

ORAL HEARING MANAGEMENT UNDER THE E.S.C.P. REGULATION*

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ABSTRACT: The European Small Claims Procedure (ESCP) is designed as a written procedure, wherein the oral hearing is granted limited space. The reason stems from the fact that an oral hearing in cross-border litigations takes a significantly longer time and its worth seems to be – notably in civil matters such as those fall within the ESCP's scope – inversely related to the value of the case (the smaller the value, the less the worth). Such a procedure gives rise to a number of significant issues, concerning its consistency with the fundamental procedural principle of the «right to be heard»; the correlative margin of discretion the court may rely on in deciding whether a hearing shall be scheduled or not; not least the role played by the modern communication technologies in this respect. The author deals with such issues in their multiple features and connections, trying to thus offer proper answers thereto. The author's overall view is that the ESCP Regulation's restrictive approach to oral hearing is reconcilable with the right to be heard and that the broad discretion conferred on the court in this respect is justified as well

KEYWORDS: oral hearing; right to be heard; small claims; European small claims procedure; ESCP; videoconference; orality.

SUMMARY: I. INTRODUCTION. A. The oral hearing in ESCP as a «Residual Tool» in the ESCP; B. Lexical remarks on the term “oral hearing”; C. The main rules on oral hearing as set out in art. 5(1a) ESCP.— II. IS DISPENSATION WITH ORAL HEARING CONSISTENT WITH THE PRINCIPLES OF FAIR TRIAL? A. Where doubts arise from – apropos of a first set of ECtHR case-law; B. Fair trial between wordings and reality in cross-border litigations for small claims – In this context is an unwavering implementation of orality actually «fair»?; C. Where doubts (should) end – along with a second set of ECtHR case-law; D. Collateral insights – on how the national law approach towards orality may influence the interpreters' judgment; E. Overview and practical implications.— III. THE ROLE OF MODERN COMMUNICATION TECHNOLOGIES IN THE ESCP'S APPROACH TO ORALITY.

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A. On the availability of appropriate technology; 1. Introduction; 2. On the availability; 3. On «appropriateness». B. The «language divide» in connection with videoconferencing; C. The (inconvenient) reference to the Evidence Regulation; D. Overview and some proposals; E. How to handle the choice (if available and proper) between in-person and remote oral hearings.— IV. CASES IN WHICH ORALITY SHOULD PREVAIL OVER WRITTEN FORM. A. Compulsory cases: 1. Evidence to be taken before the court; 2. The party requesting an oral hearing is self-represented; 3. About the remedies. B. Some expedient cases.

I. INTRODUCTION

A. The oral hearing as a «residual tool» in the ESCP

The European Small Claims Procedure (henceforth ESCP) “shall be a written procedure”, as article 5(1) of Regulation n. 861/2007 sets forth, thus making it clear that an oral hearing results in a deviation from the ESCP’s standards.

Regarded as a curbing factor for a cross-border procedure designed to be as accelerated and simplified as possible, the oral hearing, though viable, is discouraged and never arises as an automatic pre-determined moment along the course of the ESCP¹.

Article 5(1a) ESCP shapes the «oral hearing» accordingly: a residual instrument which is for the court to provide in the absence of possible alternatives in written form and on the basis of a broad discretion. It is also an instrument each party is entitled to ask for but does not have the right to claim – in the sense that the party’s request is not binding. Besides, ESCP Regulation regards traditional face-to-face hearings as exceptional, as its article 8 singles out the video- or teleconference as (a possibly) usual way for a hearing to be held.

B. Lexical remarks on the term “oral hearing”

From a terminological standpoint, it is worth recalling that the seemingly redundant term «oral hearing» instead of the simpler «hearing» depends on a significant grade of ambiguity attached to the latter. With the word «hearing»,

¹ An approach that, lest it be underestimated or misunderstood, has been additionally stressed by the amending Regulation 2421/2015, both in the Preamble, point 11, and in the wording of article 5(1a) as introduced by the said Regulation with the aim of leaving the court a wider margin of discretion in refusing a party’s request for oral hearing. This aim is pursued by ousting the adverb «obviously» from the wording of the previous article 5(1): “The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is *obviously* not necessary for the fair conduct of the proceedings”. For a recent survey on the use of ESCP (along with that of the other “2nd generation Regulations”) containing specific data on the oral hearing and its use in several EU countries (namely Belgium, France, Germany, Luxembourg, the Netherlands, Poland and Spain), see the features available in IC2BE project online platform, on <https://www.uantwerpen.be/en/projects/ic2be/>. From a statistic point of view, however, the (well-known) under-use of the ESCP renders the relevant data extremely poor and not particularly significant.

reference is made at times to the complex of activities and guarantees that the adversarial principle consists in, irrespective of whether and to what extent they are provided orally or in writing ². In this connection, «oral hearing» provides a disambiguation of an otherwise too versatile legal term.

The predicate «oral hearing», in turn, entails also an ambiguity: it may be referred, more strictly, to the chance for the party to orally address the and be questioned by the court on the matter concerned; but also, more extensively, to any chance for official and direct confrontation between any of the participants, including the judge, the parties, counsels, witnesses and any other person entitled to appear before the court. That said, it is equally clear that in the ESCP Regulation – notably in article 5 – the term is intended in the latter and more extensive sense, provided that article 5(1a) relates oral hearing both to the taking of evidence on a subsidiary basis (which might involve the parties and their counsels as well as other subjects like the witnesses) and to the specific activity of orally addressing by and to a party.

C. The main rules on oral hearing as set out in art. 5(1a) ESCP

The text of article 5(1a) literally states:

1) by its first sentence, that the court shall schedule an oral hearing whenever the sole array of written evidence proves unsatisfactory to draw a judgment; which is for the court to assess under the applicable rules of evidence (generally the *lex fori*);

2) by its second sentence, that the party may request an oral hearing regardless of the reasons, provided the court may then refuse it. Hence, the party's request may be based on any reason: e.g., for a self-represented litigant to better explain his arguments; for the parties in complex cases to take a full and simultaneous stand on the relevant issues so as to prevent possible unbalances in the right to be heard.

As to point 1), an despite the emphasis that the verb «shall» places on the court's duty to hold a hearing, this provision does not really deprive the court of discretionary power.

² Such being the sense as the right “to a fair [...] hearing” as set forth art. 6 EConvHR is generally understood, and provided that the adversarial principle is in turn strictly connected to that to “equality of arms” and to a “reasoned decision”. Instead, the more specific reference by the EConvHR to oral hearing is generally recognized in the predicate “public hearing”. See, on the subject, and for the appropriate case-law references, the following reviews: *Handbook on European law relating to access to justice* ECtHR– prepared by European Union Agency for Fundamental Rights *et al.* – Luxembourg, 2016, 40 ff., available online at: <https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>; *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)* – prepared by the Council of Europe – Strasbourg, upd. 31.12.2020, available online at: https://ECTHR.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. An even broader meaning attaches the German legal system to the «Recht auf rechtliches Gehör» (art. 103 GG), though literally consisting in the «right to a rightful hearing»: see for all H. SCHULZE-FIELITZ, GG Art. 103 Abs. 1, in ECtHR. Dreier (edit.), *Grundgesetz-Kommentar*, III, 2018, Tübingen, nr. 1 ff.

As far as the taking of evidence by oral hearing is concerned, article 9(2) ESCP admits the use of written statements coming from witnesses, parties and experts; subject to the subsidiary character conferred to witness and expert evidence (however to be taken possibly through written statements) by article 9(4) ESCP as well as to the general clause set out in article 9 (1), whereby the court “shall use the simplest and least burdensome method of taking evidence.”

A similar consideration applies *a fortiori* to the sentence in point 2), concerning the judicial discretion on the party’s request for an oral hearing, as the wording “the court may” definitely suggests a wider larger margin of appreciation. Even considering that the court’s discretion is limited insofar as the requested hearing turns out to be “necessary for the fair conduct of the proceedings”, it is however for the court to decide in what case such a necessity may arise.

For the same reasons a party may request an oral hearing, the court should in turn be able to set a hearing on its own motion. Such direction relies – again – upon a literal basis, since the provision referred to in point 1) – first sentence of article 5(1a) – in establishing that the judge «shall» hold the oral hearing in that particular situation, simply does not prevent the judge from holding it whenever deemed appropriate³.

II. IS DISPENSATION WITH AN ORAL HEARING CONSISTENT WITH THE PRINCIPLES OF FAIR TRIAL?

A. Where doubts arise from – apropos of a first set of ECtHR case-law

Yet doubts over the viability of the scheme provided for in article 5(1a) of the ESCP are diffusely cast on the basis of the «fair and public hearing» clause as set forth by the EConvHR in article 6, par. 1, as interpreted by the case law of the EConvHR Court and hence transposed in article 47, comma 1, of the Charter of Fundamental Rights of the EU (CFR).

In the opinion of many authors – especially Germans – the way the ESCP Regulation limits the party’s right to a hearing does not meet the standards of a fair trial as set out in article 6 EConvHR, insofar as the former leaves to the discretion of the court whether or not to grant the party’s request to be heard. Nor does the low value of the claims involved lead to a basically different conclusion, as there is no steady correlation between the economic value of a

³ This is also the sense of the wording of article 5(1a), second sentence, according to which the court “may” refuse the party’s request – thus it is not obliged to refuse it – ; and the more general fact that article 5(1), by stating that ESCP “shall be a written procedure”, does not derive any procedural consequence to the case the court sets a hearing without it being necessary for the fair conduct of the proceedings.

litigation and its factual or legal complexity⁴. Hence there is a need – as an alternative to simply assuming the irreconcilability of art. 5 ESCP with the fair trial guarantees – for a very strict application of the court's discretion, so as to make it conform with the exceptional cases in which the same ECtHR allows courts to dispense with holding an oral hearing requested by the party.⁵

The said criticism relies upon the assumption that, according to ECtHR case-law, article 6 EConvHR must be interpreted as meaning that, aside from some limited exceptions, the court shall not deny a party's request to be heard.

It is in fact well known that, according to the Court of Strasbourg, the right to be publicly and orally heard by the court at least once before one instance⁶ is a fundamental component for the fair trial that neither the law-maker nor the court may disregard without violating article 6 EConvHR.

As it is also well known, the ECtHR accepts that such guarantee, in both its elements of publicity and orality, may be dispensed with in exceptional circumstances⁷. Notably, established case-law admits that an oral hearing may be departed from insofar as the proceedings concern purely legal issues of limited scope or highly technical issues⁸. Such an exception also adds up

⁴ C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze*, JZ, 2012, 395; J. Wolber, *Der Beitritt der Europäischen Union zur EMRK im Lichte des Europäischen Zivilprozessrechts*, ZeuP, 2017, 942.

⁵ J. Wolber, *Der Beitritt der Europäischen Union zur EMRK*, cit., 940 ff.; T. Garber, *EuGFO*, article 5, in Geimer - Schütze (dir.), *Europäisches Zivilverfahrensrecht*, 2020, nr. 5 f.; W. Hau, *EG-BagatellVO - Article 5*, in Krüger - Rauscher (dir.), *Münchener Kommentar zur ZPO*, 2017, III, n. 2; C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze*, JZ, 2012, 394-396; E.A. Ontanu, *Cross-Border Debt Recovery in the EU*, Cambridge, 2017, 49; M. Melone - A. Pancaldi, *Il nuovo regolamento comunitario sulle controversie di modesta entità*, Dir. Un. Eur., 2008, pag. 281 ff., spec. par. XI; according to C. Oro Martinez, *The Small Claims Regulation: On the Way to an Improved European Procedure?*, in B. Hess, M. Bergström, E. Storskrubb (eds.), *EU Civil Justice: Current Issues and Future Outlook*, Oxford, 2016, whereas the original value threshold of 2.000 didn't raise issues in this respect, the subsequent increase up to 5.000 requires the limitation of oral hearing to be "seriously reconsidered". Contrary opinions thereon in P. Schlosser, *EU-GFVO*, Article 5, in Schlosser - Hess, *EU-Zivilprozessrecht*, München, 2015, nr. 1; M. Peiffer, *VO (EG) 861/2007*, Article 5, in Geimer - Schütze - Hau (edit.), *Internationaler Rechtsverkehr in zivil- und Handelssachen*, München, 2021, nr. 9; Jahn, *Das europäische Verfahren für geringfügige Forderungen*, NJW, 2007, 2890, spec. 2892; E. D'Alessandro, *Il procedimento uniforme per le controversie di modesta entità*, Turin, 2008, 86-88; in principle X.E. Kramer, *The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation*, ZEuP, 2008, 355 ff., spec. 371 f., albeit assuming that, as a matter of fact, "the court will usually respect of a party to a hearing..."; so inclined is also J. Kropholler - J. Von Hein, *Europäisches Zivilprozessrecht*, Frankfurt a. M., 2011, 1117 f.

^{As to the domestic case-law, among the very few retrieved, see Court of Appeal of Barcelona, 26 sept. 2012, as reported by <https://ic2be.uantwerpen.be/#/search/national>, which rejects the appeal raised by the defendant on account of the refusal by the Court of first instance to grant the party's request for oral hearing allegedly aimed at taking of (not specified) evidence.}

⁶ In these terms see once again ECtHR, *Salomonsson*, para. 36; ECtHR, 26 apr. 1995, C-16922/90, *Fischer*, para. 44.

⁷ As to the publicity as such see ECtHR C-58675/00, *Martinie*, para. 42-44; as to the overall dispensing with an oral hearing see *inter alia* ECtHR 12.11.2002, 38978/78, *Salomonsson*, para. 34; ECtHR 30 sept. 2020, C 58512/16, *Cimperšek v. Slovenia*, para. 41; ECtHR 23 feb. 1990, *Fredin*, para. 21 f.

⁸ See in this respect ECtHR 6 nov. 2018, C 55391/13, *Ramos Nunes de Carvalho e Sá*, para. 188-190; ECtHR 24.06.1993, C 14518/89, para. 58; ECtHR 6 apr. 2017, C 2229/15, *Karajanov*, para. 60; whereas the latter exception is generally upheld in disputes concerning social-security benefits. In a different

to the more general dispensation admitted, whereby “a hearing may be dispensed with if a party unequivocally waives his right thereto and there are no questions of public interest making a hearing necessary”⁹, the party’s consent thus playing a key role in issues concerning the right to be heard.

**B. Fair trial between wordings and reality
in cross-border litigations for small claims –
In this context is an unwavering implementation
of orality actually «fair»?**

The criticism over the handling of the oral hearing in the ESCP Regulation appears quite unconvincing. In contrast to the adversary principle, orality does not rise to a self-evident absolute guarantee in judicial procedures: the value of orality depends on the function of a specific procedure and on other variables influencing the effectiveness of the outcome. Orality plays in principle a positive role, which justifies the general assumption that the oral hearing shall in principle be granted; but without disregarding the fact that its related inconveniences¹⁰ in some cases make an oral hearings even detrimental. This is a well-known fact and there’s no need to wait for the acknowledgment of ECtHR to take notice of it¹¹.

In this respect, and considering the scope of a cross-border small claims procedure, it seems less plausible that article 5(1a) ESCP must comply with to the wording of article 6 EConvHR, than, quite to the contrary, said article must be implemented with greater flexibility.

Besides the just mentioned limitations on the right to an oral hearing, a significant role in ESCP proceedings shall be given to the need for proportionality in administering justice within the meaning of recital nr. 7 ESCP, here intended as sustainable *ratio* between the importance attached by a subject to an alleged right and the resources such subject is normally ready to spend on its judicial protection, mainly in terms of related times and costs¹². The low value of the disputes, in connection with all the serious disadvantages involved in an ordinary cross-border litigation – in terms of costs, court’s

and even more restrictive view, C. Favilli, *L’orizzonte dell’asilo e della protezione dello straniero*, in *Questione giustizia*, 2018, fasc. n. 2, 34 ff., maintains that the exceptional dispensation with oral hearing refers exclusively to the hearing intended as «party’s audition» and it may not be intended as possibility for ruling out the oral hearing at all, which article 6 EConvHR would not allow.

⁹ So ECtHR 38978/78, *Salomonsson*, *ibid.* and the case-law therein cited.

¹⁰ See in this regard the suggestive overview sketched by J. Nieva Fenoll, *The disadvantages of orality*, in F. Carpi - M. Ortells Ramos (ed.), *Oralidad y escritura en un proceso civil eficiente*, València, 2008, II, 471 f.

¹¹ Even a highly authoritative promoter of orality in civil procedure as G. Chiovenda, *Relazione al progetto di riforma del processo elaborato dalla commissione per il dopoguerra*, in *Saggi di diritto processuale civile*, Roma, 1931, II, 42 f., had to recognize that orality is not always convenient, and, when disadvantage prevails, then its theoretical primacy should give way to practical needs.

¹² See accordingly B. Vidal Fernández, *Oralidad y escritura en el proceso declarativo europeo de escasa cuantía*, in F. Carpi - M. Ortells Ramos (ed.), *Oralidad y escritura*, cit., II, 517 ff.

distance, language and time – are the main hurdles to the effectiveness of legal protection in this context; and that these are the fundamental issues the ESCP aims to address. It is thus worth noting that focus here is on the party's (notably the claimant's) own conflicting interests affecting his willingness to bring civil action; in contrast, the interest of the State to conserve judicial resources, although typically crucial in domestic small claims litigations¹³, plays a secondary rule in this setting.

Lest the basic purpose of the ESCP be frustrated, it is therefore crucial to find a proper and fair balance between the factors, so as to grant the parties – especially a «weaker» one – judicial protection that is effective. For the ESCP device to work properly, it is also important to grant the court a broad discretion¹⁴, notably to prevent a party – above all the one presumably interested in dragging out the proceedings – from systematically invoking his right to be heard and from doing so with high chances of succeeding¹⁵.

It must be added, on the other hand, that, pursuant to article 8 ESCP, the oral hearing – when ordered – shall be held preferably by videoconference or by some other appropriate distance communication technology¹⁶. The interaction of the ESCP with videoconferencing could actually change the terms of the question regarding the extent to which the oral hearing should be prevented or encouraged. The point shall be addressed later (*infra*, III.), as it is in many respects a quite problematic one, especially in the context of cross-border litigations.

C. Where doubts (should) end – along with a second set of ECtHR case-law

As a matter of fact, the ECtHR jurisprudence proves on its part far less restrictive than the previously mentioned case-law may suggest.

To begin with, the above-mentioned case-law must be understood in light of the clarification given by the ECtHR in the *Chimperšek* case, which said

¹³ On proportionality as an interpretative and legislative standard in the judiciary, see for all R. Caponi, *Il principio di proporzionalità nella giustizia civile: prime note sistematiche*, RTDPC, 2011, 389 ff. As to the fundamental role such a principle plays in the assessments of the European Courts and notably of the ECtHR, see G. Scaccia, *Proportionality and the Balancing of Rights in the Case-law of European Courts*, *Federalism* 2019, no. 4, 1 ff. For a more general overview of the proportionality doctrine, see. K. Möller, *Proportionality: Challenging the critics*, ICon (Intl. Journ. of Const. Law), 2012, 709 ff.

¹⁴ The inherent connection between handling orality and granting the court a broad margin of discretion in this regard is pointed out in B. Vidal Fernández, *Oralidad y escritura*, cit., 528.

¹⁵ Same remark in F. Ferrand, *Bilan d'application du règlement...*, in S. Guinchard (dir.), *Droit et pratique de la procédure civile* (online ed.), Dalloz, 2021, par. 449.51; see also in this vein P. Schlosser, *EuGFVO*, Article 5; F. Netzer, *EuBagatellVO*, Article 5, in Kindl - Meller-Hannich – Gesamtes (edit.), *Recht der Zwangsvollstreckung*, Baden-Baden, 2021, nr. 4.

¹⁶ A preference already made in the original text but now emphasised by the amending Regulation 2421/2015, in line with the general directions as defined by the European Council in the Stockholm Programme (OJEU, C 115, 4.5.2010, 1 ff., spec. n. 3.4.1.) and with the European Council Draft Strategy on European e-Justice 2014-2018 (OJEU, C 376, 21.12.2013, 7 ff.).

that in the absence of “*issues of credibility or contested facts which necessitate a hearing... the courts may fairly decide the case on the basis of the parties’ submissions and other written material*”¹⁷. This criterion makes the oral hearing plainly dependent on the general standard of relevance, notably on the understanding that if a fact can be established from a document already admitted into evidence, an oral hearing on the same fact may be in principle denied. Therefore, one can hardly say that the lack of «issues of credibility» may be assessed on the basis of strict and binding criteria, having to concede, on the contrary, that the court shall deploy a significant degree of discretion in this regard, notably in order to evaluate if and to what extent “the parties’ submissions and other written material” are credible enough to override possible objections – and, conversely, whether an objection is «non credible» enough to be promptly set aside¹⁸.

All the more significant in the particular context of small claims is the ECtHR 8 feb. 2016, C 64160/11, *Põnkä v. Estonia*, ruling on the domestic small claim proceedings as laid down by articles 404 and 405 of the Estonian CCP. The applicant, a Finnish national convicted of murder in an Estonian court and transferred to Finland to serve his sentence, was sued again for damages before an Estonian court by the owner of the apartment where the murder occurred. In consideration of the low value of the claim, the court seised ordered the case to be dealt with according to the simplified procedure for small claims as set out by article 405 CCP, which had admittedly been drafted on the basis of the ESCP and entitles the court to conduct the proceedings entirely in writing. The applicant’s request to be heard was denied and the proceedings unfolded exclusively in written form: it should be noted that the applicant argued for the necessity of an oral hearing on the basis of the need to take direct evidence from him and some witnesses, whereas the Court did not provide any reason for its refusal. The complete lack of justification for such refusal was decisive for the ECtHR to uphold the applicant’s complaint about the violation of article 6 of the Convention.

Albeit confirming the alleged violation of article 6, comma 1, EConvHR, by no means did the ECtHR cast doubts upon the consistency of article 5(1a) ESCP with article 6 of the Convention – nor did it cast doubts against the relevant provisions of the Estonian CCP. On the contrary, the Court showed itself to be basically open to the judicial discretion in the matter concerned, as the following assertions make it clear.

Apart from a formal tribute to the «exceptional character» of what may dispense with an oral hearing, the Court – not before having pointed out that “it does not mean that refusing to hold an oral hearing may be justified only

¹⁷ ECtHR in *Cimperšek*, *ibid.*; ECtHR, 18 dec. 2008, C 69917/01, para. 73 *Saccoccia v. Austria*.

¹⁸ Also worth mentioning is ECtHR 19 apr. 2007, C 63235/00, *Vilho Eskelinen v. Finland*, spec. par. 73 f., stating that a party shall be given the opportunity to request an oral hearing and that a subsequent court’s dismissal shall be motivated; and neither the Court’s statements nor the circumstances of the case suggest that ECtHR confined the court’s refusal to exceptional and strictly predetermined situations.

in rare cases” – goes on to say that “Likewise, a hearing may not be required when the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations”¹⁹.

This implies a wide use of judicial discretion and no rigid, predetermined restrictions underlying the assessment of whether the written material concerned is «adequately resolving»; so far, there is no presumption that a refusal of the party’s request for hearing entails a violation of the fair trial. There is instead an assumption that a denial is rightfully given wherever the requested hearing tends to reintroduce in oral form what is already taken in writing. In other words, even in the ECtHR’s assumption, the oral hearing is not different enough from written allegations as to prevent the court from making a comparative evaluation of the respective contents and to refuse the former whenever it tends to reiterate the findings already obtained from the latter.

Just as important is what the ECtHR states about its competence in the matter concerned, *viz.* the extent to which the ECtHR may scrutinize a domestic court’s assessment of the adequacy of the written material produced and the correlated need for an oral hearing. In this respect the Court shall examine whether the domestic court provided a proper explanation as to the facts underlying the denial of the requested oral hearing; in addition, the Court considers itself fully entitled to review the domestic court’s judgment on the merits²⁰.

D. Collateral insights – on how the national law approach towards orality may influence the interpreters’ judgment

In addition to Estonia, other EU national lawmakers outline civil contentious proceedings capable of unfolding entirely in written form, although the conditions for ruling out the oral hearing vary, sometimes being far more restrictive than that observed in the Pönkä case²¹. It is, in fact, worth noting that some Member States still regard orality as the most effective instrument for ensuring speed and simplicity in small claims domestic proceedings²²; which in principle may indeed prove right, provided both parties may easily access the court and speak the same language. Several Member States have in addition adopted specific coordination rules for better implementing the ESCP Regulation.

¹⁹ So literally ECtHR 12 nov. 2002, C 28394/95, *Döry*, which the said judgment refers to.

²⁰ See also in this sense ECtHR 13 mar. 2018, C 32303/13, *Mirovni Inštitut*, para. 44.

²¹ A general review thereto is available on the e-Justice Portal on https://e-justice.europa.eu/content_small_claims-42-es.do.

²² So, in Spain, the *Juicio verbal* under articles 437 ff. LEC (Ley 1/2000 de Enjuiciamiento Civil) – as its name conveys – with general application to claims up to € 6.000 pursuant to article 250, comma 2, LEC; in Italy, the proceedings before the Justice of the Peace under articles 311 ff. CPC with a general application to claims up to € 5.000 – though the bias in orality is more theoretical than implemented in practice.

France and Germany provide two examples of such dual-level legislative action and they are worth being briefly describing.

As to the coordination rules, neither of them departs from the provisions as set out in article 5(1a) ESCP. Article 1388²³ of the French CPC recalls implicitly the criteria set out therein; whereas the German ZPO, in its section dealing with the ESCP coordination rules²⁴, does not even contain a tacit reference to such criteria.

As far as domestic small claims proceedings are concerned, it is then worth considering that both French and German procedural rules make the full written procedure in principle dependent on the parties' explicit approval, as will be seen below.

By law 23 march 2019, n. 2019-222, France enacted a double set of provisions concerning the waiver of oral hearing in civil litigations: a general regime and a specific one concerning the small claims (*petit litiges*). According to the general regime, as defined by article 757, comma 2, and 828 CPC²⁵ in connection with article L 212-5-1 COJ²⁶ («Code de l'Organisation Judiciaire», the three of them as amended by provisions entered into force on 1st January 2020), the tribunal – namely the *tribunal judiciaire* – at the request of the parties and provided all of them agree with that, may order the entire proceedings to be held in writing; thus implying that a waiver of oral hearing requires the parties' consent.

²³ Article 1388 French CPC: “Lorsque le tribunal décide de tenir une audience en application de la procédure européenne de règlement des petits litiges, il connaît du litige conformément à la procédure au fond applicable devant lui.” For a general survey on ESCP implementation in France, see recently M. Winkler – P. M. Baquero, *The implementation of the European Small Claims Procedure in France*, EuCML, 2021, no. 1, 36 ff.

²⁴ §§ 1097 – 1109 ZPO, forming the ZPO Section dedicated to ESCP 861/2007 Regulation. § 1100 provides for the alternative between face-to-face and remote hearings, that is, though, a different topic, the relevant ESCP provision on which being article 8.

²⁵ So article 757 CPC “Outre les mentions prescrites par les articles 54 et 57, la requête doit contenir, à peine de nullité, un exposé sommaire des motifs de la demande. Les pièces que le requérant souhaite invoquer à l'appui de ses prétentions sont jointes à sa requête en autant de copies que de personnes dont la convocation est demandée. / Le cas échéant, la requête mentionne l'accord du requérant pour que la procédure se déroule sans audience en application de l'article L. 212-5-1 du code de l'organisation judiciaire.”

²⁶ In turn, article 828 CPC sets out that “A tout moment de la procédure, les parties peuvent donner expressément leur accord pour que la procédure se déroule sans audience conformément aux dispositions de l'article L. 212-5-1 du code de l'organisation judiciaire. / Dans ce cas, le juge organise les échanges entre les parties. Celles-ci formulent leurs prétentions et leurs moyens par écrit. La communication entre elles est faite par lettre recommandée avec demande d'avis de réception ou par notification entre avocats et il en est justifié auprès du juge dans les délais qu'il impartit. Le juge fixe la date avant laquelle les parties doivent communiquer au greffe leurs prétentions, moyens et pièces. A cette date, le greffe informe les parties de la date à laquelle le jugement sera rendu. Celui-ci est contradictoire. / Le juge peut décider de tenir une audience s'il estime qu'il n'est pas possible de rendre une décision au regard des preuves écrites ou si l'une des parties en fait la demande.”

²⁶ Article L 212-5-1 COJ so states: «Devant le tribunal judiciaire, la procédure peut, à l'initiative des parties lorsqu'elles en sont expressément d'accord, se dérouler sans audience. En ce cas, elle est exclusivement écrite. Toutefois, le tribunal peut décider de tenir une audience s'il estime qu'il n'est pas possible de rendre une décision au regard des preuves écrites ou si l'une des parties.»

As for the the specific regime concerning the *petit litiges*, the French law-makers introduced an article L 212-5-2 COJ setting out a procedure allegedly shaped on the basis of the ESCP ²⁷; which, in part, actually matches with article 5(1a) ESCP – even by picking it up literally – and in part does not. This procedure is yet to be completed by a decree of the Conseil d'Etat ²⁸determining the maximum value of the claims to which such rule applies. What definitely differs from the ESCP is – aside from its restriction to money claims – that article L 212-5-2, comma 1, COJ still makes the waiver of oral hearing dependent on the initiative and consent of all the parties, by means of a joint request for the proceedings to take place completely online (“*dans le cadre d'une procédure dématérialisée*”). This renders the outcome similar to that provided for by the general set of rules already referred to²⁹, but more complicated, insofar as its II comma provides for a sort of «reconsidering clause» whereby a party may request an oral hearing in a second time, except that the court may in such case discretionally reject it. In short this is quite a «winding route», which conveys either the idea that under the ESCP too the waiver of the oral hearing is basically left to the prior consent of the parties, or that the national stakeholders are not yet ready to face a different solution.

As for Germany, the domestic proceedings for small claims is at present provided for by § 495a ZPO, the scope of which encompasses claims up to 6.000 Euros before the *Amtsgericht*. Besides entitling the court to decide by equitable discretion, § 495a states that the oral hearing shall be held at the party's request; which underlies, inversely, a general waiver of the oral hearing – unless, as said, otherwise requested by a party ³⁰. So far, this provision defines quite a different scheme from the general rule contained in § 128

²⁷ In this sense see for all F. Eudier, *Les dispositions de procédure civile de la loi du 23 mars 2019*, AJ Famille, 2019, 323 ff., spec. note 27. Article L 212-5-2 COJ reads as follows : « Les oppositions aux ordonnances portant injonction de payer statuant sur une demande initiale n'excédant pas un montant défini par décret en Conseil d'Etat et les demandes formées devant le tribunal judiciaire en paiement d'une somme n'excédant pas ce montant peuvent, à l'initiative des parties lorsqu'elles en sont expressément d'accord, être traitées dans le cadre d'une procédure dématérialisée. Dans ce cas, la procédure se déroule sans audience. / Toutefois, le tribunal peut décider de tenir une audience s'il estime qu'il n'est pas possible de rendre une décision au regard des preuves écrites ou si l'une des parties en fait la demande. Le tribunal peut, par décision spécialement motivée, rejeter cette demande s'il estime que, compte tenu des circonstances de l'espèce, une audience n'est pas nécessaire pour garantir le déroulement équitable de la procédure. Le refus de tenir une audience ne peut être contesté indépendamment du jugement sur le fond. [...] ».

²⁸ This decree, scheduled by 1 January 2022, hasn't been enacted so far (up to the proofread).

²⁹ This is what one gets from the wording of the said article L 212-5-2 COJ and what the French interpreters actually accordingly draw therefrom: see for references S. Guinchard (dir.), *Droit et pratique de la procédure civile* (online ed.), Dalloz, 2021, § 441.461. – *Procédure dématérialisée*; F. Eudier, *Les dispositions de procédure civile*, cit., 323 ff., spec. para. 2; Conseil Constitutionnel, 21 mar. 2019, n. 2019-778, ECLI:FR:CC:2019:2019.778.DC, para. 63-67.

³⁰ § 495a ZPO – Verfahren nach billigem Ermessen – 1Das Gericht kann sein Verfahren nach billigem Ermessen bestimmen, wenn der Streitwert 600 Euro nicht übersteigt. 2Auf Antrag muss mündlich verhandelt werden.

ZPO, whereby – subject to limited derogations – a judgment without a previous oral hearing may be rendered only “with the parties’ consent” ³¹.

The above-mentioned rules apply to national proceedings. Insofar as they are more restrictive than those provided by article 5 ESCP, the conditions set out by national law for avoiding an oral hearing shall (and should) not prevent article 5(1a) ESCP from fully operating in its specific scope as defined in article 1 and 2 ESCP. Although such a conclusion may in technical terms sound obvious (*i.e. according to* the primacy of EU law in its field of application) the influence exerted by national procedural standards could be significant, especially when it comes to applying article 5(1a) ESCP. It is thus understandable – also considering the comparatively ancient influence the orality principle exercised in their judicial culture – that German and French interpreters incline to an «inside-out harmonization», tending to concede little space for a refusal of the party’s request for an oral hearing: less than what the EConvHR requires as a minimum standard according to the *Pönka* case-law, and less than the ESCP *ratio* actually needs.

E. Overview and practical implications

In the light of the foregoing, I would maintain that:

— article 5(1a) ESCP does not conflict with the fundamental right to be heard as set out in article 6 EConvHR; in fact

— in the relevant ECtHR case-law, the court actually enjoys large discretion in deciding whether to hold or not an oral hearing under the said provision and in particular whether a hearing is necessary for the fairness of the proceedings;

— even where hearing is requested by a party, the court’s discretion is not restricted to a rigid and predetermined list of exceptions: if there is a «list», then it is significantly open and comes down to the features of the single case;

— at least in the context of ESCP proceedings, oral modality is not different enough compared to written allegations, to forbid the court to deny a request for an oral hearing wherever the relevant evidence can be found in allegations and other documents already submitted in writing or that may be easily so submitted;

³¹ § 128 “– Grundsatz der Mündlichkeit; schriftliches Verfahren – (1) Die Parteien verhandeln über den Rechtsstreit vor dem erkennenden Gericht mündlich. (2) 1Mit Zustimmung der Parteien, die nur bei einer wesentlichen Änderung der Prozesslage widerruflich ist, kann das Gericht eine Entscheidung ohne mündliche Verhandlung treffen. 2Es bestimmt alsbald den Zeitpunkt, bis zu dem Schriftsätze eingereicht werden können, und den Termin zur Verkündung der Entscheidung. 3Eine Entscheidung ohne mündliche Verhandlung ist unzulässig, wenn seit der Zustimmung der Parteien mehr als drei Monate verstrichen sind. (3) Ist nur noch über die Kosten oder Nebenforderungen zu entscheiden, kann die Entscheidung ohne mündliche Verhandlung ergehen. (4) Entscheidungen des Gerichts, die nicht Urteile sind, können ohne mündliche Verhandlung ergehen, soweit nichts anderes bestimmt ist.”

— however wide the scope of judicial discretion may be, it can be reviewed when there is scrutiny on the merits by means of appeals or other remedies and eventually by application before the ECtHR against the judgment of last instance; which does not by any means contradict the nature of judicial discretion (not to be confused with unquestionable freedom of choice, which is not for a court to wield);

— accordingly, such discretion does not entitle the court to reject a party's request for an oral hearing without providing a reason for this, as a justification is necessary – irrespective of the merits – for the decision to comply with the fair trial standards;

— conversely, the party requiring an oral hearing should always submit the reasons underlying the request, so as to allow the court to assess it accurately and in turn give reasons for it.

Accordingly, the question to be answered is not (and should not be) in what particular and exceptional situations is the court excused from granting the party's request for an oral hearing; but – and somehow to the contrary – in what particular situations the court may not deny a party's request for oral hearing or should even hold one on its own motion.

Thus set forth, the problem will be dealt with in the following.

III. THE ROLE OF MODERN COMMUNICATION TECHNOLOGIES IN THE ESCP'S APPROACH TO ORALITY

A. On the availability of appropriate technology

1. Introduction

A first element to be reckoned with concerns the use of modern communication technologies and its possible impact on the margin of discretion for a refusal of an oral hearing, since full availability of such technologies might *per se* render a judicial denial of the (remote) oral hearing in principle unfair, notably when a hearing is requested by the party³².

Insofar as the said technologies are at the court's disposal, it is yet to assess how «advanced» they are at present and, in the ESCP specific context, how capable they are of overcoming the disadvantages of a traditional in-person hearing.

³² Definitely in this sense is C.A. Kern, *Das europäische Verfahren*, cit., 396.

2. On the availability

Yet problems arise right at the first step. Provided that the ESCP Regulation does not (and hardly could) require the Member States to outfit the courts with appropriate facilities, expressing more likely a wish in this regard, in the EU area – and even within each member State – the quality of remote communication technologies available to the judiciary is far from uniform and, even worse, far from consistent with the needs of a remote-hearing³³. Some EU countries lack communications technologies for remote oral hearings at all; others have more of a patchwork situation, where some fairly well-equipped offices alternate with serious deficiencies in others³⁴.

As for Italy³⁵, the pressing need to contend with the CoViD-19 pandemic has given a fundamental impulse to the introduction of videoconferencing in civil proceedings. Facilities for remote hearings are currently available in several first or second instance judicial offices (*Tribunali*, *Corti d'Appello*) but in a patchy way and by using private platforms – like *Microsoft Teams* and *Skype for business* – clearly not designed for judicial activity, which may raise doubts as to their being «appropriate» in the sense referred to by article 8 ESCP. What's worst, such facilities are absent in the offices where the competence on ESCP matters is primarily concentrated: Justices of peace (*Giudici di pace*), whose general competence encompasses the claims not exceeding 5.000,00 Euros, are at present lacking even the basic technologies for tele-matic transmission of written acts and documents – not to mention video-conferencing. As a matter of fact, neither the increasingly urgent need for modernization nor the CoViD-19-related contingencies proved strong enough to resolve this situation.

Comparing to Italy, things in France seem going slightly better for the ESCP. French tribunals, heavily under pressure from CoViD-19 pandemic, have somehow managed³⁶ to make use of private generic platform for the *visioconférence* in civil procedures (basically *Zoom*, *Skype* and *Jitsi*), though in an improvised and non-homogeneous way; however, at the very least the tribunals primarily competent for the ESCP claims³⁷ don't suffer a total black-out.

³³ See in this respect I. Abignente – R. Tuccillo, *European Small Claims Procedure Guidelines for an Effective Response to the Call for Justice*, I-LEX, 2020, fasc. 1, 70.

³⁴ See in this regard I. Abignente – R. Tuccillo, *European Small claims procedure*, cit., loc. cit., 70: “offices today [i.e. up to december 2020] in charge of being aware of ESCP, in most of the cases have no information nor electronic devices available to correctly carry out the procedure”

³⁵ See P.C. Ruggieri, *La european small claims procedure (Reg. CE 861/2007) in Italia: un (rimediabile?) insuccesso*, in *Federalismi*, 2020, fasc. 21, 288; I. Abignente – F. Rolando – P.C. Ruggieri: *The Implementation of the European Small Claims Procedure in Italy*, EuCML, 2021, 40 ff., spec. 44 ff.

³⁶ The main legal instrument has been Ordonnance 25 mar. 2020, n. 2020-304, enacted under delegation of article 11, L. 23 mar. 2020, n. 2020-290; notably article 7 of the said Ordonnance.

³⁷ See G. Thierry, *Le confinement, crash test de la transformation numérique de la justice*, Dalloz actualité, 10.6.2020 ; ID., *Le second confinement remet à l'épreuve la numérisation de la justice*, Dalloz ac-

A better way, but still with uneven coverage in terms of appropriate remote hearings, also occurs in Germany³⁸. Notwithstanding that § 128a ZPO – by its first version in force since 2002 – provides for a wide-ranging possibility for remote hearings, its implementation was gradual and is still ongoing. The legislature itself, pushing forward the implementation in 2013 by an appropriate bill (Law 25.04.2013 in BGB 2013, n. 20, 935 ff.), extended until January 2018 the time for the Länder to comply. Though still incomplete,³⁹ the coverage is nowadays widespread and, according to reports, the use of videoconferencing for oral hearing has been giving good results⁴⁰. Since § 128a ZPO reads that the court may «allow» the parties – as well as the other participants to the hearing – to attend remotely through audio-video communication tools, it is generally accepted that, despite the court's «authorisation», those subjects are however entitled to physically appear in the courtroom and lawfully participate in the scheduled hearing⁴¹. Regarding the judicial choice between in-person or remote oral hearing, article 128a, comma 3, ZPO (unlike article 8 ESCP) provides no remedy, though some interpreters hold a remedy to be available by challenging the final decision on this specific point⁴².

3. On «appropriateness»

Where technologies for remote oral hearings actually exist⁴³, an obvious problem is whether their standards may be qualified as «appropriate». Such a qualification depends on many variables, the analysis of which goes beyond the subject of this contribution. What can be said is just that the technologies in question should satisfy the following general objectives⁴⁴ and notably: a) ensure the identity of the subjects present at the hearing; b) ensure the quality of audio-visual transmission; c) prevent to a reasonable degree any

tualité, 2.11.2020; L. Cadiet, *Un état d'exception pour la procédure civile française à l'épreuve du coronavirus*, La Semaine Juridique, 13.4.2020, n. 15, 754 ff., spec. 758. A predominantly negative assessment is depicted in M. Winkler – P. M. Baquero, *The implementation of the European Small Claims Procedure in France*, cit., 38: “videoconferences are theoretically possible in French courts, but often may not be available due to technical and economic constraints.”.

³⁸ J. Wolber, *EuGFVO, article 8*, in V. Vorwerk – C. Wolf, BeckOK ZPO, München, upd. 01.03.2021, para. C, I.

³⁹ A nearly in real time adjourned list of offices is available on <https://justiz.de/service/verzeichnis/index.php>.

⁴⁰ CoViD-19 pandemic gave anyway a significant contribution to its expansion, as remarked by U. Berlit, *E-Justiz in Allemagne - La progression de la numérisation de la justice*, RFDA 2021 p. 397 ff., spec. text including footnotes from 23 to 27.

⁴¹ See in this regard R. Köbler, *Die Videoverhandlung im Zivilprozess – Vorschlag einer Neuregelung*, NJW, 2021, 1072, pointing out the need to change such henceforth outdated provision, in such a way as to entitle the court to order the parties to appear by remote and the parties to comply with it.

⁴² C.A. Kern, § 128a, in Stein-Jonas, *Kommentar zur Zivilprozessordnung*, München, 2016, par. 34; Stadler, § 128a, in Musielak – Voit, *Zivilprozessordnung*, München, 2021, par. 9; otc. D. Von Selle, § 128a, in Vorwerk-Wolf, BeckOK ZPO, München, 2021.

⁴³ Besides (to a great extent) Germany, mention can be made of Lithuania

⁴⁴ For more specific requirements, see the Guide provided by e-Justice on the dedicated page https://e-justice.europa.eu/content_manual-71-en.do?init=true.

interference from unidentified subjects and from unlawful data-gathering – a requirement that is particularly at risk where online platforms and related software consist in generic features (like those of Zoom, Facebook, Microsoft, Google) not calibrated for judicial purpose; d) are sophisticated enough to be reasonably easy to handle; e) ensure that costs are affordable for all the stakeholders, hence not only by judiciary but also by private professionals (legal counsels as well as technical advisors) and personally by the parties. The latter two requirements, d) and e), are particularly important in the ESCP context, where legal assistance is not mandatory⁴⁵.

Assuming the above-mentioned requirements are satisfied, the court should seemingly be more in favour of a remote oral hearing – especially if requested by the party – than otherwise. But even disregarding the current situation of technological inadequacy in a large majority of courthouses, further significant issues remain, making the remote oral hearing a quite demanding occurrence, in terms of both preparation and the risks of something going wrong.

B. The «language divide» in connection with videoconferencing

A first well-known issue is the «language divide» between the official one of the proceedings and the often different language of at least one of the parties. In cross-border litigations this issue is a systemic complication, far more acute than in other judicial contexts where the interests at stakes are greater and either the parties or their professionals are acquainted enough with the court's official language; or these interests are worth the burdens and costs involved in assigning interpreters⁴⁶.

As far as the oral hearing is concerned, the language issue results in the need for simultaneous assistance afforded by reliable instruments.

The ESCP provides no guidance in this regard, leaving the matter to the Member States' law pursuant to the general direction as set out by its article 19. In fact, in the case of a remote oral hearing, article 8, par. 1., comma

⁴⁵ It may be objected that, as videoconferencing still requires the parties and other persons involved to be present in the courtroom, point d) should be a court's concern only and not one of the parties. This assumption would be incorrect, since videoconferencing is explicitly extended to the direct taking of evidence pursuant to article 17 of the 1206/2001 Regulation (which article 8 ESCP refers to in general terms: on such reference see below, III.C.), whereby in principle the requesting court bypasses other courts to make direct contact with the party or his counsel.

⁴⁶ As some Authors point out, language issue is in fact less dissuasive than one might fear. Provided that the party who is more sensitive to the issue is the consumer, who generally acts as plaintiff in the ESCP; and that, pursuant to articles 17 ff. of the Brussels I Regulation (recast), this party benefits in principle from the jurisdiction of his own national court, it follows that the party for whom the language issue could be more dissuasive for remains mostly unaffected by the problem since the court's official language is that of his own: see in this sense C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen*, cit., 396.

2 – as well as in the situation referred to in article 9, 3., of taking evidence through an oral hearing, which references article 8, 1. – the ESCP redirects to the 1206/2001 Regulation on the taking of evidence; which in turn leaves the matter to the law of the requested court (article 10, 2. of the said Regulation) or exceptionally to that of the requesting court in the case of direct taking of evidence provided for by article 17 (only in this case there may be a «third kind» of proceeding resulting in a blend of both the national laws of both the requesting and requested courts).

The role of the interpreter (either in person or remote) is still considered as essential when language issues arise; and when carried out remotely, the task is demanding, time-consuming and somehow even more complex than a traditional in-person interpretation⁴⁷.

It should be added that modern communication technologies offer advanced features for automatic online translations that already provide a viable alternative to the interpreter (a lot of features embedded or integrated in the main platforms for videoconferencing are already available). The problem is that, as of now, such features are not specifically set up for forensic use; therefore, their implementation (in judicial proceedings in general and) in ESCP proceedings is yet to be accomplished, as various specific issues still require proper solutions. For example, it would be possible for the court to make a record of the oral hearing so to allow a subsequent check on the text of the translation, but this is a controversial solution, given the various objections towards recording the videoconference⁴⁸.

C. The (inconvenient) reference to the Evidence Regulation

Another factor hampering recourse to oral hearings also affects its «remote version» and arises from the last sentence of article 8, 1., comma 2, ESCP, whereby the remote hearing too⁴⁹ shall be carried out in compliance with the just mentioned 1206/2001 EU Regulation on the cross-border taking of evidence (ER). As is well known, this Regulation defines a mechanism the functioning of which strictly depends on the active cooperation of an authority (a court in principle, under article 2 ER or the central authority pursuant

⁴⁷ An insight to the instructions provided by the e-justice portal may be just quite instructive in this regard: https://e-justice.europa.eu/content_manual-71--maximize-en.do?idSubpage=6.

⁴⁸ So the German ZPO § 128a explicitly forbids the videoconference taping. In Italy, despite the absence of a legal express prohibition, many practice directions so forbid, although they don't have *per se* binding force. Nonetheless it is hard to conclude that – especially in the matters covered by ESCP – the risks of recording a hearing cannot be overcome by adopting some precautions, so to achieve a reasonable balance between the need not to uncontrollably disseminate the recording and that of keeping documented track of the hearing. See in general and in favour of the recording D. Cerri, *Emergenza e provvedimenti dei capi degli uffici: il caso pisano*, *ECtHR.judicium.it*, 8 apr. 2020.

⁴⁹ The provision obviously takes for granted that this Regulation applies to cross border oral hearings to be held in person.

to ar. 17 ER) of the member state where the evidence must be taken, whose involvement is therefore mandatory and which may not be sidestepped without violating the procedure⁵⁰. In terms of speed and simplicity, the price this instrument exacts is high⁵¹, and even more so when considering the inconveniences the ER carries with it even in its normal application⁵².

However, justified it may be when it comes to the taking of evidence abroad by traditional face-to-face hearings, in cases of remote oral hearings in small-value litigation the ER appears to be overly burdensome, especially in the light of the development of in-distance communication technologies during the last decade. In the context of a small claim, the mandatory intervention of the said authority and the related procedural complications seem disproportionate⁵³. Especially when the hearing addresses to a party (not to a witness) and is intended for clarification purposes only, specific relevance shall be given to *a)* the possibility for the ESCP judge to freely address the party any question deemed relevant for adjudicating the dispute and *b)* the possibility for all the parties and the judge to interact directly and immediately with one each other according to the typical adversarial scheme. In such a context, the intermediation of a «requested court» seems rather unclear if not utterly dysfunctional⁵⁴.

⁵⁰ There seems to be a significant difference with the inherent scope of the ER, which in principle is optional since it does not exclude the use of other legal tools if deemed more efficient (so ECJ 21 dec. 2013, C-332-11, *ProRail BV*, spec. para. 40 ff.). By contrast, in article 8, 1., comma 2, ESCP the application of the ER is designed as binding and non-optional whenever the situation set out in such provision occurs; notably, where the remote oral hearing concerns a person resident and domiciled in another Member State, article 8 states clearly that it (instead of “may”) “shall be arranged by making use of the procedures provided for in Council Regulation (EC) No 1206/2001”. And the same goes for article 9.3. in case evidence taken by way of an oral hearing.

⁵¹ In this vein see e.g. F. Gascón Inchausti, *The 2017 Directive Proposal on Common Minimum Standards of Civil Procedure in the European Union*, in F. Gascón Inchausti – B. Hess (eds.), *The Future of the European Law of Civil Procedure*, 2020, Cambridge, 245. For a favorable evaluation of such discipline see, conversely, E.A. Ontanu, *Cross-Border Debt Recovery in the EU*, cit., 49.

⁵² To the point that “...national reports and interviews also show a clear tendency to by-pass the provisions of the Evidence Regulation, which are very frequently considered as cumbersome, bureaucratic and time-consuming”: F. Gascón Inchausti – B. Hess et al., *An evaluation study of national procedural laws and practices...* – *Strand 1 – Mutual Trust and Free Circulation of Judgments*, Luxembourg, 2017, 113 ff., spec. 242, where, in addition, is reported that “With the background of the ECJ Decision in *ProRail* ... courts summon directly witnesses to appear in front of them, instead of asking the judicial authority of the member state where the witness is domiciled. In a similar vein, it has also been reported the possibility of using written testimony (affidavit) to avoid resorting to mutual legal assistance (Malta).”

⁵³ The reference by article 8 ESCP Regulation to the Evidence Regulation procedures entails for the competent court the burden of an application to be addressed to the competent central body of the Member State requested (which may, in turn, assign a national court to take part in the activity) and the related expenditure of time and resources that such a procedural device requires.

⁵⁴ Indeed, reference to the Evidence Regulation solves for the party concerned the problem of the language; but it is hard to concede that this advantage (presumably not the overriding objective of the ER, since otherwise the same instrument should have been extended to the in-person oral hearing) is worth the sacrifice of the direct and immediate confrontation between the judge and the parties, that is basically what the party's oral hearing is meant for. Unless assuming that in the case of an oral hearing under article 8(1), para. 2, ESCP Regulation (i.e. concerning the parties only and in the sole ESCP application field) the request is not needed insofar as acceptance may be taken for granted, except

No significant innovation in this regard derives from the recast of the ER by the 2020/1783 Regulation (applicable from 1 July 2022): although opportunely encouraging the direct taking of evidence by videoconferencing⁵⁵, it does not envisage a «fast track» onto which situations like that of ESCP may be conveniently channeled.

D. Overview and some proposals

To sum up the foregoing, the effectiveness of remote oral hearing and the degree it pursues the ESCP goals still raises multiple issues and is far from achieving a level of speed and simplicity comparable to that currently provided through the online exchange of documents. The preference indisputably granted by ESCP to e-hearings instead of traditional in-person hearings is therefore still far from making the oral hearing a suitable instrument to ensure the effectiveness of the ESCP. The court's approach to oral hearings in the ESCP – as easier though it may be through videoconferencing – should therefore remain at present quite cautious, and the need for broad judicial discretion in whether to hold it stands firm.

The major issues encountered in this respect concern:

- the still scarce and non-homogeneous availability of videoconferencing or other remote audio-visual systems that can be assessed as «appropriate» under article 8(1) ESCP;
- the still significant complexity of multilingual hearings even where interpretation is provided remotely;
- the still significant complexity of the procedural rules, which article 8 draws from the 1206/2001 Evidence Regulation, which will not change significantly with the recasting of the latter by 1783/2020 Regulation.

For the videoconferencing to become in the ESCP context an effective substitute for written statements, there is still a long road ahead, both in terms of availability of the appropriate features and of simplification of some of the relevant procedural rules.

As to the procedural rules, the remote oral hearing under article 8 should be freed from the formalities currently set out in the ER Regulation.

that such an interpretation would actually neutralise the significance of the referral to the Evidence Regulation.

⁵⁵ See in this regard article 20 of ER recast, whereby the cross-border direct examining of a person shall in principle be taken by videoconferencing; to be read in connection with the recital n. 21, suggesting the direct taking of evidence "Where evidence is to be taken by examining a person such as a witness, a party to the proceedings or an expert present in another Member State..." and by "...directly using videoconferencing or other distance communications technology, where that technology is available...". See also the provision in article 12 which, in case of taking of evidence by the requested court, sets out specific provisions for videoconferencing.

Insofar as the remote oral hearing is not about taking evidence, but only serves to grant a party an oral hearing from abroad, there is no apparent need for applying a procedure developed for a different and more formal activity such as that of acquiring evidence. The judge would be able to better carry out his task if entitled to proceed directly, *i.e.* without the need for the videoconference to be previously requested and authorised by a «central body» located in another Member State.

As for acquiring proper evidence – and provided it may not be taken through written statements – it would be useful if each Member State drew up a list containing the means of proof admitted by default in cases relying on distance communication technologies, conceding that in such cases the direct taking of evidence does not require the prior scrutiny by any authority or court of the Member State where the evidence must be taken.

As to the language issues, together with developing specific remote translation features for judicial use, a double-step system should be considered, consisting at the first stage in holding a remote oral hearing with the assistance of a translator providing written translation that can be seen on the video. The hearing should be recorded to permit the translation to be subsequently checked, with appropriate safeguards so as to avoid improper dissemination: considering the matters involved in the ESCP, the advantages of recording the hearing should be far higher than the risk of inappropriate use⁵⁶. A second step, to protect against serious issues concerning the correctness of the translation, should result in an interpreter being entrusted with the issue and, where necessary, the revision of the translation in question.

E. How to handle the choice (if available and proper) between in-person and remote oral hearings

Some final remarks shall be addressed to the issue on how to handle the choice between remote and face-to-face oral hearings. Provided that the alternative is practicable (*i.e.* the appropriate distance communication technology is available), the preference for remote hearing is stated in plain terms by article 8(1), comma 1, ESCP; conversely, the final sentence of the said provision confers a wide discretion on the court to decide otherwise and opt for an in-person hearing. The parties, for their part, may request the court to change its decision thereto, then challenge the judgment on this point in the event of refusal.

⁵⁶ Possible misuses result mainly in indiscriminate dissemination or manipulation of the copy. This risk that could in any event be reduced by adopting some precautions, like that of keeping the video under the court's custody, or letting the interested subjects watch the video but preventing them from downloading it. One could indeed try to make a second-hand footage by filming the computer screen; but that is an ever-incumbent risk even during the videoconference.

While removing oral hearings from a procedure raises obvious issues of consistency with the right to be orally heard, such a guarantee remains *per se* unaffected by waiving a traditional face-to-face hearing in favour of one held by videoconference or vice-versa. Here it seems appropriate to maintain that, in principle, both the modalities are interchangeable, unless particular situations require otherwise, making *one or the other* detrimental to the said right, in which case the possible prejudice pertains to the general right to be heard in the sense explained above (I.B.).

In this connection, and within the ESCP's scope, possible violations of the right to be heard may occur, *e.g.* if the inadequacy of the distance communication system prevents it from being «appropriate» according to article 8 (see above, III.3.). Conversely, a party may disagree with the court's choice to hold a face-to-face hearing on account of the court's significant distance from his or her residence or by alleging circumstances rendering significantly difficult an otherwise comfortable journey (a widespread pandemic hampering the circulation of persons may serve as an example)⁵⁷.

In both cases, the party's refusal to attend the hearing in question, along with the alleged detrimental consequences in the outcome of the proceedings, should entitle such party to challenge the judgment⁵⁸.

IV. CASES IN WHICH ORALITY SHOULD PREVAIL OVER THE WRITTEN FORM

A. Compulsory cases

1. *Evidence to be taken before the court*

Taking into account the preceding considerations, it is now possible to briefly address the problem of when in the ESCP context the oral hearing (either in-person or remote) should be regarded as necessary or at least expedient.

A first group of cases relates to the taking of the evidence, insofar as it is mandatory for a relevant means of proof to be taken through an oral hearing. This somewhat obvious remark also raises obvious issues in the light of article 9(2) ESCP, pursuant to which the court “may admit” written statements of

⁵⁷ According to J. Wolber, article 8, *cit.*, nr. 17, the eventuality for challenging the decision on this arises only in the event that the court reject a party's request for a face-to-face oral hearing. The author does not explain this limitation, probably assuming it to be obvious that the right to be heard sticks to the paradigm of the traditional in-person hearing. Which is precisely, though, what deserves to be discussed, since sometimes the alternative of a remote hearing may prove much more functional in safeguarding the effectiveness of access to justice.

⁵⁸ Article 8, last paragraph, ESCP, whereby the decision in question “may not be contested separately from a challenge to the judgment itself”, ought to be interpreted in this sense. For further remarks concerning the technique article 8 borrows from article 5(1a) ESCP, see above, III.C.

witnesses, experts or parties; that is, the entire catalogue of the most common means of evidence, the taking of which is traditionally associated with the oral hearing.

So a cautious formula is clearly intended to confer on the court a margin of discretion in deciding whether and to what extent the court should depart from a domestic rule prescribing the taking of evidence through oral hearings only or placing significant limitations on the taking of evidence in writing. In this respect, article 9(2) ESCP should prevail over domestic regulation – subject to the following.

As the ESCP doesn't lay down specific rules as to how such written statements should be obtained, it is then right, in principle, to assume that national rules apply on a subsidiary basis⁵⁹ – with a limit, though. The court's choice for written statements pursuant to art. 9(2) should not be hampered by significant restrictions set out by the national provisions, which should therefore not apply. So, by way of example, if the court avails itself of art. 9(2) ESCP, then article 257-bis of the Italian CPC, which in principle requires the consent of all the parties for written testimony to be taken⁶⁰, should not apply. Since the court may override the set of procedural rules imposing the oral hearing for the taking of evidence, the same court should be given the power to derogate from domestic provisions such as article 257-bis Italian CPC, which severely reduce the actual chance to have a witness's statement taken in writing.

However, the court is obviously not excused from observing the fundamental principles of a fair trial, which means that by admitting the written statement it shall not disregard those procedural rules (whether contained in specific domestic provisions or not) that are necessary to the protection of the said principles (mainly the adversary principle and the right of defense during the taking of the evidence).

In addition, the court's discretion in admitting written statements should not prevail over possible «public policy clauses» presiding over the oral hearing for some types of evidence; hence the need for the court to approach the matter (besides the fundamental guarantees of the civil trial notably as set forth and implemented in the ECtHR and UE legal system) in accordance with the imperative rules governing its law system⁶¹.

⁵⁹ So J. Wolber, EuGFVO, Article 9, in V. Vorwerk – C. Wolf, BeckOK ZPO, cit., no. 6.

⁶⁰ On the contrary, in the sense that article 257-bis should apply, see D'Alessandro, *Regolamento 11 luglio 2007, n. 861 istitutivo di un procedimento europeo per le controversie di modesta entità*, *Judicium*, it, para. 8, thus reconsidering her former approach expressed in E. D'Alessandro, *supra* n. 5, 87 f.

⁶¹ In the specific area the ESCP covers, though, it seems hard to come across national «imperative rules» prescribing evidence to be taken in oral form instead of taking it in written. However, in the sense that the Spanish provisions imposing the oral taking of statements from witnesses and parties shall be regarded as imperative, see J.L. Blasco Arévalo, *La prueba en el proceso europeo de escasa cuantía ECtHR su incidencia en el ordenamiento jurídico español*, RJD, 2019, 123.

2. *The party requesting an oral hearing is self-represented*

A party not assisted by a legal professional should also be granted an oral hearing if he so requests. Since in such a case the party may lawfully participate in the proceedings under article 10 ESCP, the risk is comparatively high for the unassisted party to undermine his position because of mere ignorance of the legal issues or his inability to state the facts properly. Accordingly, a direct and oral confrontation with the court and the other party could here become crucial, and is ultimately consistent with the choice to encourage the use of the ESCP.

3. *About the remedies*

In the above-mentioned situations, a court's denial of an oral hearing may expose the judgment to challenge as set out by article 5(1a), last sentence, ESCP⁶².

Given that it is for the *lex fori* to rule on the specific remedies against the judgment, the said provision makes quite clear that such a challenge should not be filed without alleging an actual harm specifically resulting from the outcome of the dispute and causally connected to the denial of the oral hearing.

According to one scholarly view, the provision in question does not grant the party enough protection, insofar as it leaves to the *lex fori* the discipline of the remedies concerned, without considering that the domestic law may completely rule out any possible remedy against the conclusive judgment⁶³. The premise of this criticism is that the (unlawful) denial of an oral hearing is such a severe breach of the fair trial rules that one cannot permit the deprivation of remedies. This view, though, is unconvincing either from a domestic or from a European perspective.

A domestic procedure may prevent some judgment from being appealed and the choice may be criticised as a whole. But it would be rather inconsequential to assume that, even in such a case, a remedy should however be given for procedural breaches of this kind. As to the European standpoint, article 18 ESCP Regulation provides for a specific remedy against what the ESCP regards as the most serious procedural violations of the fair trial principles, but the said provision definitely does not cover breaches such as the rejection of the party's request for the oral hearing. That is in fact quite a sensible exclusion: insofar as the party may submit written statements and documents, a denial of the requested oral hearing is not likely to radically undermine the

⁶² See on this topic X.E. Kramer, *The European Small Claims*, cit., 366 f.; E. D'Alessandro, *Regolamento 11 luglio 2007*, cit., para. 8; P.C. Ruggieri, *La European Small Claims Procedure*, cit., 281 ff.

⁶³ See in this sense C.A. Kern, *Das europäisches Verfahren für geringfügige Forderungen*, cit., 395.

adversarial principle or prevent the opportunity for the party to take express his views on the relevant circumstances of the case.

B. Some expedient cases

If all the parties so require, an oral hearing then seems highly recommendable⁶⁴. The risk of abuse to the detriment of the other party is here neutralised: albeit not binding, such a converging request implies that both parties are willing to sacrifice some procedural speed in exchange for a more intense confrontation with the court. In this connection, it is *a fortiori* expedient for the court – as well as consistent with article 23a ESCP – to grant a joint request for an oral hearing when the reason is the actual chance of settling the dispute.

In the light of the previous remarks (*supra*, IV.A.3.), though, it is unlikely that in such cases the court's decision not to grant the oral hearing could entitle the party to challenge the final judgment, since here it would be extremely difficult to complain of being adversely affected by the court's refusal.

⁶⁴ So essentially J. Kropholler – J. Von Hein, *Europäisches Zivilprozessrecht*, cit., 1118.