OLAŚ ANDRZEJ,
Ph.D. in law,
Attorney at law,
Assistant Professor (Adjunct) at the Chair of Civil Procedure of the Faculty of Law Administration, Jagiellonian University in Kraków, Poland.

SOME REMARKS ON THE PENDING REFORM OF THE POLISH DOMESTIC SMALL CLAIMS PROCEDURE

ABSTRACT

This paper comments on the major changes to the Polish small claims procedure proposed pursuant to the draft Act of 27 November, 2017 amending the act – Code of Civil Procedure and some other acts. The purpose of this paper is to briefly present and assess these draft amendments from the perspective of the past experiences and future expectations as well as in comparison with some features of the European Small Claims Procedure, with a special emphasis on the efficient functioning of the procedure in question in conformity with its objectives, i.e. the increase of the access to justice as well as the effectiveness and the efficiency of legal protection in disputes concerning property claims of lower value through the simplification, streamlining and acceleration of proceedings as well as lowering its costs. The author finds that while the changes in the ambit of the application of provisions on the small claims procedure as well as the abandonment of the obligatory use of official forms deserve full recognition and sup-

port as appropriate and desirable adjustments based on the past experience and the critical evaluation of the currently binding rules, the latter changes empowering judges to use broad discretion in establishing both claimant's entitlement to a claim in principle and its amount as a substitute of strict determinations based on the proper evidence (including expert opinions), without the sufficient checks and procedural guarantees, e.g. in the form of the parties' access to full appeal including thorough review of discretional findings of the court of first instance, seem to go too far in the attempt of streamlining and boosting time and cost-efficiency of this procedure, raising concerns from the perspective of due process and fair trial standards.

I. INTRODUCTION: THE SUBJECT MATTER OF THE ARTICLE

Simplified procedure (hereinafter also referred to as a: "*small claims procedure*") was introduced into the Polish civil procedure in 2000 pursuant to the Act of 24 May, 2000 amending the act – Code of Civil Procedure, the Act on registered pledge and register of pledges, the Act on court costs in civil cases and the Act on court enforcement officers and execution[1] constituting a novel form of so-called "separate procedure". Separate procedures, pursuant to the Polish Code of Civil Procedure[2], are the specific types of proceedings within the scope of civil procedure in contentious matters (i.e. civil process) constituting particular procedural regimes consisting of provisions deviating from the general rules on the civil proceedings in contentious matters, which are specifically crafted to

[1] Journal of Laws No. 48, item 554, as amended.

[2] The Act of November 17, 1964 Code of Civil Procedure, (the consolidated text: the Journal of Laws of 2018, item 155, as amended), hereinafter referred to as "*CCP*".

serve the needs as well as to fit into peculiarities of civil matters covered by the scope of their respective application[3].

The purpose of the adoption of a small claims procedure to the CCP was to increase the access to justice as well as effectiveness and efficiency of legal protection in disputes concerning property claims of lower value through the simplification, streamlining and acceleration of proceedings as well as lowering its costs[4].

Another milestone in the development of small claims procedures within the civil procedural law in Poland took place on the 1st of January 2007 with the commencement of the application of the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure[5]. Obviously, adoption of the European Small Claims Procedure as an optional instrument available to the claimants (creditors) seeking their claims of lower

[3] E.g. Matrimonial Proceedings; Proceedings in Cases Involving Relationship Between Parents and Children; Proceedings in Cases Within the Subject-Matter and Scope of Labour Law and Social Insurance; Order for Payment Procedure and Procedure by Writ of Payment and Simplified Procedure. See in this regard *M. Manowska,* Postępowania odrębne w procesie cywilnym, Warszawa 2012; *B. Draniewicz, Ł. Piebiak,* Postępowania odrębne: komentarz, Warszawa 2007.

[4] See: the official reasoning of the draft Act amending the act – Code of Civil Procedure, the Act on registered pledge and register of pledges, the Act on court costs in civil cases and the Act on court enforcement officers and execution, Governmental draft act no. 1202, p. 1. In legal literature see e.g. *J. Jankowski,* Postępowanie uproszczone w procesie cywilnym, Monitor Prawniczy 2000, No 10, p. 618 *et. seq*; *M. Manowska,* Postępowanie uproszczone w procesie cywilnym, Warszawa 2002, p. 7; *S. Cieślak,* Postępowania przyspieszone w procesie cywilnym. Zarys postępowania nakazowego, upominawczego i uproszczonego, Warszawa 2004, p. 1-2, 74; *B. Draniewicz,* (in:) B. Draniewicz, Ł. Piebiak, Postępowania..., p. 339.

[5] Official Journal of the European Union L.199.1 as amended by the Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure (L 341/1). One should note however, that the proper executive provisions necessary to implement the Regulation (EC) No 861/2007 into the polish civil procedure were added into the Code of Civil Procedure only with enactment of the Act of December 5, 2008 amending the act – Code of Civil Procedure and some other acts (Journal of Laws No. 234, item 1571) which came into force on 12 December, 2008.

value in cross-border cases did not replace the domestic small claims procedure but provided interested claimants with additional procedural choice between these two distinct procedures to a degree that the objective scope of their respective application overlaps[6].

Since its adoption, provisions governing a Polish small claims procedure undergone some moderate amendments, among which the most important was a gradual process of increasing the limit of the amount in dispute which constitutes one of decisive criteria (*ratio valoris*) necessary to apply this procedure to a given dispute[7]. Having that stated, it seems worth noting however, that none of these amendments had a major impact on the general model of the procedure in question as such, which has remained untouched since its adoption.

This situation though is about to change since a planned huge overhaul of the Polish civil procedure as devised by the draft Act amending the act – Code of Civil Procedure and some other acts of 27 November 2017[8] includes, *inter alia,* substantial modifications to the Polish domestic small claims procedure.

The purpose of this paper is to briefly present and assess the most vital of the planned amendments to the Polish domestic small claims procedure in the light of the European small claims procedure, from the perspective of the past experiences and future expectations with a special emphasis on the efficient functioning of the procedure in question conformant to its objectives as referred to above.

[6] See in this regard remarks in point II below.

[7] Initially, until 5 February 2005, small claims procedure covered claims up to PLN 5 000 which was then raised to PLN 10 000. Currently, since the 1 June 2017 the limit of the amount in dispute is PLN 20 000 which approximately equals EUR 5 000 constituting the limit of claims pursuant to the Article 2 sect. 2 of the Regulation (EC) No 861/2007 as amended by the Regulation (EU) 2015/2421 in force as of 14 July 2017.

[8] Governmental draft act no. UD309 (available in Polish: "https://legislacja.rcl.gov.pl/docs//2/12305652/12474228/12474229/dokument318923.pdf"), hereinafter referred to as: "Bill".

II. THE SUBJECT-MATTER SCOPE OF SMALL CLAIMS PROCEDURE

The most salient feature of the above-mentioned reform of the small claims procedure consist in a major overhaul of its objective scope of application, as provided for in the Article 505[1] CPC. Pursuant to its current wording, the provisions on the simplified procedure shall apply to the cases falling under the jurisdiction of district courts concerning: (1) contractual claims, if the value of the matter at issue does not exceed PLN 20 000, and in claims arising from a warranty, guarantee, quality guarantee or non-compliance of consumer goods with a consumer sales contract, if the value of the subject of the agreement does not exceed the same amount, (2) payment of rent for the lease of housing units and other charges payable by the lessee as well as charges for the use of housing units in a housing cooperative irrespective of the value of the matter at issue (no more than PLN 75 000 which according to the Article 17 point 4 demarcates the subject-matter jurisdiction of the district and regional courts).

According to a prevailing view[9], the term "cases concerning claims" used in the Article 505[1] point 1 CPC shall be understood broadly, i.e. it covers not only cases in which provision of performance (monetary or non-pecuniary claims) owed by a debtor to a creditor is sought , but

[9] *M. Manowska*, Postępowania odrębne..., s. 211-212; *S. Cieślak*, Postępowania przyspieszone..., s. 70; idem, System postępowań przyspieszonych w procesie cywilnym po zmianach Kodeksu postępowania cywilnego wprowadzanych w życie w latach 2008-2010, (in:) *J. Gudowski, K. Weitz* (ed.), Aurea praxis, aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego, t. I, Warszawa 2011, p. 95; *B. Draniewicz*, (in:) *B. Draniewicz, Ł. Piebiak*, Postępowania..., p. 341, nb 3. This broad understanding of the concept of „claim" in the context of the scope of simplified proceedings is also indicated by the shape and contents of the official "P "form of the statement of claim, which contains a section 6.1. intended to indicate a monetary claim together with possible interest, and a section 6.2 to specify „other requests", in which three options are listed: „ordering specific behavior", „provisions of things" and „other", which option – in the face of exhaustion of possible actions for the performance – must refer to demands for the determination or shaping of the legal relationships.

also those in which the claimant requests determination (establishment) of the existence or non-existence of a legal relationship or the shaping (establishing, changing or terminating) of the legal relationship. On the other hand the Article 505^1 point 2 CPC explicitly limits the scope of application of the small claims procedure to claims arising out of contracts, thus excluding all claims in torts, based on unjust enrichment and other non-contractual claims.

This scope of application is rightly criticized by the authors of the Bill as dysfunctional[10]. In simplified proceedings, cases seeking to obtain judgments shaping subjective rights (i.e. complaints demanding determination or shaping a legal relationship or law) should not be examined, due to the inappropriateness of the specific provisions governing these procedure aiming at the streamlining, expediting and simplifying of its conduct to the nature of such cases. At the same time there is no convincing justification for maintaining the principle that only actions on claims under contracts or connected with the tenancy or other form of the use of housing premises are subject to examination in these proceedings.

Therefore, the Bill proposes a new wording of the Article 505^1 point 1 CPC pursuant to which in simplified proceedings, claims for performance are examined if the value of the subject of the dispute does not exceed PLN 20,000, and in claims for warranty or guarantee – if the value of the subject of the contract does not exceed this amount. The Article 505^1 point 2 CCP in turn, excludes from the scope of its application cases that are deemed by the proponents of the Bill to be inadequate for small claims procedure: namely: (1) matters falling within the jurisdiction of regional as opposed to district courts[11]; (2) matrimonial matters and cases concerning relationships between parents and children; (3) cases in the field of labor law examined with the participation of lay judges; (4)

[10] See the reasoning of the Bill, p. 107 (available at: https://legislacja.rcl.gov.pl/docs//2/12305652/12474240/12474241/dokument318937.pdf).

[11] See in this respect the Article 17 CCP.

matters relating to social security, with the exception of the issues listed in the Article 477^8 § 2 points 1-4 CCP and pension cases.

Due to the fact that general principles may not cover all peculiar situations that would justify the examination of the case without applying the provisions on simplified procedure, the proponents of the Bill considered it appropriate to authorize the court to omit the provisions on simplified procedure, if in the opinion of the court it may contribute to a more efficient resolution of the dispute (see the draft Article 505^1 § 3 CCP,. Pursuant to this provision, the court will decide to hear the case without taking into account the provisions on simplified procedure by means of incontestable decision.

The author believes that abovementioned changes deserve recognition and support. The proposed objective scope of application, as opposed to the one currently in force, seems to be suitable to the specific procedural features of the small claims procedure, covering most contractual and non-contractual claims within the limit of the value of PLN 20 000 while, at the same time, excluding claims for determining or shaping legal relationship as well as claims arising out of matters which by the virtue of their nature shall not be subject to the streamlined procedural rules devised for the small claims procedure. Moreover, proposed regulation of the subjective scope of simplified proceedings sets domestic small claims procedure much more in line with its European counterpart (i.e. European Small Claims Procedure). Pursuant to the Article 2 sect. 1 of the Regulation (EC) No 861/2007 the latter applies to all property claims arising out of the civil and commercial matters, irrespective whether they are of contractual nature or not, if the value of a claim does not exceed EUR 20 000 except for the matters excluded under the section 2 of this Article.

III. STATUTORY FORMS OF PLEADINGS

Pursuant to the Article 505^2 CPC, in the simplified procedure, statement of claims, statement of defense, motions to set aside a default judgment

and pleadings containing evidence shall be filed using official, mandatory forms[12]. According to the Article 493 § 2 CCP and the Article 503 § 2 CCP, both read in conjunction with the Article 505^2, the same duty of using official forms applies to submitting appropriate means of appeal against orders for payment issued in the procedure by writ of payment ("postępowanie nakazowe"). and the order for payment procedure ("postępowanie upominawcze") in cases falling within the scope of the small claims procedure, concurrently recognized in one of the above-mentioned *ex parte* proceedings leading to the issuance of the order of payment in the simplified proceedings.

The mandatory nature of statutory forms is highlighted by the procedural consequences of a breach of a duty to use them as specified in the Article 130^1 § 1^1 and § 2 CCP. Pursuant to the former paragraph, if a pleading which should be filed on an official form is not submitted on such form or cannot be duly processed due to failure to comply with other formal conditions, the presiding judge shall request the party to correct or supplement those requirements within one week, forwarding the pleading concerned to that party. Such request should specify all the missing or erroneous elements of the pleading and information about the provisions of § 2 of the article in question. Pursuant to the latter paragraph, if the party fails to correct or supplement above-mentioned requirements within the specified-above time limit, the presiding judge shall order that pleading to be returned to the party. For the same reason, motions to set aside default judgment, allegations against an order for payment or objections to an order for payment shall be rejected by the court.

The purpose of establishing the obligation to file basic pleadings on official forms was to increase access to justice by standardizing these pleadings in cases pertaining to small claims and thus facilitating their

[12] Templates of official forms and methods of making them available to the parties is governed by the Regulation of the Minister of Justice on specifying the forms and the manner of making official forms available in the proceedings of 5 April 2002 (the consolidated text: Journal of Laws of 2015, item 723 as amended) enacted on the basis of the statutory delegation as provided for in the Article 125 § 3 CCP.

submission, in particular for parties not represented by professional attorneys, as well as ensuring efficiency and acceleration of simplified proceedings, by expediting initial examination of these pleadings in courts through the standardization and uniformity ensured by official forms[13].

In practice, the obligation to comply with requirement of lodging pleadings on a properly completed official forms – as a manifestation of the increased procedural formality in the simplified proceedings – has proven to be one of the most controversial measures adopted by the legislator, aimed at achieving the objective of the simplified proceedings. It is highly questionable whether the imposition on the parties of such increased requirements as to the form of procedural action may indeed serve well in realizing the goals of this procedure, i.e. reducing barriers to access to justice, as well as, simplifying and streamlining proceedings in minor and simple matters. In the academia it is rightly submitted that, contrary to the assumptions adopted by the legislator, particularly in the face of the (one may argue – excessively) formalistic approach of courts in assessing the correctness of completing official forms[14], the obligatory use of them often poses the parties (especially, but not exclusively, unrepresented by professional representatives) serious difficulties, thus making these forms counterproductive. As a result mandatory, official forms, more often than not, contribute to impeding the parties attempts at pursuing legal protection and thus increase, instead of reduction of the number of incidental proceedings triggered in the course of the main proceedings to correct or supplement the formal defects of pleadings, and,

[13] See the official reasoning of the draft Act amending the act – Code of Civil Procedure, the Act on registered pledge and register of pledges, the Act on court costs in civil cases and the Act on court enforcement officers and execution, Governmental draft act no. 1202, p. 147.

[14] See e.g. Resolution of the Supreme Court of 30 May 2001, case no: III CZP 19/01, OSNC 2001, No 12, pos. 170, pursuant to which any errors in filling official forms applicable in civil cases (in particular small claims procedure), even if they do not prevent giving the pleading a correct course, disqualify them.

consequently, extend the proceedings in time as well as effectively limit access to justice[15].

The proponents of the Bill acknowledged the referred-above criticism, admitting explicitly that practical experiences with the use of official forms in contentious proceedings (in particular in the small claim procedure) lead to the following conclusions. First, from the perspective of professional attorneys the obligation to use forms is pointless, since they are, or at least are expected to be able to properly formulate pleadings without using the forms. At the same time, the parties acting before the court on their own behalf (not represented by attorneys), who are unable to draft appropriate pleadings in their usual written form, usually cannot properly complete the forms neither. In summary, the general obligation to use official forms does not simplify the small claims procedure, but instead, complicates it, without providing in return sufficiently meaningful benefits in terms of streamlining processing of the pleadings resulting in substantial costs and time savings.

As a consequence of such conclusions, the proponents of the Bill decided to abandon the mandatory use of forms in the simplified proceedings by repealing the Article 505^2 CCP in whole[16]. Taking into consideration however that, in individual cases, the use of forms may help some incapable parties in communicating their statements and motions in written pleadings, abolishing the obligation to use forms, is not tantamount a prohibition on their use. The parties will be enti-

[15] See .e.g. *A. Zieliński*, Błędy w urzędowych formularzach – glosa – III CZP 19/01, Monitor Prawniczy. 2002, No 1, p. 18; *A. Góra-Błaszczykowska*, Postępowanie uproszczone w sprawach z zakresu prawa pracy – glosa – III PZP 2/03, Monitor Prawa Pracy 2004, No 9, p. 248 i*et. seq.*

[16] The obligation to use official form shall remain in some non-litigious proceedings (e.g. land and mortgage registration proceedings as well as registration proceedings concerning entries in the National Court Register, in which the use of forms is a consequence of specific requirements as to the contents of respective motions and submissions which are in line with the substantive rules governing these public registers.

tled to use official forms voluntarily. Proponents of the bill correctly note that, so long as no specific provision prohibits a party from filing the pleading on the form, the parties' freedom of using these forms does not require any special stipulation or authorization[17].

Fully adhering to the criticism of the obligation to use forms in the domestic small claims procedure, the above-mentioned solution proposed in the Bill should be regarded as appropriate and desirable. Insofar as this obligation, due to the need to standardize statements of claims and counter-claims brought before the courts of different EU member states in cross-border cases under the European Small Claims Procedure (the Article 4 sect 1 and the Article 5 sect. 5 of the Regulation (EC) No 861/2007) is fully justified[18], the same duty in national procedure lacks satisfactory reasons justifying its maintenance. At the same time, a solution that allows the parties to use the existing templates of forms voluntarily, at their sole discretion, should be deemed as correct.

IV. SCOPE OF THE JUDICIAL DISCRETION IN DETERMINING FACTS OF THE CASE AND RESOLVING THE DISPUTE

Major change in the Bill with regard to to the conduct of the proceedings pursuant to the domestic small claims procedure pertains to the scope of judicial discretion with regard to the establishing the facts of the case which according to the relevant legal rules decide on the legitimacy of

[17] See the official reasoning of the draft Act amending the act – Code of Civil Procedure, the Act on registered pledge and register of pledges, the Act on court costs in civil cases and the Act on court enforcement officers and execution, Governmental draft act no. 1202, p. 147.

[18] See in this regard also motive no 11, 16 and 17 of the of the Regulation (EC) No 861/2007. One should note, however, that pursuant to Article 5 sect. 3 of the Regulation (EC) No 861/2007, the official form for statement of defense is optional – the defendant may submit his response to a claim also in any other appropriate way not using the answer form.

the claim sought by the claimant as such (its principle) and the actual amount (*quantum*) of the claim awarded.

This comes as a little surprise since one of the most distinctive features of the Polish domestic simplified proceedings consists in the widening of the admissibility of the judge's discretional assessment of the facts of the case replacing detailed and precise factual findings made on the basis of evidence, in particular expert opinions. In other words, the concept of simplifying, streamlining and thus accelerating as well as lowering the costs of the proceedings conducted under the rules of the small claims procedure is largely implemented on the level of special rules of fact-finding (and evidence) conductive to the establishment of the facts of the case and the respective rules of adjudication referring to factual basis of decisions on the merits of the case.

Pursuant to the Article 505^7 CCP as currently in force, if the court decides that a case is particularly complex or that resolution thereof requires expert knowledge, the court shall continue hearing that case without application of the provisions on the small claims procedure. This rule is tantamount to the absolute prohibition of the expert opinions in the simplified proceedings which effectively lead to the lowering of the costs of the small claims proceedings and its expedition at the cost of the narrowing of its actual scope of application through a case-by-case, fact-specific, exclusion of more complicated cases from its purview and transferring them to the "regular" civil proceedings conducted in accordance with general provisions on the civil process. This solution is somewhat divergent from the more flexible rule included in the Article of the Regulation (EC) No 861/2007, pursuant to which in the European Small Claims Procedure the court or tribunal may take expert evidence or oral testimony only if it is not possible to give the judgment on the basis of other evidence. Thus the need to admit expert opinion in the European Small Claims Procedure does not *per se,* lead to inadmissibility of this procedure.

Concurrently, the Article 505^6 § 3 CCP stipulates that if the court decides that it is impossible or overly difficult to substantiate the

amount of a claim, the court may award such amount as the court may deem appropriate, established by taking into consideration all the circumstances of a case. This provision extends the general scope of so-called *ius moderandi,* empowering the court to assess and grant amount it perceives to be adequate, i.e. at the discretion of the court[19]. This discretionary power of the court is however not absolute: in its exercise not only must the court employ logic and experience in its effort of comprehensive analysis of all relevant circumstances of the case affecting the amount of the claim to be awarded to the claimant but first, it must be satisfied that the statutory prerequisites of the application of *ius moderandi,* as provided for in the quoted above provision, are met. Namely, prior to the exercise of this discretionary competence, it must establish by the court that the claimant has proven his claim in principle and simultaneously, that it is impossible or excessively difficult for him to do the same with the specific amount he is entitled to *vis-à-vis* the defendant.

According to a new wording of the Article 505^7 § 1 CCP as proposed in the Bill, whenever the establishment of the legitimacy or amount of the performance demanded by the claimant requires expert knowledge, it is for the court to decide whether to resort to his own, independent assessment based on considering all the circumstances of the case or to seek an expert opinion. This change clearly amounts to a further, substantial strengthening of the *ius modrandi* of the court in the domestic small claims procedure since, first of all a need to admit expert opinion no longer disqualifies the case from the application of its rule, and secondly the scope of this judicial power is broadly expanded to cover both the principle and the amount of the claim in dispute. Moreover, impossibility or excessive difficulties in proving the claim does not constitute the necessary prerequisite for the exercise

[19] On the *ius moderandi* under the existing provisions see e.g. *M. Manowska,* Postępowanie uproszczone, p. 75-78; *J. Gudowski,* (in:) *T. Ereciński* (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom III. Postępowanie rozpoznawcze,* Warszawa 2016, p. 866-967.

of the *ius moderandi* anymore. Conversely, according to the proposed wording of the Article 505^7 § 1 CCP it will be up to the court to determine at its sole discretion whether in the circumstances of the case it is more appropriate to exercise its own judgment in establishing the legitimacy or amount of the performance due in the dispute at hand or rather if it is more advisable to resort to expert opinion.

Furthermore, the Article 505^7 § 2 CCP as proposed in the Bill, instructs the court not to admit the expert opinion if its expected cost would exceed the value of the subject of the dispute, unless exceptional circumstances justify its admission. This rule is aimed at protecting the efficiency and economical rationality of the civil proceedings which in cases concerning property claims are grossly violated once the costs of the dispute surpass the value of the claim, thus inevitably harming either claimant, defendant or both parties (contingent upon the final allocation of this costs by the court) and contradicting the overarching objective of the civil proceedings which is to deal with civil cases in a fair and efficient manner.

This new provisions undoubtedly equip the court with a new, powerful tool enabling the streamlining, expediting and lowering costs of small claims procedure. This however comes at the price of emergence or indeed, substantial increase of a risk of unpredictability and even judicial arbitrariness in the process which in extreme cases may well amount to a sheer denial of justice, i.e. grave violation of due process rights and fair trial which standards both belong to constitutional[20] and conventional[21] fundamental principles constituting the cornerstones of the concept of rule of law[22].

[20] Pursuant to the Article 45 sect. 1 of the Constitution of the Republic of Poland Act of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483, as amended). everyone has the right to a fair and public hearing of his case without undue delay before a competent, impartial, and independent court.

[21] See the Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified by the Republic of Poland on 19 January 1993 (Journal of Laws of 1993, no. 61, item 284).

[22] See in this regard e.g. *P. Pogonowski*, Realizacja prawa do sądu w postępowaniu cywilnym, Warszawa 2005; *A. Łazarska*, Rzetelny proces cywilny, Warszawa 2012.

The proponents of the Bill acknowledge the above-mentioned risk of judicial arbitrariness[23]. However they defend proposal arguing that, taking into account high ethical and professional standards required from the judges, it can be reasonably assumed that they will be careful enough in exercising their discretion in judgments, so that the degree of risk taken will certainly not exceed the acceptable level. Moreover, as the authors of the Bill point out, errors and deficiencies in this area will be relatively easy to identify and remedy in the appellate proceedings. Thus, the proponents of the Bill assert that the weighing of these competing arguments justify conclusion that the expected benefits in the form of streamlining and improving time and cost efficiency of the proceedings should outweigh the risk of arbitrary judicial decisions.

This optimistic evaluation may however be deemed objectionable, if one gives due account to the realities of the appellate proceedings in the polish civil procedural law. One may observe quite a common practice in the courts of second instance of limiting review of judgments issued in the court of first instance challenged by means of appeal, by giving a broad deference to the factual findings contained in the contested decision. This happens even more often in the simplified proceedings where the scope of appellate control based on the model of limited appeal (so-called appeal *sine beneficio novorum*)[24] is expressly reduced by the virtue of the Article

[23] See the reasoning of the Bill, p. 109.

[24] The essence of a difference between a full (*cum beneficio novorum*) and limited (*sine beneficio novorum*) appeal lies primarily in the fact that the limited appeal does not serve - like a full appeal – an examination of the validity of the challenged judgment from the point of view of compliance with reality and the law (that is all pertinent *questiones facti* and *questiones iuris* of the case at hand), but from the point of view of its compliance with the procedural material at the disposal of the adjudicating court. Therefore, the focal point for the court of the second instance in the model of limited appeal is the judgment and its correctness in light of the records of the case collected in the case-files, not the re-examination of the case on *de novo* basis (including conducting or supplementing evidentiary proceedings) and adjudication on its merits. See in this regard the reasoning of the Resolution of the Supreme Court of 31 January 2008, case no III CZP 49/07, OSNC 2008, No 6, pos. 55. In literature see, e.g.. *J. Jaśkiewicz*, Apelacja w postępowaniu uproszczonym, Przegląd Sądowy 2003, No 10, p. 70 *et seq.*; *J. Gudowski, Pogląd na apelację* (in:) *J. Gudowski,*

505^9 § 1^1, the Article 505^{11} § 1 and 2, the Article 505^{12} § 3 CCP. Additionally decisions of the court of the second instance are not subject to cassation in appeal (see the Art. 398^2 § 2 point 3 CCP). This may be perceived (and often is) as an incentive (or even temptation) to unduly limit the scope of review of a challenged judgment to the minimum and thus, ascribe to these decisions high degree of deference. Additionally one should notice that the opportunistic tendency to give deference to assessment made by the court in a lower instance is in a natural manner aggravated once those assessments are made within discretion expressly granted to the court pursuant to the applicable provisions.

This inherent risk of arbitrariness becomes even more immense in "petty" claims matters which can be distinguished from within the small claims under the Bill. This is so, as pursuant to the draft Article 505^8 § 4 CCP, in cases in which the value of the subject of the dispute does not exceed PLN 1,000, the statement of reasons of the judgment shall be limited to clarifying the legal basis of the decision with reference to provisions of law. The court may, at its sole discretion, based on an assessment of all the circumstances of the case, decide to extend this reasoning to the remaining contents required by the Article 328 § 2 CCP[25]. Therefore, if the court of first instance is empowered to make its decision on the merits of the case based on his discretional assessment of facts and simultaneously is released by a legislator from a duty to properly justify his decision, one may doubt whether courts of second instance will find sufficiently compelling reasons or incentives to give a proper scrutiny to such findings underlying contested decisions which would require "second-guessing" intentions and reasons of the court which has issued a judgment in ques-

K. Weitz (red.), Aurea praxis..., p. 241; *A. Mendrek*, Konsekwencje modelu apelacji ograniczonej w postępowaniu uproszczonym, Internetowy Przegląd Prawniczy TBSP UJ 2017, No 1, p. 23 *et seq.*

[25] Pursuant to this provision a statement of the reasons for a judgment should specify the actual grounds (factual basis) for decision, namely: the facts that the court accepted as proven, the evidence on which the court relied, reasons for which the court denied credibility and probative value to other evidence and the legal basis for the judgment, including reference to relevant legal rules.

tion without a need of providing its reasons in writing for the purpose of appellate control.

These observations, regardless of praiseworthy intentions of the authors of the Bill to boost efficiency and maximally streamline small claims procedure, must raise serious concerns with regard to conformity with due process standards as it imposes upon the parties material risk of denial of justice.

V. WHAT REMAINS UNCHANGED

What remains unaffected by the Draft are in particular procedural rules that are devised to streamline and expedite small claims procedure through maximal reduction of the admissibility of those procedural institutions, application of which, usually leads to more complexities in the course of the proceedings which may adversely affect its time and cost efficiency. This includes, in particular, the following: limitation of the admissibility of the joinder of claims (the Article 505^3 § 1-2 CCP[26]); prohibition of the modification of claims in the course of the proceedings (the Article 505^4 § 1, first sentence CCP); prohibition of third parties direct (main) and indirect (ancillary) interventions during proceedings as well as joinder of parties (Article 505^4 § 1, second sentence CCP);

[26] Pursuant to the § 1 of the Article 505^3 CCP, only one claim may be pursued with a single complaint (statement of claim). Paragraph § 2 sets forth that more than one claim may be contained in a single complaint only if they arise out of the same contract or more than one contract of the same type. If more than one claim is unduly contained in a single complaint, the presiding judge shall order that complaint to be returned pursuant to the Article 130^1 CCP. Due to the proposed changes in the scope of application of the small claims procedure as discussed in the point II above, the Bill introduces respective changes in this provision referring to the same legal relationship of the legal relationships of the same kind as a source of admissible joinder of claims.

limitation of the admissibility of submitting counter-claims by defendants as well as declaring set-off (Article 505^4 § 2 CCP[27])[28].

VI. CONCLUSIONS

Concluding, it is fair to state that the planned reform of the Polish small claims procedure will have a material impact on the model and shape of these proceedings, affecting not only its scope of application but also abandoning the mandatory use of official forms, as well as influencing significant procedural rules of conduct pertaining to the admissible extent of judicial discretion in establishing and assessing the facts of the case determining the resolution of the dispute on its merits. While the changes in the ambit of the application of provisions on the small claims procedure as well as the abandonment of the obligatory use of official forms deserve full recognition and support as appropriate and desirable adjustments based on the past experience and the critical evaluation of the currently binding rules, the latter changes empowering judges to use broad discretion in establishing both claimant's entitlement to a claim in principle and its amount as a substitute of strict determinations based on the proper evidence (including expert opinions), without the sufficient checks and procedural guarantees, e.g. in the form of the parties' access to full appeal including thorough review of discretional findings of the court of first instance, seem to go too far in the attempt of streamlining and boosting time and cost-efficiency of this procedure, raising concerns from the perspective of due process and fair trial standards.

[27] By the virtue of Article 5054 § 2 CCP, submission of a counter-complaint and assertion of a set-off defense shall be allowed only if claims underlying these measures fall under the scope of simplified procedure.

[28] See in this regard e.g. *M. Manowska,* Postępowanie uproszczone..., p. 24 *et. seq*; *S. Cieślak,* Postępowania przyspieszone... p. 79 *et. seq.*; *B. Draniewicz,* (in:) *B. Draniewicz, Ł. Piebiak*, Postępowania..., p. 353 *et seq.*

1. Journal of Laws No. 48, item 554, as amended.
2. The Act of November 17, 1964 Code of Civil Procedure, (the consolidated text: the Journal of Laws of 2018, item 155, as amended).
3. *M. Manowska,* Postępowania odrębne w procesie cywilnym, Warszawa 2012; *B. Draniewicz, Ł. Piebiak,* Postępowania odrębne: komentarz, Warszawa 2007.
4. *J. Jankowski,* Postępowanie uproszczone w procesie cywilnym, Monitor Prawniczy 2000, No 10, p. 618
5. *M. Manowska,* Postępowanie uproszczone w procesie cywilnym, Warszawa 2002, p. 7.
6. *S. Cieślak,* Postępowania przyspieszone w procesie cywilnym. Zarys postępowania nakazowego, upominawczego i uproszczonego, Warszawa 2004, p. 1-2, 74.
7. *B. Draniewicz,* (in:) B. Draniewicz, Ł. Piebiak, Postępowania..., p. 339.
8. Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure
9. Regulation (EC) No 1896/2006 creating a European order for payment procedure (L 341/1).
10. Governmental draft act no. UD309 (available in Polish: "https://legislacja.rcl.gov.pl/docs//2/12305652/12474228/12474229/dokument318923.pdf").
11. *J. Gudowski, K. Weitz* (ed.), Aurea praxis, aurea theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego, t. I, Warszawa 2011, p. 95.
12. Resolution of the Supreme Court of 30 May 2001, case no: III CZP 19/01, OSNC 2001, No 12, pos. 170, pursuant to which any errors in filling official forms applicable in civil cases (in particular small claims procedure), even if they do not prevent giving the pleading a correct course, disqualify them.
13. *A. Zieliński,* Błędy w urzędowych formularzach – glosa – III CZP 19/01, Monitor Prawniczy. 2002, No 1, p. 18.
14. *A. Góra-Błaszczykowska,* Postępowanie uproszczone w sprawach z zakresu prawa pracy – glosa – III PZP 2/03, Monitor Prawa Pracy 2004, No 9, p. 248.
15. *P. Pogonowski,* Realizacja prawa do sądu w postępowaniu cywilnym, Warszawa 2005; *A. Łazarska,* Rzetelny proces cywilny, Warszawa 2012.

16. *J. Jaśkiewicz*, Apelacja w postępowaniu uproszczonym, Przegląd Sądowy 2003, No 10, p. 70
17. *J. Gudowski, Pogląd na apelację* (in:) *J. Gudowski, K. Weitz* (red.), Aurea praxis…, p. 241; *A. Mendrek*, Konsekwencje modelu apelacji ograniczonej w postępowaniu uproszczonym, Internetowy Przegląd Prawniczy TBSP UJ 2017, No 1, p. 23 *et seq.*