account arguments pointing out at the fact that Art. 65 of Treaty Establishing the European Community enables the Community bodies to take measures only in “civil matters having cross-border implications”, and has completed the draft regulation in this way.³

The Regulations do not contain the entire set of procedural rules. They stipulate only the basic framework for the procedure on payment order and small claim procedure. The questions not stipulated by the Regulations shall be governed by the national law of the Member States. This relates to the interpretation of particular concepts (the concept of clearly unfounded claim or inadmissibility of the claim – see point 13 of the Preamble to the Regulation on Small Claims Procedure), as well as to the course of procedure. Provided that these questions are regulated on the Community level, such regulation shall take precedence. Particularly, the court jurisdiction shall be determined in accordance with the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as “Regulation Brussels I.”) Such procedure is explicitly stated in Art. 6 of the Regulation on order for payment, where, at the same time, the court jurisdiction is modified for the purpose of payment for order procedure in consumer contracts’ disputes.⁴

In Regulation on Small Claims Procedure, there is no explicit reference to establishing the court jurisdiction according to provisions of Regulation Brussels I. Therefore, the situation

³ See BOGDAN, M.: *Concise introduction to EU Private International Law*, Europa Law Publishing, Groningen 2006, p. 87 and foll.

⁴ The provision that the consumer can be sued only in the state of his/her residence is undoubtedly in favor of consumer’s protection. However, it is then questionable why the similar protection is not granted at least to the employee (these categories enjoy protection either on the field of procedural law – Regulation Brussels I., as well on the field of conflict law – Rome Convention of 1980). On the other hand, this invokes question whether the eventual prorogation agreement made with the consumer will not be automatically invalid. See, for instance, L. de Tejada, M. – D’ Avout, L.: *Les non-dits de la procédure européenne d’injonction de payer*. In: RCDIP 2007, No. 4, p. 723 and foll.

would be different here. Regulation Brussels I. is obviously to be applied due to its generally binding character, however, the judgments under Regulation on Small Claims Procedure could be rendered also by the court of the Member State which established its jurisdiction under its national law in cases not covered by Regulation Brussels I. (Art. 4 of Regulation Brussels I.).⁵ In connection with the definition of the cross-border cases in Regulation on Small Claims Procedure, in these cases it will be possible to render judgments in summary proceedings enforceable in any other Member State, without any further formal requirements.

We presume that the interpretation of the key concepts already provided by the European Court of Justice in relation to Brussels Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters of 1968, being the predecessor of Regulation Brussels I., will be in accordance with the above-cited case-law of the European Court of Justice. Particularly, this concerns definition of *civil and commercial matters*, which is crucial for the application of Regulation Brussels I.⁶ The subject matter of the Regulation on order for payment and Regulation on Small Claims Procedure is very similar to the subject matter of Regulation Brussels I. The most important difference consists in the partial exclusion of non-contractual claims from the subject of the Regulation on order for payment. Similarly, the Regulation on Small Claims Procedure shall not apply, contrary to Regulation Brussels I., to matters concerning, *inter alia*, the employment relationship, tenancies of immovable property, except of actions for monetary claims, violation of privacy and rights relating to personality, including defamation.

Similar to Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, both Regulations pay attention to the transparent method of service of documents (Art. 13 and 14 of Regulation on order for payment, Art. 13 of Regulation on Small Claims Procedure). The given provisions represent the compromise between the protection of the other party to the proceedings on one hand, and the interest to enable smooth proceedings with reduced costs in cross-border cases on the other. Therefore, the Regulations provide, beside service attested by

⁵ If the defendant has not his/her residence on the territory of the Member State, Regulation Brussels I. shall not apply. Against such defendant, it is possible to apply the rules of so-called exorbitant jurisdiction, based, for instance, only on the fact the defendant is citizen of the state of forum. See Gaudement -Tallon, H.: *Les Conventions de Bruxelles et de Lugano*. Paris, L.G.D.J., 1996, p. 56 and foll.

⁶ Point 16 of the Preamble to Regulation on Small Claims Procedure explicitly refers to the interpretation of Regulation Brussels I. concerning the concept of “counterclaim”.

an acknowledgment of receipt, also other methods of service providing “very high degree of likelihood that the document served has reached its addressee”.⁷

If the European order for payment or claim form in small claims procedure have been served by a method without proof of receipt by the defendant personally, both Regulations explicitly provide the possibility for the defendant to apply for a review of the judgments rendered in such proceedings (Art. 18 of Regulation on Small Claims Procedure). In case of European order for payment, this is possible even after the expiry of the time limit for lodging a statement of opposition to European order for payment (Art. 20 of Regulation on European order for payment). In case of small claims procedure, the provision of Art. 18 of Regulation on Small Claims Procedure raises question, whether the remedy stated in Art. 17 thereof shall be admissible for the parties only in cases where service has not been provided by a method with proof of receipt in situations described in Art. 18.⁸ From preparatory works leading to the adoption of Regulation on Small Claims Procedure it is obvious that such an interpretation shall not apply and the given provision shall provide the observance of certain minimum standards of serving documents. However, Member States will have to amend their national law accordingly.

II.

The Regulation on Small Claims Procedure has also become the source of newly proposed legal regulation in the Slovak Republic. The draft amendment of the Code of Civil Procedure, currently being prepared and discussed in the Slovak Republic, which should enter into force on 1 July 2008, is undoubtedly based on the above-mentioned EC regulation. Based on this, the draft amendment of the Slovak Code of Civil Procedure introduces some concepts and institutes provided by the Regulation on Small Claims Procedure also to the Slovak national law. Regulation on Small Claims Procedure, which has direct effect in EU Member States and, therefore, no transposition by the national law of the Member State is required, regulates the small claims procedure in cross-border matters. On the other hand, the proposed amendment of the Slovak law introduces also to Slovak procedural law the concept of small

⁷ Point 20 of the Preamble to Regulation on order for payment

⁸ This interpretation is supported also by Art. 18 (2) of Regulation on Small Claims Procedure, according to which if none of the grounds referred to in paragraph 1 apply, the judgment shall remain in force, or, *vice versa*, the judgments shall be null and void if there is one of the reasons laid down in paragraph 1.

claims⁹, whereas the creators of the draft amendment have definitely inspired themselves by the European law regulation. According to the statement of the submitter of the concerned draft amendment, Ministry of Justice of the Slovak Republic, the aim of this new institute is to strengthen the principle of promptitude and efficiency of the civil proceedings and to provide the prompt administration of justice and smooth enforcement of law.¹⁰

After the amendment of Code of Civil Procedure enters into force, the small claims procedure will extend the list of so-called summary proceedings in Slovak civil procedural law, which are known also in the European law (e.g. European order for payment procedure or European small claims procedure). *De lege lata*, summary proceedings in the Slovak Republic include order for payment procedure and order for payment bill of exchange (cheque) procedure¹¹. Beside these and based on Regulation on Small Claims Procedure, the summary proceedings in the Slovak Republic shall be completed with the small claims procedure (in non cross-border cases). Moreover, the submitter of the draft amendment of the Code of Civil Procedure intends the summary proceedings to cover all matters for fulfillment, since for the time being it is possible to issue the order for payment only in cases where petition to commence proceedings claims a right to the payment of a pecuniary amount. According to newly proposed Art. 172 (1) of Code of Civil Procedure, the court will be entitled, even without an explicit request by the claimant and without hearing of the defendant, to issue order for fulfillment¹², if it is claimed to be decided on fulfillment of an obligation arising from law, legal relationship or breach of the law.

In such significant expansion of the summary proceedings in the Slovak civil procedure, which is definitely influenced by the European secondary law rules, one can see the tendency of growing declension from traditional principles of civil procedure, such as principle of contradictory procedure¹³ and principle of oral and immediate procedure. Only time will show, whether this would not mean also the breach of the principle of “equality of arms” in civil procedure, because the experience in the Slovak Republic leads to the conclusion that in summary proceedings the guarantee that the payment for order corresponds with the real state

⁹ The draft amendment of Code of Civil Procedure uses the notion „*veci s malou hodnotou sporu*“ or „*bagatelné pohľadávky*“.

¹⁰ Explanatory report to the draft amendment of Code of Civil Procedure. Special part, point 29 (§ 83a), available on www.justice.gov.sk

¹¹ In Slovak „*konanie o platobnom rozkaze*“ and „*konanie o zmenkovom (šekovom) platobnom rozkaze*“.

¹² In Slovak „*rozkaz na plnenie*“.

¹³ In Slovak „*kontradiktórnosť konanie*“

of matter is significantly diminished.¹⁴ Not rarely it is decided by the order for payment on the lapsed claims, fault or objectionable claims. The defense of the defendant in the form of protest is, indeed, possible, however, it is subject to the court fee in the same amount as petition to commence proceedings¹⁵. If the amount of (very often disputable) pecuniary claims is high, it sometimes causes even liquidating problems for defendants. Despite of this negative experience, according to draft amendment of Code of Civil Procedure, it will be possible to decide by order also claims for material fulfillment.

The small claims procedure, as the form of summary proceedings, will be entire novelty in the Slovak procedural law, criteria of which are, for the time being, not known and these will not fully correspond with the conditions of small claims procedure in cross-border cases according to Regulation on Small Claims Procedure. In draft amendment of the Code of Civil Procedure, small claims are defined as claims, in which the value of the claim without attribution on the day of submission of the petition to commence proceedings does not exceed the amount stipulated by special law. The precise amount of so-called small claim in Slovak civil procedure, which is stipulated for EUR 2.000 in cross-border cases, is therefore not known today. Matters related to the social security and procedure on revision of the judgments rendered in arbitration proceedings are not considered to be small claims. This is significantly narrower limitation of what is not considered small claim than the one stipulated in Art. 2 (1) of Regulation on Small Claims Procedure in matters concerning cross-border implications.

In order to strengthen the principle of promptitude and efficiency of the civil proceedings (to the detriment of the principle of contradictory and oral proceedings), rules similar to those stated in Regulation on Small Claims Procedure for cross-border cases are being introduced for domestic small claims procedure, too. For instance, it will not be required to schedule the hearing in small claims procedure. The court shall schedule a hearing only if the court considers the hearing useful, or if required so by one of the parties.¹⁶ Similarly, based on the

¹⁴ KRAJČO, J. a others.: Code of Civil Procedure. Commentary. I. volume. EUROUNDION, Bratislava, 2006, p. 433.

¹⁵ 6% of the value of the case, at least SKK 500, at most SKK 500.000 in civil matters, in commercial matters at least SKK 2.000, at most SKK 1.000.000.

¹⁶ Compare Art. 5 of Regulation on Small Claims Procedure

European legal regulation, also in domestic cases the court may hold an oral hearing through videoconference or other communication technology if technical means are available.¹⁷

According to newly proposed wording of Art. 150 (2) of the Code of Civil Procedure, the court shall not award costs of proceedings to the successful party to the extent they were unnecessarily incurred or are disproportionate to the claim in small claim procedure.¹⁸ The aim of this provision should be the enforcement of the claim with lowest possible costs, whereas the interest to continue in the proceedings because it is for the benefit of legal counsel due to counsel's fee, must not prevail.¹⁹

According to the draft amendment of the Code of Civil Procedure, in small claims procedure the appeal shall not be admissible, except from an appeal against the verdict on costs in order for fulfillment. Despite of the fact that it is not explicitly stated in draft amendment, we do presume that such inadmissibility of an appeal against the judgment of the court in small claims procedure shall relate also to the judgment rendered in the European Small Claims Procedure, since under Art. 17 of Regulation on Small Claims Procedure, the admissibility of an appeal shall be assessed according to the national procedural law of the Member States. However, at the same time point 31 of the Preamble to the Regulation on Small Claims Procedure stipulates that there should be minimum standards for the review of a judgment in situations where the defendant was not able to contest the claim. It is, indeed, questionable whether the total exclusion of an appeal in small claims procedure will not be contrary to this recommendation stated in Preamble to the Regulation on Small Claims Procedure, or to the right for effective remedy as a part of the right for a fair trial.

One of the contingent questions will be the one of costs of proceedings. This question is regulated neither by Regulation on order for payment, nor by Regulation on Small Claims Procedure. The Regulations reserve it for national procedural law of Member States. For instance, in case of European order for payment against the consumer with his/her residence on the territory of the Slovak Republic, the Slovak court shall have the jurisdiction, however,

¹⁷ Compare Art. 8 of Regulation on Small Claims Procedure

¹⁸ Compare Art. 16 of Regulation on Small Claims Procedure

¹⁹ Explanatory report to the draft amendment of Code of Civil Procedure. Special part, point 49 (§ 150), available on www.justice.gov.sk

the claim itself may be for a rather high amount in foreign currency. Therefore, the consumer would be then obliged to pay significant court fee in foreign currency.²⁰

Conclusion

Two recent European regulations, Regulation on order for payment and Regulation on Small Claims procedure keep number of issues open. Eventually, the Regulations in question enable considerable divergence due to the discrepancies in national procedural orders. Moreover, the Regulations contain several provisions which may lead in the future to the breach of the equality or legal certainty²¹ of the parties of the given proceedings. Since today approximately half a year remain to the start of the application of Regulations, we will see how their application will look like in practice of particular Member States and how this application will be influenced by national procedural orders and *vice-versa*.

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²⁰ According to Art. 172 (4) of Code of Civil Procedure, the order for payment can be issued also in foreign currency.

²¹ See Júda, V.: *Právna istota verzus retroaktivita v práve. (Vybrané problémy)*, Právnická fakulta UMB, Banská Bystrica 2006, p. 174 and foll.