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JUDICIAL POWERS OF INITIATIVE UNDER THE EUROPEAN SMALL CLAIMS PROCEDURE*

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ABSTRACT: European Small Claims Procedure Regulation contains a sparse cluster of provisions, whereby the court is conferred specific tasks implying various degrees of power to act of its own motion. Starting from the assumption that a comparatively high level of *ex officio* powers helps small claim procedures being more effective, this contribute highlights some relevant nodes of ESCP procedure and the extent therein of judicial powers of initiative.

KEYWORDS: small claims procedure; european small claims procedure regulation; judicial powers; *ex officio* powers.

1. INTRODUCTION

In ordinary civil or commercial matters, *ex officio* judicial powers tend to be limited by many factors[1], although the current situation is highly nuanced

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[1] Some of them consistent with the nature of the rights at dispute, many others with a traditional, widespread tendency of the court not to interfere with the parties' initiative. Those factors are mostly subsumed in the so-called «disposition principle», whereby the court may not interfere in the shaping of the *thema decidendum* (subject of litigation) and the *thema probandum* (the evidence to be taken) of the litigation. See on this subject, also for bibliographic references, Nieva Fenoll (2014); Taruffo (2012), spec. pp. 79 ff.; Stürner (2010); Turroni (2024).

and seems to be evolving in favor of a more active role for the court. Whatever the tendencies are, it is my opinion that in small claims litigations court's powers to act of its own motion should be set at a reasonable high level.

Especially when it comes to small claims with cross-border implications, one of the main challenges is not to discourage non-professional claimants[2]. Provided the interest in entering proceedings is generally low, a simplified procedural scheme and the possibility of option to self-defense can make the difference. But an active role of the court in addressing procedural flaws and preventing irreversible errors is also necessary as a counterbalance to the risks the inherent technicalities of civil procedure represent for non-professional, self-defended parties. In short, procedural simplification cannot do without a corresponding increase in judicial powers of initiative[3]; to greater reason when simplification teams up with disintermediation, whereby assistance by legal professionals becomes optional.

On the other hand, it cannot be overlooked that, even when the court is provided with ex officio powers, its attitude tends to be passive and far below the powers conferred by the law. This is partly due to the courts' cultural tendency to self-restraint, partly to the lack of resources for systematically assuming an active role, which often results in a veritable disproportion between the number of magistrates and the average case-flow. In short, the normal vehicle was, and keeps being, the parties, whereas the court maintains in this respect a subsidiary function. Which is, though, not a reason to underestimate the court's capacity to act of its own motion and to call off a reasonable judicial activism in the specific area of cross-border small claims.

As a matter of principle, Regulation (EC) 861/2007 establishing a European Small Claims Procedure (from now on ESCP) does not deal with judicial powers of initiative as a general issue. What we can see is a sparse cluster of provisions, whereby the court is conferred specific tasks implying a certain degree of power to act of his own motion. In the following I would try here to pinpoint some functional nodes of ESCP, where *ex officio* powers play a significant role or deserve, at least, particular attention.

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[2] See on this topic Huber (2021), pp. 92, 100, Onțanu (2017), p. 29; Simaitis, Vėbraitė & Markevičiūtė (2022), p. 133 f.; Nieva Fenoll (2022).

[3] Nothing new, indeed...: "Consistent with this vision of the informal lawyerless court was another line of criticism focusing on the unduly restricted role of the judge. Constraints designed in an earlier era to protect the common man from unrestrained judicial power now were viewed as preventing the judge from acting swiftly and fairly, by establishing a passive role for the judge as an umpire or referee in the contest between opposing litigants": Steele (1981), p. 324, referring to what John A. Lapp wrote in 1914. For further suggestions see Freda (2016);

2. PRELIMINARY CHECK ON THE CLAIM

ESCP Reg. starts by filing an application to the court, followed by a preliminary check *ex officio*[4]. Notably, art. 4.4., comma 1, ESCP Reg. grants the court power to ask for clarifications, to highlight procedural or factual shortcomings and to give the claimant a chance to make up for it.

In this context the court is thus required to perform, *of its own motion*, an overall and preliminary control both over the validity of the claim and over the merits, so to check if there's something apparently wrong with it. The court shall notably track down any deficiencies affecting the application, so to, if possible, prompt the claimant to sort them out; if not possible, dismiss the application as clearly unfounded / inadmissible.

Hence, the judicial function of checking claim's procedural shortcomings goes along with that of providing the claimant positive guidance to fix them, whenever it doesn't result in a fatal error. Whether or not in tune with the *lex fori*, this is a significant contribute the court shall give of its own motion to an effective and proficient access to justice.[5]

Although a considerable series of issues may now arise in this respect [6], I'll confine the followings to some basic remarks.

Issues of admissibility may involve various sources:

— specific ESCP Regulation rules. Such are, e.g., art. 2 as to the scope of ESCP, art. 3 the notion of cross-border case, etc. Unless otherwise provided for by other EU sources (see the next point), the judge should carry out the check on its own motion and the *lex fori* eventually dealing with similar issues should not apply.

— provisions stemming from other specific EU sources. In this case, reference is to be made to the original source: depending on what the source sets out, it is possible to assess whether a related *ex officio* power may be granted or not. An obvious example is that of jurisdiction and the relevant

[4] Art. 4.4. ESCPReg. provides for a preliminary assessment of validity/consistency of the claim: "Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies. The court or tribunal shall use standard Form B, as set out in Annex II, for this purpose".

[5] Consistent with this framework is art. 4.3. and 4. ESCP Reg. Notably, art. 4, para. 3., ESCP Reg. focuses on a specific condition, providing the court power to assess whether the claim is consistent with the scope of ESCP Reg., and to inform the claimant if it is not, so to let the claimant decide whether to withdraw the claim or let the litigation go further on, according to the appropriate national proceedings.

[6] Issues such as that of discerning the procedural flaws that may be addressed from those that are not; this is, though, a topic that goes beyond the scope of this short contribute and that deeply interacts with the *lex fori*, i.e. the national legal system of the court seized.

rules stated by Bruxelles I-recast, whereby, in principle, lack of jurisdiction is for the defendant to be raised, whereas, in principle, the court may not raise it *ex officio*. Within the frame of ESCP, the court should therefore act accordingly; which means, in principle, that it shall overlook the issue in its preliminary check and wait for the defendant to react, according to what art. 26 Bruxelles I-recast provides for. One might object that, by doing so, the court cannot entirely carry out its task of preventing the claim to be subsequently challenged by the defendant; this is, though, a calculated risk, since EU law gives preference to the defendant's will to decide whether to accept or not the jurisdiction of the Member State chosen by the claimant.

— national rules peculiar to some Member States. They may apply insofar as they are complementary to, and not in conflict with ESCP provisions. Provided that, in principle, ESCP endows the court of *ex officio* powers to preliminarily check the validity-admissibility of the application, consequence should be that this rule should prevail on national provisions stating otherwise. Just by way of an example, art. 164 of the Italian civil procedure code makes in many cases the nullity of the introductory act dependent on the reaction of the defendant. Such a solution is, though, not in line with what ESCP Reg. provides for: unlike the previous case, there's a conflict between ESCP Reg. and a national source, where the former should prevail. Irrespective of this technical remark, this is also in my opinion a better solution, in that its sole effect is to fix a procedural flaw before it may cause more trouble.

In the case of judicial evaluation of inadmissibility, as well as in that of a clearly baseless claim, it is indeed disputable that art. 4.4., comma 2, ESCP Reg.[7] applies literally, and the court may therefore dismiss the claim without giving the claimant a chance to reply in advance of the decision. Unlike the dismissal of a request for European order for payment, the decision is here capable to deploy binding effects in future claims: these effects may vary according to the cause of the dismissal and to the way each member state deals with the issue, but they may occur in the same way as they'd do in a corresponding national proceeding. And even when nothing would prevent the same application to be reiterated, there are good reasons to assert that the right to be heard demands the court to inform the claimant of the issue and give him/her the opportunity to respond[8].

[7] " [...] where the claim appears to be clearly unfounded or the application inadmissible....the application shall be dismissed".

[8] See in this vein ELI/UNIDROIT Model European Rules of Civil Procedure (2020), *sub* artt. 11 and especially 12, comma 2: "The court must not base its decisions on issues that parties have not had an opportunity to address" along with the official explanation thereof *sub* para. 4.

expl. to art. 11: "[...] the right to be heard is not only a right of the parties to be exercised upon their own initiative but is also something that must be facilitated ("ensured") by active court management carried out in the interests of justice. Parties to litigation must be given a fair opportunity to take notice of all aspects of court process concerning their proceedings [...]".

3. TAKING OF EVIDENCE

Art. 9 ESCP Reg., which is the general provision in this matter, makes no mention of judicial *ex officio* powers: in principle, ESCP Regulation does not interfere with the national approach towards judicial initiative in evidential matter[9]. Art. 9 ESCP Reg., therefore, opens a variegated scenario we won't deal with in this context.

For its part, art. 5.1.a) ESCP Reg. states that "The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests."[10] Strictly interpreted, this provision does not confer the court additional evidential powers of initiative; instead, it only entitles the court, if deemed necessary, to take evidence into its presence. Whether the evidence concerned may be ordered *ex officio* or not, it is an issue that is for the *lex fori* to address[11]; and when the *lex fori* leaves the initiative to the parties, then such a hearing may be held only if the party has previously filed the request for that evidence to be taken.

Yet, a more nuanced interpretation is viable. Insofar ESCP Reg. entitles the court to assess if an oral hearing is needed, it also allows the court to point out specific oral evidence it considers necessary, leaving to the parties the proper request whenever the evidence concerned cannot be ordered *ex officio* under the national law. In favor of this reading is the fact that ESCP Reg. clearly leads the parties to limit their evidential backstop to written evidence, so that, if they fail to request oral evidence and afterwards the court considers it necessary, then the parties should be given a chance to supplement their defensive outfit[12].

On consumers' small claims litigation something must be added. This domain has been affected by important case-law, whereby the ECJ interpreted

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[9] See in this sense art. 9.1. ESCP Reg.

[10] See on this provision Turroni (2022), p. 139 f., 157 f.

[11] In this respect, the outlook is all the more variegated. Just to give some examples, in France articles 10 and 143 of the *Code de procédure civile* grants the court power to have all the admissible evidence determined *ex officio*. In Italy, art. 115 C.p.c. —Code of civil procedure— makes the taking of evidence dependant on the request of the parties; yet legislation and case law set forth a diffuse series of exceptions tending to overturn such a general provision. This system will be discussed futher on in more detail. In Spain a general tribute to the principle of party disposition in the taking of evidence is made in art. 282 LEC – *Ley de Enjuiciamiento Civil* as well as implied by Art. 429.1., comma 3, LEC, whereby the court, prior to the opening of the inquiry, if it considers the evidence offered by the parties as insufficient for the ascertainment of some disputed facts, will point this out to the parties, highlighting, where appropriate, the additional evidence they may resort to. In Germany, the generally accepted *Verhandlungsgrundsatz* conferring such initiative to the parties has been almost overturned as regards the court's initiative; which is positively confirmed by a wide range of provisions, to begin with the measures of inquiry envisaged in the ZPO - *Zivilprozessordung* and notably in its §§ 142 and 143 on the exhibit of documents and of document acts; § 144 on the inspection and the appointment of experts; § 448 as for the questioning of the parties, aimed at assessing a disputed fact on which the evidence already taken isn't enough for the court to be persuaded

[12] The concern that this way the court would lose its impartiality is basically groundless: see on this topic Nieva Fenoll (2019), p. 1233 f.; Turroni (2024), 10 f.

Dir. (CEE) 93/13 on Unfair Terms in Consumer Contracts, in such a way as to progressively improve the court's powers of initiative as a fundamental resource for achieving the goal of tracking down and quash unfair terms in consumer contracts[13]. Next to the court's power to raise *ex officio* the unfairness of relevant contractual clauses[14], judicial protection of consumers results also in conferring the court related powers of initiative in the taking of evidence. According to the ECJ case-law[15], the national court shall notably order of its own motion all the investigative measures deemed necessary to ascertain the absence of unfair clauses at the base of the relevant contract, and this introduces a specific, EU-featured derogation to the disposition principle wherever Member States don't already provide for equivalent domestic rules.

4. ORAL HEARING

Oral hearing is what ESCP should avoid, being a factor of complication in a procedure conceived as a written procedure (as art. 5.1. ESCP Reg. makes clear). It might seem therefore appropriate to leave oral hearing to the realm of the remote eventualities and to simply discourage parties and court to make use of it. It is nonetheless important to stress that —besides its belonging to the realm of the fundamental guarantees— oral hearing could play even in ESCP an important role especially to the advantage of weaker parties and in a fast-evolving context where oral hearing can be held by remote with increasing ease[16].

In this respect an oral hearing may prove decisive for a clear understanding of relevant facts the party has not been able to properly describe, or necessary for a serious effort to reach a settlement between the parties (a possibility that art. 12.3. takes clearly into consideration). In general, it's barely needless to say that the court should be not prevented to hold a hearing of its own motion, whenever it deems necessary for an effective accomplishment of its task[17].

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[13] See, in particular, Article 6.1., whereby "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms", and Art. 7.1. stating that "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." It is also relevant what follows in Art. 8, whereby "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer."

[14] See in this regard, and in support of the ECJ direction towards an enhanced protection of the consumers, Nieva Fenoll (2019).

[15] Reference is particularly to ECJ, joined C- 419/18 and C-483/18, 7.11.2019, *Profi Credit Polska* v. Włostowska *et al.*; see also ECJ C-511/17, 11.3.2020, *Lintner v. UniCredit Bank Hungary*, spec. sent. 26 - 27; and with specific reference to *inaudita altera parte* orders for payment, ECJ C-531/22, 18.1.2024, *Getin Noble Bank et al. v. TL et al.*; ECJ C-600/18, 17.5.2022, *MA v. Ibercaja Banco*.

[16] See in this vein Onțanu (2017), p. 49

[17] Turroni (2022), p. 140

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