

**NANETTE NEUWAHL AND AL, EDS, *THE EUROPEAN SMALL CLAIMS PROCEDURE AND THE PHILOSOPHY OF SMALL CHANGE* (MONTREAL: LES ÉDITIONS THÉMIS, 2014)**

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*The European Small Claims Procedure and the Philosophy of Small Change*<sup>1</sup> is a book edited by Professor Nanette Neuwahl and Saïd Hammamoun. The book is an important piece of doctrinal analysis, as it is the first comprehensive publication to assess the successes and failures of the European Small Claims Procedure [ESCP] in its early stage of application. The editors dedicated each chapter to a country-specific analysis that aimed to determine how each member state has integrated the ESCP in its own judicial system.<sup>2</sup> The countries covered in this book are: The Netherlands, France, Germany, Italy, the United Kingdom, Ireland, Greece, Poland, Lithuania, Romania, and Turkey.

Most of the papers in the book were written between 2009 and 2012, only a few years after the implementation. As such, the relevance of some of the content appears rather dated, and at times non-applicable contemporaneously. For example, one of the main criticisms brought forward in the book is the original ceiling of 2000 euros for the lodging of a complaint, which hindered access to the procedure. The ceiling was amended in 2015 by *Regulation (EU) 2015/2421*,<sup>3</sup> which also addressed other weaknesses that plagued the original form of the ESCP.<sup>4</sup> That being said, the analysis covered in most of the book's papers is still relevant to those looking for a complete introduction to the nature of small claims procedures. It is also relevant to see how this European instrument has been interpreted by different legal systems. Much of the incompatibility between the ESCP and national procedural principles—often even constitutional principles—is still largely relevant.

The importance of this book is also highlighted by the lack of alternative doctrine on the subject matter. The ESCP is still generally ignored by legal professionals, and even more so layman European citizens, who were intended to be the main beneficiaries of this “simplified” cross-country claims instrument for consumer and commercial claims. Thus, this book should not only be considered to be

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<sup>1</sup> Nanette Neuwahl et al., eds, *The European Small Claims Procedure and the Philosophy of Small Change* (Montreal: Les Éditions Thémis, 2014).

<sup>2</sup> The European Small Claims Procedure was established by Regulation EC, *Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure*, [2007] OJ, L 199/1 to tackle civil, commercial and consumer claims.

<sup>3</sup> EC, *Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure*, [2015] OJ, L 341/1 [*Regulation (EU) 2015/2421*].

<sup>4</sup> The current ceiling is set at 5,000 Euros by article 1 of *Regulation (EU) 2015/2421*, *ibid*.

the first major collection of works on the matter; it is today's necessary introduction to the field. It contains the most comprehensive coverage of all the foundational elements essential to understanding the ESCP.

## I. Overview of specific chapters in the book

The book opens with the chapter "On justice light" by Professor Peter-Christian Müller-Graff. This is a brief introductory paper that sets the tone for the discussion to follow and highlights some of the issues which recur throughout the rest of the book. Although Müller-Graff does not get into a detailed discussion of the cross-country nature of the ESCP, he sets out a map of some of the problems of proportionality that can arise with the instrument. Notably, the author believes that a less thorough focus on the collection of facts, and subsequent application of the law, renders the procedure too superficial. The author goes on to remark that the "superficiality" of the system may even contradict national constitutional principles that protect judicial fairness, and international rights, such as article 6 of the *European Convention of Human Rights* and Article 47 (2) of the *Charter of Fundamental Rights of the European Union*. Müller-Graff explains that the superficiality that he refers to arises out of the following issues: 1) the inflexibility of the ESCP's fleeting deadlines; 2) the complexity and length of its claims forms (which often require a high degree of legal expertise); 3) the preference for written procedures over oral hearings, and finally; 4) the rapid execution of its decisions and enforcement mechanisms. As mentioned above, these issues are important elements for discussion in most of the subsequent chapters.

The second chapter, written by Professors Kramer and Ontatu, very usefully showcases some of the practical strategies that national jurisdictions have used to harmoniously implement the ESCP into their own judicial system. The authors analyze the implementation of the procedure in the Netherlands, where most of the procedural work is managed by court clerks. They remark that in this jurisdiction, it is beneficial to trust the administration of the ESCP to these court actors since they were already in a good position to manage simplified procedures. However, the authors note the existence of confusion due to a lack of information and guidance, a factor that may also explain in part why the procedure has been largely ignored by jurisdictions and why its use has been limited to very few cases.<sup>5</sup> In France, author Alexandra Tosello reaches similar conclusions in chapter 3. In the French system, the ESCP has failed to be widely adopted by plaintiffs seeking redress in small claims litigations, in fact ESCP claims made up less than 1% of all new civil claims in 2012.<sup>6</sup>

In the fourth chapter, Professor Roman Guski presents the German experience

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<sup>5</sup> The 2015 amendment of the *Regulation* attempted to address this issue in article 3(b) by encouraging all national courts to have online information. It also determines that the necessary forms to lodge a complaint to be made available in all court-houses, see: *supra* note 3.

<sup>6</sup> Alexandra Tosello, "La mise en œuvre en France de la procédure européenne de règlement de petits litiges transfrontaliers : la perspective française" in *supra* note 1 at 50.

and in doing so, conducts one of the most interesting analyses in the book. Guski applies the systems theory (as developed by Nicklas Nuhmann) to conduct a general analysis of the procedural features of the ESCP, in consideration of its outcome-related objective. The author shows how there are functional conflicts that lie at the heart of the procedure, which result in systemic paradoxes. In other words, the author suggests that the procedure has functions and features that hinder its basic objectives. As an example, Guski explains how the self-set aim of providing fast and effective results (conclusive verdicts that are easily enforceable) is undermined by its standard written form proceedings, which cause undue isolation of the parties, as they cannot readily clarify their submissions. They also make the production of evidence and the assessment of testimony a daunting task. With regular oral participation in standard procedure, courts can fully hear the parties and sort through the admissibility of evidence, thus facilitating clear hearings. Alternatively, written proceedings decrease the degree of certainty and legitimacy, while also reducing immediacy, as courts struggle to “effectively” address parties’ challenges and needed clarifications.

In the fifth chapter, Marco Mellone discusses the Italian experience. The author examines some of the problems encountered by Italian courts when identifying the European rules applicable to some vague elements in the ESCP—similar to Goski’s analysis of the German experience. In most cases, Italian tribunals have opted to apply the applicable Italian rule, as it is the only suppletive rule available. The author notes that this has particularly been the case for notification rules regarding injunction payment procedures. In the second part of the paper, Mellone offers a very useful analysis of *e-justice* technologies, and their usefulness in gapping some of the communication problems inherent to cross-country claims. In the case of a ESCP, which aims to provide means of justice to laymen European citizens, the establishment of a solid *e-justice* structure that facilitates the participation of parties and judicial actors unfamiliar with conventional procedures should be of the utmost importance. Naturally, the 2015 amendment provided by *Regulation (EU) 2015/2421* acknowledged and attempted to tackle the issue of communications technologies; crucially, its importance was highlighted in the regulation’s preamble.<sup>7</sup> It remains to be seen if the newly amended procedure will stand up to the communications issue, as courthouses and parties have yet to fully implement the measures.

The eighth chapter, written by Anastasia Grammaticaki-Alexiou and Nikolaos Davrados, is an extremely important chapter in the book. It presents a short but complete introduction to the international private law issues that arise from the implementation of the procedure. It assists the reader in understanding how the ESCP deals with issues of choice of forum and choice of law. The original regulation left both issues to be resolved by other European legal instruments, namely *Brussels I*, *Rome I*, and *Rome II*.<sup>8</sup> The author notes that these legal instruments are extremely complex. The author proposes that the ESCP should have instead contained its own rules to determine

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<sup>7</sup> *Regulation 2015/2421*, *supra* note 3.

<sup>8</sup> These provisions were subsequently amended by *Regulation 2015/2421* and now it is the *amended Brussels regime* which applies.

these issues, in a manner more accessible to the layman. The goal of access to justice professed by the procedure is self-sabotaged by its own international law provisions.

## II. General observations and concluding remarks

Some of the most interesting sections of the book arise when authors discuss why some elements of the procedure do not couple harmoniously with a specific jurisdiction. There are many instances discussed throughout the book in which country-specific procedural rules conflict with the standard implementation of the ESCP. These conflicts demonstrate that part of the difficulty lies with the “expedited” nature of the procedure, which often contradicts national principles of procedural fairness.<sup>9</sup> Determining how these procedural conflicts are going to be treated by judicial actors remains to be seen. Although it is true that the principles of *effet utile* in the EU would uphold the ESCP rule over national procedural rules, the procedure is vague as regards to some of its provisions, notably its proportionality rules (or alternatively determining the limits of the judge’s discretion to rule over what is proportional). Therefore, national jurisdictions have opted to apply national rules to circumvent this issue—an idea that was extensively discussed by Marco Mellone in his chapter on the Italian experience. Although the European legislator intended the ESCP to defer to national rules for minor issues of applicability, eventually, significantly inharmonious jurisprudence will start to emerge. The European Court of Justice will find itself increasingly forced to intervene in order to solve aspects of the procedure across all Member States.

The editors of this book were successful in bringing together a complete picture of the implementation of the ESCP. The work presents the technical elements of the procedure’s implementation in some of the most important EU Member States, while highlighting the structural conflicts within these national jurisdictions. For the reader or researcher interested in a complete introduction to the ESCP, this book is a very good start. Unfortunately, given the date of publication and the manner in which it was assembled (well after the papers were written), two problems arise: 1) some of the content is starting to be irrelevant as amendments and their application have rendered the content non-applicable; 2) reading through the book is slightly redundant as many of the authors share similar perspectives on the general nature of the ESCP. As such, it is advised that readers select specific jurisdictions of interest to them, while paying attention to changes brought forth by the 2015 amendment.

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<sup>9</sup> As an illustration, in the fourth chapter Professor Guski notes how the ESCP does not require additional hearings for enforceability verification by the court, whereas German law does require such a hearing to be granted to the debtor after judgment. See: Roman Guski,, “ Much ado about little : the EU small claims procedure as a system of legitimation : a German perspective ” in *supra* note 1 at 68.