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LEGAL INTEROPERABILITY: THE CASE OF EUROPEAN PAYMENT ORDER AND OF EUROPEAN SMALL CLAIMS PROCEDURE

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1. Introduction.

The European Union adopted on the 12th of December 2006 the Regulation creating an European order for payment procedure¹ – which is applicable since the 12th of December 2008 - and on the 11th July of 2007 the Regulation on the European small claims procedure² - which is applicable since the 1st of January 2009.

This Regulation, together with the Regulation on the order for payment procedure, represents one of the most significant examples of the action of the European Union in the field of civil proceedings. Indeed, for the first time the European Union legislator, not only regulated certain aspects related to civil proceedings in cross-border cases (e.g. the jurisdiction, the serving of documents, the gathering of evidences etc.), but also tried to propose an autonomous model of rules governing civil proceedings.

These Regulations generated an intense debate among European scholars and practitioners: in fact, the national jurists' comments on the new rules were skeptical, while the European voices, although acknowledging some critical aspects, highlighted the wide and effective application of the EU rules throughout the territory of the European Union³.

¹ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in *OJ L 399*, 30.12.2006, p. 1–32.

² Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in *OJ L 199*, 31.7.2007, p. 1–22.

³ A huge number of contributions on these Regulations has been already published. See mainly, Lopez de Tejada, Maria; D'Avout, Louis, *Les non-dits de la procédure européenne d'injonction de payer*, In: *Revue critique de droit international privé*; vol. 96, afl. 4, pag. 717-748 / 2007, Fiorini, Aude, *Facilitating Cross-Border Debt Recovery : the European Payment Order and Small Claims Regulations*, In: *International and Comparative Law Quarterly*; vol. 57, afl. 2, pag. 449-465 / 2008; Tsirikas, Dimitrios, *L'injonction de payer européenne*, in: *Zeitschrift für Zivilprozess international : Jahrbuch des internationalen Zivilprozessrechts*; vol. 14 (2009), pag. 221-237 / 2010. G. CAMPEIS - A. DE PAULI, *Prime riflessioni sul procedimento europeo di ingiunzione di pagamento (regolamento n. 1896/2006/CE)*, in *Giust. civ.*, 2007, p. 355 ss.; Michel Défossez, *Titre exécutoire européen, injonction de payer européenne et*

It must be added that, at present, there are very few works or reports on the practical application of Regulations No. 861/2007 and No. 1896/2006 in Europe⁴. For this purpose, according to both Regulations, Commission shall publish an official report on the practical application of these procedures in Europe⁵.

Notwithstanding with that, many issues come out from the practical application of these procedures: one of these issues concerns the lack of a common system of legal interoperability.

Indeed, both European Order for payment and Small claims procedures should be based on a narrow and intense mechanism of legal interoperability between all the subjects involved (Courts, citizens, judiciary functionaries) in order to speed up the functioning of these procedures.

It must not be forgotten that the goal of these procedures is to simplify international litigation in Europe by reducing the costs in cross-border cases and by helping citizens to autonomously file claims before a Court of another Member state.

For this purpose, this paper focuses on the levels and on the mechanisms of legal interoperability that both European procedures entail.

It is based on some preliminary assumptions.

First of all, the object of this paper is limited to the levels of interoperability that both the European payment order and the European Small Claims procedure entail. More precisely, this paper aims, on the one hand, to determine which are, at the moment, the mechanisms of interoperability which would be necessary for the good functioning of these European procedures; on the other, to propose the possible solutions to improve the interoperability between those actors who are involved in the application of these European procedures (European Union, Member States, national Courts, citizens);

Secondly, the analysis on the levels of interoperability necessarily entails the description of some juridical aspects. These aspects are not exhaustively described, since this is not a strictly juridical paper. On the contrary, these aspects are examined with the goal to facilitate the determination of the levels and of the mechanisms of interoperability of both the European payment order and the European Small Claims procedure.

procédure européenne de règlement des petits litiges, in *Enforcing contracts : aspects procéduraux de l'exécution des contrats transfrontaliers en droit européen et international*, Bruxelles, Larcier, 2008, p. 105-116 ; Guinchard, Emmanuel, *L'Europe, la procédure civile et le créancier : l'injonction de payer européenne et la procédure européenne de règlement des petits litiges*, in: *Revue trimestrielle de droit commercial et de droit économique*; (2008), afl. 3, pag. 465-483 / 2008. Kramer, Xandra E, *The European Small Claims Procedure : Striking the Balance between Simplicity and Fairness in European Litigation*, in: *Zeitschrift für europäisches Privatrecht*; vol. 16, afl. 2, pag. 355-373 / 2008. M. MELLONE, A. PANCALDI, *Il nuovo regolamento comunitario sulle controversie di modesta entità*, in *Rivista di diritto dell'Unione Europea*, 2008, p. 281-317.

⁴ X.E. Kramer, *Enhancing Enforcement in the European Union : the European Order for Payment Procedure and its Implementation in the Member States, particularly in Germany, The Netherlands, and England*, in *Enforcement and enforceability : tradition and reform*, eds: C.H. van Rhee, A. Uzelac, Anvers, Intersentia, 2010, p. 17-39.

⁵ See, on the one hand, Article 28 of the Regulation No. 861/2007: "By 1 January 2014, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a detailed report reviewing the operation of the European Small Claims Procedure, including the limit of the value of the claim referred to in Article 2(1). That report shall contain an assessment of the procedure as it has operated and an extended impact assessment for each Member State". And, on the other, article 32 of the Regulation No. 1896/2006: "By 12 December 2013, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a detailed report reviewing the operation of the European order for payment procedure. That report shall contain an assessment of the procedure as it has operated and an extended impact assessment for each Member State".

Finally, the paper uses the term “legal interoperability” in a broad sense: it does not only refer to the legal interoperability as such, but also entails many levels of “judiciary interoperability”. For this reason, the paper uses also synonyms to the term interoperability such as “cooperation”, “coordination” or “dialogue”. All these terms make reference to the concept of “interoperability” and to the need for mechanisms of coordination between the actors of the European judiciary space.

2. Legal interoperability and the preliminary aspects of European payment order and of European Small Claims Procedure - jurisdiction, *lis pendens* and service of documents.

a) Jurisdiction and *lis pendens*.

The European payment order as well as the European small claims procedure run before the national Court which is jurisdictionally competent according to the rules of international jurisdiction established by Regulation (EC) No. 44/2001⁶. This Regulation – which has taken the place of the former Convention of Brussels of 1968 - determines the Court which has competence to bring proceedings related to civil and commercial matters⁷.

These rules aim to avoid conflict of jurisdiction and, therefore, to avoid those situations in which more than one Court brings proceedings on the same issue, because that would create a waste of human and economical resources inside the European judiciary space.

Indeed, if a Court of a Member State brings civil proceedings in violation of the jurisdiction rules of Regulation no. 44/2001, it is possible that the final decision adopted by that Court can not have any legal effect in all the other Member States. That happens in case of infringement of the following rules of jurisdiction:

- Rules related to the so said exclusive *fora* (article 22 and 23 of the Regulation No. 44/2001⁸);
- Rules related to the so said protective *fora* (Section No. 3, 4 and 5 of Regulation No. 44/2001⁹).

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ L 12, 16.1.2001, p. 1–23*. At the moment, the Commission proposed a revision of this Regulation: see the proposal in COM/2010/748 def., 14 December 2010. A huge number of doctrinal contributions exists on this subject: see mainly, Stadler, Astrid, From the Brussels Convention to Regulation 44/2001 : Cornerstones of a European Law of Civil Procedure, in: *Common Market Law Review*; vol. 42, afl. 6, pag. 1637-1661 / 2005; Hess, Burkhard, The Brussels I-Regulation (EC) no. 44/2001 : the Heidelberg Report on the Application of Regulation Brussels I in 25 member states, Beck, Munich, 2008; Gaudemet-Tallon, Hélène / 4e éd / L.G.D.J / 2010, *Compétence et exécution des jugements en Europe : Règlement 44/2001, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*.

⁷ There are other Regulations which set up rules on jurisdictions in international civil claims, such as Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in *OJ L 338, 23.12.2003, p. 1–29*; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *OJ L 7, 10.1.2009, p. 1–79* ; Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in *OJ L 160, 30.6.2000, p. 1–18* : however, these Regulations deal with subjects not covered by the scope of the European order for payment and of European Small Claims Procedure.

⁸ Article 22 relates with the following proceedings: a) proceedings which have as their object *rights in rem* in immovable property or tenancies of immovable property; b) proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs; c) proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept; d) proceedings concerned with the registration or validity of patents, trade-marks, designs, or other similar rights required to be deposited or registered. e) proceedings concerned with the enforcement of judgments; Article 23 relates with *fora* chosen by the parties.

The Courts of the Member States of the European Union are requested to unanimously and correctly apply these rules in order to avoid any conflict of jurisdiction.

However, the system of jurisdiction in civil matters set up by Regulation No. 44/2001 is not so easy to apply: it is sometimes based on quite complicated criteria of connection, whose interpretation can often differ according to the Court seized¹⁰.

Moreover, this system of jurisdiction is not very well known by the Courts of the Member States.

Finally, except as for rules on exclusive *fora*, there are no duties for the Court seized to check automatically (“*ex officio*”) its competence to deal with the case. In other words, if parties do not raise any exception of jurisdiction, the Court seized can declare its competence to deal with the case, although it is not actually competent to do it.

All these circumstances show that the existence of common rules on jurisdiction does not avoid the risk that two civil proceedings on the same issue can be brought before two different European Member States’ Courts.

This is the reason why the Regulation (EC) No. 44/2001 provides for a mechanism whose aim is to avoid that two different Courts can both declare their competence to deal with the same issue on the basis of different interpretation or application of the rules of jurisdiction.

This is the *lis pendens* mechanism.

According to the Regulation No. 44/2001¹¹, if two European Courts are seized on the same issue, the second Court seized from a temporal point of view must stay the proceedings, in order for the first Court seized to assess which is the competent Court between the two Court seized. In other words, only the first Court seized from a temporal point of view is competent to exam and apply the rules on jurisdiction of the Regulation No. 44/2001 and, therefore, assess which is the competent Court to deal with the issue (this is the so called “competence on competence”).

The second Court seized, even if competent according to the common rules of jurisdiction, must always stay the proceedings, except in case its competence is based on an exclusive *forum* according article 22 of the Regulation No. 44/2001¹².

The mechanism of *lis pendens* is fundamental for the functioning of the European judiciary space¹³: indeed, if the second Court seized does not stay the proceedings and declares its competence and if

⁹ These rules on jurisdiction refer to the “weak” parties of a civil relationship, such as consumers, employees or persons who joined an insurance agreement: in such cases, these “weak” parties can bring civil proceedings before the Court of their residence, instead of the Court of the counterparty’s residence.

¹⁰ It must be added that the European Court of Justice is competent to deal with preliminary references concerning the interpretation of these rules (starting from the Treaty of Lisbon, it is also competent for preliminary references coming from European Courts not of last instance). Case-law of the European Court of Justice is huge: just for the latest (but not less important) decisions on Regulation No. 44/2001, see: 11.03.2010, C-19/09, *Wood Floor Solutions*, in Rep. 2010 I-02121; 25.02.2010, C- 381/08, *Car Trim*, in Rep. 2010 I-01255; 07.12.2010, Joined cases C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, not yet published; 23.04.2009, C-533/07, *Falco*, in Rep. 2009, I-03327; 16.07.2009, C-189/09, *Zuid-Chemie*, in Rep. 2009, I-6917; 19 aprile 2012, C-523/10, *Wintersteiger*, not yet published. 17.11.2011, C-327/10, not yet published. 15.03.2012, C-292/10, *G*, not yet published; 12.05.2011, C-144/10, *Berliner* not yet published.

¹¹ See article 27 of the Regulation No. 44/2001: “*Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings*”.

¹² European Court of Justice, 8.12.1987, C-144/86, *Gubisch*; 27.09.1988, C-189/87, *Athanasios*; 19.05.1998, C-351/96, *Drouot Assurances*; 8.05.2003, C-111/01, *Gantner*; 9.12.2003, C-116/02, *Erich Gasser GmbH*; 27.04.2004, C-159/02, *Turner*; 14.10.2004, C- 39/02, *Maerks Olie*; 11.10. 2007, C-98/06, *Freeport*.

the first Court seized does the same, there is the high risk that two different decisions on the same issue can be adopted. In this case, those decisions can not have any legal effect in the territory of the Member State where the other decision has been issued and, in some cases, neither in all the other Member States¹⁴.

The crucial point of the functioning of the mechanism of *lis pendens* is the assessment of the moment of seizure of the first Court. The former Convention of Brussels of 1968 did not provide for any rule concerning this point and that provoked different interpretations of the exact moment of seizure of the first Court according to the national rules on civil proceedings. Regulation No. 44/2001 improved the situation, stating that (article 30) “*a court shall be deemed to be seized: “1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or; 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.”*”

b) Service of documents.

In both the above cases, it is crucial to understand when and how the first document of the process has been served upon the counterparty.

For this purpose, the European Union adopted the Regulation (EC) No. 1393/2007¹⁵: this Regulation establishes how a document can be served upon an addressee located in an European Member State and, in specific cases, determines when the service must be considered completed.

The Regulation No. 1393/2007 is based on two main levels of interoperability, both based on the mechanism of “transmitting and receiving agencies”, which are national authorities charged to deal with the service of documents abroad: a “high level of interoperability”, in which the transmitting agency sends the document to the receiving agency which serves it upon the addressee and; a “low level of interoperability”, in which the transmitting agency serves the document directly upon the addressee by postal service.

¹³ MacLachlan, Campbell, "Lis pendens" in international litigation, Nijhoff, 2009; Marongiu Buonaiuti, Fabrizio, Lis Alibi Pendens and Related Actions in Civil and Commercial Matters Within the European Judicial Area, in Yearbook of Private International Law; vol. 11 (2009), pag. 511-564 / 2010. Bogdan, Michael, The Brussels/Lugano Lis Pendens Rule and the "Italian Torpedo", in: Scandinavian Studies in Law; vol. 51, pag. 89-97, 2007; Gallagher, Norah, Parallel Proceedings, Res judicata and Lis pendens : Problems and Possible Solutions, in Pervasive Problems in International Arbitration, ed. by Loukas A. Mistelis and Julian D.M. Lew, Kluwer Law International, 2006; Gebauer, Martin, Lis pendens, Negative Declaratory-Judgment Actions and the first-in-Time Principle, In: Conflict of Laws in a Globalized World, ed. by Eckart Gottschalk, Cambridge University Press 2007.

¹⁴ Indeed, according to article 34 of Regulation No. 44/2001 an European judgment shall not be recognized: (...) 3. *if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State addressed”*.

¹⁵ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, *OJ L 324, 10.12.2007, p. 79–120*. This Regulation replaces the Regulation (EC) No. 1348/2000.

Especially in the first level of interoperability, national authorities are requested to dialogue between them in order to correctly and speedily carry out the international service of documents.

The “dialogue” between these authorities is based on the functioning of specific standard forms provided for by Regulation No. 1393/2007: these forms contain all the elements related to the nature of the document to be served and the date of service of the document.

If this “dialogue” does not work properly, the Court seized can not receive correctly information on how and when the service has been carried out and, therefore, can not correctly assess the moment and the full validity of the seizure.

Hence, there is the risk that a national Court can consider itself as the first Court seized even if the service of the act of summons or of the other initial document of the process has not actually been served upon the defender or the service has not been correctly carried out.

2.1 Fields of legal interoperability:

Legal interoperability can be very important in order for European order for payment and European small claims procedures to be correctly started. As described before, it is important that all the subjects involved in the initial part of these procedures can fully and efficiently cooperate, by exchanging the relevant information and data.

More precisely, it is possible to determine the following fields of interoperability:

2.1.1 Interoperability for the exchange of information aiming at the good functioning of jurisdiction and of *lis pendens* mechanisms.

Seized Court for an European Small Claims procedure must determine if it is competent to deal with that case and if there is another Court which has been already seized on the same issue.

At the moment, there are no mechanisms of cooperation/interoperability between the Courts of the Member States, both at European and intergovernmental levels: therefore, a Court of a Member State can not know if actually a Court from another Member State has been seized on the same matter and, if so, when it has been exactly seized, and if the latter declared its competence to deal with the case.

It is up to the parties to raise the exceptions of *lis pendens*: in other words, parties have the duty to “warn” the Courts about the circumstance that the same claim has been already filed with another Court which is supposed to be competent to deal with the case. If parties fail to do it, then the Court seized can declare its competence, even if another Court would be competent to assess the competence and even if the latter is actually competent to deal with the case.

In light of what above, if European Courts had a direct dialogue, *lis pendens* mechanism would properly work and the risk of parallel proceedings would be avoided.

Hence, Courts should be able to transmit each other the information concerning the date of the seizure, the jurisdiction grounds of the seizure and could know if a decision on the jurisdiction has been already adopted. By acting in this way, just one European order for payment or Small Claims procedure would run on the same matter.

2.1.2 The exchange of information and data between the European competent authorities dealing with the service of documents.

As described before, *lis pendens* and jurisdiction mechanisms depend on the good functioning of the European system related to the service of documents.

These authorities should have a constant and efficient dialogue: according to Regulation No. 1393/2007, this interoperability is ensured by the use of some specific forms which are annexed to the above Regulation.

Undoubtedly, these forms play an important role for this kind of cooperation, but at the same time a narrower and more efficient interoperability is absolutely needed. These authorities should be able to exchange information and data concerning the service of documents on a common electronic platform. That would allow single authorities – and also citizens - to check at any time which is the status of the service, if there is a problem concerning the procedure of service of documents and, therefore, to carry out a faster and more efficient service for the citizens and for the Courts.

3. Legal interoperability and the running of European Order for payment and Small Claims procedures.

Both European Order for payment and Small Claims procedures entail high and intense levels of interoperability between all the actors involved in these procedures.

More precisely, in the view of the European legislator, the national seized Court plays a crucial role in both procedures, being called not only to adopt a decision on the issue (“jurisdictional function”), but also to constantly dialogue and “interoperate” with parties for the correct functioning of the procedure. Indeed, normally parties do not have a “direct dialogue” and, therefore, are not called to directly exchange documents between them, but only throughout the seized Court.

In other words, these procedures does not entail horizontal mechanisms of cooperation (between the parties), but just vertical ones (between the Court and the parties).

As we will see, this “dialogue at length” between parties and Court is based on a specific communication system: the standard forms. These standard forms represent the European codified system of judiciary communication and are drawn in all the official languages of the European Union. Their (correct) use is fundamental for the good functioning of the European interoperability mechanisms and, therefore, for the correct application of these European procedures in civil proceedings.

3.1 The European Small Claims procedure.

The EU small claims procedure applies, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed 2 000,00 Euro.

The aim of these procedure is to allow European citizens to autonomously file a so low-value claim with a Member State Court without having to ask for legal or technical assistance or, at least, reducing the applicable costs.

In order to achieve this goal, the European Small Claims Regulation provides for a very fast and easy procedure.

Plaintiff is called to file the claim before the competent Court, by using the standard claim form A, as set out in Annex I of the European Small Claims Regulation¹⁶. This form must be duly filled out and must be filed together with the attached documents.

The competent Court makes a first assessment on the admissibility of the claim according to the scope of the Regulation (for instance, if the value of the claim is higher than 2.000,00 Euro): if the claim is outside the scope of the Regulation, the Court informs the claimant accordingly¹⁷.

At the same time, if the claim is not clear or the information provided by the claimant are inadequate, the Court informs the claimant, by using standard form B, as set out in Annex II of the European Small Claims Regulation.¹⁸ Claimant can complete or rectify the claim within the period of time indicated by the Court.

If the claim is admissible and does not need any integration, then a copy of it, together with the attached documents, is served upon the debtor¹⁹

Regulation No. 861/2007 does not clearly state whether the Court or the claimant is called to serve the claim and the attached documents upon the counterparty: however, the ratio and the goal of the Regulation should suggest that the Court must do it, being otherwise the claimant obliged to bear the costs related to the service

Defender has 30 days starting from the service of the claim in order to prepare its response and to file it before the Court seized, by *filling in Part II of standard answer Form C – or another appropriate answer document - accompanied, where appropriate, by any relevant supporting documents*²⁰.

¹⁶ Art. 4, n.1: *The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced.*

¹⁷ Art. 4, n.3: *“Where a claim is outside the scope of this Regulation, the court or tribunal shall inform the claimant to that effect. Unless the claimant withdraws the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted”.*

¹⁸ Art. 4, n. 4: *“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”.*

¹⁹ Art. 5, n.2: *“A copy of the claim form, and, where applicable, of the supporting documents, together with the answer form thus filled in, shall be served on the defendant in accordance with Article 13. These documents shall be dispatched within 14 days of receiving the properly filled in claim form”.*

²⁰ Art. 5 n.3: *“The defendant shall submit his response within 30 days of service of the claim form and answer form, by filling in Part II of standard answer Form C, accompanied, where appropriate, by any relevant supporting documents, and returning it to the court or tribunal, or in any other appropriate way not using the answer form”.*

The defender's response must be dispatched together with the relevant documents, to the claimant: in this case, Regulation clearly says that the seized Court must do it²¹. Moreover, if defender raises a counterclaim, then plaintiff can file its response to the counterclaim before the Court seized within 30 days from the service on the defender's response²².

After this initial exchange of documents from both parties, Court shall assess if the final decision can be already taken or if it is necessary further judicial activities.

More precisely, the Court can demand further details from the parties or take specific evidences or *summon the parties to an oral hearing*²³.

In such a case, the Court shall give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment²⁴.

This final decision is served upon the parties.

The European Small Claims decision is immediately enforceable in all the European member States, since it is considered as an European enforcement order: member States can not refuse its enforcement, unless it is demonstrated that it is irreconcilable with an earlier decision given in any Member State or in a third country²⁵.

The European Small Claims judgment can be challenged before the national competent Courts: time limits for the appeal as well as all the other conditions for it shall be regulated by the national proceedings rules. However, according to Regulation No. 861/2007, the review of the European Small Claims decision shall be ensured, provided that the defender could not participate to the European procedure²⁶.

3.2 The European order for payment.

²¹ Art. 5, n. 4. "*Within 14 days of receipt of the response from the defendant, the court or tribunal shall dispatch a copy thereof, together with any relevant supporting documents to the claimant*".

²² Art. 5, n. 6: "*The claimant shall have 30 days from service to respond to any counterclaim*".

²³ Article 7: "*1. Within 30 days of receipt of the response from the defendant or the claimant within the time limits laid down in Article 5(3) or (6), the court or tribunal shall give a judgment, or: (a) demand further details concerning the claim from the parties within a specified period of time, not exceeding 30 days; (b) take evidence in accordance with Article 9; or (c) summon the parties to an oral hearing to be held within 30 days of the summons*".

²⁴ Article 7. 2. "*The court or tribunal shall give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment*".

²⁵ Article 22. Anyway it must be proved that: "*(a) the earlier judgment involved the same cause of action and was between the same parties; (b) the earlier judgment was given in the Member State of enforcement or fulfills the conditions necessary for its recognition in the Member State of enforcement; and (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given*".

²⁶ More precisely, according to article 18 of the Regulation, the defendant shall be entitled to apply for a review provided that: "*(a) (i) the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 of Regulation (EC) No 805/2004; and (ii) service was not effected in sufficient time to enable him to arrange for his defense without any fault on his part, or (b) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly*".

The European order for payment applies in cross-border cases related to civil and commercial matters with no value limits. It aims to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims.

In order to achieve this goal, Regulation No. 1896/2006 sets up a fast and simple procedure essentially based on the “behavior” of the debtor.

Indeed, an European order for payment is issued by the competent Court on the exclusive basis of creditor’s statement: if this order is challenged by the debtor within a 30 days limit, then an ordinary procedure shall start. If this order is not challenged by the debtor within the above deadline, then the European payment order becomes definitive and enforceable in all the European member States.

More precisely, creditor/claimant shall file the claim using standard form A as set out in Annex I of the Regulation No. 1896/2006: this form must be properly filled out with all the information concerning the claim²⁷. However, no documents must be attached.

The Court shall immediately assess if the claim falls or not within the scope of the Regulation: if not, the Court shall immediately dismiss the claim.

Moreover, the Court shall assess if the claim is clear and complete: if not, the court shall give the claimant the opportunity to complete or rectify the application: for this purpose, the Court shall use standard form B as set out in Annex II of the Regulation²⁸.

If the claimant fails to send his reply within the time limit specified by the court or if the claim is clearly unfounded, then the Court shall reject the claim by using standard form D as set out in Annex IV²⁹.

On the contrary, if the claim is admissible, it meets all the requirements indicated by the Regulation and it is not clearly unfounded, then the Court shall issue an European order for payment, by using standard form E as set out in Annex V of the Regulation³⁰.

²⁷ Article 17: “1. An application for a European order for payment shall be made using standard form A as set out in Annex I. 2. The application shall state: (a) the names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made; (b) the amount of the claim, including the principal and, where applicable, interest, contractual penalties and costs; (c) if interest on the claim is demanded, the interest rate and the period of time for which that interest is demanded unless statutory interest is automatically added to the principal under the law of the Member State of origin; (d) the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded; (e) a description of evidence supporting the claim; (f) the grounds for jurisdiction; and (g) the cross-border nature of the case within the meaning of Article 3”.

²⁸ Article 9: “1. If the requirements set out in Article 7 are not met and unless the claim is clearly unfounded or the application is inadmissible, the court shall give the claimant the opportunity to complete or rectify the application. The court shall use standard form B as set out in Annex II. 2. Where the court requests the claimant to complete or rectify the application, it shall specify a time limit it deems appropriate in the circumstances. The court may at its discretion extend that time limit”.

²⁹ Article 11: “1. The court shall reject the application if: (a) the requirements set out in Articles 2, 3, 4, 6 and 7 are not met; or (b) the claim is clearly unfounded; or (c) the claimant fails to send his reply within the time limit specified by the court under Article 9(2); or (d) the claimant fails to send his reply within the time limit specified by the court or refuses the court’s proposal, in accordance with Article 10. The claimant shall be informed of the grounds for the rejection by means of standard form D as set out in Annex IV”.

³⁰ Article 12: “1. If the requirements referred to in Article 8 are met, the court shall issue, as soon as possible and normally within 30 days of the lodging of the application, a European order for payment using standard form E as set out in Annex V. The 30-day period shall not include the time taken by the claimant to complete, rectify or modify the application. 2. The European order for payment shall be issued together with a copy of the application form. It shall not

The Court can also issue an European Order for payment for a part of the credit claimed: in this case, claimant/creditor shall be informed by standard form C as set out in Annex III of the Regulation and shall be invited to accept or refuse the issuing of such an European order of payment³¹.

In case the claimant/creditor refuses an European order of payment for the amount specified by the court or does not reply within the time limit specified by the court by returning standard form C, then the Court shall reject the claim, once again by means of standard form D as set out in Annex IV of the Regulation.

The European order for payment shall be served upon the defendant together with the creditor's claim: Regulation No. 1896/2006 does not clearly state whether the Court or the claimant shall serve the European order for payment. Article 12.5 just states that "*The court shall ensure that the order is served on the defendant in accordance with national law by a method that shall meet the minimum standards laid down in Articles 13, 14 and 15*". However, in the light of the goal of the Regulation, the Court shall serve the European order for payment upon the debtor, in order to avoid any cost or inconvenience related to the service.

The debtor/defendant has 30 days from the receipt of the European order for payment to challenge it. The opposition must be lodged before the Court issuing the European order for payment, by using standard form F as set out in Annex VI of the Regulation. As for the initial claim, no documents must be attached to the opposition.

In case of opposition, the proceedings shall continue before the courts issuing the European order for payment in accordance with its internal rules of proceedings. Accordingly, claimant shall be informed whether the defendant has lodged a statement of opposition³².

comprise the information provided by the claimant in Appendices 1 and 2 to form A. 3. In the European order for payment, the defendant shall be advised of his options to: (a) pay the amount indicated in the order to the claimant; or (b) oppose the order by lodging with the court of origin a statement of opposition, to be sent within 30 days of service of the order on him. 4. In the European order for payment, the defendant shall be informed that: (a) the order was issued solely on the basis of the information which was provided by the claimant and was not verified by the court; (b) the order will become enforceable unless a statement of opposition has been lodged with the court in accordance with Article 16; (c) where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event".

³¹ Article 10: 1. *If the requirements referred to in Article 8 are met for only part of the claim, the court shall inform the claimant to that effect, using standard form C as set out in Annex III. The claimant shall be invited to accept or refuse a proposal for a European order for payment for the amount specified by the court and shall be informed of the consequences of his decision. The claimant shall reply by returning standard form C sent by the court within a time limit specified by the court in accordance with Article 9(2). 2. If the claimant accepts the court's proposal, the court shall issue a European order for payment, in accordance with Article 12, for that part of the claim accepted by the claimant. The consequences with respect to the remaining part of the initial claim shall be governed by national law. 3. If the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal, the court shall reject the application for a European order for payment in its entirety".*

³² Article 17: 1. *"If a statement of opposition is entered within the time limit laid down in Article 16(2), the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event. Where the claimant has pursued his claim through the European order for payment procedure, nothing under national law shall prejudice his position in subsequent ordinary civil proceedings. 2. The transfer to ordinary civil proceedings within the meaning of paragraph 1 shall be governed by the law of the Member State of origin. 3. The claimant shall be informed whether the defendant has lodged a statement of opposition and of any transfer to ordinary civil proceedings".*

If no opposition has been lodged within the 30 days' time-limit, then the court of origin shall declare the European order for payment enforceable using standard form G as set out in Annex VII: this standard form shall be sent to the claimant³³.

Once the 30 days' time limit is expired, the European enforcement order can not be challenged anymore, except in very few and exceptional cases: more precisely, debtor must demonstrate that he/she was prevented to lodge the opposition not for him/her fault³⁴.

The European order for payment is immediately enforceable in all the European member States, since it is considered as an European enforcement order: member States can not refuse its enforcement, unless it is demonstrated that it is irreconcilable with an earlier decision given in any Member State or in a third country³⁵.

3.3 Fields of interoperability.

Legal interoperability can be important in order for both European Small Claims and Order for payment procedures to correctly run. As described before, these procedures are based on a constant, efficient and fast dialogue between all the actors involved: for this purpose, it must be underlined that both procedures fixe a very severe system of time limits. For instance, according to the European Small claims procedure, defender can file his/her response within just 30 days from the receipt of the claimant's file. In the European order for payment procedure, defendant must challenge the Court's order within and not beyond 30 days from its receipt: otherwise, Court's order becomes final and enforceable.

Time limits do not only refer to parties but also to the Court seized.

For instance, according to article 5 of European Small Claims procedure, the Court seized is called to exchange documents between parties (claimant's form to defendant and defendant's response to the claimant) in just 14 days.

Therefore, in light of what above, an efficient and fast system of cooperation/interoperability is absolutely needed.

More precisely, it is possible to determine the following fields of interoperability:

³³ Article 18: "1. If within the time limit laid down in Article 16(2), taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition has been lodged with the court of origin, the court of origin shall without delay declare the European order for payment enforceable using standard form G as set out in Annex VII. The court shall verify the date of service. 2. Without prejudice to paragraph 1, the formal requirements for enforceability shall be governed by the law of the Member State of origin. 3. The court shall send the enforceable European order for payment to the claimant".

³⁴ Article 20: 1. "After the expiry of the time limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where: (a) (i) the order for payment was served by one of the methods provided for in Article 14, and (ii) service was not effected in sufficient time to enable him to arrange for his defense, without any fault on his part, or (b) the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly".

³⁵ Article 22. Also in this case, it must be proved that: "(a) the earlier decision or order involved the same cause of action between the same parties; and (b) the earlier decision or order fulfills the conditions necessary for its recognition in the Member State of enforcement; and (c) the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin".

3.3.1 The dialogue between the subjects involved in the European procedures: the standard forms.

In both European procedures, the Court should play a role of “center of deposit and transmission” of the documents lodged by the parties .

This intense “dialogue” between the seized Court and parties runs through specific standard forms which are annexed to Regulations No. 861/2007 and No. 1896/2006. The content of these forms was hardly discussed during the negotiations of the Regulations, in order to achieve an efficient exchange of information regarding the dispute.

This level of interoperability based on these forms can be undoubtedly improved.

First of all, pursuant to the European Regulations, the use of the standard forms is not always mandatory and parties are free to use all the appropriate ways to participate to the procedures: for instance, according to article 5, n. 3 of Regulation No. 861/007 “*The defendant shall submit his response in any other appropriate way not using the answer form*”.

The non-binding nature of these standard forms does not facilitate the “dialogue” between parties and the Court. Parties could use unilaterally prepared claim forms whose content could differ from what provided in the standard forms set up by the European Union. On the contrary, the dialogue should be based on a common language.

Secondly, these forms are not very clear in most parts and often both citizens and Courts do not know exactly how to deal with them. Indeed, according to the spirit of the European legislator, these forms should allow European citizens to autonomously file a claim with a Member State Court without having to ask for legal or technical assistance. However, their content is sometimes very complicated and hard to be understood by the average user.

An example should clarify this statement.

As said before, both the European small claims and Order for payment procedures run before the national competent Court according to jurisdictional rules established by Regulation No. 44/2001. Standard forms of both procedures obliges claimant to indicate the jurisdictional grounds for seizing the Court of that specific Member State: in this respect, it must be remembered that the international jurisdiction is a complicated matter and it is not hard to image that the average citizen may have difficulty in interpreting and correctly applying the rules of conflict (such as “the place of performance of the obligation in question” or “the place of harmful event”, etc.) established by Regulation No. 44/2001.

For this purpose, it must be remembered that both Regulations actually oblige Member States to provide information on these issues and, more generally, on how the forms must be filled.³⁶

³⁶ See article 11 of Regulation No. 861/2007: “*The Member States shall ensure that the parties can receive practical assistance in filling in the forms*” and article 29 of Regulation No. 1896/2006: “*By 12 June 2008, Member States shall communicate to the Commission: (a) which courts have jurisdiction to issue a European order for payment; (b) the review procedure and the competent courts for the purposes of the application of Article 20; (c) the means of communication accepted for the purposes of the European order for payment procedure and available to the courts; (d) languages accepted pursuant to Article 21(2)(b)*”.

However, these rules did not receive an effective application in the practice: that means that Member States did not set up an actual system of information and instructions for citizens on how the forms must be filled.

In particular, member States should cooperate via the *the European Judicial Network in Civil and Commercial Matters*: the European Judicial Network in Civil and Commercial Matters is a network established in accordance with Decision 2001/470/EC³⁷ whose goal is to ensure a narrow coordination between the European Union and the Member States in matters related to the application of European Union Regulations of civil judiciary cooperation.

More particularly, the European Judicial Network in Civil and Commercial matters is based on the mechanism of the “points of contact”: the points of contact are authorities established in each Member State which are competent to deal with the application of specific European Union instruments of judiciary cooperation.

Each point of contact has the duty to exchange information on the practical application of the specific Regulation in question with all the other points of contact, with the goal to guarantee a more efficient application of the European Union rules.

However, the functioning of the Judicial Network in Civil and Commercial matters should be improved: indeed, till now it did not play an effective role in the application of these European procedures. Therefore, a more intense mechanism of dialogue should be built between Member States in order to guarantee an effective exchange of the information and data concerning the practical application of these Regulations.

This dialogue can be built both at a vertical and horizontal level: at the moment, the Judicial Network in Civil and Commercial uses mostly the vertical level (European Commission – Member States). Indeed, Member States are invited to transmit data and information to the Commission, being the latter charged to classify all the data and to disclose them to the citizens.

In the future, a more horizontal approach could be adopted. Member States should dialogue between them as much as they can, by using common platform and/or communication systems.

To sum up, there is still a “gap” between the Courts and the citizens concerning the use of the standard forms set up by Regulation No. 861/2007 and No. 1896/2006: a more effective interoperability between the Court and the citizens is absolutely needed.

As for the moment, the Commission set up the “European Judicial Atlas Civil in civil matters” which is an online database³⁸ containing some information on the practical application of the European Union Regulations on civil judiciary cooperation.

A specific section of the European Judicial Atlas Civil in civil matters focuses on both the European Small Claims and Order for payment procedure: this section provides some information concerning the application of the procedures and the content of the forms to be filled.

This system can be an example of how interoperability should run in the future, because it actually helps citizens to understand the main points of the procedure and to understand how a form must be filled. Unfortunately, not all the European citizens can take advantage of this level of

³⁷ 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, *OJ L 174*, 27.6.2001, p. 25–31

³⁸ See http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm -

interoperability: indeed, citizens not having access on internet at home should find a specific desk in the national Courts providing that kind of information and providing practical assistance in order to correctly fill the forms.

3.3.2 The means of transmission of the documents.

A fast and efficient system of transmission of documents between the subjects involved in the both European Small Claims and Order for Payment procedures (Court and Parties) is crucial for the correct functioning of these procedures.

Indeed, the goal of these procedures is to allow citizens to autonomously file a claim with a Court located in a member State other than the State of habitual residence or domicile.

In order to achieve this goal, the European legislator aims to overcome the need for the personal lodging of documents before the Competent Court. Indeed, the personal lodging of documents would mean an increase of the costs for both parties involved in these procedures.

National member States rules on this point highly differ.

Some member States allow lodging of claims (both coming from the national territory or outside) by post or by electronic means; on the contrary, other member States do exclusively accept the personal lodging of claims before the competent Court.

The filing of claims by means other than the personal lodging creates the juridical problem to “identify” the party who is acting.

Indeed, identification normally is ensured by physical signature of the party. By the way, in the view of these European procedures, at least one of the parties is not physically resident in the State where the Court is located. Therefore, other means of transmission of documents must be examined as, for instance, the electronic transmission of documents.

The electronic transmission of documents could actually be helpful for the good functioning of the European procedures, since it would allow parties to easily file a claim with a Court located in another member State.

According to this system of transmission, physical signature does not exist: it is replaced by an electronic signature.

However, not all the member States have implemented efficient and common systems of identification of parties.

Therefore, the European legislator adopted an intermediate approach on this point: claims can be filed with the competent Court directly or by post or by any other means of transmission of documents, including electronic ones, that are accepted according to the specific member State in which the procedure is commenced³⁹. This is the so called “Court seized approach”.

This approach still limits a broad and uniform application of these procedures among the member States: cross border cases can be facilitated only in those member States where efficient and safe systems of transmission of documents have been implemented. In the other member States, citizens are still obliged to directly file their claims with the competent Court.

³⁹ See Article 4 of Regulation No. 861/2007: “*The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced*” and article 7.5 of Regulation No. 1896/2006: “5. The application shall be submitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin”.

If a document has been transmitted to a member State which accepts this kind of transmission of documents, the latter shall also recognize the (electronic) signature incorporated in that document. In other words, member States shall mutually accept and recognize the systems of identification of parties set up in an another member State, under one condition: the electronic signature must be carried out according to the common framework for electronic signature set up by EU Directive 1999/93/EC⁴⁰.

According to the above Directive an electronic signature shall be recognized in so far as it fulfills to specific requirements such as “(a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable”. This kind of signature is defined as “Electronic Advanced Signature”⁴¹.

The European Regulation No. 1896/2006 also goes further on this point.

The electronic signature of the document shall not be required if “*the member State of origin*” has set up a system which permits the identification “a priori” of the users in a secure manner.

It must be underlined that the wording “member State of origin” included in article 7.6 of the Regulation No. 1896/2006 does not refer to the member State in which the document has been issued (State of transmission), but to the member State where the proceedings are commenced (State of destination)⁴².

Therefore, taking into account that normally claimant is resident in a member State other than the State where the Court is located, it is difficult to image that a foreign claimant could join a non-national system of identification of users.

That would reasonably be the impact of this rule on the practical application of the European Order for payment.

Moreover, it must be underlined that any reference to electronic signatures or to the common framework set up by EC Directive 1999/93 is included in the European Small Claims Regulation. Notwithstanding with this, the same juridical principles shall apply: hence, for the purpose of this Regulation, claims should be accepted if electronically signed according to the EC Directive 1999/93. Indeed, this Directive is already binding over the European member States and already allows the recognition of documents electronically signed pursuant to those conditions set up in the Directive.

At the moment, the issue of the electronic transmission of documents has been examining by important research projects in the European Union: in particularly, it must be remembered the E-CODEX project which is a co-funded project whose aim is to Improve efficiency of cross-border judicial processes through standards and solutions that ease and facilitate the cross-border case-

⁴⁰ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, Official Journal L 013 , 19/01/2000 P. 0012 – 0020.

⁴¹ Article 2.2 of the Directive.

⁴² Indeed, according to article 5.4 of Regulation No. 1896/2006, “court of origin’ means the court which issues a European order for payment”.

handling activities. Fourteen member States do take part of it, plus a non-member State⁴³ (sistemare numero nota).

4. Legal interoperability and the issue of the language: looking for an autonomous solution.

Order for payment and European Small Claims procedures are European civil proceedings running before national Courts and between different nationalities' parties.

As it has been shown before, Courts and parties need to constantly communicate between them : however, they can not use the same language.

This can entail some important problems.

Indeed, juridical language is a technical language and it deeply depends on the national law. Therefore, it can not be easily or automatically translated into a different language. Otherwise, high risks of discrepancy with the original meaning can occur.

It is not my intention to go through a very deep and complicated matter, such as the relationship between law and language. Many studies have been already carried out on this subjects⁴⁴. I just would like to point out that, within the context of the European Regulations in the field of civil proceedings, this problem becomes more and more important.

Indeed, since its foundation, the European Union's principle is the multilingualism: this means that all the Regulations and the other documents of general application must be drafted in all the official languages of the European Union.⁴⁵

At that time, this principle did not entail high complexity since, at the time of its foundation, European Union was composed by only six Member States and the official languages were four: however, many other countries joined European Union and, therefore, the total number of the official languages is now twenty-three.

All the "official languages" have the same dignity and no linguistic primacy is admitted: this means that all the national versions of the European Union documents are equally considered, as stated by the Court of Justice in many occasions⁴⁶.

Therefore, the principle of multilingualism provoked more and more complexity⁴⁷, above all when it is applied to the juridical context.

⁴³ Austria, Belgium, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Malta, The Netherlands, Portugal, Romania, Spain, Turkey

⁴⁴ Among the others, Jacqueline Visconti (edt.) *Lingua e diritto : livelli di analisi*, Milano, LED, 2010; Thomas Morawetz (edt), *Law and language*, Ashgate, Dartmouth, 2000.

⁴⁵ See Regulation No. 1 determining the languages to be used by the European Economic Community, *OJ 17, 6.10.1958, p. 385-386*. Of course, at the time of foundation of the European Union, the official languages of the European Union were only, French, Italian

⁴⁶ European Court of Justice, 20.11.2011, C-268/99; 20.11.1993, C-152/01.

⁴⁷ For the principle of multilingualism as source of complexity see, among the others, R.SACCO, Language and law, in B. Pozzo (ed.) *Ordinary language and legal language*, Milano, Giuffrè, 2005, 1, a6; P.MERCATALI (a cura di), *Computer e linguaggi settoriali. Analisi automatica di testi giuridici e politici*, Milano, Franco Angeli, 1988.

At the moment, the European Regulations in this field are internally negotiated and elaborated in all the official languages of the European Union and the adopted text is then adapted to the linguistic and juridical characteristics of all the official languages of the European Union.

For this purpose, specific meetings at the European Institutions take place in order to ensure that the different “national” versions of the text negotiated reflect the original meaning of the European legislator.

Nonetheless, it often happens that some adaptations to the national language can differ from the original meaning or, at least, can lead to different interpretations or applications.

Several examples can be given: for instance, article 4 of Regulation No. 593/2008, dealing with the applicable law in international contracts of selling, states that the applicable law to the contracts of sale of goods shall be the law of the State where the seller has its habitual residence.

This rule is so applicable to the sale of goods, being understood that the European legislator intended to apply this rule to the material goods and not to the immaterial goods⁴⁸. However, the Italian and the French versions respectively use the wordings “beni” and “biens”, which generally include also immaterial goods, while the Spanish version, more correctly, uses the wording “mercadería”, which excludes the inclusion of immaterial goods⁴⁹.

Therefore, the scope and the meaning of article 4 of Regulation No. 593/2008 – which is a crucial rule within the context of the above Regulation – changes according to the different versions.

Sometimes, the adaptations to the national languages are manifestly wrong and completely modify the original meaning of the text.

Just a wrong adaptation of even one word⁵⁰ is enough to completely change the meaning and the *ratio legis* of a rule or of the entire legislative text.

A simple example can demonstrate it.

Article 22 of Regulation No. 2201/2003 concerning the international jurisdiction and recognition of decisions in matrimonial matters as well as matters related to parental responsibility⁵¹ establishes common rules on recognition and enforcement of foreign decisions in matrimonial matters. The *ratio legis* of this Regulation is that decisions coming from an European member State shall be normally executed in all the European Union territory (the principle of mutual recognition of European decisions). Few exceptions to this principle are provided: in particular, European decisions shall not be recognized “where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defense unless it is determined that the respondent has accepted the judgment unequivocally”.

⁴⁸ See the positions of the delegations at the Council in doc. n. 14708/06 of the Council at <http://register.consilium.europa.eu>, p. 43 e p. 49.

⁴⁹ See P. Franzina, Commentario al Regolamento (CE) n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali, (Roma I), Le nuove leggi civili commentate, CEDAM, 2009, III and IV, p. 677.

⁵⁰ Let me mention the Nobel Prize José Saramago and his work “Historia do cerco de Lisboa” in which he describes the power of the word and how even a single word can completely change the meaning of the human history.

⁵¹ COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, O.J. 23.12.2003, L 338/1.

The *ratio legis* is to avoid the circulation of decisions in Europe if this decision comes from a judiciary procedure which did not respect the right to a fair trial.

However, the Italian translation of this article sounds in the following way: “a judgement shall not be recognized where it was given in default of appearance or if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defense unless it is determined that the respondent has accepted the judgment unequivocally”.

The Italian translation completely change the meaning of the rule and of the *ratio legis*⁵²: therefore, according to the Italian version, an European decision shall not be recognized each time it has given in default of appearance. However, default of appearance does not automatically mean violation of the principle of fair trial: each person is free to decide to appear or not to a process.

If he or she does not, that decision must be in any case executed in the country where it has been issued as well as all around Europe: otherwise, each person shall decide not to appear in order to automatically block the execution of the final decision.

Wrongful adaptations are present also in the national versions of the European Order for Payment: for instance, in the Italian version of this Regulation, the “defender” is sometimes called “imputato” which actually is used to make reference to the defender in criminal matters (the “accused person”) and not in civil matters.

4.1 Fields of interoperability.

As it has been described above, language plays an important role in the European Regulations in civil judiciary matters, including the European order for payment and Small Claims procedures.

Courts and parties – in other words, the actors of these procedures – need to understand each other’s communication and need to “dialogue”, as far as possible, in a common language.

In order to achieve this goal, European Union legislator set up a common linguistic platform, the European Judicial Atlas in civil matters: this platform helps parties to automatically translate the standard forms of both Order for payment and Small Claims procedures into the requested language by using a specific software.

This platform allow citizens to fill the European Small Claims forms directly in the language requested: citizens fill the forms in their own language and a specific software automatically translates the forms into the language requested.

This software is undoubtedly very helpful for European citizens aiming to access to the European civil proceedings procedures: till now, it has played an important role for the good functioning of

⁵² Article 22, lett. b of the Italian version of Regulation No. 2201/2003: “*La decisione di divorzio, separazione personale o annullamento del matrimonio non è riconosciuta nei casi seguenti: (...) b) quando è resa in contumacia, ovvero la domanda giudiziale o un atto equivalente non è stato notificato o comunicato al convenuto contumace in tempo utile e in modo tale da poter presentare le proprie difese, salvo che sia stato accertato che il convenuto ha accettato inequivocabilmente la decisione*”.

See on this MELLONE, Brevi considerazioni in merito all’impatto del diritto internazionale privato e processuale europeo sulla prassi giudiziaria italiana, in ROSSI, MELLONE, Il diritto internazionale privato dell’Unione Europea, Napoli, 2011, p. XVII.

other European instruments of civil judiciary cooperation, such as the European Regulation on service of documents, the European Regulation on taking of evidences etc.

Indeed, it can highly reduce the problem of the translation of the documents⁵³ in cross boarder cases, especially if the claim has a very small value claim (such as in the European Small Claims procedure). Otherwise, this citizen can be discouraged from applying for this procedure and can be lead not to start any lawsuit due to the huge costs of translation of documents.

However, it can not solve all the problems arising from the practical application of these Regulations.

First of all, the mechanism of translation of the European Judicial Atlas is based on the fact that the forms of the European Small Claims procedure are “standard” or, in other words, they have the same “fixed” content for all the Member States. Therefore, the translation of the Atlas is limited to these “standard” parts of the forms: no translation is provided for the parts of the forms which must be filled by the parties. For instance, no translation is provided for the part where the claimant described the nature of the issue and the object of the claim (part 8 of the Claim form- Annex 1). Therefore, citizens are however obliged to ask for the help of a translator.

Secondly, the software of European Judicial Atlas does not provide for the translation of the attached documents, such as an invoice, an agreement, a letter of intent etc. It must be remembered that both claimant and defender are called not only to respectively file the claim and the response by using the standard forms – and therefore, translating them by the ATLAS platform - but also to file the documents related to the claim or to the response.

These documents must be translated⁵⁴ into the language of the seized Court or to the language of the counterparty⁵⁵.

At the moment, there are no other mechanisms – at European level - for the translation of the documents which are filed together with the claim. This is an issue which is under the competence of the Member States.

The need for translation of the documents seriously risks to jeopardize the goal of the European Small Claims procedure to reduce the costs for international disputes for small value claims.

Moreover, it must be underlined that the claimant could be obliged to translate the claim and the attached documents not only in the language of the Court but also in the language of the defender.

53 It must be remembered that the term “documents” in the “European meaning” makes reference to the claim and to the attached documents. See European Court of Justice, 08.05.2008, C-14/07,

54 See the European Court of Justice, 8.11..2005, C-443/03; 09.02.2006, C- 473/04; 08.05.2008, C- 14/07.

55 More precisely, article 6 states: *1. The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal. 2. If any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment. 3. Where a party has refused to accept a document because it is not in either of the following languages: (a) the official language of the Member State addressed, or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched; or (b) a language which the addressee understands, the court or tribunal shall so inform the other party with a view to that party providing a translation of the document”. At the same time, it must be added that not all the documents must be filed with the claim. According to the case law of the European Court of Justice, citizens are required to file those documents which are necessary for the Court to understand the nature of the issue and the object of claim: see, European Court of Justice, C-14/07, 08.05.2008.*

More clearly, accordingly to the rules of jurisdiction set out in the Regulation No. 44/2001, it can occur that the European Small Claims procedure runs before a Court of a State “C” other than the State of the claimant (“State A”) and other than the State of the defender (“State B”). That happens, for instance, when the object of the claim is a right on an immovable property and the parties are domiciled in two European countries other than the country where the property is located⁵⁶.

In these cases, the claimant and the defender must bear a “double” cost of translation.

The translation of the documents is required not only for the forms and for the attached documents, but also for the European Small Claims judgment⁵⁷.

Finally, it must be not forgotten that European Judicial Atlas is an on-line mechanism of translation and as such it is not available for a (still) huge part of European citizens. Therefore, a “point of access” to the European Judicial Atlas and the necessary assistance for using it, should be provided in any Court of the European Union.

5. The legal interoperability and the taking of evidences.

Taking of evidences can be a crucial point for the good functioning of the European Regulations dealing with civil proceedings, especially for the European Small Claims procedure.

Indeed, in the European Order for Payment procedure the claimant is not called to attach evidences of the credit, but only to indicate them into the form.

On the contrary, the European Small Claims is an “ordinary” procedure in which both claimant and defender must prove the respective statements.

Therefore, it is possible that Parties – or the Court – need to take an evidence which is not “physically” located within the national territory of the Court seized, but in another European State.

For instance, the hearing of an important witness who is resident in an European State other than the State of the Court seized can be important for the final decision; or, a relevant document is registered by a body or owned by a person which is physically located in such foreign State.

In all these cases, the taking of evidence can entail some supplementary expenses which can strongly impact on the total amount of the foreseen costs for a cross border claim.

For this reason, the European Small Claims procedure does not entail any hearing, in so far as that would oblige the parties (and above all the claimant) and/or the witnesses to bear huge costs of transfer.

An hearing shall take place only in some exceptional cases. More precisely, an hearing shall take place if the Court considers this necessary or if a party so requests⁵⁸. This was the compromise

56 Indeed, according to article 22 of Regulation No. 44/2001, the Court of the Member State where the immovable property is located shall be competent to deal with the case.

57 See article 21 of the Regulation No. 861/2007: “*The party seeking enforcement shall produce: (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (b) a copy of the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept*”.

58 Article 5 of Regulation No. 861/2007: “*The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. 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. The reasons for refusal shall be given in writing*”. Moreover, according article 9 n. 2 “*The court or tribunal may take expert*

achieved during the negotiations of Regulation No. 861/2007: indeed, European Small Claims procedure could not provide any hearing at all, since it would have been considered not in compliance with the fair trial principle, established in article 6 of the European Convention on Human Rights as far as in article 47 of the European Charter of Fundamental Rights. Therefore, it is possible that, within an European Small Claims procedure, parties or witnesses shall participate to an hearing and, hence, shall move to the country where the proceedings are brought.

Once again, the interoperability can play an important role in order to reduce the costs and the problems for taking this kind of evidence.

5.1 Fields of interoperability.

The issue of taking of “foreign” evidences in Europe has been already examined and faced in the past by the European Union legislator. More precisely, European Union adopted Regulation No. 1206/2001⁵⁹ which provides for an important mechanism of cooperation/interoperability between the Courts of the Member States in the taking of evidences.

More precisely, Regulation No. 1206/2001 provides for two different systems of interoperability. According to the first level of interoperability, the seized Court requests to a Court of another Member State to take the evidence, as for instance to hear a witness: this is a high level of interoperability based on the mechanism of the delegation of the taking of evidences. Courts dialogue between them – once again through specific forms attached to the above regulation – in order to exchange information and instructions on the practical application of the requests for taking of evidences.

Moreover, the cooperation is strengthened by the presence of “central bodies” which are national Authorities charged to deal with the application of this Regulation.

The second level of interoperability is based on the direct taking of evidences: the seized Court physically moves to the other Member State and directly takes the evidence (i.e. hear a witness).

This is a lower mechanism level of interoperability, since the seized Court directly carries out the judiciary activity needed, although under the express authorization of the “hosting” State.

According to the “Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter”⁶⁰, this Regulation was not broadly applied in the Member States. More particularly, the study shows why and how the mechanisms of interoperability should be improved in order to guarantee a broader and more effective application to the Regulation.

European Regulation No. 1206/2001 does not “close the doors” to the use of videoconferences for hearing “foreign” parties or witnesses. However, this system of communication must be available at both the Courts involved⁶¹.

evidence or oral testimony only if it is necessary for giving the judgment. In making its decision, the court or tribunal shall take costs into account”.

59 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *OJ L 174*, 27.6.2001, p. 1–24.

⁶⁰ See it at http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

⁶¹ See article 10.4 of Regulation No. 1206/2001: “*The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference. The requested court shall comply with such a requirement unless this is incompatible with the law of*

Therefore, the practical application of these technological means actually depends on the national realities.

The same approach is adopted by the European Small Claims procedure: the Court seized can use videoconferences in order to reduce costs of transfer for the parties and/or witnesses.⁶²

However, the European legislator did not impose on the Member States the obligation to provide for video conferences in their national Courts. It should have not been a workable solution, since these technological means are very expensive and, at the moment, are present just in some Courts of some Member States⁶³.

Therefore, as previously described, the European legislator adopted an approach based on the single Court seized: if the Court seized is equipped of the technological means for a video conference, the oral evidence can be taken by that means. Otherwise, parties and/or witnesses are obliged to bear the costs for the transfer⁶⁴.

Although the hearing has a residual role in the European Small Claims procedure, the interoperability between Courts and citizens based on video conferences should be encouraged.

Indeed, that would strongly reduce the costs for European citizens to participate in the hearing before a foreign Court and, at the same time, that would allow the Court seized to personally hear the parties and/or the witnesses.

Of course, this level of interoperability can facilitate not only the small value disputes, but also all the transnational disputes: the use of video conferences could strongly improve the functioning of the European judiciary space, by reducing the costs for transnational disputes and by strengthening the right of defense of the parties. Video conferences could be used for the personal hearing of the parties and/or of the witnesses and/or of the experts.

Regulation No. 861/2007 does not make any direct reference to the Council Regulation No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

However, if the mechanisms of cooperation of Regulation No. 1206/2001 was improved, the European Small Claims procedure would undoubtedly take advantage of it. Indeed, the seized Court could request to the Court where the plaintiff is domiciled to hear the latter and/or to hear witnesses who can be useful for the final decision.

the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons, it shall inform the requesting court, using form E in the Annex. If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement”.

⁶² Article 8 of Regulation No. 861/2007 states that: “ *The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available”.*

⁶³ At the same time, the recital No. 20 of the Regulation No. 861/2007 states that “*In the context of oral hearings and the taking of evidence, the Member States should encourage the use of modern communication technology subject to the national law of the Member State where the court or tribunal is situated. The court or tribunal should use the simplest and least costly method of taking evidence”.*

⁶⁴ It must be added that, in some cases, parties can ask for a legal aid. Member States are obliged to grant this aid within the common framework set up by the Decision 2005/630/EC.