

"Trusted with a muzzle and enfranchised with a clog": the British approach to European civil procedure.

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I am trusted with
a muzzle and enfranchised with a clog; therefore I
have decreed not to sing in my cage. If I had my
mouth, I would bite; if I had my liberty, I would do
my liking; in the meantime let me be that I am and
seek not to alter me.

Much Ado about Nothing A.1 sc. iii

In Shakespeare's play, Don John calls himself a 'plain-speaking villain', though in truth he is one of the tamest villains in the Shakespearean canon. Although it would not be entirely appropriate to equate the British government or the British public to a 'villain' in the context of the development and implementation of a European law of civil procedure, this particular quote from Don John does reflect a certain consciously self-ghettoising, self-defeating attitude to be found in the British approach. This approach, in turn, has a negative effect on that field as well, as the United Kingdom could, with a different outlook towards Europe in general, and EU 'activism' in particular, exercise a profound influence on the development of many core legal concepts, by bringing its Common Law experience to the debate. Instead, the Government line (regardless of political colour) has been so far to use deliberately a *de minimis* approach to implementation, and quite clearly also with regards to negotiation on new instruments, both from first principles and in the exercise of the power not to opt-in once a draft is finalised.

The history and development of 'European civil procedure' is now quite well known.¹ A growing judicial and institutional awareness of the capacity of court procedures to limit, if not thwart, the full enjoyment of EC rights led to the creation of the Third Pillar (including 'Justice and Home Affairs') under the Treaty of Maastricht, whose article K.1 brought 'judicial cooperation in civil matters' under the aegis of the matters of 'common interest'. This was then followed by the Treaty of Amsterdam, which placed the policy area of judicial cooperation in civil matters in the First Pillar, and introduced the legislative competence to adopt measures under Articles 61 and 65 of the EC Treaty. The embryonic beginnings of a European law of civil procedure were thus laid out, through the piecemeal accretion of subject-specific, scope-limited instruments, loosely based on Article 65's definition of 'measures in the field of judicial cooperation in civil matters having cross-border implications', with the two

¹ See generally E Storskrubb, *Civil Procedure and EU Law* (OUP 2008) and W Kennett, *The Enforcement of Judgments in Europe* (OUP 2000) for the history of the Commission's legislative projects in civil procedure.

explicit limitations to ‘matters having cross-border implications’ and ‘insofar as necessary for the proper functioning of the internal market’:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67, and insofar as necessary for the proper functioning of the internal market, shall include:

- a) improving and simplifying:
 - the system for cross-border service of judicial and extrajudicial documents,
 - cooperation in the taking of evidence,
 - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting compatibility of the rules on civil procedure applicable in the Member States.

The Commission lost no time in testing the limits of its new competence (and that under the following Treaty of Lisbon (article 81 TFEU)) and began converting existing Conventions into Regulations. It converted the original measure in this field, the Brussels Convention on Jurisdiction and the Enforcement of Judgments, which codifies traditional rules of conflict of law in relation to recognition and enforcement of foreign judgments,² into a regulation (Regulation 44/2001 [2001] OJ L12/1), and followed it with a number of other regulations, including Regulation 805/2004 on the European Enforcement Order (EEO) [2004] OJ L143/15.³ This was followed by Regulation 1896/2006 on the European Order for Payment (EOP) [2006] OJ L399/1, and finally Regulation 861/2007 on the European Small Claims Procedure (ESCP) [2007] OJ L199/1.⁴ Substantively, these three regulations have the following effects. The EEO Regulation establishes a procedure for the speedier enforcement of the judgment of one EU Member State in another Member State, if it complies with certain minimum standards. This procedure is of great value to an English judgment-creditor, as it enables her to obtain an equivalent of a *formule exécutoire*, required to enforce a judgment in most Civil Law jurisdictions but, as a legal

² [1998] OJ C27/1 (Consolidated version).

³ Regulation 805/2004 creating a European Enforcement Order for Uncontested Claims [2004] OJ L143/15: see C Crifò *Cross-Border Enforcement of Debts in the European Union* (Kluwer Law International 2008), Ch.2, and C Crifò ‘First Steps Towards the Harmonisation of Civil Procedure’ (2005) 24 CJK 200. In the first draft of an amended Regulation to substitute ‘Brussels I’ (COM(2010) 748 final), at its Article 92, Regulation 805/2004 would have been repealed in favour of a generalised abolition of *exequatur* proceedings in all cases except defamation and collective redress cases, complemented by ‘three main remedies ... by which [the defendant] could prevent in exceptional circumstances that a judgment given in one Member State takes effect in another Member State’: para.3.1.1. That proposal however did not survive the consultation and discussion process.

⁴ Both of which were introduced in the Green Paper COM (2002) 749 final, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0746&rid=1> <accessed 29 July, 2014>. See A Fiorini ‘Facilitating cross-border debt recovery: the European payment order and small claims regulations’ (2008) 57 ICLQ 449.

concept, is unknown in the common law. The EEO regulation allows the litigant from one jurisdiction to bypass the foreign court processes where there is such a requirement for enforcement. The EOP Regulation goes one step further, as it creates a simple procedure to obtain, from the start, a special kind of court order for the payment of uncontested debts, which is immediately enforceable throughout the Union. There is no equivalent to this procedure in the English Civil Procedure Rules. The English litigant in a cross-border situation is faced with a choice between seeking a normal judgment which could then be made enforceable through the EEO, or the different, unknown procedure, which however is advantageous in that it is given in her own court and language, and it avoids the second step of obtaining the EEO. Finally, the ESCP Regulation attempts to create a uniform adversarial small-claims procedure for cross-border claims. Unlike the two previous procedures, a small claims procedure does exist in England and Wales, and is indeed one of the most successful procedures⁵ to have issued from the 1998 civil procedure reforms. With regards to the ESCP, therefore, a question arises as to the extent of the integration, competition and 'fit' between the European cross-border approach and the existing domestic procedure.

Other important procedural fields in which the Commission has produced legislation include cross-border service of judicial documents,⁶ the taking of evidence abroad,⁷ mediation,⁸ legal aid,⁹ and various procedural aspects of family proceedings¹⁰ and insolvency proceedings.¹¹ Further developments are expected: the Commission has recently published a Proposal to amend the ESCP Regulation,¹² which will be discussed further below. The most recent development is the European Account Preservation Order (EAPO), now adopted in Europe.¹³

The United Kingdom has not been an enthusiastic participant in the negotiation and adoption of many of these measures, but rather has displayed at all times a strong reluctance to engage beyond the minimum it perceived necessary to maintain some real or perceived advantage for its own stakeholders, as identified (or self-identified) through *ad hoc* calls for evidence. This was the case, for example, of the mention, amongst the permitted methods of service under the EEO, of 'postal service', which is the usual method in

⁵ See e.g. R. Turner "'Actively": The Word That Changed the Civil Courts', and T. Parkes 'The Civil Procedure Rules Ten Years On: The Practitioners' Perspective', in D. Dwyer (ed.) *The Civil Procedure Rules Ten Years On* (OUP 2009).

⁶ Service Regulation (EC) No 1393/2007.

⁷ Council Regulation (EC) No 1206/2001.

⁸ Directive 2008/52/EC.

⁹ Directive 2003/8/EC.

¹⁰ Regulation (EC) 2201/2003; Regulation 4/2009.

¹¹ Regulation (EC) No 1346/2000, also subject to a recent proposal of amendment (COM/2012/0744 final - 2012/0360 (COD)).

¹² COM/2013/0794 final - 2013/0403 (COD). The first official reactions from the UK can be found in the 33rd Report of the session 2013-14 of the House of Commons European Scrutiny Committee, published 29/1/2014 (HC 83-xxx), pp.44-48, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxx/83xxx.pdf> <accessed 17/7/2014>.

¹³ According to a May 2014 press release, publication was expected in the Official Journal in June 2014: [http://europa.eu/rapid/press-release MEMO-14-348_en.htm](http://europa.eu/rapid/press-release_MEMO-14-348_en.htm) <accessed 27/7/2014>, but at time of writing it was still outstanding.

England and Wales.¹⁴ Indeed, it had already negotiated a privileged position, reaffirmed in the Lisbon Treaty, with regard to measures taken under Title V of that Treaty (Area of Freedom, Security and Justice, Articles 67-89), which allows it to choose whether or not to take part and opt-in to them, or conversely refuse to participate at all or only at the negotiation or at the implementation stage. The most recent exercise of the opt-out is in regards to the EAPD, for example, where the UK indicated that it would not opt-in to the measure, but did continue to take part in the negotiations.¹⁵ Moreover, the UK government recently conducted a review of the 'Balance of Competences'¹⁶ with the express intention of gathering evidence to support a further withdrawal from the legal sphere of influence of the EU, which makes for sobering reading. Interestingly, however, few of the responses to the call for evidence provided the unqualified support that the Government was apparently seeking.

The case of the Small Claims Procedure: awareness, implementation and use of the European procedural regulations in England and Wales

Where they are applicable in England, the regulations which collectively form the embryonic European law of civil procedure present the domestic lawyer with a number of difficulties. The traditional process of Common Law court litigation, for example, would require very technical and almost exquisite refinements and identification of boundaries for each and every aspect of litigation: one need only look to the bulk of the commentaries on the Civil Procedure Rules (the so-called 'White Book'¹⁷ for example) to realise that, even after the simplifying and revolutionary Woolf Reforms,¹⁸ and despite a lack of academic interest comparable to that in other European jurisdictions, civil procedure remains one of the fields of English law that most justify the use and cost of highly trained experts. However, when it comes to commentary, both judicial and professional, on the European regulations the ground is bare, uncultivated and almost 'un-legal'. Thus, the Small Claims and the EOP Regulations are reproduced in full, appended to Part 78 of the CPR, with very few implementing additional rules¹⁹ – a consequence of a very literal understanding of their nature as 'Regulations', perhaps. Her Majesty's Courts and Tribunal Service (HMCTS), which provides a

¹⁴ Information obtained by the Author in telephone conversation with a member of the Ministry of Justice's European legislation negotiating team.

¹⁵ On 31 October 2011 a Written Ministerial Statement was made to Parliament confirming that 'the UK would not be opting in to these proposals. Although the Government has decided that the UK should not opt in to the proposal now, it intends to participate fully in the negotiations with the hope that sufficient changes will be made to enable a post-adoption opt in.'

¹⁶ The report on competence stemming from article 81 TFEU is available online at <https://consult.justice.gov.uk/digital-communications/balance-of-competences> <accessed 31/3/2014>, as are the submissions to the Call for Evidence.

¹⁷ Constantly updated and widely available through the subscription-only online database WestlawUK, it is published by Sweet&Maxwell with commentary on 'more than 10,000 cases': <http://www.sweetandmaxwell.co.uk/whitebook/contents.aspx> accessed 17/7/2014.

¹⁸ On which see J Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014).

¹⁹ a problem because there are several points in the life of one of these applications where there is a passage to 'national' law – and this is not detailed, except insofar as to say "Part 7" will apply.

number of leaflets generally aimed at the litigant in person, provides a guidance leaflet,²⁰ written in cooperation with the unit within the Ministry of Justice in charge of negotiation and implementation of the European regulations,²¹ which is notable in that it simply repeats much of the explanatory material of the Regulations themselves, or refers directly to the guidance in the forms,²² rather than attempt to provide any additional information as to how the European procedure – or any of its steps – fits in with existing English procedures or the technical English legal terminology. The leaflet tells the litigant to complete the form (to be found on the Judicial Atlas website) and pay the fee; the form must then be taken or sent to the Court, which will check that it has been correctly completed and will then serve it on the defendant. Eventually a successful claimant will be required to send²³ the final order to the enforcement authorities in the destination country, to be identified through the online European e-Justice Portal. The leaflet provides the URL of the Judicial Atlas and the European e-Justice Portal and expects the litigant to navigate them independently.

It cannot be stressed enough that there is a clear advantage to simple, non-technical procedures; this has become increasingly apparent and acted upon even in the crustiest English legal circles. ‘Technicalities’, or procedural legal qualifications, may be required but ought always to be used sparingly and only where they serve to enhance and increase the quality of justice, avoiding as much as possible the unnecessary accretion of obstacles to access to the court and to a timely resolution of the claim.²⁴ Small claims and other procedures traditionally left to the County Court have always had, ever since the creation of that court in the middle of the 19th century, at the very least the expectation that they would be user-friendly.²⁵ To be ‘user-friendly’ at Common Law means also to be addressed to and understandable by the layperson, as one of the main procedural characteristics of the Common Law is the ‘right to self-represent’.²⁶

²⁰ n. ex725, ‘Making a Cross-Border Claim in the EU’, available online at <https://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex725-eng.pdf> <accessed 27/7/2014>.

²¹ Information acquired by the author during telephone conversation with a member of the unit.

²² E.g., at p. 10, ‘All forms for the ESCP are available on the European Commission’s Judicial Atlas website - http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm. In England and Wales a claim must be commenced in the county court. The procedure introduces standard forms and Form A must be used to start proceedings. The form itself contains detailed guidance notes to assist you in completing it. It is important that you read them carefully. You will be asked to provide enough information about the evidence you have available to prove your claim, and to enable the defendant to be able to choose whether to defend the claim. This may include any relevant supporting documents where appropriate.’

²³ A non-technical use of the word.

²⁴ This is the gist of the Benthamian ‘philosophy of justice’ that is now prevalent within English civil procedure: see AAS Zuckerman ‘The Second Great English Reform of Civil Justice: A Triumph of Hope over Experience’ (2000) *Hibernian Law Journal* 178.

²⁵ N Madge ‘Small claims in the county court’ (2004) 23 *CJQ* 201. But see for a ‘reality check’ as to their actual workings, P Lewis ‘The consumer’s court? Revisiting the theory of the small claims procedure’ (2006) 25 *CJQ* 52 and P Lewis ‘Litigants in person and their difficulties in adducing evidence: a study of small claims in an English county court’ (2007) 11 *International Journal of Evidence and Proof* 24.

²⁶ See R Assy ‘Revisiting the right to self-representation in civil proceedings’ (2011) 30 *CJQ* 267-282, and A Zuckerman, *Zuckerman on Civil Procedure* (3rd edn, Sweet & Maxwell 2013) 143.

The UK Government's official website²⁷ shows a commendable commitment to explaining to self-represented litigants (LIPs) most of the basic steps of a claim and their procedural requirements. Additionally, it has been a goal of the Woolf Reforms²⁸ and a foreseen consequence of the Jackson Reforms,²⁹ or rather, of the concurrent legal funding reforms implemented by successive governments, that, in order to reduce the costs of litigation, more ought to be done to encourage and enable self-representation, including to provide as much information as to how to proceed, in clearly layperson's terms.

Therefore the simple, non-technical approach to the on-the-ground implementation of the European Regulations may appear to fall squarely within the norm, both because of their subject-matter, especially the Small Claims Regulation, and because of the general modern tendency to reduce the impact of 'proceduralese'. If such were the case, one would expect to see quite a robust take-up of these procedures, adjusting for their newness. However, such has not been the case, as figures collected for the years 2009-2012 show, especially in comparison with the slightly more established procedure of the European Enforcement Order. The numbers of applications both to obtain and to enforce EOPs and ESCPs in England and Wales³⁰ do appear to be relatively 'healthy', with a crescendo since 2009 of applications for EOPs and a dip across all categories in the year of the global financial crisis:

	2009	2010	2011	2012	Total
Application to issue European Order for Payment	85	62	242	250	639
Application to enforce European Order for Payment	38	196	47	37	318
Application to issue European Small Claims Procedure	200	105	176	45	526
Application to enforce European Small Claims Procedure	138	202	183	164	687

²⁷ <https://www.gov.uk/make-court-claim-for-money> <accessed 27/7/2014>; and see the leaflets available in relation to Form N1 (Claim form), such as 'I'm in a Dispute - What Can I Do? - For People Who Are in a Dispute' (Leaflet ex301); 'How Do I Make a Court Claim? - For People Who Want to Take a Dispute to Court' (Leaflet ex302); 'I've Started a Claim in Court - What Happens Next?' (Leaflet ex304), all available at <http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> <accessed 27/7/2014>.

²⁸ Zuckerman, cited above n. 24.

²⁹ H Genn 'Do-it-yourself law: access to justice and the challenge of self-representation' (2013) 32 CJQ 411; C McIvor 'The impact of the Jackson reforms on access to justice in personal injury litigation' (2011) 30 CJQ 411.

³⁰ These figures were obtained from the Ministry of Justice, with the proviso that they had been collated manually and therefore could not be vouched for officially as free from error, in March 2013, for the period up to the end of 2012.

What is notable, however, is that these numbers are still low by comparison with EEO requests from abroad and from the UK:

	2009	2010	2011	2012	Total
Application to issue European Enforcement Order	26	125	86	33	307
Application to enforce a European Enforcement Order	696	2547	2134	406	5783

Additionally the total numbers appear relatively small in comparison to the volume of claims typically issued in the County Court: in 2011 there were domestic applications for roughly 1 million specified money claims, for example, of which 200,000 claims were for an unspecified amount of money. In general, the majority of claims issued at the County Court are dealt with under 'small claims' rules³¹ (for general claims of less than £5,000, until 1st April 2013, and subsequently claims of less than £10,000).³²

Causes

What reasons can be given for the lack of take-up of these cross-border instruments that are supposed to be of easy access and use, and non-technical, that do not necessarily require the assistance of expensive lawyers, and that seem to fall within the recognised desire to simplify court procedures for the 'consumer'? The most common answer is the 'lack of knowledge' by potential litigants,³³ a lack of awareness of these procedures amongst the general public: for example, the Balance of Competences report refers to a Eurobarometer survey³⁴ on awareness, use and experience of the ESCP, with figures very low both throughout the Union and in the United Kingdom. This data suggests that

³¹ For the period 2004-2008, a useful report is that prepared for Consumer Focus by IFF Research, *Consumer Experience of the Small Claims Court* (2010), available at <http://www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf> <accessed 28/7/2014>.

³² CPR 26.6. The rules underwent a substantial amendment on 1st April 2013 to coincide with the enactment of most of Sir Rupert Jackson's reform proposals for tackling the spiralling costs of justice: the increase in the financial scope of the small claims track enables the automatic extension of the fixed costs rule, that is, that party costs beyond a fixed amount are not recoverable as of course from the losing party.

³³ See e.g. *Evaluation of the European Enforcement Order* (RAND Europe, 2012), the report written pursuant to the duty to evaluate the application of Regulation 805/2004. The report does not appear to be publicly available at the time of writing.

³⁴ At para 3.47. European Commission, *Special Eurobarometer 351: EU Civil Justice* (2010), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_351_sum_en.pdf <accessed 4 February 2014>. European Commission, *Special Eurobarometer 395: European Small Claims Procedure* (2013), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf <accessed 4/2/2014>: 'A survey of 26,691 EU citizens on experiences with cross border civil and commercial disputes found ... [that for the European Small Claims Procedure] [o]nly 1% had heard of the procedure and used it and only 7% had heard of it but not used it. Among UK citizens, only 5% had heard of it.'

the ‘problem’, if it be such, is not limited to the United Kingdom but is generalised and therefore can be resolved with a centralised drive to inform EU citizens of the available procedures. The additional disincentive to use the procedure, that it was only available for claims for a very low financial amount, was also mentioned in the UK Government’s report.³⁵ If this is the case, then more use and more advertisement of these instruments, besides increasing the monetary scope of the procedure, would no doubt lead to an increase in the take-up of applications both to issue and to enforce EOPs and ESCPs (the Proposal to amend the ESCP Regulation³⁶ addresses very clearly the low financial limit and recommends that it be raised to €10,000). This is on the assumption that intra-Member State commerce in particular is of such volume that there is a pocket of unmet legal need which would specifically need these instruments and would benefit from them, *if only the economic actors concerned knew about them*. It is possible to gain an insight into the value of the market – and its corresponding unmet legal need – again from the Call for Evidence of the Balance of Competences exercise:³⁷

3.56 Our Call for Evidence showed that UK goods and services’ exports to the EU stood at around £234bn (around 47% of the UK’s total exports) with Germany, the Netherlands and France being the largest markets for UK exports. The UK has recorded a trade surplus with the EU since 2004, growing to record a net surplus of £15.9bn in 2011.

3.57 According to the Free Movement of Goods’ Call for Evidence, around 132,000 UK companies imported goods from the EU and around 112,000 companies exported goods to EU destinations.

3.58 In relation to consumer activity, our Call for Evidence also reported on a Eurobarometer Survey on the European Small Claims Procedure which showed that around one in ten people living in the EU ordered or bought goods or services from sellers based in other EU countries; around one in five people made recent purchases while in another EU Member State on a holiday or business trip; and three in ten citizens purchased offline and online goods from businesses based in other Member States.

However, it is quite striking – though perhaps unsurprising in the political climate – that the main, if not the only, reason given for the lacklustre performance of these Regulations consists very much in laying the blame for it on the consumers themselves, even if only through the prism of their ignorance. This is both patronising and disingenuous. There could be other, concurrent or alternative, causes for their poor performance, at an ‘earlier’ stage of their life, so to speak. Firstly, the Regulations themselves – objectively as pieces of legislation required to apply throughout the Union – could be ill-written, or their scope ill-

³⁵ Para 3.44, reporting on the evidence gathered by the Brussels Workshop.

³⁶ COM (2013) 794.

³⁷ Citing Ministry of Justice, *Call for Evidence: Civil Judicial Cooperation* (2013), and HM Revenue and Customs, Department for Business, Innovation and Skills, *Call for Evidence: Review of the Single Market: Free Movement of Goods* (2013).

defined. Uncertainty as to the actual procedure or the actual effect of an order so obtained can be a strong disincentive to use, especially if there is a concurrent commercial need for a timely resolution (in particular applicable to EOP procedures) that would be thwarted by the need to repeat the whole process once it has become apparent that the effects are different or insufficiently robust. Uncertainty as to a legal process and its effects is even more dampening on the one-time-user, do-it-yourself litigant, whose appetite for legal resolution is already rather thin.

Secondly, there could be a bottleneck at an earlier stage in their application: there could be a lack of appetite not amongst litigants, but at the level of State negotiators and legislators when participating in the creation of instruments within 'European civil procedure' under Article 81 TFEU.

The 'legal quality' of the Small Claims Regulation

To take the first point, the problem could simply be that the Regulation itself is badly written, in a way that is either too general for the professional, or conversely too 'legal' for the layman; in addition its scope (be it the limitation to 'cross-border' cases in Article 3, or the various substantive limitations in its Article 2) could be badly defined, or too narrow. When creating an accelerated, simplified procedure for claims of small value, the simplification must necessarily take the form of a reduction in procedural formalism. However, procedural formalism (in the form of the protection of the defendant, usually) tends to increase in relation to the consideration of such 'fair trial' rights as the right to be heard and the right to an adversarial trial (including the right to be informed of and to be able to challenge meaningfully any evidence), and therefore any 'accelerated' procedure must always toe a difficult line between claimant's rights of access to justice and defendant's rights of resistance.³⁸ The compromises to the latter may be justified where an increase in procedural complexity would increase professional advice costs to the point that they dwarf the substantive value of the claim. This point is particularly sore in England and Wales, where legal advice costs are notoriously high.

With all account taken of the difficulty of the balancing exercise necessary in the creation of a procedure that could have the advantages of acceleration and 'informalism', without losing too many procedural guarantees of fair trial, the ESCP Regulation is still not a particularly well-written one, from a technical point of view. This Author has written elsewhere about some of the more technical shortcomings.³⁹ From an English legal perspective the Regulation is not immediately applicable. It fails to pinpoint in precise legal terms the steps that the litigant must undertake to engage the procedure. Specific problems arise with the generic definition of the methods of service allowed, for example.⁴⁰ This is a consequence of the need for its provisions to apply in several different

³⁸ The necessary balancing exercise is referred to, briefly, in the ESCP Regulation Preamble, at its paragraph 9.

³⁹ As to more specific and technical points, see C Crifò 'Europeanisation, Harmonisation and Unspoken Premises: the Case of Service Rules in the Regulation on a European Small Claims Procedure (Reg. No 861/2007)' (2011) 30 CJQ 283.

⁴⁰ Ibid.

jurisdictions, court systems and litigation cultures, which is inherent in a Europe-wide piece of primary legislation and it is the inevitable challenge of a law of civil procedure that is truly European.

All that this means is that more ought to be done at the domestic level to explain, if not technically implement, the Regulation and its place within the domestic legal framework. The fact of the matter is, that in the wishful thinking of the Commission, the lack of specificity and technicality in the Regulation would have been more than compensated by a robust, activist and almost paternalistic intervention by the court, whose duty it is to check content and form of the claim, for example. If this reliance on the court's taking the litigant by the hand raises any concern, it is in relation to the consequent lack of foreseeability of effects, as individual jurisdiction or even individual courts within a jurisdiction may interpret their role very differently.

Still, there is a great deal of leeway and informalism already inherent in the domestic small-claims procedure in the Civil Procedure Rules,⁴¹ and it could be argued that the Small Claims Regulation does no more than provide more of the same informalism, if on a broader scale. Just as a claim in the small claims track is subject to a certain amount of judicial discretion (as to the exact extent of the procedure),⁴² it could be argued that there is no need to fetter judicial action in a ESCP case, for it will simply be more of the same. However, there are two problems with this approach: the first is that the traditional reliance on a judicial 'commonsense' approach in cases of low value may begin to seem misplaced as the financial scope of the small claims track creeps up to encompass claims of higher value. The proposal for the reform of the Small Claims Regulation includes an increase of the financial value of the claim to €10,000. Increasing the limit to include, as the Commission itself acknowledges,⁴³ a separate category of users (Small and Medium Enterprises - SMEs), risks magnifying the flaws of informalism in the procedure, as the new category of users may be presumed to be a little more sophisticated than an individual consumer. The increased value of claims that could be brought under the ESCP is one of the aspects of the Proposal that the UK Government does not oppose. It must be noted, however, that it does so against the background of its own increase of the small-claims ceiling from £5,000 to £10,000 as a consequence of the Jackson Review of Costs. This increase must be viewed in the context of the peculiarities of the very expensive litigation in this jurisdiction, which are beyond the scope of this paper.⁴⁴ The addition, in the Proposal, of an oral hearing when the value of the claim exceeds €2,000 does not necessarily resolve the tension between 'fair trial' rights, where procedural guarantees are curtailed in favour of informalism for low-value claims and attempting to extend the reach of the procedure to a larger number of claims including some where procedural guarantees may become necessary.

⁴¹ CPR 26 PD para 8.1(a): 'The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £10,000 can be decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs. (Rule 26.6 provides for a lower financial value in certain types of case.)'

⁴² CPR Part 27.

⁴³ COM (2013) 794, para 3.1.1.

⁴⁴ See C Hodges, S Vogenauer and M Tulibacka (eds) *The Costs and Funding of Civil Litigation* (Hart/Beck 2010).

Indeed, the second and main problem with the reliance on a robust – and discretionary – activism/paternalism by the court is the variance in legal cultures throughout the Union. The scope of the court's powers and activities varies in European jurisdictions, and discretion to act (informally) in one may take quite a different colour in another. The role of the court is not always spelled out in the various Constitutions or procedural codes, but rather typically emerges from the delicate balance of the rules therein: the simplest example, of course, is that of the rule which allows or regulates the intervention of the judge in the taking of evidence.⁴⁵ From that rule and its corollaries much can be gleaned – even if it is not made explicit elsewhere – about the role of the individual judge and the court, up to the limits of the judicial power and whether or not informal procedures are to be considered exceptional and 'extraordinary'. Words matter, even in a deliberately non-technical Regulation of general applicability. The Commission chose a type of 'informalism' not only when it came to the specifics of the procedure (where words such as 'service' and 'hearing' are not defined), but also when it came to the actual framework within which that procedure would take place (so what is not defined is the Member State's 'ordinary' or 'domestic' law, for example). The crux is that informalism works when there is a shared understanding, if unspoken, as to what is an acceptable level of action by the court, what is required and what is positively not allowed. It may work within a jurisdiction, but within the European Union it is dangerous to assume, as the Commission did, that 'mutual trust' would translate into 'broadly similar action', in particular in relation to the implementation of a Regulation, which by definition ought not to require any meaningful level of legal implementation or adaptation.

The consistency of the Small Claims Regulation with the rest of a Member State's 'domestic law' is the aspect that creates the most uncertainty for the consumer, and a particular problem with regards to how the Regulation is implemented in the UK: the amount of adaptation in CPR Part 78 or even in the Practice Direction or the leaflet for litigants, is the very minimum possible, and both refer back to the (technically inadequate) text of the Regulations. The leaflet in question instructs the litigants to seek the aid of the court, itself not something that encourages – or is to be encouraged in the context of – mass utilisation of the instruments.

Vagueness by design – the role of negotiators and the scope of implementation

The implementation of the Small Claims Regulation has taken, in the UK, a defensive or *de minimis* approach. This was possible because of the legal nature of the Regulation, but also by the very terminology of the measure, and essentially its own limitation to cross-border matters. This, however, is not without cause: the Regulation was after all written after a relatively lengthy negotiation stage, so some of the causes for the inherent uncertainty of legal process and effects that a potential litigant may fear must rest not with that consumer's ignorance, or at best lack of faith in her own legal system ('what will

⁴⁵ JH Langbein 'The German Advantage in Civil Procedure' (1985) 52 U Chi L Rev 823.

the court *do?*'), but with the negotiating and drafting agents, and those in charge of implementing the final legislative result.

At the UK Ministry of Justice, for example, it is felt that the rather timid, hands-off approach to implementation of the Regulation is entirely justified in that the instruments in question were always meant to be exceptional (and not harmonising),⁴⁶ which meant that it was almost obligatory to refrain from integrating them within the existing legal framework. Indeed, this lack of acceptance of a harmonising agenda applies both to implementation (withholding as much 'integration' as possible) and to negotiation, in that, the UK and the other partially Common Law systems do not intend to impose the Common Law, just be left alone, and certainly do not want to be changed. In that regard, they are like Don John. The much vaunted 'mutual trust' is not used proactively to inform, persuade, work together for the best possible instrument that would benefit from the input of comparative civil procedure at a more abstract level; instead it is used to prevent accusations of protectionism (that is, only what is necessary to remove the necessity of separate enforcement proceedings for a foreign judgment, or *exequatur*) but no more. The UK's participation in these endeavours is instead framed by the 'cross-border' limitation: this provides the justification for maintaining a wall of 'exceptionalism' around these procedures and therefore it is most vigorously defended at all stages of the process, first of all when the decision is made to opt in or opt out. Indeed, the Government's submission to the House of Commons Committee indicate that, far from being convinced by the Commission's arguments on removing the cross-border limitation in the proposed reformed ESCP, it considers that a simple removal of the limitation is inconsistent with the Treaty itself.⁴⁷

Additionally, The United Kingdom, due to the Protocol to Title V of the Lisbon Treaty, can opt out at all stages up to implementation. It has exercised the prerogative a few times, most recently in relation to the EAPO.⁴⁸ It therefore has

⁴⁶ Indeed, in *G v De Visser*, case C- 292/10, 15/3/2012) the ECJ confirmed, with regard to the EEO Regulation that certification under the EEO is an exception to domestic rules of procedure that requires a higher standard of notification of service.

⁴⁷ See the Report of the HC European Scrutiny Committee (above n.12) , paras 11.15 and 11.16: 'Article 81(1) TFEU requires that measures adopted under that provision must have cross-border implications. The Government believes that this restriction must be reflected properly in this proposed Regulation. While it will give further consideration to the Commission's changes to Article 2, it currently remains concerned that those changes will not properly respect the Treaty's cross-border restriction and would unduly extend the instrument's scope of application to cover cases which should remain subject to national law only.

11.16 As this proposal has been brought under Article 81 TFEU the UK's Title V opt in applies. The text was presented to the Council in English on 25 November. Therefore the eight week period before which the Government will not make a decision on the opt in expires on 20 January. When deciding whether to opt in, the Government will consider the effect on UK citizens and businesses if the UK no longer participates in the Regulation; how effective the Commission's suggested changes will be in improving the quality and use of the procedure; and the negotiability of resisting the proposed changes to the crossborder restriction.'

⁴⁸ '[The UK government] announced by way of a written Ministerial Statement to the House of Commons its decision not to opt in to the proposed Regulation because the Government's recent consultation revealed significant problems, including a concern that there was a lack of adequate safeguards for defendants. However, it stated that it will participate in the forthcoming negotiations with a view to opting in in the future (PARL. DEB. H.C. (31 October 2011) col 28WS (U.K.)). In February 2013 the European Scrutiny Committee of the UK Parliament examined a letter by the Ministry of Justice regarding the EAPO and stated that "several developments have

no incentive to negotiate heavily at the creation stage, since it can always give up on the instruments.

This also explains why, whereas there are some parts of the European civil procedure regulations that clearly demonstrate the imprint of the Common Law approach (most notably, the rules relating to service in Art. 14 EEO, transposed in the EOP and referred to in the ESCP Regulations⁴⁹), for the vast majority there is a dearth of technicality, or at the very least Common Law-intelligible technicality, which makes it difficult to understand, at times, exactly how ‘domestic law’ or ‘national law’ should intervene. It has taken the CJEU until 2013 to resolve the issue of the effect of the opposition to an EOP (in Case C- 144/12, *Goldbet Sportwetten GmbH v Massimo Sperindeo*)⁵⁰ and the UK did not even submit observations, even though the outcome is very similar to the solution found by the Rules Committee in enacting Part 78 CPR.⁵¹ The UK’s hands-off approach, post-adoption, in this case by not intervening in a Court of Justice case, quite clearly affects the very quality of the European legal discourse, as was pointed out during the Balance of Competences exercise:

3.54 The Law Society of England and Wales, the Bar Council, Dr Mills and participants at the London workshops stated that another way in which the ECJs decision-making could be improved was for the UK to intervene more frequently in cases before the ECJ. Of those respondents, the Law Society of England and Wales, including those practitioners who responded to its own consultation, said that the UK should intervene to ensure the ‘commercial context was understood’. The other respondents said that intervening would allow the ‘common law perspective to be represented’. At the Edinburgh and Brussels workshops, participants stated that some of the criticism over the rulings had arisen because the judgments have been misunderstood or people had failed to understand the context in which they had been made.

Strike up, pipers ?

Messenger

My lord, your brother John is ta'en in flight,
And brought with armed men back to Messina.

Benedick

Think not on him till to-morrow:
I'll devise thee brave punishments for him.

gone the UK's way”, but there are still “significant concerns” about various issues of the proposal.’ N Kyriakides ‘A European-wide preservation order: how the common law practice can contribute’ (2014) 33 CJQ 93, fn 36.

⁴⁹ On which see Crifò, cited above n. 39.

⁵⁰ Not yet published: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-144/12> <accessed 25/7/2014>.

⁵¹ According to the Court, opposition to EOP just finishes the EOP process, it is not ‘entering an appearance’ for the purposes of 24 BR, and therefore does not need to include challenges to jurisdiction. This point was clear to the Rules Committee when it enacted CPR 78.6, which clearly indicates how and when a challenge to the jurisdiction ought to be done, and if he does so a) rule 10.1(3) [reasons for filing an acknowledgement of service]; (b) rule 10.3 [time limits for filing an aos] ; and (c) rule 15.4(1) [period for filing a defence] do not apply.

Strike up, pipers.

Much Ado About Nothing A. V sc. iv

The recent decision on the EAPC laid bare the inner workings of the Government's approach to European developments: it relied on the criticisms of a few influential trade bodies instead of taking a principled approach to the problems of continent-wide enforcement of judgments. The recent submissions with regards to the proposal to reform the ESCP⁵² are as revealing on the cross-border point. From a UK perspective, these Regulations are merely extraordinary procedures that will not further coalesce into a coherent body of (harmonised) European civil procedure. Any analysis of their usefulness would require therefore a substantial amount of empirical research as to their impact on the individual problems they seek to resolve, within the limiting constraints of the improvement of the internal market.

Ultimately, Don John stirs up a little trouble but it peters out and the play culminates in a happy ending. In the final scene, the villain, defeated and recaptured after an abortive escape attempt, is all-but forgotten save for a passing reference to his impending punishment. If the UK persists on its isolationist course, as the political landscape at the time of writing indicates is likely, it will definitely not be forced to any compromise with regards to the Commission's legislative competences but it may well be that, like the other players in *Much Ado*, the other Member States and the Commission will see the UK's attitude as nothing more than a minor distraction and continue on their legislative agenda unabated. Yet this would not be quite the happy ending. It is not just UK citizens, as opposed to the stakeholders – generally trade associations – with very specific agendas and who can be stirred into action by a call for evidence, who will lose out. So too will the citizens of the other Member States, the UK's isolationist approach denying them the considerable weight of experience and tradition that the Common Law could bring to the nascent European law of civil procedure.

⁵² Above n. 47.