The Simplification of Debt Collection in Italy

TRAIN2EN4CE Project and Future Challenges

La semplificazione del recupero crediti in Italia

Il Progetto TRAIN2EN4CE e le sfide future

a cura di Sara Tonolo

Giappichelli

The Simplification of Debt Collection in Italy

TRAIN2EN4CE Project and Future Challenges

La semplificazione del recupero crediti in Italia

Il Progetto TRAIN2EN4CE e le sfide future


IUSTITIAM COLIMUS

The Simplification of Debt Collection in Italy

TRAIN2EN4CE Project and Future Challenges

La semplificazione del recupero crediti in Italia

Il Progetto TRAIN2EN4CE e le sfide future

a cura di Sara Tonolo

Giappichelli

VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
http://www.giappichelli.it

ISBN/EAN 978-88-921-2340-3
ISBN/EAN 978-88-921-7172-5 (ebook - pdf)

G. Giappichelli Editore

Questo libro è stato stampato su
carta certificata, riciclabile al 100%

Finito di stampare nel mese di giugno 2022.

Stampa: LegoDigit s.r.l. - Lavis (TN)

INDICE

pag.

SARA TONOLO, TJAŠA IVANC, COCOU MARIUS MENSAH

INTRODUCTION

The development of the internal market of the EU and its regulation in the event of debt collection is of paramount importance for consumers' confidence.

For companies to venture to invest in neighbouring countries of the EU, they need to be sure that their investments are guaranteed by strong regulations. The same is true for individuals who make inter-European purchases as it is understood that consumerism is the desired effect to boost the economy, however, in any civil and commercial activity, there are always contingencies, oversights, and sometimes debts. For example, many European companies ''forget'' to pay their workers or flatly refuse to reimburse consumers in case of defective products. To recover the money, consumers or workers who are not accustomed to legal tools are quickly discouraged without knowing that the European Union, intending to boost commercial exchanges, has adopted very competitive regulations to ensure cross-border debt collections. This is of course Regulation n. 1896/2006 of December 12, 2006, establishing a European order for payment procedure, as amended by Regulation n. 2017/1260, and Regulation n. 861/2007 of July 11, 2007, establishing a European small claims procedure, as amended by Regulation n. 2017/1259.

The overall problem that arises is that these tools are not only little known to most consumers, but also many workers in the

legal sector. To counter this situation, the European Union has bet on awareness-raising through the training of the workers of the judicial sector and on the dissemination of information concerning the regulations on the collection of debts in the EU.

It is in this perspective that we can say that this book is a summary of the different practices encountered in one of the member countries of the Train to Enforce project, coordinated by the Faculty of Law of the University of Maribor to improve the knowledge of EU instruments for cross-border collection of debt European, namely the small claims procedure (Regulation n. 861/2007) and the European order for payment procedure (Regulation n. 1896/2006). Debt collection mechanisms already exist at the national level in each member country of the European Union. These mechanisms are very effective for internal procedures and are regulated by the civil code, the code of civil procedure and other notarial or legal acts depending on the country. However, a common regional tool applicable to EU countries (except Denmark) is essential, and it presents a non-mandatory format, i.e. an alternative tool for EU member countries allowing disputes to be settled in civil and commercial matters at several levels. These regulations are designed for debts ranging (up to 5000 EUR for the European procedure for the settlement of small claims – ESCP) and more than 5,000 euros for the European order for payment procedure – EOPP). In all the member states and the candidate state, partners of this project, (Faculty of Law, University of Maribor, Slovenia, Leibniz University of Hannover, Germany, University of La Coruña, Spain, University of Graz, Austria, University of Rijeka, Croatia, University of Tirana, Albania, University of Trieste, Italy, Uppsala University, Sweden) one remark was unanimous: the general lack of knowledge of the efficient use of the aforementioned tools.

The 3-year project, financed by the EU Justice Programme – JUST-JTRA-EJTR-AG-2018 had the mission to promote the

standards of debt collection in the EU and to train the specialists in the judicial sector: lawyers, judges, specialists in legal affairs, etc. Through the surveys used by the different teams, it was found that the European alternative methods of collection of debts are often used by the companies and the sums clearly exceed the EUR 5,000, the threshold for the ESCP. However, individuals or small and medium-sized companies who use the ESCP are sometimes reluctant, because they prefer not to waste time claiming a debt of EUR 2,000 for example, especially since they do not master the procedure and hiring lawyers or legal aid could turn out to be more than the sum requested. The use of alternative methods besides national ones to claim money from European partners is poorly mastered by specialists in the field and not very popular with the population. However, in the era of Covid-19 and remote working, several commercial activities are carried out online and claims or reimbursements worth – EUR 5,000 or less are growing at a fast rate. The procedure, which does not require a lawyer, translator, or legal agency, is affordable and useful for any individual or company carrying out commercial activities with European partners.

According to the United Nations Conference on Trade and Development (UNCTAD), online shopping has increased by 6-10 percentage points in most product categories and the main gainers are ICT/electronics, gardening /do-it-yourself, pharmaceuticals, education, furniture /household products, and cosmetics/personal care categories.

The resurgence of online purchases, in companies belonging to different EU countries, will necessarily increase the number of claims, refunds, or products not received-synonymous with refunds.

Debt collection procedures then have an important role to play in regulating this flow, notwithstanding their optional nature.

The aim of gathering together within this publication extracts

from Italian judgments that have applied these Regulations, along with translations into English, is to make them accessible to legal practitioners and international trade specialists who intend to launch such proceedings in Italy. As such, it will set out a body of case law that should be useful in dealing with the main problems that have arisen in relation to the application of the regulations in Italy, thus increasing the scope for relying on them. The difficulties present in Italy still need to be overcome. As is the case in many other European countries, these limit access to these proceedings above all for foreign operators or consumers. They include for instance a lack of offices/services that can assist in identifying the competent court, difficulties in compiling and translating the forms required to launch proceedings, the low level of publicity given to such procedures on judicial websites, the fact that it is impossible to launch proceedings online, the optional nature of proceedings and the excessive reference to the *lex fori* in terms of aspects that are not governed by it, which entails difficulty in coordinating European and Member State laws.

Publishing this casebook to draw attention to these regulations and educate legal professionals and consumers alike is the purpose of the Train to Enforce project, which has been successfully conducted. This casebook is a valuable addition to the arsenal of legal literature on the subject of the regulation of debt collection and constitutes a big achievement that will be useful for consumers and legal specialists.

Trieste - Maribor, 30 May 2022

SARA TONOLO

SET-OFF AS A DEFENCE UNDER THE SMALL CLAIMS REGULATION AND UNDER CURRENT PRIVATE INTERNATIONAL LAW

TABLE OF CONTENTS: 1. Introductory remarks. – 2. The concept of set-off within European Rules of Jurisdiction. – 3. Consequences of coordination with the *lex fori* in relation to the setting off of claims. – 4. Concluding remarks.

1. *Introductory remarks*

A close reading of various provisions within Regulation n. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure, as amended by Regulation n. 2017/1259, offer a starting point for some interesting reflection on the rules applicable to set-off under current private international law and procedural law [1].

[1] Commission Delegated Regulation of 19 June 2017 replacing Annexes I, II, III and IV to Regulation (EC) n. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, in OJEU of 13 July 2017, L 182, p. 1. See HAZELHORST, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, Cham, 2017, p. 383-397; KRAMER, *European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects*, in HESS, BERGSTRÖM, STORSKRUBB (eds.), *EU Civil Justice. Current Issues and Future Outlook*, Oxford-Portland, 2015, pp. 97-122.

Alongside Regulation n. 1896/2006 creating a European order for payment procedure, as amended most recently by Commission Regulation (EU) n. 2017/1260 of 19 June 2017 [2], it sets out a simplified procedure for certain types of dispute [3]. Regulation 1896/2006 sets out minimum standards for ensuring the free circulation of orders for payment throughout the Member States in relation to uncontested pecuniary claims. Its scope does not extend to claims different from those concerning the payment of a sum of money, such as in particular those concerning orders of specific performance as well as injunctions. In the event that a European order for payment is issued, the court in the Member State of origin issues a declaration of enforceability unless a statement of opposition is lodged within a time limit of thirty days of service of the measure. A European order for payment which has become enforceable in the Member State of origin is recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Regulation n. 861/2007 – as amended in 2017 – regulates the European Small Claims Procedure. This relates to disputes the value of which, excluding all interest, expenses and disbursements, does not exceed EUR 5,000,00 at the time when the

---

[2] Commission Delegated Regulation EU 2017/1260 of 19 June 2017 replacing Annex I to Regulation (EC) n. 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure, in OJEU of 13 July 2017, L 182, p. 20.

[3] KRAMER, *The European Small Claims Procedure. Striking the Balance between Simplicity and Fairness in European Litigation*, in "Zeitschrift für europäisches Privatrecht", 2008, pp. 355-373; FIORINI, *Facilitating Cross-Border Debt Recovery-The European Payment Order and Small Claims Regulations*, in "International and Comparative Law Quarterly", 2008, p. 449; LEANDRO, *Il procedimento europeo per le controversie di modesta entità*, in "Riv. dir. int.", 2009, p. 65 ff.; D'ALESSANDRO, *Choosing among the three regulation creating an European enforcement order (EEO regulation, EOP regulation ESCP regulation): practical guidelines*, in "Int'l Lis", 1/2010, p. 39.

claim form is received by the court or tribunal with jurisdiction[4]. Under the Regulation, a judgment given in the European Small Claims Procedure is recognised in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. As far as enforcement is concerned, it is governed by the law of the Member State of enforcement, and it is stipulated that any judgment given in the European Small Claims Procedure must be enforced

[4] Pursuant to the limited access to the procedure, outlined by the Eurobarometer 347 Survey (*Flash Eurobarometer 347 Business-to-Business, Alternative Dispute Resolution in the EU*, in *ec.europa.eu*), the European Commission in November 2013 presented a report aimed at suggesting some revisions to Reg. n. 861/2007 (*Report to the European Parliament, the Council and the European Economic and Social Committee on the application of regulation no. 861/2007CE* (COM (2013) 795 final, in *ec.europa.eu*): extension of the operational scope of the Regulation to claims up to € 10,000; adoption of a broader definition of cross-border cases; enhancement of electronic communication, including for service of certain documents; imposition of an obligation on courts to use videoconferencing, teleconferencing and other means of distance communication for the conduct of oral hearings and taking of evidence; establishment of a maximum limitation on court fees charged for the procedure; provision for an obligation on the Member States to put in place distance means of payment of court fees; limitation of the requirement to translate Form D, containing the certificate of enforcement, to only the substance of the judgment; determination of information obligations on the Member States in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms. This proposal was discussed in the European Council, but the General Approach reached on 24 November 2014 identified less radical changes. The regulation of the European Parliament and of the Council of 16 December 2015 n. 2421/2015/EU extended the ESCP scope to cross-border disputes up to 5,000 Euros and introduced only the amendments apt to simplify and to make less burdensome both the taking of evidence and the conduction of proceedings by enhancing the use of communication technologies, as well as by entitling parties to pay court fees remotely. See MAŃKO, *Reform of the European Small Claims Procedure,* Briefing: EU Legislation in Progress, PE 565.871, Brussels, European Parliamentary Research Service, 2015; KRAMER, *European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects*, ed. by HESS, STORSKRUBB, Oxford, 2016, p. 97 ff.

under the same conditions as a judgment given in the Member State of enforcement. The person against whom enforcement is sought is not devoid of any protective remedies: under Regulation n. 861/2007, enforcement is in fact refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country. In order for irreconcilability with an earlier judgment to constitute grounds for refusal of enforcement, the following prerequisites must be met in relation to the earlier judgment: it involved the same cause of action and was between the same parties; it was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and 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.

As far as set-off is concerned, as well as problems relating to its much-debated regulation within private international law, including in the wake of the "communitarisation" of private international law[5], recital no. 17 to Regulation n. 861/2007 raises some interpretative problems. It states that "in cases where the defendant invokes a right of set-off during the proceedings, such claim should not constitute a counterclaim for the purposes of this Regulation". As such, the defendant should not be required

[5] FALLON, *Compensation légale de créances en droit international privé et ses effets dans l'ordre juridique communautaire – Observations sous CJCE, aff. 87/01P, 10 juillet 2003 (Commission contre Conseil des Communes et Régions d'Europe – CCRE),* in "Revue@dipr.be", 2003, pp. 68-70; BULL, *Optional Instruments of the European Union*, Cambridge, 2016; SMITS, *Optional Law: A Plea for Multiple Choice in Private Law*, in "Maastricht Journal of European and Comparative Law", 2010, p. 347; CRIFO, *Europeanisation, harmonisation and unspoken premises: the case of service rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)*, in "Civil Justice Quarterly", 2011, p. 283.

to use standard form A contained in Annex 1 in order to exercise that right (as provided for under Article 5(6) of Regulation n. 861/2007 for counterclaims), and a problem thus arises regarding coordination with the procedural rules of national systems, under which set-off could be established according to the different rules provided for in them [6].

2. *The concept of set-off within European Rules of Jurisdiction*

By incorporating the reference mentioned above into recital 17, and by also asserting in recital 16 that "The concept of 'counterclaim' should be interpreted within the meaning of Article 6(3) of Regulation (EC) n. 44/2001 as arising from the same contract or facts on which the original claim was based. Articles 2 and 4 as well as Article 5(3), (4) and (5) should apply, mutatis mutandis, to counterclaims", Regulation 861/2007 appears to incline towards a notion of off-set that is construed in terms of a procedural objection, which is thus governed by the rules of the *lex fori*, and is hence subject to the different approaches adopted by the EU Member States in this area. As is generally known, some systems accept the set-off of pecuniary claims (Belgium, France, Italy and Portugal), which occurs *ipso iure* where certain prerequisites are met (reciprocal claims that are fungible, enforceable and liquid) or, if these are not met, at the discretion of the parties (voluntary set-off) or *ope iudicis* (judicial set-off). In

other systems, set-off may occur based on a declaration by one of the parties involved (Germany, Denmark, Finland, Norway, the Netherlands and Sweden) where certain prerequisites are met (reciprocal claims that are fungible and enforceable). There are also systems in which set-off is essentially a judicial procedure (Ireland), where it only occurs as a procedural matter up to the respective value, and the defendant may refrain from paying its debt until a court ruling has been issued concerning its claim [7].

The issue as to whether set-off may be invoked within individual legal systems either as a form of defence (raised as a simple objection by the defendant as justification for the failure to comply with the contractual obligation invoked by the claimant within the proceedings brought by the latter, the aim of that objection being to obtain the full or partial rejection of the claimant's claim) or as a counterclaim brought by the defendant (seeking to obtain a different order against the claimant) has led to the development of a line of case law since the Brussels Convention of 27 September 1968 came into force [8], which takes the

---

[7] For a comparative law analysis of the substantive provisions governing set-off within EU Member State legal systems, see the analysis presented by Advocate General Philippe Léger in his opinion delivered in relation to the dispute that resulted in the judgment of the Court of Justice of 13 July 1995 in Case C-341/93, *Danvaern Production A/S c. Schuhfabriken Otterbeck GmbH & Co.* [1995] ECR I-2053 – 2078, para. 28 et seq.

[8] For the text of the Convention, in the consolidated version following adherence by Finland, Sweden and Austria, see *OJEC* 26 January 1998, C 27, p. 1 et seq. On the Brussels Convention in general, as well as its development, see: ANCEL, *The Brussels I Regulation: Comment*, in "Yearbook of Private International Law", 2001, p. 101 ff.; GAUDEMET TALLON, *La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale,* in "Revue critique de droit international privé", 2001, p. 601 ff.; ID, *Compétence et exécution des jugements en Europe: règlement n. 44/2001, Conventions de Bruxelles et Lugano,* Paris, 2002; SALERNO, *Giurisdizione ed efficacia delle*

view that only set-off *as a counterclaim* falls within the scope of the rules on jurisdiction laid down in the Brussels Convention (replaced initially by the Brussels I Regulation [9] and later by the recast Brussels I Regulation [10]), and by contrast that set-off as an objection does not [11]. In the event that also set-off as an objection should fall within the scope of the rules on jurisdiction, the derogation provided for under the rules on the linking factor with the general forum would no longer have the status of *lex specialis*, and would engage the jurisdiction of the *forum actoris* whenever set-off was invoked in a dispute.

Therefore, the generally accepted interpretation regarding the operation of set-off appears to seek to assert that set-off in a narrow sense, i.e. where the respective interest underlying the counterclaim results from a contract or tort different from that underlying the claimant's claim, should be governed by the *lex fori*.

Thus, it would appear that it is not now possible to conclude that such a self-standing interpretation underpins the concept of set-off under Regulation n. 861/2007, despite the broad and generally recognised benefit in elaborating self-standing concepts within the Brussels system. This development started to take

---

decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione), Padova, 2015.

[9] Regulation (EC) n. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in *OJEC* of 16 January 2001, L 12 pp. 1-23.

[10] Regulation (EU) n. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJEU* of 20 December 2012, L 351, p. 1 et seq.

[11] ECJ, judgment of 13 July 1995 in Case 341/93, *Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co.*, cit., para. 18. On the distinction between set-off and counterclaim for the purposes of the Brussels Convention of 1968, see ECJ, judgment of 9 November 1978 in Case C-23/78, *Nikolaus Meeth v. Glacetal* 1978 [ECR] 2133-2148, including in particular the opinion delivered by Advocate General Capotorti, *ivi*, paras. 3-4.

shape shortly after the entry into force of the Brussels Convention when the Luxembourg Protocol of 3 June 1971 vested the Court of Justice of the European Communities with competence to develop self-standing concepts with regard to the scenarios covered by the Brussels Convention. The aim was to avoid the Convention provisions from encountering problems upon application, depending upon how the concepts underlying them were interpreted.

Examples include the concepts of matters relating to a contract [12], obligation [13], consumer [14], torts, delicts and quasi-delicts [15], the classification of civil and commercial matters [16], the definition of maintenance claims [17], and the identification of

---

[12] See regarding this issue: Court of Justice, judgment of 22 March 1983 in Case C-34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987-1012; judgment of 8 March 1988 in Case C-9/87, *SPRL Arcado v. SA Haviland* [1988] ECR 1539-1556; and judgment of 17 June 1992 in Case 26/91, *Jacob Handte e Cie GmbH v. Traitements mécano – chimiques des surfaces SA (TMCS)* [1992] ECR, I-3967-3996.

[13] Court of Justice, judgment of 6 October 1976 in Case C-14/76, *Éts. A. de Bloos. SPRL v. Société en commandite par actions Bouyer*, in [1976] 1497-1519.

[14] Court of Justice, judgment of 21 June 1978 in Case C-150/77, *Bertrand v. Paul Ott KG* [1978], 1431-1451; judgment of 19 January 1993 in Case C-89/91, *Shearson Lehman Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, cit.; and judgment of 3 July 1997 in Case C-296/95, *Benincasa v. Dentalkit S.r.l.* [1997] ECR I-3767-3800.

[15] Court of Justice, judgment of 27 September 1988 in Case C-189/87, *Athanasios Kalfelis v. banca Schröder, Münchmeyer, Hengst and C. ia, and others* [1998] ECR 5565-5587; judgment of 27 October 1998 in Case C-51/97, *Réunion européenne SA and others v. SSpliethoff's Bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002,* cit., para. 24.

[16] Court of Justice, judgment of 14 October 1976 in Case C-29/76, *LTU Lufftransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] I-ECR 1541-1561; judgment of 21 April 1993 in Case C-172/91, *Volker Sonntag v. Hans Waidmann e altri* [1993] ECR, I-1963-2003.

[17] Court of Justice, judgment of 27 February 1997 in Case C-220/95, *Antonius van den Boogaard v. Paula Laumen* [1997] ECR I-1147-1187.

the place where the harmful event occurred [18]. More generally, a particularly significant aspect of the development of the legislative prerequisites on which the comparative interpretation of national legal systems aiming to arrive at a unitary definition of certain institutes of private international law is based is the link between these prerequisites and the general principle of EU law [19].

As far as set-off is concerned, the Regulation establishing a European Small Claims Procedure does not appear to embrace a self-standing concept of it. This is in spite of the various attempts at harmonisation made by the Court of Justice, such as in the case *Commission of the European Communities v. Council of European Municipalities and Regions (CEMR)* [20]. This case arose out of an action for annulment brought against a decision of the European Commission concerning the set-off of its own claims under a technical assistance contract against amounts due to CEMR as Community contributions for the activities carried out by it [21]. The Court annulled the Commission's decision,

---

[18] Court of Justice, judgment of 30 November 1976 in Case C-21/76, *Handelskwekerij G. J. Bier B. V. v. Mines de potasse d'Alsace S.A.* [1976] ECR 1735-1757; judgment of 27 October 1998 in Case C-51/97, *Réunion européenne SA and others v. SSpliethoff's Bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002,* cit., para. 30 et seq.

[19] See for example the interpretation applied in the judgment of 28 March 2000 in Case C-7/98, *Dieter Krombach v. André Bamberski,* cit., para. 38: "With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States".

[20] Court of Justice, judgment of 10 July 2003 in Case C-87/01 P, *Commission of the European Communities v. Council of European Municipalities and Regions (CEMR)*.

[21] The dispute arose specifically out of the conclusion of three technical assistance contracts between the Commission and the Council of European Municipalities and Regions (CEMR), an association governed by French law comprising various national associations of local and regional authorities

holding that set-off could not apply under these circumstances, as it was not permitted under Belgian law, which was applicable to the advisory agreements in dispute, owing to the choice of law made by the parties. The Court went on to clarify the general principle on which that conclusion was based, accordingly setting out the fundamental rule that "[i]n so far as it extinguishes two obligations simultaneously, an out-of-court set-off between claims governed by two separate legal orders can take effect only in so far as it satisfies the requirements of both legal orders concerned" (in this case Belgian law and Community law) [22].

---

throughout Europe, the association *Agence pour les réseaux transméditerranéens* (ARTM) and the association governed by French law *Cités unies développement* (CUD). These contracts, referred to as MED – URBS and MED – URBS MIGRATION, concerned two regional cooperation programmes adopted on the basis of Council Regulation (EEC) n. 1763/92 of 29 June 1992 concerning financial cooperation in respect of all Mediterranean non-member countries (in *OJEC* L 181, p. 5 et seq.) and contained terms that were expressly intended to establish Belgian law as the applicable law, as well as the civil jurisdiction of the Brussels courts, should attempts to resolve amicably any disputes arising between the parties be unsuccessful. The Commission's claim was based, in its view, on the violation by the CEMR of its budgetary obligations in relation to the individual contracts, and as such could be set-off against the amounts due as Community contributions in relation to the conduct of the activities covered by the contested contracts.

[22] Court of Justice, judgment of 10 July 2003 in Case C-87/01, cit., para. 61. More specifically, the Court clarified that, in this case too Belgian law precluded the operation of set-off, as the prerequisite that the Commission's claim must be certain, which was required under Belgian law for set-off, was not met. It held in fact that "(…) no matter what the outcome of the appeal brought by the Commission against the judgment of the Tribunal de Première Instance, Brussels, of 16 November 2001, the fact that that court, which had jurisdiction under the relevant clause in the MED URBS contracts, held in that judgment that the Commission had no claim under those contracts, fully confirms that the CEMR's defence against the Commission's claims was at least a serious one": Court of Justice, judgment of 10 July 2003 in Case C-87/01, cit., para. 63.

3. *Consequences of coordination with the* lex fori *in relation to the setting off of claims*

Assuming that the Regulation establishing a European Small Claims Procedure does not embrace a self-standing concept of set-off, and thus according to the position set out in recital 17 of the preamble the defence cannot be raised within the facilitated procedure by filing form A annexed to the Regulation, this clearly restricts the defence rights of the defendant, who will be required to have recourse to national procedural rules. In Italy, according to Article 35 of the Italian Civil Procedure Code, a claim may be set off against another claim up to the amount of the main claim. Alternatively, if it exceeds that amount, it may be actioned within other proceedings. This evidently means that, rather than expedite the proceedings in cases involving small claims, it will rather result in a need for complex coordination between different proceedings.

Once those coordination issues have been resolved, a further problem is which law is applicable to the set-off; absent any self-standing unitary classification within the European Union, this matter will have to be resolved according to the *lex fori*. One might wonder whether Article 17 of the Rome I Regulation could resolve classification conflicts that arise whenever different classifications are used in different systems. This has been relevant above all following the United Kingdom's withdrawal from the European Union.

The procedural classification of the "set-off defence" traditionally followed within common law countries might become relevant once again [23]. It is important to recall, especially as re-

[23] In the United Kingdom, set-off as a defence is regulated under Order 18, rule 17, of the *Rules of the Supreme Court*. On the development that resulted in the distinction between *set-off* and *counterclaim*, see in general LOYD, *The Development of Set-off*, in "University of Pensylvania Law Review", 1916, pp. 541-547.

gards legal set-off, that a classificatory clash may arise as a result of the enactment of a self-off statute, in view of the type of legislative instrument into which the provision on set-off is incorporated [24]. The prospects for the application of the provisions on set-off remain uncertain. It is not certain how the national courts will coordinate with the European law on small claims disputes, above all where set-off statutes are applicable, which will require detailed assessment from a private international law perspective.

4. *Concluding remarks*

Set-off is a complex institute in most Member States, even though it can act as a mechanism for the simultaneous extinction of two separate (generally pecuniary) claims in existence at the same time between two reciprocal debtors, up to the amount of the lower debt. This complexity can in fact be explained by reference to the "different situations as regards the rules for implementing it, the procedural rules and its effects", as was appropriately clarified by Advocate General Philippe Léger in his opinion delivered within a dispute concerning the interpretation of the concepts of "counterclaim" and "set-off" for the purposes of the Brussels Convention [25].

Since set-off may be invoked within individual legal systems either as a defence raised by the defendant as a simple objection seeking to justify its failure to comply with the obligation incumbent upon it as actioned by the claimant within the proceedings launched by the latter, with a view to obtaining the full or

---

[24] See FLETCHER, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the Gibbs Test*, in "Indiana Law Journal", 1998, pp. 171-179.

[25] ECJ, judgment of 13 July 1995 in Case 341/93, *Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co.*, cit., para. 30 of the opinion.

partial rejection of the claimant's claim, or alternatively as a counterclaim raised by the defendant, seeking a different order against the claimant, first the case law of the ECJ and now the Regulation establishing a European Small Claims Procedure has excluded set-off as an objection from the rules under examination [26]. If this were not the case, the derogation laid down by Article 6(3) from the general forum provided for in Article 2 of the Convention would have undermined the general principles on which the Brussels system is based.

In the light of the difficulty in coordinating between the provisions of the Regulation and national law, which undoubtedly leads to negative consequences in terms of the defendant's defence rights, we must consider whether it would be appropriate to amend Regulation n. 861/2007 in such a manner as to turn it into a genuinely effective instrument for protecting individual expectations, having regard to the (substantive and procedural) discrepancies between the various national rules on set-off.

---

[26] ECJ, judgment of 13 July 1995 in Case 341/93, *Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co.,* cit., para. 18. On the distinction between set-off – claim and set-off – and counterclaim for the purposes of the Brussels Convention of 1968, see ECJ, judgment of 9 November 1978 in Case C-23/78, *Nikolaus Meeth v. Glacetal* 1978 [ECR] 2133-2148, including in particular the opinion delivered by Advocate General Capotorti, ivi, paras. 3-4.