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ACCESS TO JUSTICE IN SMALL CLAIMS PROCEDURE: COMPARATIVE STUDY OF CIVIL PROCEDURE IN LITHUANIA, POLAND AND UKRAINE

Radosław Flejszar*, Iryna Izarova** and Vigita Vėbraitė***

Abstract

The aim of this article is to analyse the reforms of civil procedural law in Lithuania, Poland and Ukraine, which have undergone great changes during recent years. These reforms incorporate many new rules of civil procedure into the codes of these States in order to ensure effective, fair, impartial and timely protection of rights and freedoms before the courts. For Ukraine it is a very important step towards the approximation of Ukrainian law to EU law on the way to its integration into a genuine European Area of Justice. One of the most important reforms, namely the implementation of the small claims procedure, is analysed in depth. This is unusual for East European countries with civil law systems; despite this, the small claims procedure helps ensure access to justice when the regular court fees are higher than the amount of the plaintiff's claim, as happens in most consumer disputes. Legislative provisions have been developed to fulfil this need. The main conclusions presented herein relate to this concept and its perspectives. Research on legal developments in Ukraine, Poland and Lithuania could help us find the best way to ensure access to justice in small claims in our legal systems.

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Keywords: civil procedure; small claims procedure; Code of Civil Procedure of Lithuania; Code of Civil Procedure of Poland; Code of Civil Procedure of Ukraine; reforms of civil procedure; simplified procedure

Contents

I. INTRODUCTION: BACKGROUND TO CURRENT REFORMS OF CIVIL PROCEDURE IN LITHUANIA, POLAND AND UKRAINE

Recent changes in the social development paradigm have led to a new vision of the very phenomenon of law and the role of the State. These changes have been accompanied by legislative reforms that have also affected the civil procedure as every new elected government in power strives to provide the most efficient procedure for the administration of justice so as to resolve disputes between citizens of the State and the proper functioning of the judicial system.

One of the ways to accelerate and reduce the costs of civil cases is to differentiate proceedings when a specific (or simplified) procedure applies to cases belonging to certain categories in order to speed up the procedure through various means. E. Steele outlined in his research that these simple, accessible procedures, which do not require the participation of a representative and which save the parties time and money, have fascinated Americans since colonial times.[1]

Simplified action proceedings or simplified review of small claims is an extremely interesting topic that has become rather urgent over the last few years. As noted by B. Yungesson and P. Hennessey, attention was paid to them in literature since the

[1] Steele, Eric H. "The Historical Context of Small Claims Courts Law and Social Inquiry", Vol. 6, No. 2, *American Bar Foundation Research Journal* (1981) 293–376.

beginning of the century.[2] In the late 1970s and during the 1980s, the wave of access to justice flooded not only Florence but also the whole world, and resulted in the borrowing of the institution of small claims into the legislation of those legal systems that had not yet contained such procedures. M. Cappelletti, B. Garth and N. Trocker, in their influential report "Access to Justice: Comparative General Report", which found its implementation in the Recommendation of the Committee of Ministers of the Council of Europe on measures facilitating access to justice in 1981,[3] underlined the importance of small claims to ensuring the accessibility of justice. Subsequently, they have repeatedly noted the need to extend the use of small claims procedures to overcome such obstacles to accessible justice.[4]

Unsurprisingly, today more than two-thirds of the member states of the Council of Europe maintain procedures in national legislation for resolving small claims, and at the EU level there is a single European small claims procedure. The European Commission for the Efficiency of Justice (CEPEJ) reports that simplified procedures for small claims are enshrined in the national legislation of countries such as Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Estonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Monaco, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, the Czech Republic, the United Kingdom (England and Wales, Northern Ireland, Scotland). Moreover, in all the EU States the all-European order is in effect. These include Bulgaria and Cyprus. In total, 35 out of 47 Council of Europe member states. At the same time, there are 12 member states of the Council of Europe where there is no small claims procedure: they are Armenia, Azerbaijan, Denmark, Finland, Georgia, Iceland, Moldova, the Netherlands, the Russian Federation, Switzerland, Turkey and Ukraine (till 2017).[5]

Recently, a simplified procedure for resolving small claims has been introduced in the civil procedural law of the States in which there was traditionally no such procedure. This was typical of the Soviet period of development and countries of the so-called Soviet Bloc and states, which were very influenced by it.

Recommendation No. R (84) 5 of 28 February 1984 of the Committee of Ministers to Member States on the Principles of Civil Procedure Designed to Improve the

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2 Yngvesson, Barbara, Hennessey, Patricia "Small Claims, Complex Disputes: A Review of the Small Claims", Vol. 9, No. 2, *Literature Law & Society Review* (1975) 219–274.

3 Recommendation N°. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice available at <https://rm.coe.int/168050e7e4>, last access 15 August 2019.

4 Garth, Bryant G.; Cappelletti, Mauro; Trocker, Nicolo, "Access to Justice – Variations and Continuity of a World-Wide Movement" (1985). Articles by Maurer Faculty. Paper 1064. pp. 664–707, available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2063&context=facpub>, last access 15 August 2019.

5 CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 120, available at: <https://rm.coe.int/cepej-report-on-european-judicial-systems-edition-2014-2012-data-effic/16807882a1>, last access 15 August 2019.

Functioning of Justice[6] have determined that a differentiation can be made according to the value in dispute. The Recommendation and the features of the German model related to small claim disputes evolved in the Lithuanian civil procedure along with the new Code of Civil Procedure[7] (CCP Lithuania). Such features related to small claim disputes alongside the court (payment) order and documentary proceedings comprise so-called simplified civil proceedings in Lithuanian legal doctrine.

In the Polish Code of Civil Procedure (Polish CCP), which was adopted on 17 November 1964 and is still in force, apart from contentious proceedings pending in accordance with general rules, there are also special contentious proceedings (called "separate proceedings") applicable only in specific categories of civil disputes. Among the separate proceedings "accelerated proceedings" are worth mentioning. There are three types of "accelerated proceedings": (1) simplified procedure; (2) order for payment proceedings, and (3) writ of payment proceedings. A characteristic feature of the Polish small claims procedure is the possibility of its overlapping with both the order for payment and the writ of payment proceedings. The simplified procedure and the writ of payment proceedings are mandatory. The provisions governing the small claims procedure in Poland were introduced on 1 July 2000. They comply with the principles set forth in the above-mentioned Recommendation No. R (84) 5. Currently, almost nineteen years after their introduction, a new reform is enacted.

The second grand reform of civil procedure in Ukraine is a result of the ongoing integration of Ukraine into the European Union. In particular, the convergence of national legislation with European legislation seeks reform of the judiciary, court proceedings and related legal institutions with a view to achieving efficiency and optimization of the powers granted to the courts of various jurisdictions, as well as transparency and openness of justice in line with the provisions of the Association Agreement between the European Union and Ukraine (the "Agreement).[8]

The bill on amendments to the Commercial Code of Ukraine, Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts No. 6232[9] (CCP 2017 Ukraine) was adopted by the Verkhovna Rada of

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6 Recommendation No. R (84) 5 of 28 February 1984 of the Committee of Ministers to Member States on the Principles of Civil Procedure Designed to Improve the Functioning of Justice, adopted by the Committee of Ministers on 28 February 1984, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1>, last access 15 August 2019.

7 The Code of Civil Procedure was adopted on 28 February 2002 and came into effect on 1 January 2003.

8 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>, last access 15 August 2019.

9 Civil Procedure Code of Ukraine in the edition of the Law on amendments to the Commercial Code of Ukraine, Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts No. 6232 (eff. 2 October 2018), available at: <https://zakon.rada.gov.ua/laws/show/1618-15>, last access 15 August 2019.

Ukraine on 3 October 2017 and signed by the President of Ukraine on 22 November 2017. This statute came into force on the commencement of the operation of the new Supreme Court as a cassation instance court on 15 December 2017.

The purpose of the CCP 2017 Ukraine is to provide rules for ensuring effective, fair, impartial and timely protection of rights and freedoms before the courts. Therefore, the new institution of small claims procedure appeared in the CCP, which was previously unknown in Ukrainian legislation.

In this article small claim procedure in Lithuania, Poland and Ukraine will be discussed. This comparative analysis gives us more ideas on how to regulate the hearing of small claims before the judge to ensure a fair and efficient trial and what the special features of these procedures are in East European countries. These three neighbouring countries were chosen due to their long-lasting common historical background, including similar legal sources and the Soviet Union's influence, in particular, on the view of judiciary and a fair trial.

II. SMALL CLAIMS IN LITHUANIA

In the Lithuanian CCP only one article is devoted to the small claims procedure. Article 441 of the CCP provides that cases in which the amount of money at stake is below EUR 2,000 are heard according to the general rules of contentious proceedings, except, as otherwise provided for in the article: (1) the court, hearing the case, is entitled to decide for itself by what form and procedure to hear the case; (2) the court may pass a judgment, which could contain an introduction and resolution as well as brief report on the reasons.

Legal regulation establishes the right for a judge to decide at his or her discretion whether or not to apply the small claims procedure or to hear the case in the traditional way. It is not a right of the parties to the dispute to decide how to organise the hearing of a civil case regarding a small claim.

As the law states, the court may decide whether to deal with small claims by way of a procedure either written or oral, but if at least one party to the proceedings so requests, the case must be heard according to the oral procedure. Such legal rule was institutionalised in the CCP according to the case law of the European Court of Human Rights, which states that "public hearing" in Article 6(1) of the Convention necessarily implies a right to an "oral hearing". However, the obligation under Article 6(1) to hold a public hearing is not absolute. Thus, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary.[10]

[10] e.g. Case of European Court of Human Rights *Salomnsson v. Sweden*. Judgment Strasbourg 12 November 2002 Final.

A survey of judges conducted by scholars has shown that a written procedure in small claim disputes is chosen rather often in Lithuania. As many as 44.2% of the judges interviewed indicated that disputes related to small amounts of money are tried in a written form.[11] Such results may surprise many legal scholars in Lithuania as it is quite often discussed in different public events[13] that judges tend to forget this simplified procedure and try to hear all civil cases according to the same procedure.

The court can also decide not to apply the rules concerning the preparatory stage to hear a civil case in a court hearing: it may decide not to organise an exchange of further procedural documents after the receipt of a reply to a statement of claim or not to summon a preparatory hearing. Obviously, the fundamental principles of civil procedure, such as adversarial litigation, equality of the parties, or fair trial must be maintained during a small claims procedure. There is also no prohibition against the use of modern technologies in small claims disputes in order for court to prepare a case for hearing or in order to receive necessary information regarding the claim and the position of the defendant.

The features of small claims procedure in Lithuania resemble the legal regulation of similar procedures in Germany and are not influenced by the EU Regulation on small claims procedures.[12] Article 495a of the German Code of Civil Procedure (ZPO) states that cases whose monetary value is below EUR 600 may be heard in written proceedings. If one party to the disputes requests an oral hearing, it must be organised. The right to be heard in small claims disputes has been emphasised also by the Constitutional Court of Germany.[13]

One feature that the Lithuanian procedure has in common with the EU Regulation is the constant attempts at raising the threshold of small claims. From 14 July 2017, the EU Regulation allows civil and commercial claims up to EUR 5,000 to be heard according to the European small claims procedure.[14] In Lithuania, when the CCP was adopted, small claims procedures were allowed up to approximately EUR 300 Euros (1000 Litas[14]); currently, the threshold is at EUR 2,000.

There are no exact official statistics, except the above-mentioned surveys of judges, as to how often and in what civil matters small claims procedures are used in Lithuania by first instance courts. Such a situation occurs when this procedure can be used for different monetary civil claims (contractual claims, claims in labour law, etc.). There is also no exact prohibition against hearing small family claims according to this procedure. Judges can decide at their own discretion which family disputes

11 Brazdeikis, Aurimas, *Asmens teisės į bylos išnagrinėjimą per protingą laiką įgyvendinimo sąlygos* (Vilniaus universitete leidykla, Vilnius, 2016) 195–196.

12 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. O.J. L 199, 1–20.

13 Thomas, Putzo, *Zivilprozessordnung: Kommentar, 38. Auflage* (Beck, Munich, 2017) 229.

14 Lithuania introduced the Euro as the official currency in year 2015.

are not very complicated so that it is not necessary for a court to use all its potential powers.[15] We believe also that many small claims are resolved in Lithuania by the payment order procedure, which is faster and cheaper for plaintiffs. Also, if a claim is grounded on written evidence, a documentary procedure may be applied. Judges also notice that quite often defendants are passive in small civil claims and civil cases are determined by default judgments.[16]

It may be concluded that in Lithuania there are no major discussions in the legal doctrine or by practitioners whether small claims procedures are useful; whether small claims procedures could be allowed in civil procedure overall; or whether it might be useful to introduce mandatory quick procedures for small claims. For instance, in Germany, some legal scholars have stressed many times that the value of a claim should not influence how civil cases are heard before a judge. The financial value of a claim does not represent how important the civil case is personally and economically for the parties to a dispute.[17] We believe that small claims procedures do not mean that parties to the dispute lose their procedural rights and guarantees, especially if in such legal regulations the court decides whether such procedure will or will not be applied. Also, small claims procedures can help to solve problems concerning the efficiency of civil proceedings as the number of civil cases in courts increases almost every year.

Although it is considered that peaceful settlement regarding small value disputes is highly probable,[19] judicial conciliation is not a key aspect of small claims procedure in Lithuania. For example, one of the main aims of the preparatory stage of civil proceedings is to reconcile the parties to the dispute and, as has been already said, in small claims procedures the court may decide not to organise a preparatory stage. Several years ago the concept of mediation development was adopted by the Ministry of Justice and the law amending mediation in civil disputes[18] was prepared. One of the aims of the Law was to introduce mandatory pre-trial mediation for all small claims disputes. In the end it was decided that it was too complicated and too expensive for a State to establish a system of mandatory mediation for all small claims disputes. Mandatory mediation in Lithuania will be introduced only for all contentious family disputes from 1 January 2020.

Appeal proceedings regarding judgments rendered according to the small claim procedure do not contain any peculiarities in Lithuania. Until the year 2006 the CCP allowed a restriction against lodging an appeal in small claims disputes when the disputed amount was less than 250 Litas (about EUR 75). This restriction was not

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15 Norkus, Rimvydas *Supaprastintas civilinis procesas* (Justitia, Vilnius, 2007) 232–233.

16 Brazdeikis, Aurimas. *Asmens teisės į bylos išnagrinėjimą per protingą laiką įgyvendinimo sąlygos* (Vilniaus universitete leidykla, Vilnius, 2016) 199.

17 e.g. Olzen, Dirk, „Bagatellsachen: Eine unendliche Geschichte?" in Festschrift für Albert Zeuner (J.C.B. Mohr, Tübingen, 1994) 452.

18 Draft of legal acts available at <https://www.e-tar.lt/portal/lt/legalAct/TAR.27B041C4CCDE/asr>, last access 15 August 2019.

applicable to disputes arising in civil cases concerning wages and other labour-related payments, maintenance claims or compensation of damages connected with the harming of the health of a natural person, loss of life, or a professional illness. In the year 2006 the Constitutional Court of Lithuania formulated its official constitutional doctrine whereby the provision of Article 30(1) of the Constitution, stipulating that a person whose constitutional rights or freedoms are violated has the right to apply to a court, covers, *inter alia*, the right to appeal, i.e. to appeal against a final judicial act of a first instance court to a court at least one instance higher.[19] Now there is a rule in Article 304 of the CCP that appeals regarding monetary claims up to EUR 2,000 are heard by one judge of an appeal court. A panel of three judges hears other civil disputes in an appeal court.

III. SMALL CLAIMS IN POLAND

A. THE VARIETY OF SIMPLIFIED PROCEDURES

In Polish legal doctrine and practice the position has long been held that one cannot construe equality between a small claim civil case and a simple civil case. A case where the subject-matter of the dispute may have a low value may be very complex and complicated.[20] Procedural models were created in different countries to enable more efficient and less expensive resolution of small claims disputes.

Similarly, to other European Union countries, and especially to Germany and Lithuania, as well as in the Polish Code of Civil Procedure (CCP),[21] distinguished from contentious proceedings pending in accordance with general rules, there are also designated special contentious proceedings (called "separate proceedings") applicable only in specific categories of civil disputes. Provisions regarding these proceedings can be found in Title VII of Book One, Part One of Polish CCP.[22] According to Article 13(1) of the Polish CCP the court shall hear cases in contentious proceedings unless the law provides otherwise. In instances provided for by the law, the court shall hear cases according to the provisions concerning separate proceedings.

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19 The Constitutional Court of Lithuania Ruling of 16 January 2006. No. 7/03-41/03-40/04-46/04-5/05-7/05 available at: <http://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2006>, last access 10 February 2019.

20 Jędrzejewska, Maria, Modele postępowania w cywilnych sprawach "drobnych i prostych" (model sądowy, arbitrażowy, administracyjny), 7 *Palestra* (1977) 18–19.

21 The Act of 17 November 1964 – the Code of Civil Procedure (consolidated text – Journal of Laws of 2019, item 1460, as amended) came into effect on 1 January 1965, in completely different socio-economic and political realities. After the political breakthrough in 1989, the Act was changed dozens of times.

22 Titles I-VI of Book One contain provisions regulating contentious proceedings pending in accordance with general rules, and in Title VII separate proceedings are regulated.

While distinguishing separate proceedings, the Polish legislature was guided by either the particular nature of the cases to be heard (e.g. in the case of proceedings in matrimonial cases or proceedings under labour law) or aimed at accelerating proceedings in specific cases through various means. For the purpose of determining separate proceedings included in the latter category, the term "accelerated proceedings" is used in the Polish doctrine.[23] These proceedings include: order for payment proceedings (Article 484^1–Article 497, CCP); writ of payment proceedings (Article 497^1–Article 505, CCP); simplified procedure (Article 505^1–Article 505^{14}, CCP); European order for payment procedure (Article 505^{15}–Article 505^{20}, CCP);[24] European small claims procedure (Article 505^{21}–Article 505^{27a}, CCP),[25] and electronic writ of payment proceedings (Article 505^{28}–Article 505^{39}, CCP). One of the criteria for the division of accelerated proceedings is their mandatory or optional nature.

Only the writ of payment proceedings and simplified procedure are applicable irrespective of the will of the parties if the prerequisites specified in the Code of Civil Procedure occur. By contrast, the beginning of the other types of accelerated proceedings depends solely on the plaintiff's decision.

On the grounds of the Polish CCP the small claims procedure is called a "simplified procedure". Prior to making a more detailed analysis of the solutions adopted in this proceeding, attention should be paid to the possibility of overlapping the simplified procedure with other separate proceedings, including some accelerated proceedings. The Polish legislature explicitly excluded the possibility of any links between the simplified procedure and the European procedure in cross-border cases, i.e. the European order for payment procedure (Article 505^{15} (2), CCP) and the European small claims procedure (Article 505^{21} (2), CCP).

It should be clearly stressed here that in Poland, as in Lithuania, the small claims procedure, i.e. simplified procedure, is not in principle subject to the influence of the EU Small Claims Regulation.[26] It is also not possible to conduct the electronic writ of payment proceedings, which is essentially an electronic form of writ of payment

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23 Cieślak, Slawomir, *Postępowania przyspieszone w procesie cywilnym. Zarys postępowania nakazowego, upominawczego i uproszczonego* (Beck, Warsaw, 2004) 3.

24 According to Art. 505^{15} (1) of the CCP the court shall hear cases in the European order for payment procedure if the conditions set forth in Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (O.J. L 399, 30.12.2006, p. 1, as amended), are met.

25 According to Art. 505^{21} (1) of the CCP the court shall hear cases in the European small claims procedure if the conditions set out in Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing the European Small Claims Procedure (O.J. L 199, 31.07.2007, p. 1, as amended), are met.

26 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. L 199, 1–20.

proceedings, with the simplified procedure (Article 505[29], CCP). In the same civil case, the provisions governing the order for payment proceedings and the writ of payment proceedings may not be applicable at the same time.[27] On the other hand, in certain civil cases, it is possible to overlap a simplified procedure with both the order for payment and the writ of payment proceedings. The provisions of the Polish CCP also clearly show the possibility of the simplified procedure being combined with proceedings in labour law cases (Article 505[14] (1), CCP), which is not included in accelerated proceedings.[28] The issue of the coincidence of separate proceedings is very complicated. Therefore, below – for comparative purposes and after discussing the most important features of the Polish small claims procedure – only the problem of the coincidence of this procedure with the order for payment proceedings and the writ of payment proceedings will be discussed.

B. THE MAIN FEATURES OF SIMPLIFIED PROCEDURES

The provisions governing the simplified procedure were introduced by the Act of 24 May 2000 amending the Code of Civil Procedure, the act on registered pledges and the pledge register, the act on court costs in civil cases and the law on court bailiffs and execution.[29] The explanatory memorandum of the draft of this Act indicated that the proposed changes are aimed at simplifying and streamlining the proceedings in small claims (civil) cases, and consequently providing significant acceleration. The authors of the amendment recognised that such simplification and acceleration of the proceedings requires simultaneous changes in the existing separate proceedings, i.e. in the order for payment proceedings and the writ of payment proceedings. The assumption was that these proceedings together would be a more effective way of pursuing civil claims.

At the time when the simplified procedure was introduced, it included cases for contractual claims in which the amount in dispute did not exceed PLN 5,000 (approximately EUR 1,200) and for receivables related to the use of residential premises. Similarly to Lithuania, also in Poland the value of claims for which the simplified procedure applies is constantly increasing. From 5 February 2005 it was PLN 10,000 (around EUR 2,400), and currently – from 1 June 2017 – it is PLN 20,000 (around EUR 4,750). It should be noted that the current value of claims

27 Flejszar, Radosław, *Przedsiębiorca w postępowaniu cywilnym rozpoznawczym* (Beck, Warsaw, 2006) 240.

28 An example of such a situation is the hearing of such small claim civil cases that are at the same time employee cases, i.e. claims for payment of amounts due under an employment relationship in an amount not exceeding PLN 20,000.

29 Journal of Laws of 2000, No. 48, item 544.

recognised in the simplified procedure is very similar to the value of claims that may be recognised in the European small claims procedure.[30]

The scope of the simplified procedure is specified in Article 505[1] of the CCP. Pursuant to this article, the following cases are heard in this proceeding falling within the jurisdiction of the district courts:

1. contractual claims where the amount in dispute does not exceed PLN 20,000 and in cases for claims under an implied warranty for defects, quality warranty or non-compliance of consumer goods with a consumer sale contract, if the value of the object of the contract does not exceed the said amount; and
2. payment of rent for the lease of residential premises, charges payable by the tenant and charges for the use of residential premises in a housing cooperative regardless of the amount in dispute.

Attention should be drawn to three significant limitations on the scope of cases examined in the simplified procedure. First, claims within the purview of the proceedings in the simplified procedure must result from contracts and not from other events (e.g. from an unlawful act). Secondly, the value of the subject of the dispute or the value of the subject of the contract[31] cannot exceed PLN 20,000. Thirdly, in cases relating to rent and other charges related to the use of residential premises, one can claim payment of cash benefits with a maximum amount of PLN 75,000 (around EUR 17,900). According to Article 16 and Article 17 point 4 of the CCP[32] cases regarding property rights where the subject of the dispute has a value not exceeding PLN 75,000 belong to the jurisdiction of district courts. In practice, in the latter category of cases, the amount of monetary claims related to the use of residential premises is usually significantly lower than PLN 75,000.

Due to the fact that the type of civil cases that are subject to recognition in the simplified procedure is currently defined in a way that is not very clear, the amendment to the CCP from 4 July 2019 introduced the pivotal change in the

30 From 14 July 2017 civil and commercial claims of up to EUR 5,000 can be claimed in these proceedings.

31 Such a limitation of the value of the subject of the contract, and not only the value of the object of the dispute, is aimed at restricting the scope of the subject-matter of the analysed proceedings exclusively to small claims.

32 Article 17, point 4 of the CCP provides that regional courts have jurisdiction over cases pertaining to property rights where the amount in dispute exceeds PLN 75,000, except for cases related to maintenance, infringement of possession, establishment of a separate property regime between spouses, cases to have the content in the land and mortgage register made consistent with the actual legal status and cases heard in electronic writ of payment proceedings. In the first instance a property claim is heard by a district court (with the value of the subject of the dispute up to PLN 75,000) or a regional court (with the value of the subject of the dispute over PLN 75,000).

matters discussed.[33] According to the new wording of Article 505[1] (1) of the CCP in the simplified procedure; cases will be heard in property claims if the value of the dispute does not exceed PLN 20,000. In turn, in paragraph 2 of this article, certain categories of such cases were excluded (e.g. matrimonial cases and cases involving parent–child relationships). The characteristic feature of the simplified procedure is the need to file a statement of claim, statement of defence, opposition to a default judgment and pleading containing evidence, on official forms (Article 505[2], CCP). That is a common feature of the simplified procedure and the European small claims procedure, which also uses forms. It should be noted, however, that in the amending act to the CCP the requirement to submit pleadings on forms has been abandoned. In consequence Article 505[2] of the CCP will be annulled.

In the discussed proceedings, the principle is that only one claim may be claimed under a single statement of claim. However, more than one claim may be joined in a single statement of claim only if they arise out of the same contract or contracts of the same type (Article 505[3] (2), CCP). The new version of Article 505[1] §3 encompasses the same legal relationships, or relationships of the same type, but not the same contract or contracts of the same type.

The solution, which is aimed at preventing excessive complexity of the proceedings, is to prohibit any modification of a statement of claim and to exclude the use of such institutions as primary intervention (Article 75, CCP), secondary intervention (Article 76–Article 83, CCP) and third party summons (Article 84–Article 85, CCP). In addition, counterclaims and objections to a set-off shall be admissible if the claims qualify for a simplified procedure (Article 505[4], CCP).

In the simplified procedure, the application of the provisions on evidence from an expert witness report was excluded (Article 505[6] (2), CCP). However, such an exemption is of a relative nature, because if the court decides that the case is particularly complex or that specialist knowledge[34] is required to resolve it, the court shall continue to hear the case without reference to the provisions on simplified procedure, i.e. according to general provisions on the contentious proceedings (Article 505[7], CCP). It should be emphasised here that, as already mentioned above, simplified procedure is mandatory for parties and for a court. If the case meets the requirements set out in Article 505[1] of the CCP, the plaintiff must file a statement of claim on the form, and the court is obliged to apply the provisions on simplified procedure. It is only possible in the course of the proceedings that the court can decide on further recognition of the case according to the general provisions on contentious proceedings.

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33 Act from 4 July 2019 on the amendment of the Act – Code of Civil Procedure and some other acts (Journal of Laws 2019, item 1469). The mentioned amendments to the CCP in the system of simplified procedure will enter into force on 7 November 2019, available at: <prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001469>, last access 21 August 2019.

34 If specialist information is required for the court, evidence from an expert witness report is admissible (Article 278(1), CCP).

In the Act of amendments to the CCP, the absolute exclusion of the possibility of allowing evidence from an expert witness report in a simplified procedure was dropped. In accordance with the new wording of Article 505[7], if the determination of the legitimacy or amount of the benefit will require the use of specialist information, the court will decide whether it will assess the circumstances of the case independently or allow evidence of the expert witness report. Such evidence cannot be admitted in principle if its cost would exceed the value of the subject of the dispute.

As a rule, the recognition of cases in the simplified procedure takes place at an oral hearing. However, as already mentioned above, in practice, the simplified procedure often overlaps with the order for payment proceedings or the writ of payment proceedings.

In the order for payment proceedings, the prototype of which was the German document proceedings and bill of exchange proceedings (*Urkundenprozess und Wechselprozess*[35]) and the Austrian *Verfahren in Wechselstreitigkeiten*,[36] the court issues a payment order *in camera* if the plaintiff seeks a pecuniary claim or other fungibles and the facts supporting the claims sought are demonstrated by the attached specific documents (Article 485, CCP).

However, in the writ of payment proceedings, modelled on the German and Austrian *Mahnverfahren*,[37] a payment order is issued if the plaintiff claims a monetary claim (Article 498, CCP). If the defendant successfully appeals against the payment order issued in the order for payment proceedings, a hearing is designated (Article 495, CCP), and the court applies in the further proceedings simultaneously provisions on the order for payment proceedings and on the simplified procedure.[38] In turn, appealing against a payment order issued in the writ of payment proceedings results in the order for payment to lose its effect, the court appoints a hearing (Article 505, CCP), and further proceedings are conducted in accordance with the provisions on simplified procedure. Once the amendment of the CCP from the 4 July 2019 is in force, the subjective scope of writ of payment proceedings will be identical when juxtaposed with the scope of the order for payment proceedings, as per the new Article 480[1] CCP.

It should also be emphasised that, in accordance with the general regulation contained in Article 148[1] of the CCP, the court may hear a case *in camera* if the defendant has acknowledged a claim or if the court considers, after the parties have filed pleadings and documents, also after they have filed oppositions or objections to the order for payment or an opposition to a default judgment, having regard to all

35 See §592 ff. of the German Code of Civil Procedure (ZPO).
36 See §555 ff. of the Austrian Code of Civil Procedure (öZPO).
37 See §688 ff., ZPO and §244 and ff., öZPO.
38 In the resolution of 27 November 2001, III CZP 61/2001, the Supreme Court stated that in the case of conflicts between separate proceedings, the rule is that the more specific provisions rank ahead of the more general provisions.

arguments and evidence, that an oral hearing is not necessary. However, a case may not be heard *in camera* if the party included a motion to hold an oral hearing in its first pleading, unless the defendant has acknowledged a claim.

The provisions governing the Polish small claims procedure are therefore in accordance with the provisions of Article 6 of the European Convention on Human Rights, guaranteeing the parties the right to an oral hearing. It is also preserved when there is a coincidence of a simplified procedure with an order for payment proceedings or a writ of payment proceedings, or if there is a basis for the application of Article 148^1 of the CCP.

In the simplified procedure, the parties' right to appeal against the judgment of the court of first instance is not restricted. The court of second instance, however, does not carry out evidence proceedings with the exception of the documentary evidence (Article 505^{11} (1), CCP), unless new facts or evidence were detected at this stage. Moreover, in the analysed proceedings, as in Lithuania, the court recognises the appeal in the composition of one judge (Article 505^{10} (1), CCP). (Also at this stage parties are guaranteed the right to an oral hearing.) According to Article 505^{10} (2) of the CCP, the court may hear an appeal *in camera*, unless the party requested a hearing in its appeal or in response to the appeal. From 7 November 2019 the abovementioned article will be annulled. The principle imprinted in it will be pertinent not only in a simplified procedure but in all procedures according to the new Article 374 CCP.

Attention should also be paid to the regulations concerning the content and reasoning for the judgment issued in the simplified procedure by the court of first and second instance. A party may also submit an application to prepare a statement of reasons for the judgment immediately after the judgment is announced (Article 505^8 (1), CCP).[39] A party may also waive delivery of the reasoning for the judgment. In such a case, the time limit for lodging an appeal starts running on the day on which the judgment is announced (Article 505^8 (2), CCP).[40] What is more, in the new Article 505(4) of the CCP, which will be in force from 7 November 2019, the question of a statement of reason in cases where the value of the dispute does not exceed PLN 1,000 (around EUR 240) is described. The reasoning for the judgment will be limited to clarifying the legal basis of the judgment regarding provisions of law.[41]

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[39] According to Art. 328(1), CCP the rule is to provide the reasoning for the judgment at the written request of the party, which must be filed within one week from the date on which the judgment is announced. Notwithstanding, this article will be annulled from 7 November 2019, and by that, to make it clear that it is also permitted in other cases.

[40] An appeal shall be filed with the court which rendered the appealed judgment within two weeks of the judgment accompanied by the statement of reasons being served on the appellant (Art. 369(1), CCP).

[41] It will be the Court's discretion whether to extend the reasons for the judgment for the remaining elements indicated in Art. 328(2), CCP.

The most far-reaching solution, which aims to enable the first instance court judgment issued in simplified procedure to become final and non-revisable, is the rule contained in Article 505^8 (3) of the CCP, modelled on the German *Rechtsmittelversicht*.[42] Pursuant to this provision, a party who attends a hearing at which a judgment is announced may, after the judgment has been announced, declare that it waives the right of appeal; such declaration shall be made for the minutes of a hearing. If all eligible persons waive the right of appeal, the judgment shall become final and non-revisable.

All the solutions presented above were introduced in order to simplify and speed up the proceedings in small claims civil cases and reduce their costs. Due to the increase in the value of the subject of the dispute in the simplified procedure to PLN 20,000 PLN from 1 June 2017, the number of civil cases heard in first instance by district courts in this proceeding increased significantly. This tendency will undoubtedly be maintained after the entry into force of the amendment to the Code of Civil Procedure from 4 July 2019, which provides for further extension of the scope of cases heard in the simplified procedure to all cases from property claims (as well as the existing cases for contractual claims) and resignation from the obligation to submit the pleadings on forms. In contrast to small claims proceedings in other countries, in particular in Germany and Lithuania, the Polish simplified procedure is mandatory and, together with the order for payment proceedings and writ of payment proceedings, creates a coherent whole, allowing faster and cheaper litigation of small claims.

IV. SMALL CLAIMS IN UKRAINE

A. CODE OF CIVIL PROCEDURE 2017 OF UKRAINE: THE NEW PARADIGM OF ACCESSIBLE JUSTICE AND SMALL CLAIMS

The main purpose of current legislative reforms in Ukraine is to approach European standards of justice. Reforms of the Civil Procedure are the result of a new paradigm of justice for many countries that were under the umbrella of the Soviet Union due to their accession to the Council of Europe, the ratification of the European Convention, and the implementation of the ECtHR decisions, which provided a new level of rights protection for their citizens and led to the need for reform of the national legislation.

[42] Schreiber, Klauss, Der *Dispositionsgrundsatz in Zivilprozeβ*, 4 Jura (1988) 196; Rosenberg, Leo, Schwab, Karl Heinz, Gottwald, Peter, *Zivilprozessrecht*, 17 Auflage, (Munich, 2010) 781; Flejszar, Radosław, *Zasada dyspozycyjności w procesie cywilnym* (Beck, Warsaw, 2016) 607–612.

The goal of the Code of Civil Procedure of Ukraine, noted in Article 1, is to determine the jurisdiction and powers of the general courts in civil disputes and other cases prescribed by this Code to establish a secure procedure for civil proceedings. Article 2 contains an item on the objectives and basic principles of Civil Procedure, which states that the task of the civil justice system is a fair, impartial and timely consideration and resolution of civil cases for the effective protection of violated, unrecognised or disputed rights, freedoms and interests of individuals' rights and interest of legal entities as well as the interests of the State, while the court and those who take part in the trial are required to guide the task of civil justice that prevails over any other considerations in the judicial process.

This approach to defining the basic task of civil procedure in Ukraine indicates the evolutionary transition to a new stage of its development as the exercise of justice defines the role of judges and participants.

Considering the significant transformations taking place in Ukrainian society, the intensification of the European integration process, and the desire to join the EU, the high standards of administration of justice required by the European Union have brought about the necessity of a complex global reform of civil procedural law.

Among all the changes that have affected the civil process of Ukraine, attention should be paid to the proceedings before the courts of first instance that have been significantly updated with the aim of realising the principle of proportionality and the idea of effective protection of civil rights mentioned in Articles 1 and 2 CCP 2017. It should be immediately underlined that these methods allow realization of improvements in the consideration and resolution of cases, but also brings about a few problems in practice.

It is noteworthy that there has never been a small claim procedure in Ukrainian legislation, like in other Eastern European countries that were representatives of the Soviet Bloc: in these legal systems a simplified procedure could not be related to the amount at stake, since the main purpose of civil proceedings was not to consider the case and resolve the dispute, but to protect socialist property and find the truth.[43] In Ukraine, this is the first attempt to differentiate civil proceedings and to introduce a special simplified procedure for hearing cases whose value does not exceed the statutory amount.

After Ukraine became independent the civil procedure reform proceeded in line with the Council of Europe Recommendation; in particular, in CPC 2004 the order for payment procedure was introduced. It was a great step towards the development of the judiciary of Ukraine and a really tremendous opportunity to improve resolution of debt collection cases as the time and volume of debt collection cases, including as an overall proportion of all cases, increases year on year (approx. 15–16% according to data of Judiciary of Ukraine).

[43] See more about the goals of civil procedure in the Soviet period and in post-Soviet states: Maleshin, Dmitry, *Civil Procedure System of Russia*, (Statute, Moskow, 2011).

Nevertheless, the remaining part of the total number of cases come within the general action procedure, which had not been significantly changed during the previous civil judicial reform. Accordingly, the main problems of the national litigation in civil cases were duration and non-proportionality.

For instance, it cannot be said that judicial costs in Ukraine are high even after the adoption of the Law of Ukraine "On court fees" in 2011. For submission to a court in Ukraine of a statement of a monetary claim, which is filed by a legal entity, the court should be paid 1.5% of the value of the claim, but not less than UAH 1,921 (EUR 68) and no more than UAH 672,350 (EUR 24,012); an individual or an entrepreneur individual pays 1% of the value of the claim, but not less than UAH 768.40 (EUR 27) and no more than UAH 9,605 (EUR 343). It means, for all claims, for more than EUR 34,300, regardless of its real value, the applicant will pay only EUR 343, the highest limit of court fees.

The problem is the different approaches for the court fees in Ukrainian civil procedure. For instance, an application for the issuance of a court order costs only UAH 192.10 (EUR 7). But there is no such correspondingly attractive proposal for the small claims procedure, unfortunately.

In the CCP 2017, among the general principles of legal proceedings, the principle of proportionality was introduced, as well as provisions on the effective protection of the right in Chapter 1, "Fundamental Provisions" of Section I, "General Provisions" of the CCP, which are new phenomena. This necessitated the introduction of specific mechanisms for their implementation in civil proceedings, which are further developed in Article 11.

This principle according to the CCP, means that the court shall determine the procedure for conducting proceedings, taking into account: the tasks of civil justice; ensuring a reasonable balance between private and public interests; features of the subject of the dispute; value of a claim; complexity of the case; the value of the consideration of the case to the parties; the time required for the commission of one action or another; the amount of court costs related to the relevant procedural actions, etc. Therefore, the final decision about the appropriate procedure for case consideration does not depend on the parties, but on the court, which was a very ambitious decision, taking into account that the limit on appealing small claims under the CCP had been introduced.

Consequently, we believe that the introduction of a procedure for resolving small claims in the CCP of Ukraine is really a very important and worthwhile step, as the Council of Europe data confirms that they share common civilisation values and have a unified conventional system of protection of rights. The introduction of civil proceedings with general and simplified action indicates that Ukraine is approaching European standards of justice.

At the same time as S. Voet rightly spoke about the "new and general trend: keeping small and unchallenged claims outside the judiciary and providing for cheaper and more efficient alternatives. The judiciary should fall back on its core

task: adjudicating complex disputes", which should be implemented not only in Belgium,[44] but also in other countries. It means that judicial procedure for small claims will not help to ensure effective rights protection without ADR creation in Ukraine, which is very suitable for such claims.

Additionally, the new approaches to the small claims definition and elements of simplifying the procedure for their consideration and appeal must be in line with the general approaches to the administration of justice in civil cases established in Ukraine, in particular, related to the rights to be heard by court and to appeal the final decision.

B. SMALL CLAIMS, UNKNOWN FOR UKRAINE

There is an imbalance between small claims and claims which may be dealt with in small claims procedure: according to Part 6, Articles 19 and 274 of the CCP 2017, these are small cases and so-called insignificant cases, as follows:

- first, these are cases in which the cost of the claim does not exceed the established limit established by law;
- second, these are cases of so-called insignificant complexity that meet the following three conditions:
  - they are construed as "small" by the court;
  - they are not included in the list of cases, which are to be considered only according to the rules of the general action proceedings; and
  - the amount of the claim in these cases does not exceed the limit established by law (see more below);
- third, these are cases arising from labour relations;
- fourth, there may also be cases provided for in paragraph 1 of Article 161 of the CCP, as an alternative to order for payment procedure according to the claimant's choice;
- and finally, Part 2 of Article 274 states that the range of cases which can be heard by the court through simplified proceedings is unlimited (referred to in the second rule, mentioned above).

The list of cases which cannot be considered in the simplified proceedings includes the following: family relations, except for alimony and the division of spouse property; on inheritance; privatisation of public housing; unsubstantiated (unjustified) assets; and exceeding limits, established by law.

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44 Voet, Stefaan "Relief in Small and Simple Matters in Belgium", No. 4, *Erasmus Law Review* (2015), available at: <http://www.erasmuslawreview.nl/tijdschrift/ELR/2015/4/ELR-D-15-00017> last access 14 August 2019.

Consequently, most of the criteria to consider when assigning a case as small or insignificant in small claims procedure are related to the amount of the claim.

In general, it is considered that determining the amount of a claim in cases that are appropriate to be heard under the simplified proceedings depends on the economic situation in the State, the legislation and the specialisation of the courts that deal with them.[45] In our opinion, this still depends on the level of trust in the judicial system in the State, and it would be advisable to gradually increase the amount of the claim in cases that are considered small, following the example of European small claims procedure and the results of the small claims procedure implementation into judicial practice.

As of 1 January 2018, the highest limit for small claims procedure is the amount of the claim not exceeding UAH 176,200, which is approximately EUR 6,300 and as of 1 January 2019, UAH 185,300, which is approximately EUR 6,600. The highest limit for the amount of a claim, which can be heard in a simplified proceeding, construed by the court as insignificant, was UAH 800,000 in 2018, which is approximately EUR 28,500 and as of 2019, UAH 926,500, which is approximately EUR 33,089.[46]

As CEPEJ reports, in many Council of Europe States there are procedures for hearing small claims, either nationally or in the ordinary European order, with a great difference in determining the small claims value – in the Czech Republic it is about EUR 398, in Romania it is more than EUR 45,000.[47]

In addition to the amount of a claim, the selection of the case hearing procedure is affected by its essence. Typically, small claims are defined as cases concerning monetary claims[48] or maintenance claims. In the CCP, unfortunately, there are no provisions that characterise the case; we can only conclude that these are maintenance claims for the recovery of an amount of money.

The commencement of the small claims procedure is also very important due to the absence of clear provisions established in the CCP. There are no requirements for a claimant to apply in simplified proceedings if the claim is small or insignificant. The only exception is in the provisions of Part 7 of Article 277, where the mandatory manner of the resolution of a simplified procedure is mentioned. At the same time, the CCP does not have fixed grounds for refusing or returning the application, dismissing a claim or even abandoning the application if the applicant does not apply in accordance with the appropriate procedure prescribed by the CCP. Therefore,

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45 CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 120, available at: <https://rm.coe.int/cepej-report-on-european-judicial-systems-edition-2014-2012-data-effic/16807882a1> last access 14 August 2019.

46 According to the official course of the National Bank of Ukraine, as of 14 August 2019.

47 European Judicial Systems. Efficiency and quality of justice. *op. cit.* 10, 120.

48 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure available at <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l16028_en.htm>.

we can conclude that the simplified procedure is an alternative to the general proceedings, but only by court discretion. The limits of the appeal for judgments in small claims were newly introduced in the CCP. Only a second appeal (cassation) was limited but this is now available if a fundamental right of a uniform law enforcement practice was violated; the person submitting the cassation is not able to refute the circumstances established by the appealed judgment in the course of another case hearing; the case represents a significant public interest or is of exceptional importance to the party who appeals; or the first instance court has classified the case as small by mistake. The first appeal procedure for small claims has no restrictions and has only one peculiarity – it is a written procedure with no party notification.

We believe that it is more advisable to limit the right to appeal in small claims to courts of appeal due to the main objective of these types of proceedings – to overturn unlawful or unfounded judgments – and this court may decide whether the case contains fundamental rights issues or violation of uniform law practice as well as whether to classify the case as small or insignificant. Otherwise, the time-limits for small claims consideration will last years, as is typical in general procedure.

The limits for second appeal in small claims in Ukraine became an object of a ECtHR decision, in which the Court reiterated "that the right of access to a court is not absolute but may be subject to limitations … This restriction is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance".[49]

V. CONCLUSIONS

The implementation of simplified proceedings demonstrates the transition to an evolutionary new level of development of civil proceedings as an order of effective administration of justice. This is determined by the role of the judge and process participants in selecting the most rational procedure for reviewing their case.

The concept of resolving small disputes in the civil proceedings order should include the following:

1. identification of the subject and nature of disputes which can be heard in the simplified procedure, without reducing or narrowing the guarantees for participants in such disputes, by determining the size of claims, definition of the subject of the dispute and determination of the grounds for obligatory application in the simplified procedure;

[49] *Tayisa Denisovna Azyukovska v. Ukraine*, application no. 26293/18, pp. 20–21.

2. the dispositive nature of the choice of the procedure for the case hearing upon the initiative of the claimant, giving rights to the defendant to influence the choice of procedure, but not to allow him or her to abuse his or her procedural rights;
3. the requirement for representing the interests of the parties, in particular, that a representative or other specialist is not mandatory or even prescribed;
4. establishment of a special procedure for appealing court decisions adopted in the simplified procedure, in particular, only by the court of appeal; and
5. enforcement of a judgment adopted by the simplified procedure without additional requirements.