

ADAPTING IRISH SMALL CLAIMS PROCEDURE

Adapting the Irish Small Claims Procedure to the E–Commerce Era

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The notion that most people want black-robed judges, well-dressed lawyers, and fine panelled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.

Warren E. Burger, former Chief Justice, United States Supreme Court

‘Our Vicious Spiral’ Judges Journal 22, 49 (1977)

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ABSTRACT

This article evaluates the impact which the proposed European Small Claims Procedure (ESCP) may have on the existing Small Claims Procedure (SCP) in Ireland. Part one reviews the present Irish Small Claims Procedure. Part two considers the proposal for a Regulation establishing a European Small Claims Procedure for the resolution of cross-border disputes and its relevance for the resolution in Ireland of small claims in cross-border disputes. The present Irish SCP is designed to deal with low cost disputes at a national level. Consequently, the resolution of small value disputes with a cross-border element such as those arising from e-commerce is untouched under the domestic SCP. In order to promote increased consumer confidence and a truly integrated common market, the European Commission has produced a proposal for the regulation of an ESCP intended to be implemented by the year 2009. The proposed ESCP is predominantly a written procedure that deals with claims under €2,000 in value arising in cross-border disputes, and it provides for the enforcement of decisions in any of the member states (with the exception of Denmark) without the present need of going through the formal mutual recognition of judgements.

This article discusses the challenges posed by the European Commission proposal as modified by the European Parliament and the European Economic and Social Committee. The main conclusion of this article is that the ESCP, in conjunction with Information Communication Technology (ICT) tools, has the potential to realise more efficient enforcement of the rights of European consumers. This article also argues that the effectiveness of the Commission’s proposal may be hindered by its own restrictions, such as its exclusive application to cross-border disputes, its low monetary threshold and the lack of adequate provisions supporting Alternative Dispute Resolution methods such as mediation and negotiation.

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A THE CONCEPT OF SMALL CLAIMS COURTS

Several legal systems offer an expeditious procedure called a Small Claims Procedure (SCP) to resolve small claims without the need for legal representation. The aim of the SCP, as opposed to ordinary civil procedure, is to provide a means of dispute resolution where the expense and the time involved are not proportionate to the value of the claim. Other legal systems offer simplified procedures applicable to small claims and, arguably, these procedural simplifications can also be considered a SCP because in practice very similar results are achieved.²

Baldwin identifies five main features of the SCP that distinguishes it from the ordinary civil procedure.³ Firstly, the SCP is a more informal and simplified procedure. Secondly, legal representation of litigants is generally discouraged. Accordingly, claimants are not obliged to make any legal arguments to support their claims. Thirdly, judges play a more interventionist role at the oral hearings by assisting unrepresented litigants in relation to procedural matters. Fourthly, procedural rules are more relaxed for litigants and judges, giving litigants more flexibility in presenting their evidence, and judges more freedom in reaching their decisions.⁴ Finally, litigants often pay for their own legal costs.

B SMALL CLAIMS PROCEDURE IN IRELAND

1 Introduction

Under Irish law, the District Court is competent to hear small claims on the basis of the District Court (Small Claims Procedure) Rules, 1997 & 1999.⁵ Only consumers are eligible for this procedure where they have bought goods or contracted services for private use from someone selling them in the course of business.⁶ Claims relating to minor damage to property and non-return of rent deposits may also be addressed under the SCP.⁷ However, personal injuries, hire-purchase agreements, breach of leasing agreements and debts are excluded from the SCP.⁸ The maximum amount of a claim is €2,000.

² With the publication of the Green Paper on the European Order for payment procedure and the measures to simplify and speed up small claims litigation of 20 December 2002 COM (2002) 746 final, the European Commission distributed a questionnaire to all the EU Member States. The results showed only four Member States had formal small claims procedures: Ireland, the UK, Spain and Sweden.

³ See J. Baldwin "Is There a Limit to the Expansion of Small Claims" (2003) 56 *Current Legal Problems* 317-318.

⁴ *ibid.* at 328

⁵ SI No. 191 of 1999.

⁶ SCP (1999) Rule 1. Only consumers in a transaction with a business can access to the SCP which excludes businesses and private sales between consumers.

⁷ Examples of these claims are deposits from holiday home or a room/flat in a premises where the owner also lives but claims related to rented accommodation are only within the competence of the Private Residential Tenancies Board.

⁸ These limitations are quite stringent in comparison to other SCPs in the EU. In Spain, England and Wales for instance debts are quite frequent matters in the SCP.

Claims over this limit fall under the ordinary civil procedure of the District Court.⁹

The Irish SCP is designed to allow consumers with small value disputes to obtain redress in court at a low cost without the need of legal representation. This is reinforced by a prohibition on the District Court awarding legal costs to any of the litigants.¹⁰ The standard claim form points this out in a clear and concise manner by saying:

You may engage a solicitor at your own cost. The respondent may do likewise. The whole point of this procedure is that you can bring a claim without using a solicitor. If you do engage one, you will have to meet his/her costs even if you win your case.¹¹

2 Online Procedure

The SCP commences when the claimant (the consumer) submits a claim either in Irish or English with the corresponding fee of €15 in the Small Claims Office at the District Court. Since 5th of December 2006 a pilot project allows lodgement of a claim and the fee online in 16 District Court areas.¹² The pilot project also permits the claimant to monitor the progress of his claim. Extension of the project to the entire Irish State is planned for the end of April 2007.¹³ This project, which has cost €700,000 to date, is to be followed by a similar initiative that would allow monitoring High Court cases and paying court fines online.¹⁴ The initiative in the High Court is expected to be fully implemented by June 2007.¹⁵ Meeting this deadline may depend to some extent on the results of the Small Claims Online pilot project.

To lodge an online claim, a consumer must click the Small Claims Procedure box at www.courts.ie. Once there, the site explains the coverage of the SCP and the option of filing an online application where a particular District Court area is part of the pilot project. Consumers are expected to read simple and brief Guidelines and a Checklist before they fill in the application on the secure website. A District Court clerk, called the Registrar, will receive the claim and will consider whether the claim is appropriate for the SCP, and

⁹ The monetary limit was increased from €1,269 to €2,000 with effect from 7 February 2006. In the ordinary civil procedure at the District Court the monetary limit is €6,350.

¹⁰ Not all district judges welcome the assistance of lawyers, particularly when only one party is represented, because that may inhibit them from playing a more interventionist role. *supra.* at 334.

¹¹ Online Claim Form, Claimant Solicitor Question Screen at www.courts.ie.

¹² Although the online procedure was not officially launched until 5th of December the pilot project started the 6th of November. During that month 20% of small claims applications received in the Dublin District Court have been lodged online. See “Consumers invited to lodge complains online, Ireland On-Line” 5 December 2006. Available at www.breakingnews.ie.

¹³ “Small Claims Court to process claims online”, RTÉ News, 5 December 2006. Available at www.rte.ie/news. It was also broadcast on the same day on RTÉ1 national news.

¹⁴ *Ibid.*

¹⁵ Radio Program Morning Ireland (Interview with John Coyle director of IT at the Court Service) 5 December 2006. Available at www.rte.ie/news.

if so, the claim would be admitted and processed.¹⁶ If the Registrar rejects the claim, an email will be sent to the claimant informing him of the reasons for the rejection. If the court Registrar admits the claim a notification will be sent to the claimant with the corresponding case number along with a pin number which allows the claimant to follow the case online. A copy of the claim coupled with all the documentary evidence and a Notice of Dispute will be sent to the respondent (the business) by registered post.¹⁷

The main advantage of the online initiative is that it makes the SCP accessible to consumers who can now file and monitor their cases from a computer, twenty four hours a day, seven days a week. Commenting on the accessibility of the online initiative, Mr PJ Fitzpatrick, Chief Executive Officer of the Courts Service, said that:

[it] facilitates those who through business, transport or mobility challenges ... cannot easily attend at a court office, to now, without inconvenience, lodge a claim with the minimum of fuss or red tape.¹⁸

“The main purpose of the Small Claims Online service is to settle cases before they go to court, saving time for both the claimant and the court.”¹⁹ If the respondent accepts the claim, or if he does not reply to it within fifteen days, the District Court will make an order in the complainant’s favour for the amount claimed. This must be paid in a short specific period of time by a cheque which will be sent by post to the claimant without the need to attend court.²⁰

3 Offline Procedure

The respondent may accept, ignore or contest the claim. In the first case, if the respondent accepts the claim it will be necessary to notify the Registrar by returning the Notice of Acceptance of Liability form; this would make the claim immediately enforceable.²¹ Secondly, if the respondent does not reply to the claim within fifteen days, the claim will be automatically treated as undisputed. The Registrar at this stage will ask the claimant to swear an affidavit, and then the District Court will make an order in favour of the claimant. The District Court will order the respondent to pay the amount requested in the claim.²² This amount will be limited to the claimant’s financial loss, excluding any additional compensation.²³ Finally, in the event

¹⁶ The Registrar will admit only those claims from consumers that had concluded a contract in Ireland and where the business has its premises in the jurisdiction where the court sits.

¹⁷ SCP (1999) Rule 5.

¹⁸ David Forsythe quoting PJ Fitzpatrick, “Small claims goes online”, *Cork Independent*. 7 December 2006.

¹⁹ SCP (1999) Rule 4 and 8 (1).

²⁰ In 2005, a total of 2,697 small claims were reportedly dealt with the Court Service: 2,114 (78%) were settled or decided in favour of the claimant. From the total, 55% of claims were settled by the Registrar without a court hearing, 310 were not proceeded with and 560 were to court for an oral hearing. This information is available at the statistics section of

²¹ SCP (1999) Rule 6 (1).

²² SCP (1999) Rule 11 (1).

²³ Additional compensation such as loss of earnings can be awarded in the ordinary civil procedure but not in the SCP.

that the respondent contests the claim, the Registrar may interview and negotiate with both litigants separately with the intention of reaching a pre-trial settlement.²⁴ The Registrar may propose solutions when requested by the litigants. Over half of the cases are settled with the aid of the Registrar without the need for an oral hearing in court.²⁵ If the matter cannot be settled, the claim will be brought before the District Court judge for a public hearing. On the day of the hearing, litigants will be expected to explain the facts and give evidence under oath. During the oral hearing, litigants will be allowed to bring their own solicitors, experts and witnesses, but each party will bear his own costs.²⁶ Once the District Court judge reaches a decision, litigants are formally notified by letter. The judgment can be appealed to the Circuit Court where the judge may award the costs in favour of the successful party.

The respondent has four weeks – counting from the day the judgement was rendered – to pay the amount awarded by the court. If the respondent does not pay in time, the claimant will be advised by the Registrar to send a Court Order (Decree) to the sheriff for the execution of the judgment.²⁷ At this stage the sheriff will first send a letter to the party in question asking for due payment.²⁸ If the party refuses to comply with the order, the sheriff may seize any property of the respondent to pay the claimant.²⁹

4 Assessment

The resolution of small value disputes faces two major obstacles. The first obstacle is frequently the small amount of money at stake. When there is little money involved, consumers will not seek a remedy in court because the cost of this may be more than the amount claimed, particularly when adding the loss of earnings in attending the court and the stress of litigation.³⁰ Lord Woolf's reports analyzing the SCP in the UK found that high costs were the main obstacle, and argued that in order to obtain effective civil litigation "we must seek to achieve a more proportionate but workable system, not one which is theoretically impeccable but unaffordable".³¹ Lord Woolf's Reports,

²⁴ SCP (1999) Rule 4 and 8 (1).

²⁵ In 2005, a total of 2,697 small claims were reportedly dealt with the Court Service: 2,114 (78%) were settled or decided in favour of the claimant. From the total, 55% of claims were settled by the Registrar without a court hearing, 310 were not proceeded with and 560 were to court for an oral hearing. This information is available at the statistics section of www.courts.ie.

²⁶ SCP (1999) Rule 10 and 13.

²⁷ This payment will be that of the amount owed to the claimant plus the sheriff's costs for the execution.

²⁸ This payment will be that of the amount owed to the claimant plus the sheriff's costs for the execution.

²⁹ The execution of the Decree may be quite flexible allowing in some cases the payment in instalments. Registrars are notified about the executions of the judgment.

³⁰ See Robin C. A. White, *The English Legal System in Action* (Oxford University Press, 1999) 293.

³¹ The report stated that in 40% of the claims with a value of less than £12,500, the costs for the successful party alone were close to, or actually exceed, the total value of the claim. See Lord Woolf produced two reports, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, Lord Chancellor's Department, 1995)

which advocated legal procedures that are proportionate and accessible for small value disputes, significantly influenced the reform of both UK law and the reform of the Irish law of civil procedures. Thus, one must welcome the insertion of the Online Small Claims Procedure in Ireland because it lowers economic barriers to litigants.

The second obstacle is the increasing volume of cross-border disputes. The internet has made it possible to enter into inter-jurisdictional arrangements at the click of a mouse. This development has significantly complicated the resolution of disputes. At present, the resolution of cross-border disputes is beset with difficulties. The current Irish SCP is not completely available for use by non Irish residents. The European Consumer Centre – Clearing House Dublin (ECC/CH) explains that the SCP was not created with cross-border cases in mind.³² Despite the fact that the law allows claimants who are non-Irish residents to initiate legal actions in Irish courts, significant burdens are imposed, because litigants have to be physically present in contested claims during the court oral hearing. If the claimant decides not to attend the hearing it would cause an obvious imbalance between the parties. As a result, litigants living abroad would have to pay travel and accommodation expenses which cannot be recovered under the SCP. The ECC/CH report recommends the development of consumer Alternative Dispute Resolution (ADR) methods as the most plausible means to resolve cross-border disputes in the future.

ADR encompasses any method of settling disputes outside (alternative to) litigation. ADR is usually subdivided into three main approaches: negotiation, mediation and arbitration. Methods of ADR that rely primarily on the use of Information Communications Technology (ICT) tools are generally referred as Online Dispute Resolution (ODR).³³ Since the present Irish procedures for dealing with small claims were designed to address low cost disputes at a national level, their application to resolving cross-border disputes has proved quite inefficient. This inefficiency is currently being addressed at European Community level by the European Commission in its recent proposal for the regulation of a European Small Claims Procedure.³⁴

C PROPOSAL FOR A REGULATION FOR A EUROPEAN SMALL CLAIMS PROCEDURE

1 Introduction

In March 2005 the European Commission issued a proposal for the regulation of the ESCP, which found general support from the European

354 and Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (London, Lord Chancellor's Department, (1996) 106.

³² European Consumer Centre Clearing House Dublin "The Small Claims Court and its Use in Cross Border Dispute Resolution" June 2004, (web).

³³ For a clear differentiation between ODR and ADR see Gabrielle Kaufmann-Kohler and Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice (Kluwer Law International, The Hague, November 2004) 3.

³⁴ Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure COM (2005) 87 Final.

Economic Social Committee and the European Parliament, with some modifications. Presently, it is left to the European Council to adopt the common position. Major changes are not expected, since the European Council has agreed to the main modifications made by the European Parliament. The Commission proposal is expected to come into force by January 2009.³⁵

2 Scope of the ESCP

The scope of the ESCP proposal extends to all civil and commercial matters. This includes not just consumer disputes but a range of civil claims such as personal injury compensation, disability discrimination and unequal access to services. There are a number of exceptions to the ESCP. These are matters relating to revenue, customs, administrative matters, status or legal capacity of natural persons, property rights outside of a matrimonial relationship, wills and successions, maintenance obligations, tenancies of immovable property (except actions on monetary claims), violations of privacy and rights relating to personality (including defamation), insolvency, employment law and social security.³⁶ The main reason for these exclusions is that there are differences in national laws on these matters.

3 Cross-border Disputes

The European Commission proposed that the ESCP should be applied in all Member States as an additional procedure for cross-border disputes as well as for domestic disputes.³⁷ The Commission maintains that using ESCP for domestic disputes would “eliminate distortions of competition between economic operators in different Member States and facilitate access to justice under equal conditions in all Member States”.³⁸ This issue was debated in the European Council where most Member States proposed that the ESCP should be restricted to cross-border disputes.³⁹ The UK government expressed its opposition to the use of the ESCP in domestic disputes, based on Article 65 of

³⁵ European Parliament press release: A new small claims procedure for cross border cases. (25 October 2006) (web); Article 23.2 as amended by the European Parliament opinion of 24 October 2006.

³⁶ Article 2. Arbitration is also explicitly excluded, even though its exclusion from this Regulation is already obvious given the different nature and regulation of arbitration. See Opinion of the European Economic and Social Committee (EESC) of 15 February 2006 para. 6.1.3.

³⁷ The Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial law [COM (2002) 196 final] states that Member States have the obligation of providing access to justice through a “swift and inexpensive legal proceedings” p.7.

³⁸ ESCP (n.35) Recital 6.

³⁹ Department of Constitutional Affairs (the UK), Partial Regulatory Impact Assessment on a EU Proposal for a Regulation creating a European Small Claims Procedure. (2005) para. 10 (Available at www.dca.gov.uk); See also The Courts: Small Claims Government Response to the Constitutional Affairs Select Committee’s Report. February 2006. para 24. The House of Lords recommended that the ESCP should not be mandatory, allowing temporally domestic procedures to be available. House of Lords, European Union Committee: European Small Claims Procedure, 23rd Report of Sessions 2005-06 para 78.

the EC Treaty which limits Community participation to cross-border issues, and consequently on the principles of subsidiarity and proportionality.⁴⁰

The European Parliament recently introduced an amendment whereby the ESCP would only be applied to cross-border cases.⁴¹ A cross-border case is one “when at least one of the parties in a dispute is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised.”⁴² However, the UK had proposed a more accurate definition in keeping with Article 65 of the EC Treaty which maintains that a cross-border claim is one that “has arisen directly from the supply of goods or services out of one Member State into another.”⁴³ It is proposed that the use of the ESCP as an optional procedure for domestic disputes may remove the national limitations of domestic procedures. For instance the SCP in Ireland can only be used by consumers in a very limited number of situations.⁴⁴ In Spain the upper limit of a small claim is €900.⁴⁵ These differences would be removed if the proposed ESCP were introduced for domestic disputes. Furthermore, most Member States do not have a domestic SCP at all, and they could benefit from its use.⁴⁶ I propose, on one hand, an optional adherence to the ESCP for domestic disputes in those Member States which opt for it. It should on the other hand be compulsory adhered to in those countries which do not have a SCP at all.⁴⁷ This might take a step towards a legal uniformity and the objective of obtaining a single and coherent area of justice within the EU.

4 Enforceability

Probably the main advantage of the ESCP is that it allows the enforcement of a judgment in any Member State (with the exception of Denmark) without any present need to go through the formal mutual recognition of judgements.⁴⁸ The ESCP makes enforcement significantly faster

⁴⁰ House of Lords, European Union Committee: European Small Claims Procedure, 23rd Report of Session 2005-06 para 6. These restrictions however were not supported by other UK entities such as the Association of the Personal Injury Lawyers and the Citizens Advice Bureau. See Response by the Association of Personally Injury Lawyers 5, October 2005 (Available at www.apil.com); Citizens Advice Bureau Press Release: Establishing a European Small Claims Procedure, 7 October 2005 (Available at www.citizensadvice.org.uk).

⁴¹ Article 1.1 as amended by the European Parliament Opinion of 24 October 2006.

⁴² It follows the agreement of the JHA Council of 1 and 2 December 2005. See European Parliament Opinion the 19 May 2006. Article 1.1 as amended by European Parliament Opinion the 25 October 2006 and its justification to it.

⁴³ House of Lords, (n.38) para 72.

⁴⁴ *supra*. n.7.

⁴⁵ Article 31.2.1 Spanish Civil Procedural Act *Ley de Enjuiciamiento Civil* (LEC) of 8 January 2000 and *Ley Organica del Poder Judicial* (LOPJ) developed by the the Ley 38/1988 de *Demarcación y Planta Judicial* and the RD 122/1989) Consumers in Spain have also another voluntary procedure aside from the courts, which is the Consumer Arbitration System (*Arbitraje de Consumo*). Courts, the consumer associations and the government encourage its use.

⁴⁶ *supra*. n.1.

⁴⁷ This point of view is rejected by the House of Lords which clearly expressed that the EC should not reform (or improve) Member States' civil judicial procedures outside their competences. House of Lords, (n.38) para 62.

⁴⁸ Article 2(3) excludes Denmark from the ESCP.

and less expensive.⁴⁹ The ESCP procedure is carried out without the condition of a security by filling in a form in any of the languages recognised by the Member State where enforcement is sought.⁵⁰ There is a significant exception to this rule involving judgments in uncontested claims.⁵¹ The peril of this exception is that the defendants who are aware of this may refuse to participate in the procedure in order to hinder the enforcement of the judicial decisions that will follow the recognition procedure. In that case, a second judgment by the court of the Member State of enforcement is required.⁵² The UK proposes the application of the ESCP enforcement procedure to all judgments, contested and uncontested.⁵³

5 Judicial Review

International law does not consider the right of appeal in civil procedure as a fundamental right, but as a matter to be determined by the national legislator. Presently, there is a significant diversity of views on this matter under national laws. As a result, the ESCP leaves it up to Member States to decide whether an appeal is available under their national procedural law against a judgment rendered in an ESCP.⁵⁴ In the event that an appeal is available it must be communicated to the Commission. The Commission's proposal stated that any appeal procedure could not require legal representation for the parties but this provision was later amended by the Parliament.⁵⁵

The ESCP also foresees the possibility that Member States may allow the review of an ESCP judgment but only in exceptional circumstances where there had been faulty communications or *force majeure* that impeded the defendant from contesting the claim.⁵⁶

6 ICT in the ESCP

The use of the Internet and ICT tools will definitely reduce barriers in access to justice by simplifying court formalities, lowering costs, increasing international cooperation, and promoting the use of major languages.⁵⁷ Another major advantage of the Internet and ICT is that it provides information in a fast and centralised way, which is useful in a judicial procedure with an international dimension. In this regard the European

⁴⁹ Article 18 abolishes the intermediate measures of *exequatur*, whereby under the Brussels Regulation 44/2001 a second judgement is necessary before recognising a judgement from another country.

⁵⁰ Article 13.

⁵¹ This does not include creditors who from October 2005 have the option to bypass the recognition procedure in uncontested cases by using a European Enforcement Order (EEO) under Regulation 805/2004.

⁵² In those cases recognition and enforcement may be sought in accordance with the provisions of Regulation 805/2004 and of Brussels Regulation (Article 19).

⁵³ House of Lords (n.38) para 187

⁵⁴ Article 15.

⁵⁵ Article 15 as amended by the European Parliament opinion of 24 October 2006.

⁵⁶ Article 16.

⁵⁷ Orna Rabinovich-Einy 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape' (2003/04) 6 Yale J. L. & Tech. 17.

Parliament has introduced informative web links for parties involved in the ESCP.⁵⁸ The claim and answer forms will be available on the Internet, a requirement which will further facilitate access to the ESCP.⁵⁹ However, the current proposal leaves it up to the Member States to decide whether or not to provide the use of online lodging of claims, the use of e-mail for interrogating witnesses or to admit experts' opinions, etc.⁶⁰ Despite this, the European Parliament encouraged the use of ICT tools for the oral hearings and the taking of evidence:

Member States should encourage the use of modern communication technology. The court or tribunal should use the simplest and least costly means of taking evidence.⁶¹

The objective of the ESCP is the creation of a cost efficient procedure applicable to small-value claims in cross-border disputes. This objective can only be achieved by using a written procedure, assisted by electronic forms such as emails and videoconferencing as foreseen by the proposed ESCP. Additionally, the ESCP enables the use of new technologies in transferring information and evidence between the courts of the different Member States.⁶² However, it will be the Member States who will decide, through their own regulations, which specific means of communication are acceptable in their courts.⁶³

Given that the ESCP is a proposal for a Regulation and not a Directive, it is arguable whether it leaves too many aspects to the discretion of Member States, which could call into question the legal certainty expected from a European regulation.⁶⁴ This approach on one hand creates some degree of procedural disharmony within the EU. On the other hand, this approach

⁵⁸ Standard form A.

⁵⁹ The European Parliament had introduced this requirement in its opinion of 19 May 2006 (Article 3.7) but was later removed in its opinion of 24 October 2006. The reason for this change cannot be other than the principle of subsidiarity leaving this requirement to the Member States. Given that this is a regulation, such provision would be desirable.

⁶⁰ The EESC recommends the use of telephone for obtaining evidence only when the identity of speakers may be proved and conversations can be recorded and transcribed the statements made. EESC (n.35) 6.6.1.

⁶¹ Recital 10 as amended by the European Parliament opinion of 24 October 2006. See also Article 7.2 as amended by the European Parliament, opinion of 24 October 2006. This has been justified by the European Parliament opinion by stating: "There is a need to reconcile the principle of proportionality of the procedure with that of the quality of the judgment, which must be based on sufficient proof. Besides, the proposal's purpose is to simplify the procedure, but not to the point of allowing the court to dispense with all rules on the burden of proof or the hierarchy of methods of taking evidence." See Amendment 64.

⁶² Article 3 admits the lodgement of claims by email. Article 6 and 7 allows the use of IT for the hearings and taking of evidence.

⁶³ Article 3.1 of the Proposed Regulation provides "The claim form may be lodged directly, by post or by any other means of communication such as fax or email acceptable to the Member State in which the procedure is commenced"; Article 6.1. "The court or tribunal may hold a hearing through an audio, video or email conference, if the technical means are available and if both litigants agree"; Article 7.1 "In particular, the court may admit the taking of evidence through telephone, written statements of witnesses, and through an audio, video or email conference".

⁶⁴ EESC (n 35) 6.5.2.

attempts to comply with the principle of subsidiarity, and to promote the use of ICT tools in those courts that are prepared to use them, while it encourages their use in those courts which are presently not well-equipped with ICT tools. It is thus expected that, in due time, electronic communications would reach every possible and reasonable aspect of the judicial procedure to assist in the resolution of online as well as offline disputes. During this evolutionary process it would be advisable neither to impose the use of technology nor to discourage it, taking into account all types of individuals and their needs. Users without Internet access or with a limited knowledge in ICT should not be discriminated against, by being forced into using an unfamiliar electronic means. In the same manner, the law should not constrain those courts or litigants who feel confident in using ICT tools and could then benefit from them. Therefore, in my view, courts should incorporate ICT into legal procedure in a way that makes it more efficient and accessible to the consumers. However, its use should not be mandatory for consumers without ICT skills, as it could create a new barrier in access to justice.

7 ADR as a complement to ESCP

The use of ADR tools such as mediation and negotiation can be particularly useful for some types of contractual relations, such as those where there is a cross-border element, and where a long-term relationship exists between the parties, which it would be inadvisable to jeopardise with a court case, eg disputes with a neighbour or with an organisation to which the consumer hopes to deal with again. ADR is also effective in resolving those disputes where both parties are willing to reach an agreement. When two parties settle a dispute amongst themselves the result will be convenient for both of them; by contrast, when the dispute is solved in court the award may not satisfy both parties to the same degree.

Notwithstanding this, the use of the ESCP is still necessary when one party refuses to negotiate a settlement, which leaves the courts as the only opportunity to obtain redress. Furthermore, an unnecessary use of ADR could cause additional expense to the parties.⁶⁵ The ESCP should encourage more clearly the use of ADR and ODR. The only reference made thereto is in Article 9.4 which vaguely states “Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.” This was first expressed by the European Parliament and more recently by the European Economic Social Committee (EESC)

In keeping with its views repeatedly expressed on the matter, the EESC reaffirms its commitment to the development and strengthening of mechanisms for alternative dispute resolution (ADR), which should set out strict, clearly defined principles and rules and be harmonised at Community level. A reference to these procedures could be included in the proposal's Explanatory Memorandum.⁶⁶

⁶⁵ “It is difficult to think what other dispute resolution mechanism can actually be cheaper or faster than the ESCP itself is intended to be.” House of Lords (n 38) para 206.

⁶⁶ Opinion of the European Parliament resolution on the prospects for approximation civil procedural law in the European Union COM (2002) 654 and Opinion EESC (n 35) 5.6.

In this respect, the English Small Claims Track leaflet informs and encourages the litigants to use ADR (eg negotiation or mediation), to the extent that if it is refused unreasonably by one party the judge in his discretion may impose legal fees on that party whether or not he is successful in the proceedings.⁶⁷

It is suggested that the implementation of the ESCP should be coupled with the use of ADR and ODR services, in order to relieve the courts of those disputes which could be settled outside of the courts. A reference should also be inserted in the claim form and its guidelines in order to inform the claimant of these options.⁶⁸

The use of ADR should be complemented by ICT (ODR) as far as the parties may benefit from it. ODR has proven to be an effective tool for resolving small value claims amongst consumers. The most famous example is SquareTrade, which has an exclusive contract with the popular online auction house eBay.

SquareTrade offers two levels of ODR to eBay users: direct negotiation and mediation.⁶⁹ To date, over two million disputes across 120 nations in 5 different languages have been resolved using this platform.⁷⁰ Disputes arising from an eBay transaction can be submitted to SquareTrade which will contact the other party by email. If the other party agrees to use SquareTrade they can start a negotiation process using a secure website accessible by a login password. During this first stage parties negotiate using electronic forms designed to help them identify main problems and possible solutions. This is achieved with software tools that rely on multiple choice boxes, limit the free text complaining of the users, encourage proposals for agreement, set deadlines, and even shape the tone of exchanges. This software is the key element of the process because it takes over some of the expertise of mediators.⁷¹ However, in those cases where parties cannot reach an agreement through assisted negotiation, they can require SquareTrade to assign a mediator.⁷² The appointed mediator may propose solutions, if required by the

⁶⁷ HMCS leaflet EX301 'Making a claim- some questions to ask yourself' p.1 "Court rules require you to think about whether alternative dispute resolution is a better way to reach an agreement before going to court. If you refuse to consider this, you may not get your costs back, or the court may order you to pay the other party's costs, even if you win the case." This has also become a practice in ordinary English civil procedures. See *Burchell v Bullard* [2005] EWCA Civ 358 and *Halsey v Milton Keynes General NHS Trust* [2004] 1WLR 3002.

⁶⁸ The UK has proposed the following question for the claim form: "Parties are encouraged to settle disputes arising between them without going to Court wherever possible. What steps have you taken to resolve your dispute before beginning this procedure?" House of Lords (n.38) para 207.

⁶⁹ See the ODR system of SquareTrade for eBay users at www.squaretrade.com/cnt/jsp/odr/overview_odr.jsp?marketplace_name=eBay&campaign=EBY_OD_1.

⁷⁰ See www.squaretrade.com (About us)

⁷¹ 85% of cases are settled through the use of facilitated negotiation. See Conley Tyler, M and Di Bretherton 'Seventy-six and Counting: An Analysis of ODR Sites' A Report of Research conducted for the Department of Justice, Victoria, Australia. Available at www.odr.info/unece2003.

⁷² This second stage involves the payment of a US\$40 fee.

parties to do so. Arguably, the role of the mediator overlaps with that of the arbitrator, but unlike arbitration, the proposed settlements are never binding on the parties. Settlements become binding once parties agree to them, and they are always kept confidential by SquareTrade. Thus, the use of ADR and ODR can complement the ESCP. If this is done appropriately – eg by informing the parties and by means of imposing legal fees on a party if participation in ODR is unreasonably refused – it may encourage litigants to settle their disputes in a faster and more efficient way. It would not be unrealistic to think that ODR will change the way disputes are resolved in the future, and move from being an alternative method to a primary method for resolving disputes.

D CONCLUSION

In evaluating the current Irish SCP it can be concluded that it is a suitable mechanism for resolving consumer disputes, which will soon be available all over Ireland at the click of a mouse. This procedure, however, has a very limited scope which is only available to consumers in a very limited number of domestic disputes. Nevertheless, the Irish procedure is about to be complemented by a new European Commission proposal for an ESCP which resolves many types of cross-border disputes.

The proposed ESCP is a written procedure that offers European consumers with cross-border disputes a new option for access to justice. This article suggests that the ESCP – if assisted with ICT tools – has the potential to increase the effectiveness of the enforcement of consumers' rights across the European Union. However, the potential of this proposal may be limited by its own restrictions. Those restrictions are mainly the exclusive application of the ESCP to cross-border disputes, its low monetary threshold, and the lack of adequate provisions supporting ADR and ODR. This article advocates that using the ESCP as an optional procedure for domestic disputes may remove the national limitations of domestic procedures. It also proposes that the current economic limit should be raised given that this procedure may not be the best option for the lowest monetary claims. For such claims ADR and ODR are likely to be more cost efficient and faster solutions.

Finally, it is suggested that the ESCP will also be more efficient if it is complemented by the assistance of ADR and ODR. To this end, clear provisions referring and encouraging the use of ADR and ODR should be included in the proposed Regulation for an ESCP. An effective implementation of the ESCP may in turn increase consumers' confidence in buying in other Member States, and promote at the same time the development of a truly integrated European market. The ESCP is the first step towards a unified European procedural law, the success of which will determine further implementation in higher claims and in other new areas outside the civil and commercial law.