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Remedies against Excessive Duration of Civil Proceedings in Slovenia

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1. INTRODUCTION

The functioning of civil justice in Slovenia has for a long time been hampered by excessive duration of civil proceedings and by backlogs in courts. This still seriously undermines the reputation of the judiciary in public opinion. About ten years ago both the European Court of Human Rights (hereinafter: ECtHR)[2] and the Constitutional Court of Slovenia[3] delivered influential judgments stating that there is a structural defect in the functioning of Slovenian civil justice and that the right to a trial within a reasonable time is too often violated. The ECtHR found that that the average length of judicial proceedings in Slovenia revealed a systemic problem that had resulted from inadequate legislation and inefficiency in the administration of justice[4]. Despite recent progress, judicial proceedings at first instance in litigious civil and commercial cases remain long[5].

In 2008 Slovenia implemented a far-reaching reform of civil justice. The focus was the pragmatic issue of effectiveness, proper balance and a proportionate distribution of resources. The importance of the preparatory stage of proceedings was emphasised. This is accompanied by extended responsibilities of the parties that are under the threat of procedural sanctions. A diligent and thorough preparation and activity of the judge as well as the parties (their legal counsels) is expected. Nevertheless, although important improvements were made, the law still does not provide for sufficient tools (or sometimes it is just that courts do not apply the already existing tools often enough), which would effectively prevent parties and their attorneys from dilatory tactics and from non-diligent preparation of their cases. Another problem is that the judges are predominantly lenient toward sloppy preparation of the attorneys (just like the latter are lenient toward the sloppy preparation of the trial by the judge).

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2 *Lukenda v. Slovenia*, No. of application 23032/02, judgment dated 4.10.2005.
3 Decision of the Constitutional Court, No. U-I-65/05, 5.10.2005.
4 *Lukenda v. Slovenia*, No. of application 23032/02, judgment dated 4.10.2005, Par. 93-95.
5 Assessment of the 2013 national reform programme and stability programme for SLOVENIA – COMMISSION STAFF WORKING DOCUMENT, Brussels, 29.5.2013, SWD(2013) 374 final.

Nevertheless, the aggregate of measures adopted on different levels – ranging from the reform of procedural legislation, organisational measures, better court management and oversight, judicial training to the more active role of lawyers – has brought positive results. There is a distinct positive trend and the situation is – as numbers show – no longer as critical as the general public opinion in Slovenia suggests. A study of 2013 (and relying on data, provided for the period 2006-2010), commissioned by the EU Justice DG states that in Slovenia "disposition time for litigious civil and commercial cases in first instance courts in 2010 is still not adequate, being above the EU27 mean, although an improvement compared to the previous years. The clearance rate is around 100% which means that the situation is stable"[6]. In 2010, the average length of a civil dispute (civil and commercial litigation) going through all three instances in Slovenia was about 30 months (430 days in first instance, 110 days in appellate courts and 380 days in the Supreme Court). The positive trend continues. It is reported that the disposition time was reduced (concerning first instance proceedings) to 348 days in 2013 and cca. 220 days in 2014[7]. unresolved pending cases were reduced by 17 %. The courts were largely able to resolve more cases than they received in 2010-2012 and reached even about 110% clearance rate in 2014[8]. Disposition time for civil and commercial cases shows a positive trend, decreasing by an average of 20% since 2006 (for all instances alike)[9].

It is still worrying that Slovenia has one of the highest number of newly filed non-criminal cases per inhabitant in the EU member states[10]. This is probably not that much an expression of a particularly unfortunate litigious legal culture, but also of unpredictability of court outcomes (due to the lack of consistency of case law and still insufficient guidance role of the Supreme Court). This inevitably triggers the influx of a huge number of new cases and then new appeals. The unpredictable outcome of

6 The functioning of judicial systems and the situation of the economy in the European Union Member States Strasbourg, 15 January 2013; Report prepared for the European Commission (Directorate General JUSTICE), p. 516, available at: http://ec.europa.eu/justice/effective-justice/files/cepej_study_justice_scoreboard_en.pdf
7 See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions The EU Justice Scoreboard for 2016. http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf
8 Ibid, p. 8.
9 Assessment of the 2014 national reform programme and stability programme for Slovenia (Commission Staff Working Document); Accompanying the document: Recommendation for a Council Recommendation on Slovenia's 2014 national reform programme and delivering a Council opinion on Slovenia's 2014 stability programme (Brussels, 2.6.2014, SWD(2014) 425 final); p. 31. Available at: http://ec.europa.eu/europe2020/pdf/csr2014/swd2014_slovenia_en.pdf
10 Assessment of the 2013 national reform programme and stability programme for Slovenia Commission Staff Working document, Brussels, 29.5.2013, SWD(2013) 374 final.

court cases is an important factor which boosts litigation. In addition, the high number of incoming cases shows that the legal profession (the Bar) does not sufficiently fulfil its expected "filtering" role of preventing unmeritorious cases to reach courts.

Another interesting statistical data concerns the question how often the ECtHR has established the violation of the right to a trial within reasonable time in Slovenia. In 2005, the ECtHR this occurred on 159 occasions, whereas in 2015 there were only 15 cases of established violations. On the face of it this would seem as the strongest indication of the improved situation concerning length of civil proceedings. This assumption however would be wrong. True, the situation in Slovenia has improved, but not so drastically. The main reason for the sharp decrease in the violations established by the ECtHR lies elsewhere. Namely, Slovenia has established a system of remedies that enable victims of the violation of the discussed right to seek compensation already before domestic courts. Exhaustion of these remedies is a precondition for access to the ECtHR and, more importantly, if adequate compensation is ensured already before national bodies, there is no need for the parties to appeal to the ECtHR. The purpose of this paper is thus to shed some light on the system of remedies that a party to civil proceedings can adhere to in case of excessive duration of proceedings.

The introduction of individual remedies in case of excessive duration of proceedings should be understood against the background of the ECtHR doctrine, established in the *Kudla* case[11]. Since then the ECtHR has been examining the length of proceedings cases from the viewpoint of two conventional rights: right to a trial within a reasonable time (Art. 6/1 ECHR) and the right to effective legal remedy against the violation of conventional rights (Art. 13 ECHR) [12]. In *Lukenda*, the ECtHR determined that the Slovenian legal system does not provide for adequate and effective legal remedies against the violation of a right to a trial within a reasonable time[13]. It found that a party could neither invoke such remedies when the proceedings in question were still pending, nor can he or she effectively claim a compensation for – foremost – non-pecuniary damages after the termination of proceedings, in which the right to a trial within a reasonable time was violated. Shortly after the decision of the ECtHR in *Lukenda*, the Slovenian Constitutional Court also rendered a judgment in which it declared that the Slovenian legal system does not provide for adequate remedies against the violation of the right to a trial without undue delay[14].

[11] *Kudla v. Poland*, No. of the application 30210/96; judgment dated 26.10.2000.

[12] See e.g. F. Tulkens, The Right to a Trial Within a Reasonable Time: problems and solutions, in: Venice Commission, Can excessive length of proceedings be remedied?, Collection Science and techinque of democracy, No. 44, Council of Europe, Strasbourg, 2007, p. 342.

[13] *Lukenda v. Slovenia*, No. of the application 23032/02; judgment dated 6.10.2005.

[14] Decision of the Constitutional Court, No. U-I-65/05, 22.5.2005.

2. THE 2006 ACT ON PROTECTION OF THE RIGHT TO A TRIAL WITHOUT UNNECESSARY DELAY

Following the aforementioned decisions of the ECtHR and the Constitutional Court, the Act on protection of the right to a trial without unnecessary delay (hereinafter: the Act) was adopted[15]. The adoption of the Act was a part of the so called "*Lukenda Project*"; aimed at the elimination of backlogs in Slovenian courts, by providing for structural and managerial reform of the judiciary. In general, the Act provides for a combination of two types of legal remedies; one which is specified for speeding up a court proceeding (supervisory appeal and a motion to set a deadline) and the other which is specified for awarding (particularly non-pecuniary) damages. The first type of remedies is designed to obtain acceleration of pending proceedings. In that sense, the remedy offers a preventive relief. On the other hand, once the proceedings, in which the right to a trial without undue delay has been violated, have already terminated, the unreasonable duration can no longer be rectified. Therefore a compensatory relief, in form of a claim for damages, is the only remaining option. New remedies may be used by parties to court proceedings, participants in non-contentious proceedings and injured parties in criminal proceedings (Art. 2). However, entities of public law are exempt from the right to seek just compensation (Art. 24).

The Act provides that in the event of a delay in pending proceedings any party may lodge a supervisory appeal (*nadzorstvena pritožba*) with the president of the court examining the case. Unless the appeal is deemed to be manifestly unfounded or incomplete (Art. 6/1) the president of the court must request the presiding judge to report on progress in the proceedings, and the latter is required to indicate in writing to the presiding judge any irregularities he finds. The president of the court may also require the judge to submit the case file if he considers it necessary (Art. 6/3). If the judge notifies the president of the court in writing that all relevant procedural acts will be performed or a decision issued within a time-limit not exceeding four months, the president of the court shall inform the party thereof and thus conclude the consideration of the supervisory appeal (Art. 6/4). If after the receiving of the report of the trial judge, the president of the court establishes that the court is not unduly protracting the decision-making in the case, he shall dismiss the supervisory appeal by a ruling (Art. 6/5). If the president of the court establishes that the right to a trial within a reasonable time has been violated, he or she may put the case on the priority list (particularly if the matter is urgent) or set deadlines for procedural

[15] Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja (ZVPSBNO); *Official Gazette*, No. 49/06.

measures. If he orders that appropriate procedural acts be performed by the judge, he shall also set the time-frame for their performance, which may not be less than fifteen days and not longer than six months, as well as the appropriate deadline for the judge to report on the acts performed (Art. 6/6). If the president of the court establishes that the undue delay in decision-making in the case is attributable to an excessive workload or an extended absence of the judge, he may order that the case be reassigned (Art. 6/7).

If the aforementioned supervisory appeal proves unsatisfactory[16] a further remedy is available in proceedings which are still pending: a motion to set a deadline (Art. 8-11 of the Act). This motion is decided upon by the president of a superior court (a court which exercises appellate jurisdiction over the court, where proceedings in which the right to a trial within a reasonable time has allegedly been violated). The party may lodge the motion to set a deadline within fifteen days after receiving the ruling or, in case of non-response, after the time limits for the response has expired. Thus, a prior exhaustion of the remedy of supervisory appeal is a procedural prerequisite for filing of a motion to set a deadline. Procedure and possible decisions (Art. 11), which can be taken by the president of the higher court with regard to the motion to set a deadline, in general correspond to those of the president of the court with regard to the supervisory appeal; with the exception of powers to reassign the case to another judge (see supra).

The Act strives to ensure that both the decisions as well as practical measures concerning the aforementioned remedied shall be reached promptly. Time-limits, imposed by the Act, are short. For example, the president of the court examining the case had to decide within two months if a supervisory appeal is well-founded. If the judge dealing with the case notifies the president that procedural acts or a decision will be forthcoming within four months, the president informs the party accordingly. If the complaint is justified, procedural acts are to be carried out within a period of up to six months. As to a motion for a deadline, a decision on whether the complaint is well-founded must be rendered within fifteen days and, if justified, procedural acts must be performed within four months.

After the proceedings in which the right to a trial without undue delay had (allegedly) been violated, have terminated, the party may file an action for just compensation. The act specifically defines a non-pecuniary damage, caused by an excessive duration of court proceedings as a legally recoverable damage. The Act limits the amount of non-pecuniary damages to 300-5000 EUR (Art. 16/2). Besides,

[16] That is the case if the president of the court dismisses the supervisory appeal or fails to respond to the party within two months or fails to send the notification or if appropriate procedural acts have not been performed within the time-limit set in the notification or ruling of the president of the court.

a court can, when appropriate, taking in the account foremost the behavior of the applicant in the previous procedure, reject the claim for monetary compensation if it finds that a mere declaration of violation (and a possible publication of a judgment) presents a sufficient remedy (Art. 18/1). The Act also imposes a procedural prerequisite that prior to an action the claimant must seek (within nine months after the final resolution of the case) a consensual dispute resolution with a state attorney (Art. 19). In any event, if the applicant's proposal for settlement is not acceded to or the State Attorney's Office and the applicant fail to negotiate an agreement within four months of the date on which the applicant filed his or her proposal, the applicant may bring a claim for just satisfaction, before the competent court as provided by the 2006 Act. The claim must be lodged within six months of the State Attorney's Office's refusal to accept the applicant's proposal or of the expiry of the period within which the State Attorney's Office should decide on the settlement. The experience shows that this mandatory negotiations phase is extremely important and a vast majority of claims are settled at that stage. Only few cases actually reach courts. If they do, the action must be filed within 18 months after the negotiations with a state attorney failed. In addition, a party which has not availed himself to at least one of the accelerating remedies against the excessive duration of proceedings, while these were still pending (supervisory appeal or motion to set a deadline) shall be precluded from claiming compensatory relief after the termination of proceedings (Art. 15). Thus, a party who has not attempted to protect his or her right to a trial within a reasonable time, while the proceedings were still pending and when it was therefore still possible to accelerate them, cannot seek a compensatory relief.

According to Art. 20 of the 2006 Act, all claims for non-pecuniary damages are decided pursuant to rules for small claims proceedings, as determined in the Civil Procedure Act[17] (hereinafter: CPA). This means that the procedure is conducted in a predominantly written manner, whereby all facts and evidence must be offered before the trial (Art. 452, CPA). An oral hearing can be omitted unless a party explicitly requests it (Art. 454, CPA). The jurisdiction is vested with local courts (*okrajno sodišče*) for the place of the domicile of the claimant (Art. 20/3 of the 2006 Act). An appeal is possible but is limited to examination of grave procedural errors and erroneous application of substantive law and does not enable for a re-examination of findings of facts (Art. 458/1, CPA). A further appeal on points of law (*revizija*) to the Supreme Court is excluded (Art. 458/8, CPA)[18].

[17] Zakon o pravdnem postopku, *Official gazette*, No. 26/99-...45/2008).

[18] The preference for simplified proceedings, strict time limits and restrictions concerning possibility of appeal is expressed also in the Venice Comission Report on the effectiveness of national remedies in respect of excessive length of proceedings, Adopted by the Venice Comission at its 69th Plenary Session (15–16 December 2006; Par. 209).

The Constitutional Court confirmed that the limitation of non-pecuniary damages to 5.000 EUR is in conformity with the Constitution[19]. Nevertheless, if the party feels that it hasn't been compensated adequately and that he is thus still a viction of violation within the meaning of the ECHR, the access to the ECtHR is still possible[20]. In this context, however, the ECtHR as well has already rejected complaints that the sums in respect of non-pecuniary damage which can be obtained under the Slovenian 2006 Act are lower than the sums awarded for comparable delays in the ECtHR's case-law[21]. The ECtHR stresses that the sufficiency and reasonabless of redress awarded as a result of using a domestic remedy must be assessed in the light of all the circumstances of the case[22]. These include not merely the duration of the proceedings in the specific case but the value of the award judged in the light of the standard of living in the respondent State, and the fact that under the national system compensation will in general be awarded and paid more promptly than would be the case if the matter fell to be decided by the ECtHR[23]. Furthermore, the domestic procedures are also closer and more accessible than the proceedings before the ECtHR and are processed in the applicant's own language, they thus offer an advantage that needs to be taken into account[24].

The aforementioned provisions refer to claims for non-pecuniary damages. Furthermore, under article 21 of the 2006 Act, a party may bring an action for pecuniary damage caused by a violation of the right to a trial without undue delay within eighteen months after the final decision. When deciding on pecuniary damage, the court has to take account of the provisions of the Obligations Act and the substantial criteria of assessment whether the right to a trial without undue delay has been

[19] Decision of the Constitutional Court No. U-I-1/10, Up-1315/09 dated 20 January 2011. The Constitutional Court concluded that the petitioner did not demonstrate that by limiting financial compensation for non-pecuniary damage resulting from a violation of the right to a trial without undue delay to EUR 5.000,00 the legislature unreasonably regulated the manner of exercising the right to judicial protection of the mentioned right. She namely did not demonstrate that the maximum financial compensation thus determined by law would not provide a wide enough margin for awarding reasonable financial compensation in the case at issue. The petitioner's claims that this constituted constitutionally inadmissible unequal treatment of the injured parties pursuant to the Act Regulating the Protection of the Right to a Trial without Undue Delay in relation to other injured parties are also manifestly unfounded.

[20] Ibid.

[21] The highest non-pecuniary damages that the ECtHR awarded Slovenian appellants due to the violation of the right to a trial within reasonable time were 16.000 EUR (*Sedminek v Slovenia*, 9842/07), followed by 12.000 EUR (Jama v Slovenia, 48163/08) and 9.600 EUR (*Kračun v. Slovenia*, 18831/02 and *Čakš v. Slovenia*, 33024/02).

[22] *Zajc et al. v. Slovenia*, 13992/03, 33814/03, 37190/03, 3088/03, 38847/04, judgment dated 6 May 2008.

[23] Ibid.

[24] Ibid.

violated. The law is not entirely clear but it seems to me that the aforementioned procedural prerequisites (exhaustion of remedies, available when the proceedings were still pending - supervisory appeal and motion to set a time limit, as well as obligatory attempt to settle the case directly with the State Attorney's office) do not apply with regard to claims for pecuniary damage. In any case, it can be expected that also in the future claims for reimbursement of pecuniary damage shall very rarely be successful. It is practically impossible, at least in ordinary litigation cases, to establish a causal link between violation of the right to a trial within a reasonable time and pecuniary damage.

Both with regard to pecuniary and non-pecuniary damage it is important to note, that the law provides for a strict liability of the Republic of Slovenia for damages (Arts. 16/1 and 21/2).[25] Therefore, no intent or negligence needs to be asserted and proved, but only other prerequisites for damages: violation of the right, damage and causal link.

Before the 2006 Act the situation in Slovenia was unsatisfactory also with regard to compensatory relief for non-pecuniary damages. The problem was that concerning moral (non-pecuniary) damage in form of mental distress, the principle of *numerus clausus* applies in Slovenian law (Art. 179 of the Obligations Act)[26]. Thus only legally recognised moral (non-pecuniary) damages can be recovered. Concerning the mental distress, a non-pecuniary damage is legally recoverable only if it is suffered owing to *reduction in life activities, disfiguration, defamation of good name or reputation, deprivation of liberty, violation of a personality right, or the death of a close person* (Art. 179 of the Obligations Act). The mental distress in form of creditor's suffering, pain, feeling of frustration or helplessness caused by an excessive duration of proceedings was not a recoverable damage under Obligations Act. Certain courts have tried to subordinate such damages under the notion of "violation of personality rights"[27]. This however was not convincing. The right to a trial without undue delay is not a personality right. It is a human right (a procedural guarantee), but there is no general provision entitling a person to claim compensation for non-monetary damages incurred by violation of human rights in Slovenian Code of Obligations. Other courts have directly invoked Art. 41 of the ECHR and stated that this provision concerning just satisfaction for non-pecuniary damage in case of violation of a right to a trial without undue delay can be relied upon by Slovenian

[25] This is in line with recommendations of the Venice Comission Report on the effectiveness of national remedies in respect of excessive length of proceedings, Adopted by the Venice Comission at its 69th Plenary Session (15-16 December 2006); Par. 205).

[26] See e.g. B. Strohsack, 'Odškodninsko pravo in druge neposlovne obveznosti' (Ljubljana: ČZ UL 1990), p. 225.

[27] E.g. judgment of the Maribor Court of Appeals No. I Cp 179/2008, dated 10.2.2009.

courts[28]. This view has however been rejected by the Supreme Court of Slovenia. The Supreme Court rightly pointed out that Art. 41 of the ECHR relies to competences and procedures in the ECtHR for Human Rights and does not constitute a legal basis for procedures and competences in national courts.[29] To summarise, before the enactment of the 2006 Act it has been at least questionable whether there were sufficient legal grounds for effectively claiming compensation for non-pecuniary damages, caused by violation of the right to a trial without undue delay. On the other hand there were no such restrictions concerning pecuniary damages but – as also the case law of the ECHR clearly shows – at least with regard to ordinary civil litigation, it is difficult to establish a causal link between excessive duration of proceedings and a pecuniary damage.[30]

3. THE TRANSITIONAL PROVISIONS

The 2006 Act has been in force since January 1, 2007. Pursuant to Art. 25, the Act applies also to parties of proceedings, which have terminated before that date, but who have already filed application to the ECtHR for just satisfaction and proceedings in Strasbourg were still pending. In such cases, a state attorney must propose a settlement and if this fails, the party may file claim for non-pecuniary damages pursuant to the 2006 Act. If the party fails to do so, but still pursues proceedings in the ECtHR, her application shall be declared inadmissible due to non-exhaustion of domestic remedies. The ECtHRt has already decided on several occasions, when Contracting Parties have adopted legislative measures in order to comply with the "reasonable time" requirement under Article 6/1 of the Convention, that applicants should exhaust such remedies notwithstanding the fact that their applications had been lodged with the Court prior to the enactment of the legislation in question[31].

The 2006 Act however did not protect parties whose right to trial within reasonable time has been violated in proceedings, which have terminated before January 1, 2007, but who failed to file applications to the ECtHR. Such parties could not avail themselves to specific regime for claims for non-pecuniary damages under the 2006 Act. However, they could also not successfully pursue claims for non-pecuniary damages under the general law of torts. As already explained, the principle of *numerus clausus* of legally recognised non-pecuniary damages applies

[28] E.g. decision of the Celje Court of Appeals No. Cp 26/2008, dated 23.10.2008.

[29] Judgments of the Supreme court No. III Ips 41/2006, dated 18.9.2007 and No. II Ips 470/2009, dated 8.7.2009.

[30] See e.g. Sedminek v. Slovenia, 9842/07, judgment dated 7 November 2013.

[31] *Grzinčič v. Slovenia*, No. of the application 26867/02, judgment dated 3 May 2007, Par. 105.

in Slovenian torts law and, under the general law, non-pecuniary damage caused by violation of a right to trial without undue delay is not legally recognised[32]. As parties in such situation could pursue claims for non-pecuniary damage neither under the 2006 Act, nor under the general law of torts, the Constitutional court found that such situation violated their right to equality before the law and declared this aspect of transitional regime of Art. 25 of the 2006 Act to be unconstitutional[33]. The Constitutional court also abolished the restriction that only parties to proceedings, which have terminated after January 1, 2007 (or at least parties, whose applications to the ECtHR were still pending) may avail themselves to special regime for claims for non-pecuniary damages under the 2006 Act. The 2006 Act has thereafter been amended accordingly[34]. Therefore, the only restriction for pursuing claims for non-pecuniary damage under the 2006 Act remains the general statute of limitation for claims in torts, which is 3 years (Art. 352, Law of Obligations).

4. THE ECTHR'S ASSESSMENT OF THE 2006 ACT

In Grzinčič[35] the ECtHR has had the opportunity for the first time to assess the system of remedies, afforded by the 2006 Act. The Court has found (the aggregate of) these remedies to be effective and therefore in compliance with Art. 13 of the ECHR. The Court repeated its finding that a combination of two types of remedies, one designed to expedite the proceedings and the other to afford compensation, seemed to be the best solution for the redress of breaches of the "reasonable time" requirement[36]. With regard to remedies, available in pending proceedings, the Court noted in particular that the 2006 Act provided for strict and short time-limits[37]. In the Court's view, these deadlines comply with the requirement of speediness necessary for a remedy to be effective. The Court was therefore satisfied that the aggregate of remedies provided for by the 2006 Act in cases of excessively long proceedings pending at first and second instance was effective in the sense that the remedies were in principle capable both of preventing the continuation of the alleged violation of the right to a hearing without undue delay and of providing adequate redress for any violation that has already occurred[38]. The Court also noted that in assessing

[32] See supra, Sec. 2.2 and e.g. Judgment of the Supreme court No. III Ips 41/2006, dated 18 September 2007.

[33] Decision of the Constitutional Court No. U-I-207/08, Up-2168/08, dated 18.3.2010.

[34] ZVSBNO-B, *Official Gazette*, Nr. 38/2012.

[35] *Grzinčič v Slovenia*, No. of the application 26867/02, judgment dated 3 May 2007.

[36] *Grzinčič v Slovenia*, No. of the application 26867/02, judgment dated 3.5.2007, Par. 96.

[37] Ibid, Par. 86–88.

[38] Ibid, Par. 98.

the reasonableness of the length of proceedings the Slovenian courts are in essence required to look at the criteria established by the ECtHR's case-law[39].

The Court also determined that the system for just satisfaction for non-pecuniary damages, which can be sought after the termination of proceedings, also complies with the requirements of Art. 13 of the ECHR[40]. A compensatory remedy is, without doubt, an appropriate means of redressing a violation that has already occurred[41]. The Court however, did not specifically assess the limitation of the amount of damages to 5.000 EUR as imposed by the 2006 Act. Nevertheless, in light of the previous case-law of the Court[42], it should be expected that this limitation shall not be considered unreasonable and therefore it does not undermine the effectiveness of the remedy.

The Court observed that it was too soon to establish any long-term practice of domestic authorities applying the 2006 Act, however as the Act was specifically designed to address the issue of the excessive length of proceedings before domestic courts, the Court concluded that there was no reason to doubt its effecti veness at this stage. However, as the Court warned, this position might be subject to review in the future and the burden of proof as to the effectiveness of the remedies in practice remains on the Slovenian Government[43].

5. Can a structural defect be cured on a level of an individual case?

The ECtHR stated that "where the judicial system is deficient in structural respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution"[44]. This view is not convincing though. Remedies such as a motion for setting of deadlines and a supervisory appeal can be effective in a system which in general functions well and where the violation of a right to a trial within a reasonable time is just an exceptional defect, attributable to improper administration of an individual case. However, if a judiciary suffers from huge backlogs in courts and overburdening of judges, violations of the right to a trial within a reasonable time are not that often a result of an inadequate administration of justice in particular case but rather of the mere fact that the case

[39] Ibid, Par. 97.
[40] Ibid, Par. 89.
[41] Ibid, Par. 96.
[42] *Scordino v. Italy*, Application No. 36813/97, judgment dated 29.3.2006, *Dubjakova v. Slovakia*, Application No. 67299/01, judgment dated 10.10.2004.
[43] *Grzinčič v Slovenia*, No. of the application 26867/02, judgment dated 3.5.2007, Par. 108.
[44] Ibid, Par. 95.

has not yet get on the agenda due to backlogs. In such conditions, the mentioned remedies cannot really be effective[45] – unless they result in taking the cases 'over the queue' (either directly by ordering the case to be put on a priority list or indirectly by setting dead-lines which could, due to existing back-logs, not be complied with unless the judge himself gives the case priority). This however jeopardises the right to equality before the law and results in the fact, that other litigants with open cases in the same court will need to wait even longer for their turn. The problem of excessive amount of court cases can hardly be effectively remedied by creating new court cases, just like the problem of overburdening of judges can be hardly remedied by imposing new burdens (deciding appeals, writing reports…) upon them. It seems to be a matter of a simple logic to conclude that when the defect is of a structural nature, it cannot be cured with measures on the level of an individual case, but only with measures on the structural level.

When the ECtHR determines that certain states have perfectly understood what kind of remedies the Court had in mind for addressing…,[46] it is regrettable that it did not in the same time give any information as to whether the duration of proceedings and backlogs in courts in these member states has in fact decreased as a result of these remedies.

6. What is a "remedy" and when does it have a preventive, acceleratory or compensatory goal

There seems to be some confusion as to the use and the meaning of different legal terms. For example, "remedies" could be understood as measures, adopted by the judiciary, legislation and court administration in order to improve the functioning of the justice (such as: improving procedural laws, better court management, strengthening court personnel and infrastructure, investing more financial sources of the state treasury to the judiciary…). In fact, such measures are the most effective "remedies" for systemic failures within judiciary. However, in the context of Article 13 of the ECHR (linked to Art. 35/1 on the exhaustion of domestic remedies) one cannot think of remedies in this sense. What Art. 13 ECHR requests is a remedy, available to an *individual* in his or her particular case, thus a remedy in the sense of an individual, subjective right (claim). Naturally, one does not have an individual legal claim for the above-mentioned measures to be implemented.

[45] Similar: P. Oberhammer, Speeding Up Civil Litigation in Austria – Past and Present Instruments, in C. H. Van Rhee, The Laws Delay: Essays on Undue Delay in Civil Litigation (Antwerpen, Groningen: Intersentia 2004), p. 231.
[46] *Scordino v. Italy*, Application No. 36813/97, judgment dated 29.3.2006, Par. 186.

A further dilemma exists with regard to differentiation between preventive and compensatory remedies or accelerating and compensatory remedies. On the first sight, it seems that the differentiation is simple: a preventive remedy is such that can be used while the proceedings are still pending (in order to accelerate them), while the latter is available after the termination of proceedings (when there can be no more acceleration of proceedings, but only a redress in form of damages). However, also the remedies designed to expedite the proceedings (such as a supervisory appeal or a motion to set a deadline) are not exactly preventive in the sense that they, as the ECtHR puts it, "expedite the proceedings in order to prevent them from becoming excessively lengthy"[47]. It would be unreasonable to stimulate or even demand that parties should avail themselves to such remedies even before there was any dysfunction in their pending case. Also these remedies are supposed to be applied after there has already been an unjustified delay. That corresponds to the practice in Slovenian courts. Parties do not avail themselves to, for example, supervisory appeals, unless there is already a serious delay in proceedings as a whole. Such remedies can be preventive only in cases, where a delay can be identified as a result of a malfunction in a single particular phase of proceedings and has not yet resulted in delaying the proceedings as a whole. Here, by "speeding up" proceedings at the later stage, the delay can be "caught up". But in conditions of a structural defect (backlogs in courts), the delay is usually not attributable to a malfunction in a particular stage of proceedings. In such cases, the abovementioned remedies can (at best), diminish the delay, which has already occurred, but not assure for an overall compliance with the reasonable time standard (whereby, according to the position of the Venice Commission, even in such a case such remedies still could not be considered as preventive) [48]. The Venice comission makes a clearer differentiation between preventive and compensatory remedies than the ECourHR. Remedies, aimed at fast-tracking the pending case are not necessarily preventive. If they are applied in proceedings, where there has already been an undue delay as a whole, they aim to *restitutio in integrum* and not to prevention. In such a case, according to the Venice comission, such remedies are not preventive, even if they result in the remainder of the case to be dealt with more quickly than the ordinary one and in this manner the undue delay will be caught up and the global lenght of proceedings will be reasonable. In such a case, a pecuniary reparation will not be necessary – but this still does not mean that such remedies should be considered as preventive[49].

[47] *Grzinčič v Slovenia*, No. of the application 26867/02, judgment dated 3.5.2007, Par. 95.
[48] Report on the effectiveness of national remedies in respect of excessive length of proceedings, Adopted by the Venice Comission at its 69th Plenary Session (15–16 December 2006); Par. 178–179).
[49] Ibid.

Thus, such remedies might be denoted as "accelerating" but not as "preventive". Remedies, which are genuinely preventive in the strict sense, are only measures of the judicial, executive and legislative power concerning the structural level of the functioning of the justice system – but such measures, as explained above, cannot be considered "remedies" in the sense of Art. 13 ECHR.

7. A FINAL REMARK

The ECtHR is right in requiring that member states should organise its judicial system in such a way that its courts can meet each of its requirements, including the obligation to hear cases within a reasonable time[50]. A fact that courts are overburdened and that there are huge backlogs in courts should be, except in extraordinary circumstances, no excuse. Besides, it cannot be denied that a positive effect of the judgments of the ECtHR obliging the contracting states to pay just satisfaction was that at least some member states, Slovenia probably included, finally found it reasonable to invest more financial sources in judiciary.

Slovenia fulfilled what the ECtHR, "encouraged" (in fact: required) it to do without leaving it much choice. Within these limits, the adopted solutions are the most what could be achieved. Rather informal proceedings upon a supervisory appeal and a motion to set a deadline are less burdensome for the judiciary than a full-scale appeal (such as a constitutional appeal) or even opening of a totally new or separate proceedings (such as an action in administrative court) would be. But it is foremost important that the situation in Slovenian justice system concerning reduction of backlogs in courts is improving – not because of this law, but because other measures were adopted with aim to improve the functioning of judiciary. Statistics in the recent years shows a steady decrease of court backlogs – though this does not necessarily mean that this is followed by an increase or at least retaining of the same level of quality of adjudication. It seems that the situation in Slovenia concerning the causes of excessive duration of proceedings has already changed and that excessive duration of proceedings in Slovenia is attributable to improper administration of individual case, and no more a result of a systemic defect. In such conditions, remedies available under the 2006 Act, can be effective.

Another lesson that can be learnt from the Slovenian experience is that overnight solutions could prove to be counter-productive or even disastrous on longer term. One of main measures of Slovenian programme of reducing back-logs in courts

[50] See e.g. Union Alimentaria Sanders SA v. Spain, No. of application 11681/85, judgment dated 7.7.1989.

consisted of appointing a large number of new judges. However, because so many open posts for judges appeared almost over night, there was not enough competition to fill them and probably not only the best lawyers (though, all fulfilling formal criteria for appointment) were nominated for judges at that time. On the other hand, the situation now – as the backlogs in courts already decreased – seems to be that there are too many judges in Slovenia already and the government plans to reduce their number. The prognosis is that the number of judges will in time decrease due to retirements of older judges, whereby retired judges shall not be replaced by new ones. This means that in the near and mid-term future even the best and highly qualified candidates for judges will find it very difficult to be appointed as there simply won't be any vacant posts. Thus, this attempt to resolve the problem of back-logs in courts nearly "over-night", which indeed seemed successful and was uncritically applauded or sometimes nearly required by observers in the Council of Europe, could have very negative consequences for the future of legal profession and for the quality of adjudication in Slovenia.

Norwegian Civil Procedure – how to make fast Even Faster[1]

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1. INTRODUCTION

Norwegian civil procedure scores well on efficiency as measured in average time for case processing and for achieving high trust among the public[3]. General litigious civil and commercial cases are on average processed in approximately six months and small claims civil cases in four months. On average, a case has passed through both the District Court and the Court of Appeal within 13 months[4]. The number of incoming litigious civil and commercial cases is the second lowest in Europe, with only 359 cases per 100,000 inhabitants in 2012[5].

This text identifies and explores some of the key features providing efficiency in Norwegian civil proceedings. It will be argued that the main hearing model of civil proceedings, a preference for settlement and flexibility are central elements ensuring efficiency. Critical questions are also raised: Are the proceedings too efficient in some areas? Are there still points of improvement or threats to efficiency?

2. NORWEGIAN CIVIL PROCEDURE

Norwegian civil procedure could be characterised as West-Scandinavian (or West-Nordic). It is based on Scandinavian tradition emphasising early settlement. In 1795, Conciliation Boards (Forliksrådet) were introduced to allow for swift and cheap settlement of dispute using local lay people to help the parties find an acceptable solution. Conciliation Boards had additionally power to decide some types of small claims, and still do so. Conciliation Boards still have a role in the civil justice system.

The 1915 Civil Procedure Act modernised the civil justice system based on the ideas and concepts of Franz Klein and Austrian (and German) civil procedure[6]. The

1 I would like to thank Associate Professor, Dr. Erik Eldjarn for his insightful comments.
2 Contacts: Anna.nylund@uit.no
3 In a study conducted for the Norwegian Courts Administration, 88 percent of respondents said they trusted the courts. See http://aarsmelding.domstol.no/data/2014/aarsmelding.pdf, p. 26–27.
4 Evaluering av tvisteloven (Oslo: Justis- og beredskapsdepartementet 2013), p. 21–23.
5 CEPEJ, European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice (Council of Europe 2014), p. 202.
6 H. H. Fredriksen, "German Influence on the Development of Norwegian Civl Procedural Law"

idea of dividing the proceedings in an initial pleadings stage, a preparatory stage and a final concentrated main hearing became the backbone of the proceedings. In practice, the role of the preparatory stage was limited. Still, an early model of the "main hearing model" of civil proceedings has existed since 1915.

Norwegian civil procedure has also strong connections to English common law civil proceedings. Traditions for a concentrated, party (legal counsel) driven main hearing are strong in Norwegian court culture. Further, the court system is very simple with only general courts, no administrative courts and very few special courts. The Norwegian Supreme Court has central role in the legal system as its case-law is a central legal source.

Pragmatism is another feature of the Norwegian (civil procedure) law. The reason is at least partly societal. The legal system has historically not been very elaborate due to small local communities with few lawyers and even fewer legal academics. Such a system cannot deliver detailed rules: it must rely on judicial discretion. The court system with only general courts also requires the procedural rules to be flexible enough to fit a number of different types of cases. The strong position of the courts has also contributed to a tradition of open, flexible rules. As a conflict averse society, Norwegians prefer fast and pragmatic solutions to disputing for principles.

At the end of the 1990's the Civil Procedure Act required comprehensive revision and modernisation. The result was the Dispute Act of 2005[7], which entered into force 1 January 2008. The foundation of the Dispute Act (hereinafter DA) consists of several key principles, in particular swift and cheap justice, proportionate and fair use of resources, and flexibility. The aim is to enable courts to provide quality proceedings with substantively correct results by three mechanisms. First, by strengthening the preparatory stage of proceedings and the duty of the judge to manage the case, to clarify disputed questions of fact and law and by giving judges increased opportunities to give parties guidance. Second, by stressing the role of the courts a last resort of dispute resolution. Third, by making proceedings more flexible including increased opportunities to choose between oral and written proceedings or a combination thereof.

After the reform, the average time for civil proceedings in District Court has remained stable[8]. According to judges and attorneys, the quality of proceedings

in V. Lipp and H.H. Fredriksen (eds), Reforms of Civil Procedure in Germany and Norway (Tübingen: Mohr Siebeck 2011)

[7] Act of 17 June no. 90 relating to mediation and procedure in civil disputes. An unofficial English translation is available at http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf. Unofficial English and German translations are also available in V. Lipp and H.H. Fredriksen (eds), Reforms of Civil Procedure in Germany and Norway (Tübingen: Mohr Siebeck 2011).

[8] Evaluering av tvisteloven (Oslo: Justis- og beredskapsdepartementet 2013), p. 21–23, 81–82, 105 and 108.

has been enhanced, but only to a limited degree. However, the legal costs of small claims has sunk by 62.2 %. The legal costs of other cases has not been reduced.

3. THE MAIN HEARING MODEL AND THE ACTIVE JUDGE

3.1. THE PREPARATORY STAGE AS A KEY COMPONENT

The 2008 reform of Norwegian civil procedure strengthened the main hearing model of civil procedure. In the main hearing model civil proceedings consists of three distinct stages: the pleadings stage, the preparatory stage and the main hearing stage[9]. During the main hearing, the court hears the case in a single, concentrated hearing where the parties present the pleadings, evidence and legal argumentation. The preparatory stage has a key role in ensuring the concentrated main hearing. During the preparatory stage, the parties identify disputed and undisputed factual and legal question and relevant evidence. The judge has a key role in ensuring progress; helping the parties sort out disputed circumstances from undisputed; and distinguishing key questions from more peripheral.

The preparatory stage has a double function in enhancing concentration. First, by ensuring that the case can be heard in a single hearing. In larger cases, the hearing may be on consecutive days. Preclusion occurs at the end of the preparatory stage two weeks before the date of the main hearing, DA section 9–16. The claims, grounds for claims and evidence are "fixed": the parties may not introduce new claims, grounds for claims or evidence after the closing of the preparatory stage. However, as the parties present only list the evidence, the content of the evidence may change, and as they only present an outline of claims and grounds for the claims. The parties may adjust the claims, grounds for claims and evidence as long as the essentials remain the same. As a rule, two weeks before the main hearing the parties submit written closing submissions, which state briefly the claims, the factual and legal grounds for the claims and evidence invoked, DA section 9–10. The parties have detailed information of the claims; the legal and factual ground for the claims; which pieces of evidence will be presented; and which persons will be heard during the main hearing. Thus, the parties have ample time to prepare their legal argumentation for the main hearing and there will generally not be a need for adjournment[10].

[9] For a closer discussion on the main hearing model A. Nylund, "Introduction to preparatory Proceedings" in L. Ervo and A. Nylund (eds), Current Trends in Preparatory Proceedings (Cham, Springer forth coming).

[10] J.E.A. Skoghøy, Tvisteløsning 2 edn, (Oslo: Universitetsforlaget 2014), p. 629; and A. Robberstad, *Sivilprosess* 3 edn (Bergen: Fagbokforlaget 2015), 48–50.

The judge has a duty to ensure a concentrated hearing by working with the parties to make a tentative time schedule for the hearing, especially timing of hearing witnesses, DA section 9–11.

Second, the case as such should be concentrated to disputed factual and legal questions. By sorting out undisputed questions, and questions of little or no relevance, the case boils down to the essential elements. A concentrated case increases efficiency, as the parties and the court do not have to discuss these questions or to present evidence to support them. Concentrating the case to relevant disputed circumstances is likely to enhance the quality of argumentation and eventually the quality of the decision[11].

Although the case is "fixed" at the end of the preparatory stage, the parties do not present evidence or arguments during the preparatory stage. The argumentation and presentation of evidence takes place during the main hearing. Each piece of evidence has to be identified, and the parties must indicate which of the disputed circumstances each piece of evidence proves. For instance, a party claiming compensation based on breach of contract must identify the contractual agreement and provisions the opposing party is in breach of, and present an outline on the factual and legal circumstances constituting the alleged breach of contract and the evidence in supporting the claims. Section 9-2 DA specifically states that the claimant may not go further than necessary in argumentation in the statement of claim. The preparatory stage is not the trial, thus the parties may not argue their case during it, only present the outlines to enable clarification and concentration of the issues.[12] The parties present evidence and legal arguments during the concentrated main hearing. Rulings after the main hearing are only based on material presented directly to the court at the hearing, DA section 11-1.

The rules on evidence stress the duty of the parties to inform about all relevant evidence of the case. The parties are obliged to disclose the existence of important evidence if they have no reason to believe that the opposing party is aware of the evidence, DA section 21-4. There is a general duty to testify and give evidence and to give access to evidence, DA sections 21-5 and 26-5. This duty applies to parties as well.

Parties shall restrict themselves to offering only relevant and proportionate evidence. The court may reject evidence with little or no relevance and excessive evidence. The same is true for evidence, which is expensive to obtain. Cutting off disproportionate evidence is important for cases of a limited monetary value.

[11] Skoghøy, Tvisteløsning, p. 551–555.

[12] T. Schei and others, Tvisteloven. Kommentarutgave Bind I, vol 1 2nd edn, (Oslo: Universitetsforlaget 2012), p. 299.

The success of the preparatory stage is contingent on preclusion and an active judge. The role of these two factors are discussed next. If the court or the parties find relevant arguments, claims or evidence is missing after the end of the main hearing, the court may decide to continue the proceedings. However, the threshold for doing so is very high, particularly if a party wishes to invoke new evidence[13].

3.2. PRECLUSION

Preclusion at the end of the preparatory stage is a key to concentrated main hearings. Parties must be barred from changing their claims, the ground for the claims and introducing new evidence after the conclusion of the preparatory stage. Preclusion forces the parties to prepare the case and "boil it down" to essentials well in advance of the main hearing. In Norway, preclusion occurs when the preparatory stage is closed two weeks before the main hearing. Thus, the parties have ample time to prepare their cases and to sharpen their argumentation primarily to central issues.

However, preclusion is not in itself a panacea. Strict rules on preclusion, especially the principle of eventuality (*Eventualmaxime* in German) may result in front-loading of the case and increased litigation. The parties must include all possible issues and evidence in order to avoid preclusion thereof. The case will then become loaded with all possible claims, grounds for the claims and evidence making it difficult to distinguish central elements from peripheral ones and differentiating between disputed and undisputed elements may be onerous. Preclusion at the end of the preparatory stage gives parties the possibility to let the case evolve and to add and drop elements as needed.

Very lenient rules, on the other hand, may result in an attenuated preparatory stage and less concentration in the main hearing.

The Norwegian civil procedure follows a middle path with flexible rules. Preclusion is as a rule not applied *ex officio:* it requires a protest from the opposing party unless an "important consideration" suggest the opposite. The threshold for "important considerations" is high, and requires that the main hearing would have to be adjourned and an additional ground for rejecting the change, such as gross negligence of the party. The court has discretion to allow the amendment despite protest from the opposing party. Changes should as a rule be allowed when the party cannot be blamed due to change of circumstances or new evidence not available earlier. If a change results in little or no harm for the opposing party, or if disallowing the change would result in loss for the party, the court should permit it. The former

[13] Ibid, p. 350–351.

circumstance covers changes that result in only limited need for further preparation of the main hearing, the latter applies *inter alia* to changes where the identity of the case remains the same although the claims are modified[14].

Amendments may result in more efficient proceedings. For instance, the claimant claims compensation for a leaky roof from the seller of the building, but discovers additional damage shortly after filing the statement of claim. The inspection of the damages end shortly after the preparatory stage is closed. If the claimant is not allowed to include the additional damage in the current case, a new case must be filed, inducing additional costs for both parties and the court. If the court allows extending the claims, all relevant damage may be included by adding an extra day to the main hearing. Only limited additional cost and delay will result from the extra day.

3.3. THE ACTIVE ROLE OF THE JUDGE

Efficient preparatory proceedings require active involvement of the judge and the parties (their legal counsel). The judge has several duties to promote efficiency and clarification, but the parties must also be active and cooperate with the judge in charge of preparation of the case. The active role of the judge continues throughout the proceedings and applies in appellate proceedings as well.

First, the judge has a duty to case management, DA sections 9-4 and 11-6. The judge "shall actively and systematically manage the preparation of the case" to ensure swift and cost effective proceedings. The duty is restricted to questions related to ensuring timely preparatory proceedings and possibilities for early settlement. As part of the case management, the judge in charge of the case must make a number of choices, including *inter alia* if court-connected mediation is appropriate; if summaries of factual or legal questions are necessary; if the case should be split to several proceedings; and if expert evidence or on-site inspections are needed. The judge must ensure timely preparatory proceedings to allow the main hearing to be set within the time limit of six months. This rule is modelled based on the English civil procedure reform of 1995[15].

Secondly, the judge has the duty to give guidance on procedural rules, routines and formalities, procedural guidance (*prozessuelle Prozessleitung* in German), DA section 11-5 (1). The duty is primarily restricted to questions that are of importance for the parties in the current case ("as is necessary"), and only as far

[14] Ibid., 347–349.

[15] Skoghøy, Tvisteløsning, p. 551–558; Robberstad, Sivilprosess, p. 193; and I. L. Backer, Norsk sivilprosess (Oslo: Universitetsforlaget 2015), p. 179–182.

as the parties have overlooked a question ("prevent errors and ... enable errors to be rectified"). The court has a duty to encourage parties to rectify errors within a time limit, DA section 16-5. The duty to guide self-represented parties goes further. However, the judge may never give advice to the parties. The judge may not guide a party in a manner that is liable to impair impartiality[16].

Third, the judge has a duty to clarification and a right to provide material guidance (*materielle Prozessleitung* in German), DA section 11-5 (2)-(5). The difference between clarification and guidance is very subtle. *Clarification* relates to ambiguous or incomplete claims, factual and legal grounds for claims and evidence. For instance, if there are two or more alternative claims or ground for claims, such as damages and price reduction, or liability based on negligence or breach of contract, and it is not clear which of the claimant invokes (primarily), then the court has a duty to clarification. *Judicial guidance* on substantive issues could potentially result in extending the case to new or different claims, factual or legal grounds for the claims and evidence. For instance, in a case on lack of conformity of goods, the buyers has claimed price reduction or damages, the judge could provide judicial guidance by asking (indirectly) if the buyer wants to invoke rectification or delivery of substitute goods.

The judge has a duty to clarification, but only a right to judicial guidance. When clarifying issues, and particularly when providing judicial guidance, the judge must not act in a manner that is liable to impair impartiality. The way the judge poses a question, the selection of wording, the tone of voice and body language are all relevant factors. When considering judicial guidance, the judge must take into account numerous factors, including legal representation of the parties, the stage of the proceedings, if the question is already briefly touch upon by the parties, the type of the case, and the importance of the case for the parties[17].

4. COURTS AS A LAST RESORT – EARLY SETTLEMENT

The Committee drafting the Dispute Act stressed that court should be a last resort for dispute settlement. Parties have an obligation to try to reach friendly settlement before involving the court. When appropriate, parties should use other dispute resolution mechanisms, such as dispute resolution boards, to solve their conflicts. Early settlement of cases is cost efficient for both the parties and society[18].

[16] Skoghøy, Tvisteløsning, p. 558 ff.; Robberstad, Sivilprosess, p. 189-192; and Backer, Norsk sivilprosess, p. 274–278.

[17] E. Eldjarn, Materiell prosessledelse (Tromsø: UiT Norges arktiske universitet Det juridiske fakultet 2016), p. 82–102.

[18] NOU 2001: 32, Rett på sak, Lov om tvisteløsning (tvisteloven), Bind A, (Oslo: Justis- og politi-

The Dispute Acts promotes early settlement both before and after the case becomes pending. Before the proceedings, the parties are obliged to send the opposing party a notice of the claim, DA section 5–2. The notice shall contain sufficient information to identify the claim and the outlines of the legal and factual grounds for it. The parties must also give notice of important evidence. The notice helps clarify issues early, delineates the dispute, and may serve as a foundation for negotiations for settlement. The parties also have a duty to attempt to reach amicable settlement, DA section 5–4. The parties may *inter alia* try negotiation, mediation, or a dispute resolution board.

The sanction for failure to send a notice or attempt to reach an amicable settlement is limited to responsibility for possible extra legal costs for the opposing party. The Dispute Act has also rules on out-of-court mediation (chapter 7), but mediation is not mandatory. However, the rules on out-of-court mediation are seldom used and many lawyers are unaware of them.

The Dispute Act also promotes settlement during all stages of court proceedings. The court has a duty to consider the possibility of full or partial settlement at each stage of the proceedings, DA section 8–1. The duty is limited to an evaluation of if, and how, the judge should promote settlement at the specific stage. Judicial settlement efforts vary in range from subtle hints that the parties should consider negotiations to more active involvement. The role of the judge limits the efforts available: the judge may not give advice, present proposals for a solution or act in a manner that could impair the impartiality of the court in the view of the parties. The case may also be diverted to court-connected mediation. In court-connected mediation, the judge usually serves as the mediator. The mediator is not limited by the role of the judge and may have private meetings with the parties. Approximately 40–50 % of all court cases are solved by judicial settlement efforts or court-connected mediation[19].

departementet 2001), p. 130; I. L. Backer, ‚Goals of Civil Justice in Norway: Readiness for a Pragmatic Reform' in A. Uzelac (ed), Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems (Cham, Springer 2014).

[19] A. Nylund, ‚The Many Ways of Civil Mediaiton in Norway' in L. Ervo and A. Nylund (eds), The Future of Civil Litigation Access to Courts and Court-annexed Mediation in the Nordic Countries (Cham, Springer 2014); and A. Nylund, ‚Preparatory Proceedings in Norway - Efficiency by Flexibility and Case Management' in L. Ervo and A. Nylund (eds), Current Trends in Preparatory Proceedings (Cham, Springer forthcoming).

Užsienio valstybių patirties apžvalga /
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5. FLEXIBILITY AND JUDICIAL DISCRETION

Flexible rules and judicial discretion were keywords of the Norwegian civil procedure reform. They are an epitome of Norwegian civil procedure thinking. Procedural rules are general and must fit a range of as the same rules apply to civil, commercial, family and administrative cases. Certain types of proceedings, such as child-custody disputes, have partly special rules, but the basis for all proceedings is the same. Flexibility is required to fit the proceedings to the case at hand. For instance, although the preparatory stage should normally consist of limited written communication and a telephone conference, the court may limit it to written communication only, or expand it to consist of court hearings at the court.

The judge must always strive for proportionality: each case should be allocated enough and appropriate resources for giving the court a solid foundation for its decisions and the parties a fair trial, but not more than necessary[20]. Many rules give judges discretion: trust on judges' capacity to make sensible and conscientious decisions is the foundation of the Dispute Act.

Many rules provide the judge discretion to choose the appropriate reaction. The court should consider the issue, the circumstance and consequences of the options available. When deciding on preclusion the court shall take into account if the late modification is a result of circumstances beyond the influence of the party, or of possible protraction tactics, and the importance of the right to the party. If preclusion results in loss of an important claim due to res judicata, then the court should be lenient. If the additional claim is of less consequence, or if there are alternative ways to make the claim, then the court should adopt a stricter stance. Reasonableness, fairness and cost-benefit analyses should permeate judicial decision-making.

While flexibility as such is beneficial, it requires skilful, reflective judges and sufficient time for judges to consider alternatives. Balancing different principles is demanding. The legal counsel may try to pressure the judge and judges may yield to pressure under constraint. Less experienced judges may err on either side. Case management and judicial guidance are rigorous tasks and require time. A restrictive approach where the judge opts to disallow amendments, cut off evidence: and shorten proceedings, may result in a need to formal decisions including providing grounds for the decision. A lenient approach will result in more time spent on the substance of the case. Erring on the restrictive side may result in a materially wrong judgment, whereas erring on the expansive side will only result in a slightly longer proceeding. Thus, most judges tend to be lenient. This is also reflected in the duration and cost of civil litigation: the court reform did not result in shorter or cheaper court proceedings.

[20] Skoghøy, Tvisteløsning, p. 555–556.

6. SMALL CLAIMS AS THE ACHILLES' HEEL OF CIVIL JUSTICE

Hitherto, this paper has highlighted elements enhancing efficiency of civil proceedings. In spite of the general success, there are some important weaknesses. Small claims is a significant weakness.

Small claims could be characterised as the Achilles' heel of the civil procedure reform. Claims with a value of less than 125,000 NOK (approximately 13,500 €) are labelled small claims. For many citizens the amount is significant, amounting to an equivalent of almost 1/3 of a gross annual income.

The proceedings start in Conciliation board unless the case is exempted due to its nature (mainly cases against a public authority and family cases), or the case has been heard on the merits by a complaints tribunal or board, DA section 6–2. Conciliation boards are not formally courts, yet they have significant adjudicative tasks, particularly deciding uncontested pecuniary claims. Local Execution and Enforcement Commissioners administer the Conciliation boards, but the cases are heard by a panel of three lay judges. As the panels in Conciliation boards are organised based on municipalities, there are only a limited number of cases in most of the more than 400 municipalities. More than 2/3 cases are uncontested and decided by administrative staff without a hearing. Some cases are diverted directly to the District Court as they are too complex factually or legally, or if it is necessary to hear witnesses or appoint experts.

The hearing at the Conciliation board is usually limited to 15–30 minutes. Evidence is limited primarily to written documents, and witnesses may only be presented by consent of the board, DA section 6–8 The board has not power to compel the witness to appear or to appoint expert witnesses. A party may request discontinuation of the proceedings if the meeting has not been closed within three hours, DA 6-11. Conciliation boards may only decide a case if a party requests it and the members of the panel deciding the case agree that the case is factually and legally simple, DA 6-10. Additionally, there must be sufficient evidence to decide the case.

The Conciliation boards have a duty to promote settlement, DA section 6–8. However, there is little room for settlement efforts. If the parties agree that the panel cannot decide the case, the proceedings can be set up as a quasi-court-conducted mediation. In practice, there is only limited time for mediation, as the board generally hears several cases per hour. The panel members have usually no mediation training, which reduces their ability to use more advanced mediation techniques[21].

[21] Nylund, 'The Many Ways of Civil Mediaiton in Norway'.

Conciliation boards solve a limited number of cases. Of the incoming cases, more than two thirds of the cases end with default judgments, usually without the board hearing the case. One in five cases is dismissed or discontinued as unsuitable for Conciliation boards. Of the remaining 10 % of cases, approximately two thirds are solved, with an almost even distribution between settlement and judgment.

While Conciliation boards offer an avenue to simple legal proceedings, many small claims are too complex for the boards. Consequently, Conciliation boards are a detour on the way to the District Court. Lack of mediation training and limited time to mediate reduces the help the parties gain to settle the case. Many settlements are probably a result of clarification of facts rather than a result of narrowing the gap between the parties. With "genuine" mediation more cases could settle early. Legal counsel have a limited role in the proceedings, as the proceedings should be informal, which further reduces the possibility for legal clarification[22]. The quality of proceedings is variable. At best, the parties may find early solution through clarification of the facts and resolution of clearly unmeritorious.

If the case is too complex for the Conciliation board; the parties do not settle and the panel does not decide the case; or the board decides the case, a party may induce regular civil proceedings. In District Courts, claims of a primarily economic value of less than 125,000 NOK are directed to the small claims track. Small claims procedure is swift and cheap, and the proceedings are both simplified and flexible. The judge may *inter alia* limit evidence to achieve increased proportionality. The aim is to accommodate parties with no or only partial legal representation. The judge has a heightened duty to clarification and judicial guidance to serve self-represented parties.

The preparatory stage has a more limited scope, and there should generally not be a preparatory hearing, only a single hearing when the case has become sufficiently clear, DA sections 10-2 and 10-3. The lack of a preparatory hearing seems inconsistent with the goal of accommodating self-represented parties. Clarification, settlement efforts, and procedural and material guidance typically require an oral format, especially if the judge needs to address to party in person. In general civil cases, if at least one of the parties is self-represented, the court should have a preparatory hearing[23]. Paradoxically, this does not apply to small claims proceedings, which are designed for self-represented parties. The goals of cost-saving seemed to overrun obtaining clarification. In practice, many judges conduct preparatory hearings, primarily by telephone.

The rules on judicial settlement efforts apply to small claims proceedings. However, court-connected mediation should generally not be conducted in the

[22] Schei and others, Tvisteloven. Kommentarutgave Bind I, p. 225.
[23] NOU 2001: 32 A, p. 342.

small claims track.[24] The principle reflects an excessive avoidance of costs. Although unsuccessful mediation increases costs and delays, successful court-connected mediation provides a potential for swift and cheap dispute resolution, and more favourable outcomes. A general rule discouraging court-connected mediation in small claims cases is too categorical and deprives the parties of access to efficient and appropriate non-contentious dispute resolution. "Mediation" offered by Conciliation boards is not sufficient, since the lay judges lack both qualifications and time to mediate. The reason for overlapping rules on mediation, which in practice reduce the access to mediation, are a result of tug-of-war on the role of Conciliation boards, where lawyers are generally in favour of abolishing the boards and the politicians favouring lay judges. The committee working on the draft for the Dispute Act was pressed for time, which is reflected in particular in the vague rules on Conciliation boards and small claims proceedings. The vagueness of the rules augments the problems.

Although flexibility and an active judge generally enhance efficiency, the use of them is demanding. Most small claims are assigned to a deputy judge, who has usually recently graduated from university and has limited experience as a lawyer. Deputy Judges serve usually two years, and a maximum of three years. Many small claims are simple cases suitable for inexperienced judges, but other cases are more demanding. Lack of proper preparation of the case exacerbates the challenges for the judge.

Access to second courts is limited, as the parties need a leave to appeal. A leave to appeal is seldom granted Thus, the discretion and the decision of the inexperienced judge deciding the case, is often not subject to review. While such a rule makes sense from the perspective of enhancing cost and time efficiency, it may inadvertently lessen the quality of justice, as discretion and inexperienced judges may be a hazardous cocktail.

7. STRUCTURE AND FUNDING OF THE COURT SYSTEM AS A THREAT

The structure and funding of courts may also prove to be a threat to the efficiency of Norwegian civil procedure.

Currently, there are 66 District Court and 6 Courts of Appeal. Many of the District Courts are small, with one to three judges, and a couple of deputy judges. The judges decide all types of cases, including *inter alia* compulsory care of children

[24] NOU 2001: 32 A, p. 342.

and mentally ill persons, child custody, employment, construction cases, complaints against administrative orders, and a range of criminal law cases. Judges in smaller District Courts have little or no opportunity for specialisation. In larger District Courts, judges often practise "moderate specialisation", where for instance family cases are distributed to a limited group of judges, complex construction cases to another group of judges and economic and organised crime cases to a third group of judges. The same judge may be member of several groups of specialisation, and all judges sit a number of different cases. Moderate specialisation increases the quality of legal proceedings and the outcomes; it also ensures coherence of the legal system as each judge has an overview of different types of cases. Today, many parties choose to arbitrate commercial cases. More specialisation of District Courts could attract some of these cases back to courts. However, specialisation requires a certain minimum size of a court, with a minimum of five or six judges, not counting deputy judges.

A drastic reduction of the number of courts have been discussed. However, due to local resistance, little progress has been made. In Denmark and Finland, which have approximately as many inhabitants as Norway, the number of District Courts has been reduced to around 25. Sweden, with almost a double population, has 48 District Courts. Due to the geography, a slightly higher amount of District Courts could be required in Norway. Absence of modern telecommunication, especially equipment for videoconferences, hinders the court reform. Paradoxically, Norway has financed such systems in other countries, including Lithuania, but not found the means to do it nationally.

Norwegian courts face an increasing pressure to process more cases, particularly criminal cases, without getting more resources. While the police and the public prosecution have increasing budgets and are able to investigate and prosecute increasingly complex crimes, courts have not received any additional resources. An increased number of complex criminal cases, and partly increasingly complex administrative cases, cause court congestion.

Another problem are the "vanishing" commercial cases. Norway has one of the lowest numbers of civil and commercial cases per 1 million inhabitants in Europe. Considering that civil cases include administrative cases and the lack of special courts, the number is low. Approximately 40 % of civil cases are child law cases (child custody, parenting time and compulsory care). Therefore, the traditional commercial case has become rare. There are several explanations, including small courts and limited specialisation. In small District Courts, judges have little experience in commercial cases and complex litigation, thus parties may prefer arbitration. Larger District Courts face increasing congestion, where commercial cases receive a lower priority.

8. FINAL THOUGHTS

Norwegian civil proceedings are cost and time efficient. Citizens trust the court system. In the general perception, courts deliver quality outcome. The main hearing model, flexible proceedings and early settlement are the key success factors. However, the legislator has so far not solved the perpetual enigma of small claims proceedings. Neither has some of the most politically sensitive issues been solved: the role of Conciliation boards and centralising the courts. While a legal culture emphasising judicial discretion, flexibility, pragmatism and settlement and a successful modernisation of the rules of civil procedure are essential, they are not sufficient alone. Efficient proceedings need continuous maintenance and evolution.

Remedies Againt Delay of Process – the Polish Model

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1. INTRODUCTION

The problem of excessive length of judicial proceedings is one of the fundamental aspects of the modern system of justice in civil cases. Moreover, the doctrine indicates that the excessive length of examination of the proceedings is obvious and inevitable[2]. There is no perfect model of procedures, which would be able, in practice, to eliminate the imperfections of human activity[3], but in every legal system actions should be taken in order to reduce or mitigate the problem of excessive length at every stage of the proceedings, including the stage of executing judgments through state coercion.

The excessive length of judicial proceedings can be analysed in two aspects. One aspect is the efficiency of the proceedings in a systemic perspective, that is the whole legislation related to the establishment of the common judicial system and the ancillary bodies, including bailiffs, which consists of the status of the judicial and judicially related authorities, the ways to counteract the accumulation of civil cases and manage these cases in order to improve the procedure. Sometimes, the reduction of the speed and efficiency of the examination and the enforcement proceedings is caused by the imperfect legislative solutions.[4] However, in principle the provisions of the Polish Code of Civil Procedure[5] contain a wide range of solutions to counteract the excessive length of the proceedings, both in relation to the mainstream (in this regard, the provisions of shaping the model of concentration of the evidence material are of particular importance), and in terms of interlocutory

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[2] K. Piasecki, 'Przewlekłość sądowego postępowania w sprawach cywilnych – przyczyny i środki zaradcze' (1989), NP 4, p. 29.

[3] T. Zembrzuski, 'Niezaskarżalność orzeczeń w przedmiocie skargi na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki' (2006) Pal. 9–10, p. 29.

[4] J. Świeczkowski, 'Wadliwe regulacje prawne jako przyczyna niskiej sprawności sądowego postępowania egzekucyjnego (wybrane przykłady)' (2006) PPE 12, p. 124.

[5] Act of 17 November 1964 – the Code of Civil Procedure, Journal of Laws 2014, item 101 as amended), hereinafter: CCP.

procedures (e.g. initiated with the request for exclusion of a judge or the request for exemption from court fees).

The second aspect is an analysis of the causes of the excessive length of a specific proceeding due to the behaviour of its parties, participants or judicial authority. In this regard, the Polish legislator introduces some instruments to discipline the parties and participants in the proceedings. An example of such construction is Art. 103 of CCP, according to which, regardless of the outcome of the case, the court may order a party or intervener to pay costs, which arose due to their negligent or obviously improper behaviour.

Negligent or obviously inappropriate behaviour may include, among others, deliberate delay in the presentation of evidence or presenting them at certain intervals, unfounded refusal to issue the documents, conduction of an additional hearing in connection with an obviously unjustified request to reinstate the deadline, or deliberate lack of payment of an advance on the examination of evidence. Also, it applies to expenses arising from the repeal of the explanations, the submission of untrue statements, the concealment of evidence or the delay in the presentation of evidence, as well as unjustified refusal to submit to mediation, on which parties previously agreed on. The court adjudicates on the obligation of the party to repay the costs caused by the negligent or obviously inappropriate behaviour, in the decision closing the case in the instance.

Certainly a significant meaning in counteracting the excessive length of judicial proceedings has the Act of 17 June 2004 on complaints about a breach of the right to hear the case in preliminary proceedings, conducted or supervised by the prosecutor and judicial proceedings without undue delay[6], which is a basic, non-code instrument. A party can make a complaint for a declaration that in the proceedings, which the complaint concerns, there has been a violation of their right to hear the case without undue delay if the proceedings in the case last longer than necessary to clarify the facts and legal issues which are relevant to the decision on the case, or longer than necessary to conclude enforcement proceedings or other proceedings concerning the execution of a judicial decision. Due to the limited scope of the study, the complaint as a non-code solution will not be further examined.

In order to determine whether proceedings have excessive length, one should assess in particular the timeliness and accuracy of the actions taken by the court, in order to issue the decision on the substance or actions taken by the court or bailiff in order to conduct and complete the enforcement proceedings or other proceedings on the implementation of a judicial decision, taking into account the nature of the case, the degree of factual and legal complexity, importance for the

[6] Journal of Laws, No. 179, item 1843 as amended.

party who filed the complaint, issues resolved in it and behaviour of the parties, in particular, the party, which raised the issue of excessive length of the proceedings. The establishment of adequate amount of money is a sanction for the state for defective organisation of the administration of justice and a compensation for the plaintiff for moral damage caused by excessive length of the proceedings. The penalty is set in proportion to the delay it causes and the severity for the plaintiff. The appropriate sum of money serves as a kind of compensation for the stress and frustration caused by the excessive length of the proceedings[7]. The relevant for the assessment of excessive length is the timeliness and accuracy of the actions taken by the court, but the conclusions stemming from them are corrected also by the nature of the case, the degree of factual and legal complexity, as well as the importance of the case for the plaintiffs. The behaviour of the parties is also relevant. This means that the standard for protection of the right to the hearing without any undue delay is individualised.

In this study, particularly important will be the analysis of the provisions of the Polish Code of Civil Procedure which prevent the excessive length of the examination proceedings, also in relation to interlocutory proceedings.

2. THE STANDARD FORM OF THE POSTULATE OF SPEED OF THE PROCEEDINGS

The basic construction important for preventing the excessive length of the proceedings is introduction of the postulate of speed of the proceedings in the general provisions of the judicial act. At the core of the standard model of the postulate of speed of the proceedings are the provisions of Art. 6 § 1 of CCP, under which the court should prevent the excessive length of the proceedings and strive to ensure that the settlement takes place at the first hearing if this is possible without any damage to the case.

In its jurisprudence, the Supreme Court pointed out[8] that the complexity of the functions of the judiciary means that the effectiveness of the courts is determined not only by the efforts taken by the courts themselves, but also that it is largely dependent on proper fulfilment of the duties by other authorities – like the prosecutor's office, advocacy, legal advisors – which directly interact with the courts, and also by those authorities, whose actions contribute indirectly to the proper prepa-

[7] Decision of the Supreme Court of 28 May 2015, III SPP 10/15, LEX No. 1740741.

[8] Directional recommendations on further increasing the level and efficiency of judicial proceedings, resolution of the Supreme Court of 15 July 1974, KwPr 2/74, OSNC 1974, No. 12, item 203.

ration or conduction of certain phases of the process; meaning, in particular, public authorities and non-governmental organisations. That efficiency is also dependent on conscientiousness and integrity of actions of the participants in the proceedings and the right attitude of the persons acting as experts and witnesses. Therefore, in order to increase the efficiency of proceedings, the courts cannot limit themselves to the improvement of their own actions, but should also – through proper cooperation with the authorities which are also responsible for the proper administration of justice – take the full advantage of the appropriate measures conferred on them by the law, in order to increase the range of control over proper fulfilment of the obligations by all those involved in court proceedings.

As it is indicated, parties (participants) in the proceedings are also responsible for the implementation of the postulate of speed of the proceedings in the area adequate to the roles they have in them. Art. 6 of CCP allows for the court to resolve the dispute even if the party responsible for the evidence does not prove the facts from which it derives legal consequences. The court is not obliged to act *ex officio*, which is consistent with current trends in shaping the adversarial court proceedings. In accordance with Art. 6 § 2 of CCP, the parties and the participants are obliged to quote all the facts and evidence without any delay, so that the proceedings could be carried out smoothly and quickly. However, the rapid performance of actions by the parties or the participants in the proceedings is measured not only in terms of speed, but also in the light of the principle of truth. In accordance with Art. 3 of CCP, the parties and the participants are obliged to carry out procedural actions in accordance with good practice and give explanations of the circumstances of the case truthfully and without concealing anything, and present evidence. Especially in the context of the latter provision, the speed of the proceedings is not a value itself, as quick proceedings do not meet their purpose, if they are not both efficient and effective, and therefore do not lead to an accurate outcome.

The speed of recognition of cases (Art. 6 of CCP) cannot come at the expense of explanation of relevant circumstances which lead to the decision[9]. In the jurisprudence of the Supreme Court, the attention of the courts is given to the need of rapid and consistent recognition, with the requirements of applicable laws of the cases within the jurisdiction of the courts, but this does not entitle the courts to apply simplifications – for the sake of speed –which are in conflict with these provisions and which may have an adverse effect on the recognition of the cases in accordance with the truth[10]. Although the provision of Art. 6 of CCP is primarily supposed to prevent obstruction of the process by the parties, it is also clear that its

[9] Judgment of the Supreme Court of 22 September 1994, III CRN 30/94, Legalis No. 28837.
[10] Judgment of the Supreme Court of 19 May 1976, IV PRN 9/76, Legalis No. 19437.

violation occurs when the courts lead with their inaction to unjustified delay in the recognition of specific cases[11]. Consideration of the speed of the proceedings – which is a fundamental value that should be consistently implemented in every process – cannot override the right of a party to defend and lead to deprivation or restriction of this right[12]. The key to a fair implementation of effective legal protection of the parties in connection with maintaining their right to obtain a final decision within a reasonable time is to maintain a balance between the speed of the proceedings and appropriately deep analysis of the claims and evidence of the parties, and where appropriate – also in connection with the *ex officio* action of the court (e.g. in case of suspicion of simulating the conduction of the process).

The above discussed postulate of speed of the proceedings is reflected in the specific provisions of the judicial act. As it is emphasised in the literature, the speed and efficiency of the proceedings apply to the whole conduction of the proceeding, so not only to preparation of the hearing, its course and outcome, but also to the possible interlocutory proceedings. Therefore, the Polish Code of Civil Procedure equipped the court and the court chairman with adequate measures to concentrate the process material through the ability to issue directives before the hearing with the purpose of its preparation.[13] Among these instruments the following structures can be identified: a directive for submitting a response to the claim or preparatory documents (Art. 207 § 1–3 of CCP), an obligation of the parties to present the statements, evidence and explanations necessary for truthful determination of the factual basis for the parties' claims or rights (Art. 212 of CCP), an order to appear in person or by proxy (Art. 216 of CCP), the appropriate application of the provisions on merging or separation of the cases (Art. 218 and 219 of CCP), a decision on formal pleas (Art. 221 and 222 of CCP), partial judgment (Art. 317 of CCP) or the preliminary judgment (Art. 318 of CCP). Some of them will be examined in further parts of the study.

3. THE ROLE OF CONCENTRATION OF EVIDENCE MATERIAL IN COUNTERACTING THE EXCESSIVE LENGTH OF THE PROCEEDINGS

The principle of concentration of the process material is widely used since it requires a coordination of all necessary actions (e.g. determination of contentious issues, clarification of interlocutory issues) and counteracting the excessive length of the

[11] Judgment of the Supreme Court of 13 September 2011, SNO 33/11, Legalis No. 461887.
[12] Judgment of the Supreme Court of 16 July 2009, I CSK 30/09, Legalis No. 274036.
[13] J. Bodio, 'Komentarz aktualizowany do art. 6 K.p.c.', in: 'Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego', ed.: A. Jakubecki (LEX 2015).

proceedings (Art. 6 of CCP). As pointed out by T. Wisniewski, it is desirable that the final resolution of the case, from the point of view of substantive law as well as the purpose of the process, is accurate and fair. Although, according to the Roman maxim, the truth is the daughter of time (*veritas temporis filia*), and rush – the stepmother of the court (*festinatio iudiciorum noverca*), it is in both public and individual interest to grant the party concerned a kind of assistance from the court in realisation of the substantive law efficiently and without excessive length. Tardiness of the judicial institution is a problem for the society (increased costs of administration of justice), and for the persons concerned (protracted period of uncertainty as to their personal legal situation) [14].

In the civil adjective law, there are two systems of concentration of the process material: the system of preclusion, in which the parties are required to submit at once all the facts known to them and the evidence under pain of losing the possibility of submitting them later, and the system of discretionary power of the judge, under which the decision to take into account the facts and evidence that despite earlier possibility were not submitted, is left to the discretion of the court. Usually, because of the highly formalised nature of the first system, the elements of preclusion are mitigated by discretionary power of the court to take into account the process material. In the current Polish model of the concentration of the process material, the recognition of the material by the judge has a dominant role, which strongly limits the elements of the preclusion system.

Before the first hearing, the defendant may submit a response to the claim, but at the same time the legislature indicates that the court chairman may order submitting a statement of defence within the prescribed period of not less than two weeks (Art. 207 § 2 of CCP) under pain of dismissing the belated response to the claim (Art. 207 § 7 of CCP). The order of the court chairman to submit a statement of defence is a manifestation of the discretionary power of the judge in terms of concentration of the process material. In this case, the source of the requirements as to the time of the material gathering is the decision of the judicial institution. The court chairman may also, before the first hearing, oblige the parties to submit further preparatory documents, indicating the order of their submission, the period within which they must be submitted, and circumstances to be clarified. In the course of the case, the submission of preparatory documents occurs only if the court decides so, unless the paper covers only a request for taking evidence. The court may issue a decision in a closed session. This provision is aimed at concentrating the process material, according to the postulate of speed of the proceedings stated

[14] T. Wiśniewski, 'Zasada koncentracji materiału procesowego', in: T. Wiśniewski, 'Przebieg procesu cywilnego' (LEX 2013).

in Art. 6 of CCP. This provision prohibits the submission of pleadings without the consent of the court. In the subject of this consent, the court shall issue a resolution that may be issued in closed session. A preparatory document submitted without the consent of the court expressed in a form of a resolution will be returned. The return of the response to the claim or a pleading does not preclude the presentation by the parties of their allegations and evidence at the hearing (Art. 217 of CCP). It should be noted, however, that falling to oblige with the process encumbrance by the parties, may result in a later stage of the proceedings with sanctions provided in Art. 207 § 6 of CCP.

By ordering the service of the writ, statement of defence or the submission of further preparatory documents, the chairman or the court, if they decided to allow the submission in the course of the case, instruct the parties about the contents of Art. 207 § 6 of CCP. Under this provision, the court ignores the late statements and evidence unless the party substantiates that it did not raise them in the lawsuit, a statement of defence or further preparatory documents without its fault or that the inclusion of late statements and evidence will not cause any delay in the examination of the case or that there are other exceptional circumstances. 'Exceptional circumstances' is a vague concept. It allows for a better adjust of the position of the court as to the possible inclusion of delayed statements and evidence to the needs of a particular case. Discussed premise is of a subsidiary character, because the inclusion takes place despite the guilt of the party and the delay in examining the case. The usage of this premise should occur due to the need to protect particular private interest or an important public interest[15]. Thus, the party may submit, also during the proceedings, a document containing the requests for taking evidence without the appropriate authorisation of the court at any time (without the sanction of return of the document), but the decision if those requests are accepted is left to the court in situations referred to in Art. 207 § 6 of CCP.

As pointed out by the Supreme Court, when interpreting Art. 207 § 6 of CCP, one must take into consideration Art. 217 § 1 of CCP which gives a right to the parties to quote facts and evidence which justify their claims or to disprove the requests and statements of the opposing party until the closure of the hearing. In this light, Art. 207 § 6 of CCP is an exception to the general rule, which means that it should be used only in limited cases which it concerns[16]. However, such an interpretation of this provision does not preclude the possibility of applying the sanctions in the

[15] K. Weitz, 'System koncentracji materiału procesowego według projektu zmian Kodeksu postępowania cywilnego', in: 'Reforma postępowania cywilnego w świetle projektów Komisji Kodyfikacyjnej', ed.: K. Markiewicz (Warsaw: 2011), p. 32.

[16] Judgment of the Court of appeal in Warsaw of 7 July 2015, I ACa 1912/14, LEX No. 1782090.

form of omissions of facts and evidence on actions or inactions performed not only by the parties, but also by their proxies, legal representatives or a guardian of a party whose whereabouts are unknown, however, the measure of required diligence should include, among other, a professional nature of the attorney.

The purpose of Art. 207 of CCP is to concentrate the evidence material and enable the court to decide on the pace and manner of submitting the documents, which, among others, can be used against the abuse of procedural law. The parties may only voluntarily submit the claim and statement of defence – these are the documents which should include all the reasons in favour of their positions. In other respects, the chairman has a discretionary freedom to evaluate the admissibility of further documents – from the moment of the effective filing a lawsuit.

From the perspective of the concentration of the process material it is essential to mention the provisions of Art. 212 § 1 of CCP, according to which the court at the hearing by asking questions to the parties aims for the parties to cite or supplement statements or evidence to support their claims and give explanations necessary for a truthful determination of the factual basis of the pursued claims and rights. The court seeks in the same way the clarification of the relevant circumstances which are disputed. The initial explanation from the parties provided in this provision (commonly referred to as an information hearing of the parties) is therefore a very important instrument for providing to the court, in the context of being in charge of the process material, the possibility to concentrate the process material (Art. 6 of CCP). Its aim is not to familiarise the adjudicating court with all the information and views on the issues recognised in the case, which a party wants to share[17]. Therefore, the provisions of this regulation are one of the manifestations of the implementation of the discretional power of the court in the civil proceedings in the scope of gathering the process material, because they allow the court to precisely determine the factual basis on which the plaintiffs base their claim, as well as statements or evidence submitted by the defendant.

The activity of the court referred to in Art. 212 § 1 of CCP is perhaps only focused on stimulating the evidence initiatives of the parties and obtaining from them the factual statements when they are insufficient to assess the substance of the reported claim or defence. It cannot, however, lead to the substitution of parties and independent building by the court the factual basis of the claim and result in taking over the duties of the parties related to the collection of evidence[18]. The explanations submitted in the light of Art. 212 of CCP serve only to determine what circumstances are disputed between the parties. Proving these circumstances, and thus demonstrating that the statements on their existence are true, needs a conduction of evidence proceedings basing on the provisions of the judicial act.

The burden of proof needed to settle the case rests on the parties under pain of losing the case. The court is equipped with the right (not the obligation) to accept further evidence not mentioned by any of the parties, but it is guided by its own assessment, whether the material collected in the case is sufficient for its settlement or not. The possibility of accepting by the court the evidence not mentioned by the parties does not mean that the court is obliged to replace the inaction of the party with its own activity[19]. If it is proven necessary, the court may instruct the parties and participants in the proceedings, who appear in the court without a lawyer, legal advisor, patent attorney or State Treasury Solicitors, about the legal proceedings (Art. 5 and Art. 212 § 2 of CCP). A justified need to provide instruction occurs when the legal actions in the proceedings are taken by an incompetent person, or a person who does not have sufficient knowledge of the law, because then giving instructions prevents inequality between the parties in the proceedings, but it cannot interfere with the neutrality of the court. Therefore, if the party in the proceedings demonstrates a proper activity and knowledge of the law to the extent pointing to the skilful support of the claim, then the plea of infringement of Art. 212 § 2 of CCP is unfounded. A violation of Art. 212 of CCP is in principle impossible if the party is represented by a lawyer or legal advisor[20]. Thus, the discussed provisions are not designed to provide – in violation of fundamental rules of civil procedure, in particular the adversarial principle – assistance by the court in effective implementation of claims filed by a party or charges of an opponent against these claims.

As already signalled, according to Art. 217 § 1 of CCP, a party may until the end of the hearing cite facts and evidence to support their claims or to repel the statements of the opposing party. However, the court ignores the late statements and evidence unless the party proves that it was not the party's fault that it did not raise them at the appropriate time or that the inclusion of late statements and evidence will not cause any delay in the examination of the case or that other exceptional circumstances occur. The court is not obliged to take into account subsequent requests for evidence of the party until it proves a thesis beneficial for itself and ignores the requests until a sufficient explanation of the facts of the case is provided (Art. 217 § 2 of CCP) [21]. Moreover, the court ignores the statements and evidence, if they are appointed only for the purpose of delay or the circumstances at issue have already

[17] Judgment of the Court of appeal in Lodz of 19 June 2013, I ACa 49/13, Legalis No. 736531.
[18] Judgment of the Court of appeal in Warsaw of 11 June 2015, I ACa 1846/14, LEX No. 1771378.
[19] Judgment of the Supreme Court of 5 February 2002, I PKN 846/00, Legalis No. 66204.
[20] Judgment of the Court of appeal in Warsaw of 16 January 20013, I ACa 749/12, LEX No. 1294856
[21] Judgment of the Court of appeal in Rzeszow of 23 September 2015, III AUa 452/15, LEX No. 1808730.

been sufficiently explained. Clarifying the facts in dispute should be understood as a state of affairs in which there either has been reconciliation between the parties of the disputed circumstances, or they have been clarified in favour of the party submitting the evidence. It is unacceptable to omit the evidence submitted by the parties with reference to the explanation of the case, if the evaluation of the existing evidence leads, in the court's opinion, to a conclusion unfavourable to the party pleading for further evidence. Such action would deprive one of the parties the opportunity to prove their statements. However, this situation does not occur when the evidence thesis is irrelevant to the outcome or proposed measures are useless for proving it[22]. Thus in this situation, similar to the case of art. 207 § 6 of CCP, the court has the opportunity to use an instrument limiting the potential possibilities of delaying the proceedings by the parties through the tactic of spreading in time the submission of statements and evidence supporting their position.

Summing up the selected issues relating to the concentration of the process material, it should be emphasised that, in accordance with Art. 224 § 1 of CCP, the chairman closes the case after evidence taking and giving voice to the parties. This provision concerns the competence of the chairman referred to in Art. 210 of CCP, and it should be taught in conjunction with other provisions, in particular Art. 3 of CCP, which assumed the activity of the parties, and Art. 6 of CCP, which refers to the postulate of speed of the proceedings. The adversarial process and the obligation to provide the parties with an opportunity to defend their rights allow the chairman to close a hearing if appropriate, relevant evidence had been carried out and the parties have had an opportunity to express their views[23]. As it is emphasised in the jurisprudence, these provisions introduce the domination of the adversarial principle in civil proceedings, removing the principle of responsibility of the court for the outcome of evidence taking, and what's more – while retaining certain powers of the court, its duties have been limited. Disposers of those proceedings are the parties. Moreover, according to Art. 232 of CCP, the parties are required to present evidence to establish facts from which they derive legal consequences[24]. The only exceptions are special circumstances that can justify the activity of the court *ex officio* (the already indicated simulation of the conduction of the process, protection of the public interest, etc.). However, this does not change the substance of the application of the adversarial principle as the basic principle of civil proceedings directly related to the principles of truth, dispositiveness and the postulate of speed of the proceedings.

[22] Judgment of the Court of appeal in Krakow of 22 May 2015, I ACa 331/15, LEX No. 1755144.
[23] Judgment of the Court of appeal in Lublin of 30 October 2012, I ACa 485/12, LEX No. 1237240.
[24] Judgment of the Supreme Court of 7 May 2008, II PK 307/07, LEX No. 490351.

4. ACTIONS AGAINST THE EXCESSIVE LENGTH OF THE PROCEEDINGS THROUGH ABUSE OF INTERLOCUTORY PROCEEDINGS

It should be noted that the problem of excessive length of proceedings refers not only to the main examination proceedings or at a later stage – the enforcement proceedings – but equally applies to interlocutory (accidental) proceedings. One possible tactic to delay the proceedings is the abuse of the right of submitting requests initiating such proceedings, in order to stop or delay the main proceedings. This phenomenon has been noticed by the legislator who introduced solutions to prevent such practices bearing the characteristics of the abuse of procedural rights.

Among these structures it is worth mentioning the provisions of Art. 53[1] of CCP, according to which another request for exclusion of a judge, based on the same circumstances, shall be dismissed without placing any explanation by the judge whom it concerns. The request is dismissed by the court conducting the case, meaning the court in systemic context. The rejection of the request should therefore be performed by the court where the case is being conducted, composed of three judges pursuant to Art. 53[1] in conjunction with Art. 52 of CCP[25]. The settlement takes place without the participation of the judge which the request concerns[26]. This applies correspondingly to re-notification by the judge about the basis of his or her exclusion (in accordance with Art. 51 of CCP). The court may issue a decision in a closed session. The decision rejecting the request cannot be a ground of appeal. However, it can be recognised, at the request of the party pursuant to Art. 380 of CCP, in appeal proceedings because it could affect the outcome of the case.

Similarly, in order to prevent the excessive length of the procedure a construction relating to the request for establishment of a lawyer or a legal advisor from the office has been developed. In accordance with Art. 124 § 1 of CCP, the request for the establishment of a lawyer or a legal advisor, as well as an appeal from the refusal of their establishment, does not suspend the course of the proceedings unless it concerns the establishment of a lawyer or a legal advisor for the plaintiff, as a result of a request filed in the lawsuit or before any legal action was taken. The court may, however, suspend the examination of the case until the final outcome of the request; therefore, it may not appoint a hearing, or cancel or postpone the hearing which had been already appointed. The suspension of the course of the proceedings may occur *ex officio*, but also at the request of a submitting party e.g. in the appeal against the decision to refuse the establishment of a lawyer or a legal advisor.

[25] Judgment of the Court of appeal in Gdansk of 8 February 2008, I ACa 1273/07, Legalis No. 287206.
[26] Judgment of the Supreme Court of 29 May 2013, II PK 273/12, Legalis No. 750322.

On the other hand, referring to this institution in conjunction with legal remedies (also those extraordinary), the legislature in § 5 Art. 124 of CCP introduced a clear regulation that another request for the establishment of a lawyer or a legal advisor, based on the same circumstances, has no impact on the deadline for the appeal. What's more, another request for the establishment of a lawyer or a legal advisor, based on the same circumstances, is rejected. The decision rejecting the request cannot be a ground of appeal (Art. 117^2 § 2 of CCP).

However, if the decision on the rejection of another request for the establishment of a lawyer or a legal advisor, based on the same circumstances, lies in the hands of the court referendary (Art. 123 § 2 of CCP), then this decision may be appealed to the court which issued the contested decision (Art. 398^{22} § 1 of CCP). This court decides as a court of second instance, applying the provisions on appeals (Art. 398^{23} § 2 of CCP). Thus, the party may re-apply for the establishment of a lawyer or a legal advisor, after the rejection of the first request in this regard, if it is relying on other circumstances than those on which it relied on in the first request, dismissed by the court.

The cases selected above, which relate to the interlocutory proceedings, show the importance of proper care of the legislature for efficiency and effectiveness of the procedure in this aspect, which significantly affect the course of the main proceedings.

5. CONCLUSIONS

To sum up, although the speed of the proceedings is not a value of an absolute character, it is one of the parameters of the assessment of the behaviour in terms of efficiency and reliability. The literature indicates that the postulate of speed of the proceedings, associated with the principle of concentration of the process material, refers to all of the stages of the proceedings, as well as the interlocutory proceedings; it contains an obligation to oppose the excessive length of the proceedings while directing their – formal and material – course. The reduction of the time needed for the resolution of the case, which is necessary in many cases, also restores the faith of the plaintiff (applicant) in the sense of seeking justice[27]. Thus one of the basic criteria to verify if the proceedings are fair and accurate is to reach the settlement within a reasonable period of time, but with the proviso that this outcome will be pertinent and will provide the appropriate level of legal protection of the entity which needs such protection.

[27] B. Bladowski, 'Metodyka pracy sędziego cywilisty', in: B. Bladowski, 'Metodyka pracy sędziego cywilisty' (LEX 2013).

This last aspect is particularly important, as opposed perception of speed, efficiency and effectiveness of the proceedings would mean a denial of the functions and objectives which are fulfilled by the system of justice. The literature correctly points out that one of the essential features of a fair trial, a prerequisite for the procedural justice, is the effectiveness of the proceedings. This feature of the proceedings – considered from the point of view of constitutional and systemic role of the civil courts, the judge positions, the adequacy of judicial procedures, as well as the formal guarantees of a fair trial – leads to the conclusion that the effectiveness of legal proceedings needs to be included in the basic principles of any functioning legal system[28]. A. Łazarska stresses that the effectiveness of the procedure covers two aspects: the speed of the proceedings and the opportunity to actually make use of the guarantee of judicial protection, and the effectiveness of the procedure is as important as the accuracy of the judgment. Hence, the ideal outcome would be to achieve a fair judgment as soon as possible[29]. The Polish model against the excessive length of the proceedings is therefore an essential element of civil procedural law system, whose primary objective is effective legal protection for those who seek it.

In practice, there is a continuous discussion relating to the desired level of formality of the proceedings and the shape of some institutions (e.g. the prohibition of submitting pleadings without the permission of the court) in terms of their compliance with the right to the court, particularly in terms of effective access to the court. It seems that this is an unsolvable dilemma between real access to the court, resulting from the fast and effective settlement of civil disputes, and the implementation of this access through the use of moderate formalism, allowing for actual perusing of the claims and the defence of the rights of the parties (participants) in the proceedings. Therefore, the primary challenge for the Polish legislator, as well as for other legislators, not only European, is to seek the right balance between fairness and thoroughness of judgment and the speed and efficiency of adjudication with minimal costs of the proceedings. This leads to a constant search for the way to optimise the efficiency of civil proceedings, taking into account social, economic and technical changes, which on the one hand give birth to other categories of civil cases, aggravating the ordinary courts (e.g. in the field of virtual economic transactions), and on the other – opens new ways to improve the current model of concentration of the process material (mainly by using the ICT system and the means of distance communication).

[28] A. Łazarska, 'Rzetelny proces cywilny' (Warsaw: 2012), p. 374 and further.
[29] Ibidem, p. 378.

Efficiency in East-Scandinavian Civil Proceedings

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1. BACKGROUND

In this paper, I compare the efficiency of civil proceedings of two East-Scandinavian countries, namely Finland and Sweden. The reason behind this comparison is the increased focus in both countries on the efficiency of civil proceedings due to recent wide-ranging reforms in the field. In Finland, there has been, e.g., much discussion and much effort to solve problematic delays in civil cases, whereas the Swedish proceedings seem to work more quickly. In Finland, there is even a lack of civil cases at courts, mainly due to the high risk of legal costs and delays, while in Sweden courts are still seen as an attractive alternative for dispute resolution.

In Sweden, the so-called modernised proceedings have been a hot topic since 2008, when the "More modern court proceedings" reform entered into force. One primary aspect in the reform was the wide use of modern technologies. For example, it is now possible for all trial parties to participate through video conference[1]. The wide use of court technologies, which intensify the proceedings, already involves a risk of not encountering parties and other actors as human beings and of making proceedings too technical. The trend is no less interesting due to the fact that especially in Sweden the legislator has put much effort into reception matters at courts, focusing on good service[2]. These two trends – to meet people in a positive way and to modernise proceedings by means of technology – do appear to be contradictory.

[1] See Chapter 5, Section 10, Swedish Code of Judicial Procedure (SCJP).

[2] See for instance: Brå Bemötande i domstol Rapport 2013: 11. Brå Diskriminering i rättsprocessen, Om missgynnande av personer med utländsk bakgrund Rapport 2008: 4; Hovrätten för Västra Sverige 2008 Har vi blivit bättre på att bemöta brukarna? Resultatet av den uppföljande intervjuundersökningen 2008; Domstolsverket Domstolarnas bemötande av allmänheten – ett åtgärdsprogram Ju98/2513; Brå and Domstolsverket Vittnesstöd- Utvärdering med förslag för den fortsatta verksamheten Ju2006/5404/KRIM 2008; Regeringens skrivelse Reformeringen av domstolsväsendet- en handlingsplan Skr 1999/2000: 106; Statens offentliga utredningar Betänkande av Förtroendeutredningen Ökat förtroende för domstolarna – strategier och förslag SOU 2008: 106.

Hovrätten för Västra Sverige Vad tycker brukarna? En intervjuundersökning om kvaliteten vid Hovrätten för Västra Sverige 2007; Hovrätten för Västra Sverige Vad tycker hovrättsaktörerna om EMR-reformen? En intervjuundersökning om tillämpningen av de nya reglerna för processen – En Modernare Rättegång 2010.

The tension between fairness, good service, and economic efficiency seems to be typical in both countries, even if the tools to solve this contradictory situation have been different. In Finland, it is possible to obtain compensation for delays or request that a case receives urgent consideration. Moreover, written proceedings have once again gained popularity as alternatives to orality as a fundamental value in court proceedings. Due to, on the one hand, some common factors and, on the other hand, some contradictions, the achieved efficiency is a promising starting point for comparative legal studies between East-Scandinavian countries. Which tools factually work and how do they generate the effects we notice in each country's legal system?

2. SWEDISH PROBLEMS AND SOLUTIONS

The Swedish Code of Judicial Procedure (SCJP) dates from 1948 and is rooted in the basic procedural principles of orality, immediacy and concentration[3]. Over time, however, the principles have been commuted several times due to practical difficulties. Nowadays, it may even be questioned whether the current SCJP is still the same code or if the latest reforms have changed the fundamental principles so much that the spirit of the original code is no longer based on the same aims and objectives as in 1948[4]. Accordingly, the new keywords in the Swedish proceedings, namely 'flexibility' and 'party-autonomy', emphasise efficiency rather than immediacy or orality.

The principle of orality has, since the reform of 1987, been based on the idea of functionality. Thus, the court should choose between written or oral preparation, taking practical needs into consideration. Proceedings even allow written preparation only[5]. Since this reform, it has also been possible to use telephones in cases where this is deemed reasonable or if alternative costs or other inconveniences would be too high in comparison to the interest of the case[6]. It is very common to use the phone in Swedish courts and the experiences have been mostly positive. Some negative aspects have been reported, such as technical problems and the fact that the parties themselves play a significant role in considering whether it is reasonable to conduct a phone hearing or not[7]. It should – of course – be the court

[3] P.O. Ekelöf, H. Edelstam, M. Pauli, 'Rättegång V' (Stockholm: Norstedts Juridik 2011), p.11–13 and B. Lindell 'Civilprocessen' (Uppsala, Iustus Förlag 2012), p. 118–120, 290.

[4] K-G. Ekeberg, 'En ännu modernare rättegång?' Svensk Juristtidning 2013, p. 175.

[5] Regeringens Proposition om ett reformerat tingsrättsförfarande 1986/87: 89, p. 1, Lindell (2012), p. 43, 290.

[6] Chapter 5, Section 10 (SCJP).

[7] E. Bylander, 'Muntlighetsprincipen vid domstol i Sverige.' In: E. Bylander – P.H. Lindblom,

who decides if it is suitable and allowed to use the phone or not. The opinion of the parties should not play the main role in this consideration.

The next step was taken in 2008, when a rather substantial reform, the so-called "More modern process" (EMR I) entered into force. The reform became famous due to the extensive use of modern technology in court hearings[8]. Through new rules it is now possible to let everyone in a trial participate through video conference[9]. Thus, orality was once again downplayed. At the main hearing, the parties can also present legal material by referring to documents in the case and they have wider possibilities to evoke written testimonies[10]; a possibility that is used on a regular basis. In civil cases, this type of referred material are mainly summaries of the case and written evidence. The use of this possibility has shortened hearings, but some district courts are of the opinion that the time saved is only marginal. The opinions whether the step towards written proceedings has been useful as a time saver vary fifty-fifty[11]. Procedural sanctions too are used to intensify the proceedings. One of them is the default judgment, which became stricter with the EMR I reform[12].

The legislator also wanted to clarify that the centre of gravity in the judiciary should be rooted in the district courts. Therefore, a leave for appeal now applies to all civil cases and court matters even in the court of appeal[13]. Furthermore, the audio visual records from the district court are replayed at the main hearing in the court of appeal and in most cases the persons are not questioned again at the higher instance. The role of appeal, thus, is more to control than to try the case[14].

In 2016, the legislator took one more step in the same direction and made the novelties of EMR even stricter and wider by means of the EMR II reform[15]. Through this re-reform, the possibilities of using modern technology were made even more

(eds.) 'Muntlighet vid domstol i Norden. En rättsvetenskaplig, rättspsykologisk och rättsetnologisk studie av presentationsformernas betydelse i förfarandet vid domstol i Norden' Uppsala Iustus Förlag 2005, p. 125.

[8] L. Ervo – A. Dahlqvist, 'Delays in civil proceedings – comparative studies between Finland and Sweden' In L. Ervo – A. Nylund (eds.) "The Future of Civil Litigation Access to Courts and Court-annexed Mediation in the Nordic Countries" Cham Heidelberg New York London Springer 2014 , p. 260–263, Regeringens proposition 2004/05:131, 'En modernare rättegång – reformering av processen i allmän domstol', p. 1.

[9] Chapter 5, Section 10 (SCJP).

[10] See Chapter 43, Section 7 and Chapter 46, Section 6 (SCJP). Already early on, it was possible to solve a case without a main hearing, also based on merits, if the main hearing was not deemed as having regard to the investigation in the case nor requested by any of the parties. The main hearing is, however, needed if oral testimony is presented.

[11] Ervo – Dahlqvist (2014), p. 260–263 and Årsredovisning 2010, Sverigens domstolar, p. 18 and 28, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/.

[12] E. Bylander, "En modernare rättegång och bättre?" Svensk Juristtidning 2007, p. 518.

[13] Chapter 49, Section 12 (SCJP).

[14] Ervo – Dahlqvist (2014), pp. 260–263 and Regeringens proposition 2004/05: 131, p. 1.

[15] Lagrådsremiss En modernare rättegång II, 13 maj 2015.

comprehensive[16]. At the same time, the courts' duty to make a summary has been further emphasised in 2016 with the EMR II earlier, it was the duty of a court to write a summary if it was probable that the summary made the procedure more effective. From 2016 on, the court has a duty to write a summary in co-operation with the parties if there are no reasons according to which the summary may be deemed unnecessary[17]. In Sweden, alongside the use of technology, the other widely used tool to make proceedings quicker and more effective is summaries and schedules[18]. Accordingly, the court produces a schedule that will help both parties and the court make their own timetables and so enable them to prepare the case in time. In large and complicated cases, the court may even make use of lists of current questions and themes clarified in the case. Such lists help structure a case. The parties have to be able to act within the planned timeframe[19]; if the schedule is too tight or otherwise unsuitable, they have to inform the court that they cannot follow it. Indeed, the parties´ general responsibility to co-operate in an active way to ensure that proceedings remain effective is very much emphasised in the Swedish judicial system.

3. FINNISH PROBLEMS AND SOLUTIONS

Before 1993, in the old style of Finnish court proceedings, written statements in pleadings were allowed. The procedure was only partly oral and otherwise based on the records. The parties used written statements even in the court sessions in order to explain their claims, grounds and judicial arguments which led to adjournments[20]. In 1993, the old civil procedure was replaced by an oral, immediate, and concentrated procedure. It was also emphasised in the new procedure that the decision should be arrived at without delay and that the proceedings should not cause excessive costs[21]. The model for this reform was found mostly in Swedish civil procedure. The lower courts were being equipped to deal with intricate cases more thoroughly than before and with straightforward cases more quickly than earlier[22]. However, this ideal soon proved to be unsuccessful. The main problem after the reform in 1993 was that the

[16] http://www.regeringen.se/rattsdokument/lagradsremiss/2015/05/en-modernare-rattegang-ii/.

[17] Chapter 42, Section 16 (SCJP 2016) and Lagrådsremiss En modernare rättegång II, 13 maj 2015.

[18] Ekeberg (2013), p. 172.

[19] Chapter 42, Section 6 (SCJP).

[20] J. Lappalainen, 'Siviilijutun käsittely käräjäoikeudessa vuoden 2002 uudistuksen mukaan' Helsinki, Helsingin yliopiston oikeustieteellinen tiedekunta 2002, p. 6–8, L. Sippo – A.Välimaa, 'Siviiliprosessin muutetut säännökset' Helsinki Talentum, Helsinki 2002, p. 1–4.

[21] K. Ervasti, 'Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa' Helsinki Oikeuspoliittinen tutkimuslaitos 2004, p. 507.

[22] L. Ervo, 'The Reform of Civil Procedure in Finland' Civil Justice Quarterly 1995, p. 56.

preparatory stage became too cumbersome. In practice, the preparatory stage had not acquired a serving profile to function as preparation for the main hearing, and so instead the parties advocated in a full manner already during the preparation. The main reason for this was the fear of preclusion[23]. The preclusion rule was made milder in the re-reform of 2003 and some other measures were applied to solve the problems caused by the 1993 reform. However, even the re-reform did not totally alleviate the problems. This is why the reformed civil procedure did not help make Finnish proceedings more effective, but in effect caused legal expenses to increase and civil procedure to last somewhat longer than had been the case earlier[24].

The 1993 reform could not solve the problem of long-lasting proceedings. It just changed the nature of piecemeal main hearings towards piecemeal preparatory stages. Still, today, the problem remains as delays in proceedings. Two very practical and direct steps to solve the problem have been taken, namely compensation[25] for delays in the juridical proceedings and the option to request urgent consideration[26]. That said, the compensation is mostly retrospective and its direct effects are uncertain. Moreover, by the same token, the State may "buy" extra time so as not to violate art. 6 of the European Convention on Human Rights (ECHR). The request for urgent consideration, on the contrary, is in place to prevent delays *a priori*. It means that a party may request the district court to order urgent consideration of a matter[27].

Finland has tried to intensify proceedings also by limiting the possibility to appeal. All decisions by the district courts may be appealed to the court of appeal, but the court of appeal decides if the matter is to be taken up for further consideration[28]. In civil (including petitionary) cases, the leave for continued consideration has been granted in all cases since October 2015. This system of leave for continued consideration has been used in Finland since 2011, and in the beginning it was granted

[23] Lappalainen (2002), pp. 15–18, Sippo – Välimaa (2002), p. 4–8.

[24] L. Ervo, 'Swedish-Finnish Preparatory Proceedings: Filtering and Process Techniques' In L. Ervo – A. Nylund 'Current Trends in Preparatory Proceedings A Comparative Study of Nordic and Former Communist Countries' Cham Heidelberg New York London Springer 2016, p. 14–18.

[25] The Act on Compensation for the Excessive Length of Judicial Proceedings entered into the force in January 2010. The amount of the compensation is EUR 1,500 for each year during which the judicial proceedings have been delayed for a reason that the State is liable for. Under certain conditions, the amount of the compensation may be raised or reduced. The maximum amount of the compensation is EUR 10,000.

[26] The English information can be found of the web: http://oikeus.fi/54440.htm.

[27] A matter may be ordered to be considered urgently in exceptional cases when there are very important reasons to do so. The decision to order urgent consideration is made with regard to, among other circumstances, the duration of the judicial proceedings so far, the nature of the matter and its significance to the party. If a request for urgent consideration is accepted, the district court must decide the matter without undue delay before other matters.

[28] Chapter 25a Section 5 (10.4.2015/386), Finnish Code for Judicial Procedure (FCJP).

in civil and petitionary cases if the district court was against the party only in respect of a debt, and the difference between the claim presented in the appeal document and the final result of the decision of the district court (value of the loss) was not more than €10,000. Legal costs and interest calculated on the claim shall not be taken into consideration in calculating the value of the loss.[29] Leave for continued consideration shall be granted if:

(1) There is cause to doubt the correctness of the conclusion of the district court;
(2) It is not possible to assess the correctness of the conclusion of the district court without granting leave for continued consideration;
(3) In view of the application of the law in other similar cases, it is important to grant leave for continued consideration in the matter; or
(4) There is another important reason for granting leave.
(2) However, leave for continued consideration need not be granted on the basis of subsection 1(1) solely in order to reassess the evidence, unless, on the basis of the grounds presented in the appeal, there is justified reason to doubt the correctness of the conclusion of the district court[30].

4. STATISTICS

In Finland, the total annual approved budget allocated to the whole justice system was €792 410 000 in 2010, whereas in 2012 it was already €855 857 000. In Sweden, the total annual approved budget allocated to the whole justice system in 2010 was €4 064 159 050 and in 2012 €4 519 656 078[31]. Annual public budget allocated to all courts (excluding legal aid and public prosecution) as % of GDP per capita in 2012 in Sweden was 0.15 %, in Finland 0.13 %, in Denmark 0.10 % and in Norway 0.06 %, which seems to be economically the most effective country whereas the 'weakest' country is Bosnia and Herzegovina with 0.60 %[32].

In Sweden, the state annually allocates €66.70 per inhabitant to the courts whereas the average in Europe is €35 per inhabitant to the functioning of courts. However, budgetary efforts differ significantly among the countries, from small amounts of less than €10 per inhabitant (Republic of Moldova, Georgia, Armenia,

[29] Chapter 25a Section 5 (7.7.2010/650), FCJP.

[30] Chapter 25a, Section 11, FCJP.

[31] Year2012statistics:http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, figure 2.1, page 21. Year's 2010 statistics: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf.

[32] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, figure 2.6, page 31.

Albania) to amounts exceeding €100 per inhabitant (Switzerland €122.10 or Germany €103.50). Sweden, with its €66.70, is in fourth place after Slovenia with €80.20. Finland uses €46 and holds the eighth position with this amount after the Netherlands, Italy and Norway[33]. Based on these statistics, it looks like Sweden invests more in court services than does Finland[34].

As regards to the length of proceedings, in 2012 the Swedish average length of proceedings in the district courts was 7.3 months[35]. Compared to 2008 (the last year before the possible impact of the EMR reform), the length of proceedings has decreased. Case length at that time was 8.6 months in the district courts[36]. In 2015, the average length in civil cases was 7.0 months. Still, the variation between the district courts regarding civil cases is rather high, namely between 2.0–9.1 months in 2012 and 2.1 – 12.6 months in 2015. One explanation of the large variation between the district courts is that many of the courts that have the shortest lead times also have more resources in relation to the amount of cases they handle, compared with the other courts. That is because they are small courts that need a certain minimum level of personnel to maintain judiciary[37].

In Sweden, between 2008 and 2012, the amount of filed cases in the appellate courts increased by 8 %. During the same period, the number of determined cases increased by 4 %. The number of pending cases in the appellate courts has also increased during the last years but is on a lower level than in 2008[38]. In the

[33] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, figure 2.5, page 30.

[34] However, there are also opposite results when comparing the named countries. The amount of inhabitants in Finland is about 5.43 million, while in Sweden, the population count is 9.56 million. In 2012, there were roughly 502 judges in Finnish district courts, 9 assistant judges, 129 notaries and 1000 office staff and 264 bailiffs, altogether, 1904 employees in the Finnish district courts. In all general courts in Finland, the statistics for 2012 are as follows: 706 judges, 177 referendaries, 9 assistant judges, 129 notaries, 2641 bailiffs and 1,203 other employees – or, altogether, 2488 employees. Compared with Sweden, Finland seems to have invested many more resources in general courts compared to the amount of inhabitants. However, due to the differences in the amount of pending cases and especially due to the differences in jurisdiction, it is very difficult to compare the real resources only with the help of the number of employees. Ervo – Dahlqvist (2014), p. 269. Professor Jyrki Virolainen has compared the effectivity of the courts of appeal in Finland and in Sweden and the result was that the Swedish judiciary seems to be more effective. See http://jyrkivirolainen.blogspot.fi/2009/11/189-hovioikeusprosessin-uudistaminen.html.

[35] L. Ervo, Dahlqvist (2014), p. 264–265 and Sveriges domstolar Årsredovisning 2012, p. 28, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/.

[36] L. Ervo, Dahlqivst (2014), p. 264–265 and Sveriges domstolar Årsredovisning 2008, p. 28, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/.

[37] L. Ervo, Dahlqvist (2014), pp. 264–265 and Sveriges domstolarÅrsredovisning 2015, p. 24–25, 28, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/,

[38] L. Ervo. Dahlqvist (2014), p. 264–265 and Sveriges dosmtolar Årsredovisning 2012, p. 28–30, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/.

district courts, since 2012, the number of field civil cases has been quite stable, but otherwise the amount of filed cases has been decreasing. In 2013, there were 82 744 civil cases, in 2014 86 258 cases and in 2015 81 787 filed civil cases. In 2013, the total amount was 180 038 cases, in 2014 175 538 cases, and in 2015 170 408 cases in the Swedish district courts[39].

In 2012, there were about 425,000 filed civil cases at the Finnish district courts and 469,000 cases were decided by a final decision. The latter number had increased by about 23 %, compared with the year 2011[40]. In 2013[41], Finnish district courts decided 491 700 civil cases, which is 5 % more than in 2012. 68 % of these were debt-cases. In 2013, there were 5 % less filed civil cases than in 2012. In the end of 2013, there were 73 000 pending civil cases, which is 20 % less than in 2012. 99.4 % of determined cases (438 900) were decided already during the preparatory stage. 436 500 cases were decided during the written preparation, and 2 400 cases during the oral preparation. Only 0.6 % of cases continued to the main hearing[42].

Concerning the length of the proceedings, in 2012, the average length of proceedings in all civil cases at all Finnish district courts was 2.3 months, whereas in 2011, it had been 2.5 months[43]. In 2013, the average duration of civil cases was 2.6 months in cases which were decided during written preparations. If the case continued to the main hearing, the average was 12.5 months. In all civil cases, the average length was 2.7 months. In 2013, 83 % of cases were decided according to the law suits. 97 % of these were judgments by default[44]. In 2012, the average length of the proceedings in all civil cases, which were decided during written preparation, was 2.2 months, whereas in all civil cases that needed a main hearing, the average was 11.4 months[45]. The average processing time in civil cases was 6.4 months in 2012. In civil cases, the average length was 8.5 months; in petitionary matters, the average was 4.2 months[46]. In petitionary cases, the average time of hearing in 2012 was 5.2 months, whereas in 2011 it had been 5.3 months. In this group, the duration of proceedings was the longest in family law cases, such as divorce and custody cases. If the main hearing was necessary, the average length was 8.2 months[47]. All of this indicates that the

[39] http://www.domstol.se/Publikationer/Statistik/court_statistics_2015.pdf, p. 9.

[40] http://tilastokeskus.fi/til/koikrs/2012/koikrs_2012_2013-04-02_tie_001_fi.html.

[41] This is the most recent statistics available. Due to economic constraints, court statistics are no longer published.

[42] http://www.stat.fi/til/koikrs/2013/koikrs_2013_2014-04-02_tie_001_fi.html.

[43] tilastokeskus.fi/til/koikrs/2012/koikrs_2012_2013-04-02_tie_001_fi.html.

[44] http://www.stat.fi/til/koikrs/2013/koikrs_2013_2014-04-02_tie_001_fi.html.

[45] tilastokeskus.fi/til/koikrs/2012/koikrs_2012_2013-04-02_tie_001_fi.html.

[46] tilastokeskus.fi/til/hovoikr/2012/hovoikr_2012_2013-06-28_tie_001_fi.html.

[47] tilastokeskus.fi/til/koikrs/2012/koikrs_2012_2013-04-02_tie_001_fi.html.

undisputed civil cases constitute the greatest case load at the district court level. However, most cases of this kind are decided in written preparation, which means they do not demand exceptional amounts of resources. This is also the explanation why the Swedish length of civil proceedings seems to be longer despite the fact that length has been identified as a problem in Finland but not so much in Sweden. The reason for this, however, is that in Sweden there are no undisputed debt cases at district courts because these cases reside under the bailiffs, while in Finland they go to the courts (where they are usually decided during the written preparation, shortening the average case length).

The processing time of cases in the Finnish courts of appeal has clearly been reduced in the 2000s. About ten years ago, in 2003, the average processing time was nearly three months longer than the 2012 average processing time, 5.9 months. Especially the number of cases which take more than one year at the court of appeal has been decreasing. In 2003, one fourth of all cases took at least a year, but in 2012 only every ninth[48]. In 2013, the amount of decided cases at the appellate courts decreased by 5 %. The total amount of decided cases was 9 700 of which 1800 were civil cases and 1700 petitionary cases. The amount of filed cases in 2013 was 9 700, which is 0.9 % less than the year before. The average length at the courts of appeal in civil cases was 5.7 months in 2013. In all civil cases, it was 6.2 months (i.e., in civil cases 8.4 months and in petitionary cases 4.1 months). The situation has thus improved, especially where the longer lasting cases are concerned. In the beginning of 2000s, every forth case took more than one year in the appellate courts, but by 2013 only every ninth case took that long[49].

5. COMPARISONS

Individuals seem to be more prone to go to court to solve disputes (more than 3000 new cases per 100 000 inhabitants) in the Central and Eastern European states, South-eastern European states and in the countries of southern Europe than in the countries of northern Europe – Finland and Sweden included – and the states of the South Caucasus, where less than 1000 new cases were filed per 100 000 inhabitants per year[50]. It is difficult to say if this is a sociological phenomenon that says more about people´s habits than about the functioning of courts and civil proceedings. However, one indicator could be how attractive courts are perceived as an alternative to dispute resolution or if, for instance, delays, legal costs or well-functioning

[48] tilastokeskus.fi/til/hovoikr/2012/hovoikr_2012_2013-06-28_tie_001_fi.html.
[49] http://www.stat.fi/til/hovoikr/2013/hovoikr_2013_2014-06-27_tie_001_fi.html.
[50] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, p. 203.

arbitration or mediation are reasons to avoid courts even if people are not avoiding conflicts as such[51]. Still, the lack of civil cases has been seen as problematic in Finland, while the situation in Sweden is quite dissimilar; there, courts still have civil cases to be solved despite the fact that arbitration also works well in Sweden and has a long tradition there[52]. The hypothesis, then, is that Swedish court proceedings are seen as more attractive among the general public than in Finland, which implies that at least the image of courts is better in Sweden than in Finland. Whether this trust in courts is based on a well-functioning system or whether it is just an empty image is another question.

According to European comparisons, Sweden belongs to that one third of European states where court productivity can be considered satisfactory. Both the Clearance Rate and the Disposition Time are positive for the main non-criminal case categories. Therefore, prognoses are positive too, and the Swedish courts should not expect major difficulties in coping with the volume of cases to be addressed, especially in non-criminal cases[53]. Finland, evidently, has too high a Disposition Time in non-criminal litigious cases, but could expect its rate to improve when considering their positive Clearance Rate (above 100 %), which might have a positive impact on the length of proceedings[54]. Thus, there seems to be some statistical support for the hypothesis that the Swedish court system is working better than the Finnish one, which, in turn, may also mean that it comes across as attractive to the general population. The positive image does seem to have some substance.

According to national statistics, the more modern Swedish procedure for presenting evidence by playing back audio visual recordings and holding additional examinations has proven to be successful[55]. The new technique has overall been satisfactory and the new procedure has led to a substantial decrease in cancelled hearings. Between 2008 and 2012, the decrease in this respect was 77 %[56]. During the same period, the length of proceedings in the civil cases also decreased from 7.6 months to 3.8 months, which means that proceedings are 50 % shorter now[57]. From the efficiency perspective, the more modern proceedings seem to have been a success.

[51] See A-L. Autio, "Lainkäyttö yritysten riidanratkaisussa" Helsinki Talentum 2014.
[52] Autio (2014), p. 22 and Statens offentliga utredningar Näringslivets tvistlösning SOU 1995: 65, p. 115.
[53] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, pp. 198–199.
[54] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, p. 199.
[55] Ervo - Dahlqvist (2014), p. 263 and Statens offentliga utrednignar En modernare rättegång II – en uppföljning SOU 2012: 93, p. 19.
[56] L. Ervo, Dahlqvist (2014), p. 263 and SOU 2012: 93, p. 241.
[57] L. Ervo, Dahlqvist (2014), p. 263 and SOU 2012: 93, p. 240–241.

However, in Sweden, the leave to appeal in all civil cases in the appellate court has had several impacts on the proceedings, too. For instance, it seems that requests from court parties of having three judges present at the main hearings have increased[58]. The parties also refer to more evidence and their written pleas are more extensive than before the reform. More questions are given to the parties and witnesses at the main hearing. As a consequence, the hearings have become longer[59]. However, these opinions of district courts do not seem to correspond with the statistics presented above.

In several states, the number of incoming non-litigious cases is higher than the number of resolved cases, which in fact leads to a backlog. Finland is included in this group of European countries. In Finland, the activity of the first instance court, as regards the volume of cases, also mainly stems from non-litigious civil (and commercial) cases. Thus, Finland is still experiencing long case management timeframes, but can expect an improvement due to a better ability to absorb the incoming cases, which could have a positive impact on the duration of proceedings if this trend is confirmed[60]. If the Finnish court authorities cannot deal with the number of cases within a reasonable timeframe and in an otherwise efficient and fair way, the solution could be to focus on litigious cases and transfer other cases outside the courts along the lines of what has been done in Sweden, where, e.g., non-litigious debt cases reside with bailiffs. Still, the Swedish system for non-litigious debt cases has led to other types of problems and the system is not totally flawless or fair (false debt-claims are part of daily-life and can be very serious, especially for senior citizens)[61]. From this perspective, the Finnish system could be seen as fairer and therefore more efficient in respect of judicial relief. It is necessary to bear in mind, though, that moral efficiency too can be calculated in an economic way and that it too has costs[62].

[58] L. Ervo, Dahlqvist (2014), p. 263 and SOU 2012: 93, p. 19.

[59] L. Ervo, (2014), p. 263 and Sveriges domstolar Årsredovisning 2010, p. 21, available on the web: http://www.domstol.se/Ladda-ner--bestall/Verksamhetsstyrning/Arsredovisning/.

[60] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, p. 205.

[61] A.H. Persson, "Seniorlån – en skuldfälla eller ett sätt att få guldkant på tillvaron?" Juridisk Tidskrift 2012, p. 841–853.

[62] M. D. Bayles, "Procedural Justice" Dordrecht Kluwer 1990.

Nowhere fast? Shortcuts to Judgment in Recent Italian Procedural Legislation[1]

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1. For a long time The Italian system of civil justice has been troubled by "time". I will now state the obvious (and with a very sad heart): Italian proceedings of all sorts tend to be longer than proceedings in other developed countries and they do not comply with the reasonable delay standard set by art. 6 of the ECHR and by art. 111 of the Italian Constitution[2].

They are simply too long, unacceptably long.

There are several causes for this situation and it is beyond the scope of this presentation to analyse them. There are also several ways to try to solve it, as the papers presented at this conference clearly show. For example, this morning, we have heard many presentations dealing with the organization of the courts or with the development of e-proceedings[3]. In Italy, by contrast, so far, the legislator appears to be mostly relying on a "procedural approach", on the assumption that proceedings may be made faster and more efficient by changing the rules that govern their development.

In order to tackle this dramatic situation, many (more or less extensive) reforms have been enacted in recent years by the Italian lawmaker, as concern both adjudicative jurisdiction and enforcement jurisdiction.

This paper, in fact, is centred on some procedural devices, which the Italian lawmaker enacted in the past few years in order to try to reduce the duration of civil proceedings. What I aim to present is by far not a complete list of procedural innovations in Italian legislation. It would simply be pointless. On the contrary, my

[1] This is the text of a paper presented at a Conference organized by the University of Vilnius on September 30 and October 1, 2016, dedicated to "Ways of implementation of the right to civil proceedings within a reasonable rime"

[2] For a very recent assessment of the situation, see Caponi, The Performance of the Italian Civil Justice System: An Empirical Assessment, in The Italian law journal, 2016, n. 1, p. 15 ff.

[3] Incidentally, it has to be remarked, on a positive note, that electronic proceedings are now a well-defined and successful reality in Italy: as a matter of fact, most interactions between lawyers' and courts in civil litigation develop through the so called electronic "console". Moreover, the security standards applied by the Italian legislation with reference to e-proceedings are arguably higher than those commonly accepted in the European setting. So far, however, the development of e-justice does not seem to be accompanied by a shortening of civil proceedings.

intention is just to provide some meaningful examples of a more general trend in the development of the face of Italian civil justice.

Actually, the lawmaker appears to believe that the "procedural solution" will suffice to achieve the aim of shortening the duration of civil proceedings.

The experience with the new devices enacted over more than two decades, however, seems to tell another story, yet this is something best left for my final remarks.

2. As a preliminary remark, it must be pointed out that many Italian academics strongly believe that in order to comply with the fair process requirements set by the Constitution in art. 111, civil proceedings should be fully and analytically regulated by statute, avoiding or strongly limiting any judicial discretion in regards to the organization of the proceedings.

Large sections of the Italian procedural doctrine, actually, express suspicion towards judicial discretion, on the assumption that it cannot be controlled and reviewed and therefore its exercise may infringe on the parties' fundamental rights.

A corollary of such approach is that only fully regulated proceedings should lead to a decision that will become res judicata, i. e., unchangeable.

Arguably, this way of thinking has widely influenced procedural reforms in Italy, making it hard, for example, to introduce a real system of case management as many other Europeans States have.

As a matter of fact, case management implies collaboration between the judges and the parties, within a general framework set by statute, but with wide ranging judicial powers to regulate the course of individual proceedings.

The Italian system of civil procedure, by contrast, has been defined for a long time as "inflexible" and not very concerned with the proportionality principle, which is at the core of important reforms throughout the world.

Fully regulated proceedings, with pre-determined time-limits and phases, actually require "time", irrespective of the complexity of the case.

3. The "inflexibility" of the Italian civil procedural system can be clearly found in the most throughout recent reform of Italian civil procedure, brought by law n. 353 of 1990, which basically rewrote entire parts of the code of civil procedure.

What concerns us here is that the reform changed the structure of ordinary civil proceedings by introducing a system of rigid subsequent time limits for all of the activities of the parties. When a given time limit expires, the parties may no longer perform the specific procedural activity related to that time limit (e. g.: the filing of a document): a system of procedural preclusions has thus been enacted.

The original belief of the lawmaker was probably that this strict organization of the development of the procedure would shorten the length of civil proceedings. As a matter of fact, before this reform, it was possible for the parties (*rectius*, their lawyers) to bring new elements in the case (in particular, new evidence and new defences) over the whole course of first instance proceedings (thus forcing the other party to ask for a postponement of the case in order to examine the new element and raise her defences against it).

Reality has shown that this aim has not been achieved. The parties' activities are nicely structured and punctuated, but the time elapsing from one procedural stage to the next is often unacceptably long (and for reasons not related to the procedural rules themselves).

The system of preclusions is thus only instrumental to an organized development of the procedure but has proved to be unable, in itself, to reduce the duration of civil proceedings.

Moreover, the system of procedural preclusions (in a context where no pre-trial phase exists) not always enables the judge to make the substance of the case prevail over form: preclusions, actually, tend to make the search for "truth" rather elusive.

4. Interim and provisional remedies are traditionally considered shortcuts to judgment, in the sense that they provide a quick decision, outside of ordinary civil proceedings or within them, but with the aim to preserve or anticipate the protection that those proceedings should provide with the final judgment.

Provisional remedies in Italy have also been reformed in 1990, by law n. 353, with a very successful set of new procedural rules (*procedimento cautelare uniforme*).

The reform confirmed the instrumental nature of provisional remedies, in the sense that they are not an independent form of judicial protection of rights: on the contrary, they try to make proceedings on the merits effective and efficient by protecting the right adjudicated upon during the course of the proceedings and before the final judgment has been rendered.

Such instrumental nature, even after the reform of 1990, was considered a necessary feature of provisional remedies: as a matter of fact, the original rules of law n. 353 made it always compulsory for a party which was granted *ante causam* provisional remedy to bring proceedings on the merits within a peremptory time limits of 30 days. When that limit was not respected, the provisional remedies would become ineffective.

A provisional remedy, moreover, would become ineffective if proceedings on the merits were started, but subsequently were struck out for failure to perform procedural activities (*estinzione*). In other words, after the reform of 1990 (as it was

before), provisional remedies could not stand alone and always had to be connected to pending (or soon-to-be pending) proceedings on the merits.

It could thus happen that the party that had been granted the provisional remedy had lost interest in the decision on the merits, but still had to pursue the proceedings in order to avoid the provisional remedy from becoming ineffective. When one thinks about proceedings in default of the defendant, this situation appears to be rather surreal.

Thus, one could say that strict instrumentality was a factor in the global overcharging the backlog of the courts.

In 2005\2006, the lawmaker brought an important innovation in this area of the law.

The distinction between conservative and anticipatory remedies, previously only elaborated in academic writings, was implemented into the procedural system.

Today, there are two procedural tracks in relation to provisional measures: strict instrumentality still is enforced vis à vis conservative measures, which preserve a situation but offer no actual satisfaction of the applicant's claim (like sequestration of the debtor's assets). On the other hand, anticipatory measures, which provide for unstable but immediate relief (the claimant gets what the claimant wants, but on a provisional basis), are treated differently. Today, when an anticipatory measure (e.g., a *provvedimento d'urgenza*: an urgent measure under art. 700 c.p.c.) is granted *ante causam*, the winning party is no longer compelled to bring proceedings on the merits.

In other words, the interim measure may stand alone, though as a provisional and never final decision, which may be overturned should proceedings on the merits be started at any time.

The same happens when an anticipatory measure is issued, proceedings on the merits are started and are subsequently struck out. In this case, too, the anticipatory measure still stands.

The idea behind this reform is that when an applicant has obtained a measure which provisionally grants the type of relief he applied for, that applicant has no real interest in bringing or further cultivating proceedings on the merits. *Res judicata* is only relevant for academics, not for the common people who apply for fast, efficient and effective relief.

The same may be said about the other party, who may not be willing to further litigate the issue after having lost the "preliminary battle" (possibly with high legal costs…).

Therefore, no party will spend time and money in proceedings that nobody is really interested in and the State will be happy because scarce judicial resources will have been spared.

It is very hard to verify whether this reform has contributed in reducing the number of cases going to court (therefore making it possible for judges to dedicate more time to dispatching pending cases). As a matter of fact, counting the number of cases which could have gone to court, but didn't because both parties' were somehow satisfied by the anticipatory decision, is not an easy task.

One possible side effect (and an unwanted one…) of this reform, however, is that judges, aware of the stronger impact of anticipatory measures, may now be less willing to grant them and more demanding as concerns the requirements for their approval (*fumus boni iuris* and periculum in *mora*).

5. In 2009, another major procedural reform was enacted (law n. 69) in the constant attempt to try and reduce the duration of civil proceedings.

Arts. 702-bis ff. were thus brought into the code of civil procedure, introducing the new summary ascertainment proceedings (*procedimento sommario di cognizione*).

The basic idea is that, in regard to simpler cases, which fall to be decided by a single judge of the *Tribunale* (Main court of first instance), it is possible to conduct the proceedings in a less formal way, in particular as concerns the way the evidence is gathered and the parties' activities are organized.

The law does not specify when a case may be considered "simple" in this context: academics and practitioners tend to agree, however, that a case may be dispatched in a summary (i. e., de-formalized way) when the facts on which the decision has to be given are not in dispute or if the necessary evidence may be gathered in a quick way (e. g., only a couple of witnesses have to be heard).

These proceedings may be summary, but the final decision is not: on the contrary, first instance proceedings are decided with a final order (*ordinanza*) which, however, has the function of a judgment and, like a proper judgment, has to be appealed against within a peremptory deadline or it becomes a *res judicata* under art. 2909 c.c.

The main characteristic of these new proceedings is that they may be started as summary proceedings by the claimant. but it is up to the judge, at the first hearing, to decide whether the case is suited for a summary decision or, rather, it is deemed to be too complex: if that is the case, the proceedings leave the summary tracks and are turned into ordinary proceedings (where full formalities will be enforced).

Some academics have strongly criticized these new "alternative" proceedings, mostly because they are considered not to comply with the Constitutional requirements of fair trial since their course is not strictly regulated by statute and the judge's discretion plays a stronger role than in ordinary proceedings.

My opinion is that these proceedings provide a challenge to both the parties and the judge; the challenge of being able to cooperate with each other in agreeing on a less formal and therefore quicker course of the proceedings when the case does not require a lot of evidence to be gathered. *Procedimento sommario* may actually be considered a form of embryonic Italian case management, even though we are still way behind other countries in this concern.

Summary proceedings, however, have so far proved to be a failure, in the sense that they are very little used in practice. The reasons for this failure are several: lawyers are always suspicious about new procedural devices and tend to avoid using them unless they are obliged to; judges, on the other hand, appear to be too ready to turn summary proceedings into the ordinary tracks, either because the case is more complex than the claimant suggested, or because it is a solution which enables the judge to postpone the decision of the case. After all, to be able to say that a case is a "simple one", a judge has to appear at the first hearing with a fair understanding of the case itself. And most civil judges, in our congested courtrooms, simply do not have time to do that.

6. The Italian lawmaker, however, seems to have a lot of trust in the capacity of deformalized proceedings to speed up the duration of civil cases.

As a matter of fact, in 2014, in one more redrafting of procedural rules to try to shorten the length of civil proceedings[4], a new art. 183-*bis* was introduced in the code of civil procedure.

This new provision sets for a "mirror-like" mechanism vis à vis the one I have described in the previous paragraph in relation to summary proceedings.

Here, when ordinary proceedings are started, at the first hearing, the judge is empowered to decide that the case is simple and that it may be conducted in a deformalized summary way, in order to reach a decision faster. When that decision is taken, the case leaves the tracks of ordinary proceedings and follows the rules set by art. 702-*ter* c.p.c. for summary proceedings.

This new procedural "switch" appears however to be (still) scarcely used in practice, mostly because the procedural mechanisms set forth in art. 183-*bis* c.p.c. are rather unclear and because, for the same reasons mentioned above as concerns summary proceedings, the judge is not necessarily ready, at the first hearing, to take decisions concerning the complexity of the case.

It has to be noted, however, that, in 2015[5], the lawmaker has attempted to implement the use of both summary proceedings and of the procedural switch of

[4] *Decreto-legge* 12 September 2014, n. 132, converted into law 10 November 2014, n. 162.
[5] Law 28 dicembre 2015, n. 208, the so-called *Legge di stabilità* 2016.

art. 183-*bis* c.p.c. by making an application to those procedural mechanisms one of the requirements to apply for an equitable compensation for the unreasonable duration of civil proceedings[6]. In other words, the party that does not prove to have tried to use all of the devices which could fasten the course of the proceedings, may not later complain for the excessive length of her trial.

7. The lawmaker, in recent times, has also tried to reduce the length of appeal proceedings, notoriously long in Italy, especially at the Court of appeal level (in many Courts, cases are dispatched in 4 or 5 years….).

Traditionally, an almost absolute right of appeal has existed in Italy, as concerns both second instance appeals and appeals before the *Corte di Cassazione*, our Supreme Court. Over time, this has led to a serious congestion of appeal courts of all kinds.

Thus, in 2012[7], a new art. 348-*bis* c.p.c. was brought in the code of civil procedure, introducing the so-called "filter to the appeals" (*filtro in appello*): in other words, today, at the first hearing before a second instance judge, the latter may dispose of the case in a summary way, simply stating that the appeal has no reasonable chance to succeed.

When that happens, however, all is not lost for the appellant, who is enabled to appeal against the first instance court directly to the Supreme Court. This may appear to an outsider rather odd: that when the doors of the court of appeal close down, those of the Cassation open up. One must consider, however, that under art. 111, para. 7 of the Italian Constitution, an absolute right exists to appeal a decision before the Supreme Court when such decision infringes upon a subjective right and has a "final" nature.

Unsurprisingly, also this new procedural device, which recalls some feature of English civil procedure, has failed to reduce the backlog of Court of appeals.

As a matter of fact, appeal judges have proved to be reluctant to apply this "filter", either to resist the temptation to simply dispose of unwanted new cases

[6] Under the new Art. 1-*bis* of the so-called *Legge Pinto* of 2001, a party has the right to apply for *rimedi preventivi* (preventive remedies) in order to avoid a violation of the "reasonable delay" principle set in art. 6 of the E. C.H.R. Parties which have applied for such *rimedi preventivi* but still have suffered a damage deriving from the unreasonable duration of the proceedings are entitled to an equitable compensation. The *rimedi preventivi* to which art. 1-*bis* refers are listed in art. 1-*ter* of *Legge Pinto*, and, as remarked in the text, among them we find "bringing the claim as a summary proceeding under art. 702-*bis* c.p.c." and "applying for a procedural switch from ordinary to summary proceedings under art. 183-*bis* c.p.c." Art. 2, para. 1 of *Legge Pinto* now peremptorily states that a claim for equitable compensation brought by a party which has not applied for *rimedi preventivi* under art. 1-*ter* is inadmissible.
[7] *Decreto legge* 22 June, n. 83, converted into Law n. 134 of 7 August 2012.

(which is good) or because, in order to decide that an appeal has no likely chance of success, one has to study that appeal and be ready to rule upon in at the very first hearing of the case (and not five years later...).

8. In this short presentation, I have tried to point out some recent new features of Italian civil procedure which have been implemented in an attempt to reduce the duration of civil proceedings.

The outcome of all these new devices, unfortunately, is rather disappointing.

Apart from proceedings for provisional measures, which have proved to be a success, so far the lawmaker has not been able to provide mechanisms that really implement its purposes.

Strangely enough, the lawmaker keeps on refusing to introduce proceedings in default, which could lead to a judgment against a defendant which does not appear before the court based on the simple claim of the plaintiff.

Moreover, the legislator has so far been unable (or unwilling) to redraft ordinary proceedings introducing a real system of case management or a pre-trial phase.

As I have hinted in the second paragraph, this may arguably be a consequence of academic suspect towards judicial discretion.

At the end of the day, however, the conclusion that may be reached from the Italian experience in the last 20\25 years is that procedural reforms alone are not enough.

The lawmaker has basically transformed the code of civil procedure into a sort of Frankenstein monster, full of articles *bis*, *ter* and *quater*, but no real avail.

Civil proceedings continue to last far too long, notwithstanding all of the reforms and the efforts.

At this point, the lawmaker should have realized that it has to find new ways to try and solve this dramatic problem of Italian civil justice.

Starting to spend more money in a more efficient way in the judicial system might be a good attempt. Yet every solution, which requires more money to be spent, is indeed a problem in these times of austerity.

However, one should always remember Albert Einstein's definition of insanity: "Doing the same thing over and over again and expecting different results."

This is a lesson the Italian lawmaker should really learn.

Obtaining a Decision within Reasonable Time – the Austrian Approach

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1. INTRODUCTION

More than 100 years ago, Franz Klein, the drafter of the Austrian Civil Procedure Code ("CCP"), realised that litigation is only able to fulfill its function if it constitutes "current support" ("*Gegenwartshilfe*")[1]. Hence, when the Austrian Civil Procedure law was introduced in the late 19th century, speedy adjudication was one of the main goals to be achieved.

Still nowadays, speeding up civil law proceedings is a central issue in social-constitutional states. The importance of this goal has been stressed by the European Convention on Human Rights, whose Article 6 i.a. entitles everyone to a fair and public hearing by an independent and impartial tribunal within a reasonable time. In Austria, its relevance has been underlined by several amendments of the CCP; acceleration of civil law proceedings was the main task of one of the last amendments, which came into force in 2003[2].

Currently, the situation regarding delay in civil proceedings is a manageable problem in Austria. Austrian judges are capable of completing normal proceedings in due time. The average disposition time in first instance courts amounted to 135 days in litigious and 57 days in non-litigious proceedings in 2012.[3] In comparison to other nations, Austria still ranges among the best regarding the average duration of civil proceedings.

Acceleration of civil law proceedings can be achieved in many different ways; but there are several elements that are even more decisive when talking about acceleration. The main priorities are related to:

- special procedures;
- the fact finding-process;

[1] Klein, 'Reden – Vorträge/Aufsätze – Briefe I' (1927) p.88; Klein, 'Vorlesungen über die Praxis des Civilprozesses' (1900) p. 10; Oberhammer, 'Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen', in BMJ (ed), Franz Klein Symposion (2005) p. 57.

[2] Zivilverfahrens-Novelle 2002, BGBl 2002/76.

[3] CEPEJ, Evaluation report on European judicial systems, CEPEJ, Evaluation report on European judicial systems, 184 (www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_en.pdf).

- preclusion of the exercise of rights;
- review proceedings;
- legal remedies against delays in civil proceedings.

2. ORDER FOR PAYMENT PROCEEDINGS

Special expedite proceedings are one of the most important tools to counter delay in civil procedure and to achieve justice within reasonable time[4]. In Austria, this topic is first and foremost linked with the order for payment proceedings ("*Mahnverfahren*") due to their practical importance. This procedure has become the standard of litigation in (contentious) civil matters.

Provided that the statutory requirements, such as conclusiveness in point of law, are met, a payment order is issued electronically on all claims for payment up to an amount of EUR 75,000 solely based on the facts alleged by the plaintiff. The plaintiff does not have to submit any evidence proving his allegations. No hearing is held by the court. The payment order will become non-appealable and enforceable if no objection is raised within four weeks. If an objection is raised in time, an ordinary civil proceeding will be initiated. The subsequent procedure is identical to a procedure initiated by an ordinary complaint with no order for payment being issued by the court. As the order for payment is the most rapid court decision to obtain in Austria, it has widely replaced the judgment in default.

The "*Mahnverfahren*" is of tremendous practical importance. A glance at statistics[5] shows the significance of the order for payment procedure: In 2015, a total amount of 439,744 civil law matters was brought before Austrian district courts, 371,019 of them were actions for an order for payment; this means a percentage of 84,4 %. In just 33,137 cases, i.e. 8, 9 % of the applications for an order for payment, a valid objection was raised and a standard civil procedure initiated. Conversely, more than 91% of the applications for an order for payment filed at district courts did not lead to a (standard) proceeding, because the procedure finished already with the service of the order for payment and the expiration of the time limit for contestation[6].

[4] W.H. Rechberger, 'Zur Entwicklung des Zivilverfahrensrechts in Österreich in den letzten 50 Jahren', in Sailer (ed), 'Beschleunigung des Verfahrens und Schutz der Grundrechte. Zur Entwicklung des Verfahrensrechts in Österreich in den letzten 50 Jahren', FS zum Jubiläum 50 Jahre Oberösterreichische Juristische Gesellschaft p.54 (p. 67).

[5] Information given by the Austrian Ministry of Justice.

[6] With respect to the situation at the superior court, data differs a little, which can be explained by the higher values in dispute. At a total of 36,189 civil law matters, 22,802 applications for an order for payment were filed (this means a percentage of 63 %), whereby the objection rate is approximately 42,2 % in labor law matters and 40,7 % in other civil law matters.

The order for payment procedure was the first almost fully electronical procedure in Austria; its IT based conduct is an important aspect of the rapidity of the procedure. It can only be mentioned at this point that electronic means are used extensively in Austrian civil procedure: The pleadings should be submitted by way of an electronic legal data exchange ("elektro-nischer Rechtsverkehr", ERV), the minutes and decisions can be transmitted electronically[7]. The "electronic file", occasionally postulated in Austria, is, however, at present not (entirely) reality. The pleadings of the parties, the minutes of the proceedings, the expert opinions and the court's execution of requests are already kept and managed in electronic form – the paper file, however, has not disappeared entirely yet[8].

3. RESPONSIBILITY OF THE JUDGE, THE PARTIES AND THE LAWYERS

3.1. THE DOMINANT POSITION OF THE JUDGE

In Austrian civil procedural law the concentration of proceedings is closely linked to the judge's power to control the litigation; it is his obligation to ensure a concentration of the proceedings[9].

Franz Klein criticised the liberal approach of the German Code of Civil Procedure with its overemphasis on party rule and the principle of party presentation right[10]. Accordingly, the Austrian CCP was and still is characterised by a material-collection model where the judge as *dominus litis* does conduct the proceedings not only formally, but also with an emphasis to their substance (described by the Austrian term "*diskretionäre Gewalt*" [discretionary power])[11]. Otherwise, parties

[7] Further details about electronic submissions cf Rechberger/Simotta, 'Grundriss des österreichischen Zivilprozessrechts[8]' (2010) margin no. 456.

[8] The purely electronic file seems just to be a matter of time. Cf *Rechberger*, 'Die Anwendung moderner Technologien im österreichischen Zivilprozess – ein Update, in FS Rüßmann' (2013) p. 733.

[9] Cf Klein/Engel, 'Der Zivilprozess Österreichs' (1927) p.309 et seq; Oberhammer, 'Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen', in Bundesministerium für Justiz (ed), Franz Klein Symposion (2005) (2005) p. 57 et seq.

[10] Cf Klein, 'Reden – Vorträge/Aufsätze – Briefe I' (1927) p. 51. It is therefore a question of the truthful determination of the facts which is explicitly mentioned by sec 182 Austrian CCP (cf Kralik, 'Die Verwirklichung der Ideen Franz Kleins in der Zivilprozeßordnung von 1895', in Hofmeister [ed], Forschungsband Franz Klein [1988] p. 92).

[11] Cf Rechberger, 'Die österreichische ZPO – (k)ein Vorbild für die ungarische ZPO 1911?', in Sutter-Somm/ Harsági (eds), ' Die Entwicklung des Zivilprozessrechts in Mitteleuropa um die Jahrtausendwende' (2012) p. 1. (p. 4 et seq) with further references.

unacquainted with the law would suffer serious disadvantages, because the outcome of the proceedings depends significantly on the position of the judge within the process. It was the perception of the civil procedure's social function which led Franz Klein in direction of the inquisitorial principle[12]. The material-collection model of Klein was not labelled by its creator, probably because he refuses the "maxims mania" of his contemporaries,[13] and is best described by the term "*moderate inquisitorial* principle"[14]. It is one – if not the – core of the civil procedure law reform in Austria at the end of the 19th century[15].

The dominant position of the judge in the Austrian civil procedural system is expressed in a set of possibilities to support the procedure's economy and to encounter possible dilatory demeanor of the parties. Concentration of proceedings becomes notably manifest in the judge's competence to reject submissions of fact and evidence and applications for evidence, if they are to delay proceedings (sec 179, 180 para 2, 275 para 2 CCP). Sec 179 CCP stipulates that the court may reject late submissions by the parties if the parties acted with gross negligence and permitting the submission would seriously delay the proceedings[16]. Additionally, the court may also reject taking evidence, if considering the following relevant circumstances: there is no reasonable doubt that the offer of evidence was intended to delay the proceedings and taking evidence offered would in fact delay the proceedings (sec 275 para 2 CCP). The prerequisites for the latter provision are considerably high. Hence, courts hardly apply said paragraph[17]. As a consequence, one may consider to replace the high threshold provided in sec 275 para 2 CCP with a benchmark easier to prove.

According to sec 275 para 1 CCP, the court may explicitly reject offers of evidence the court deems to be irrelevant[18]. Moreover, the court may upon request issue a time limit for the taking of evidence if an obstacle hinders the taking of

[12] Cf Kralik in Hofmeister p. 91.

[13] Cf Oberhammer, 'Richtermacht, Wahrheitspflicht und Parteienvertretung', in Kralik/Rechberger (eds), 'Konfliktvermeidung und Konfliktregelung, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XII (1993) p. 31 (p. 49).

[14] Rechberger/Simotta, 'Zivilprozessrecht[8]' margin no. 403; Rechberger, 'Die österreichische Zivilprozeß-ordnung an der Jahrtausendwende', in Mayr (ed), '100 Jahre österreichische Zivilprozeßgesetze' (1998) p. 55 (p. 58). Cf for this purpose also Fucik in Rechberger, 'Kommentar zur ZPO[4]' (2014) Vor § 171 ZPO margin no. 3.

[15] Cf Kralik in Hofmeister 92; Oberhammer in Bundesministerium für Justiz p.55.

[16] Cf Pimmer, 'Zur Befugnis des Richters zur Zurückweisung verspäteten Vorbringens und Beweisanbietens' nach § 179 Abs 1 Satz 2 ZPO, JBl 1983, p.129; McGuire, 'Prozessförderungspflicht und Präklusion. Über das Verhältnis von § 178 Abs 2 zu § 179 ZPO nach der ZVN 2002', ecolex 2010, p. 1153; Fucik in Rechberger, ZPO4 § 179 margin no. 2.

[17] Rechberger in Rechberger, ZPO[4] § 275 margin no. 3; Rechberger in Fasching/Konecny (eds), Kommentar zu den Zivilprozessgesetzen III[2]' (2004) § 275 ZPO margin no. 7.

[18] Rechberger in Fasching/Konecny III[2] § 275 ZPO margin no. 2 et seq.

evidence for an uncertain period of time, if the possibility to conduct the taking of evidence is doubtful, or if the taking of evidence shall take place outside of Austria (sec 279 CCP)[19].

3.2. ACCELERATION OF THE EXPERT EVIDENCE

The duration of expert evidence may play another very important role concerning delay in civil procedure. The fact that a judge does appoint an expert but does not know how long it will take to deliver the expert opinion has often been the reason for delays. Although the judge could have demanded explanations and could replace the expert by another one in case the expert needs too much time (sec 354 para 2 CCP), the 2002 amendment of the Austrian CCP tried to make the legal situation even more clear: According to sec 357 CCP, the judge has to fix a certain time limit. Supposing that the expert is not able to meet the deadline, he has to inform the court within 14 days. The court either has to extend the time limit or dismiss the expert and appoint another one (sec 359 para 2 CCP).

3.3. THE OBLIGATIONS OF PARTIES AND LAWYERS

Franz Klein idealised this intended cooperation to be a "working group"[20] between parties and court, which was criticised as euphemistical.[21]

Interestingly, it was only the amendment of the Austrian CCP 2002[22] which has stipulated explicitly that the parties are in general obliged to co-operate in order to enable a quick procedure ("*Prozessförderungspflicht*"):

- Sec 178 para 1 CCP contains the parties' obligation to provide the court with all the necessary facts truthfully and to submit all evidence to support their submissions.
- According to sec 178 para 2 CCP, each party has to make its allegations as timely and as completely as possible in order to guarantee speedy adjudication.

[19] Rechberger in Fasching/Konecny III[2] § 279 ZPO margin no. 5.

[20] Klein/Engel, Zivilprozess' p. 197.

[21] Cf P. Böhm, Bewegliches System und Prozeßzwecke, in Bydlinski/Krejci/Schilcher/Steininger (eds), Das Bewegliche System im geltenden und künftigen Recht' (1986) p. 211 (p. 240 f); Oberhammer in Kralik/ Rechberger p. 31 (p. 59 f); Rechberger in Mayr p. 56.

[22] The reform measures of this amendment were supposed to serve the "acceleration, simplification, reduction of expenses and efficient technical implementation of the procedure" according to the legislative materials (Cf ErlRV 962 BlgNR 21. GP).

Hence, the parties are under an obligation to allege the facts truthfully and comprehensively in their pleadings. However, sec 178 CCP itself does not provide for legal consequences.

4. OTHER MEANS OF ACCELERATION

Preclusions of submissions are effective means to avoid delay of proceedings. The rules on preclusion shall not be too strict, especially because a rigid application may also increase the risk of delay due to unnecessary motions by the parties in order to avoid any preclusion.[23]

There are some other means to accelerate proceedings:

4.1. DEFAULT JUDGMENTS

Every procedural law has to provide rules for the case that one of the parties fails to appear at the first oral hearing or does not respond to the action by a statement of defence. *Franz Klein* already stressed the enormous importance of default judgments for the duration of a trial. Therefore the recourse against default judgments was originally limited to the appeal ("*Berufung*") and the *restitutio in integrum* ("*Wiedereinsetzung in den vorigen Stand*"). But, according to some amendments of the Austrian CCP, an objection ("*Widerspruch*") can also be filed within 14 days of service of the default judgment (sec 397a CCP). It is available regardless of the reasons why the party was in default. Its only purpose is to offer the party in default a second chance. Such an objection is only available if a party misses the first procedural step to be taken by him, e.g., the answer to the complaint, but not the preliminary hearing after an answer has been filed. Conversely, the objection is not available if the proceeding was preceded by an order for payment procedure. If the objection is admissible, the judgment in default is set aside and an oral hearing is scheduled[24].

Nowadays, the legislator being conscious of the importance of default judgments tries to countermand this development. The 2002 amendment of the Austrian CCP partly restricted the opposition. The possibilities to proceed against default judgments are now limited to the following cases:

- if the defendant does not respond to the action by a statement of defence at the regional court (not if the claimant or the defendant does not appear at the first oral hearing);

[23] Rechberger in Sailer p. 72.

[24] Cf Rechberger, Austria, in Taelman (ed), International Encyclopaedia of Laws: Civil Procedure (2011) p. 54 et seq.

- if the claimant or the defendant does not appear at the first oral hearing at the local court.

Since any objection may be used for dilatory purposes, during the preparation of the civil procedure law amendment 2002, a complete abolition of the objection against default judgments was discussed[25]. However, the lawyers prevented such a measure.[26] In this regard, it may be argued that lawyers are responsible for a delay in proceedings due to their objection to abolish the objection against a default judgment.

4.2. "EVENTUALMAXIME"

As already indicated, speedy adjudication can be achieved by means of preclusion in first instance proceedings. Their aim is to urge both parties to an active and timely cooperation as regards the investigation of the facts. The options meant to achieve this goal are, however, of limited nature: either preclusion directly by law or preclusion by the judge as an organ established by law. Franz Klein[27] remained skeptical as regards a preclusion by law, particularly in form of the so called "eventual principle" ("*Eventualmaxime*"), because proceedings may become cumbersome and confusing due to the subdivision in procedural sections[28]. The CCP thus follows the second approach: preclusion by the judge.

There remain, however, some reminiscent of the "*Eventualmaxime*" in present Austrian civil procedure: They can be found in conjunction with the application for *restitutio in integrum* (sec 149 para 1 CCP), for the claims in enforcement proceedings (sec 35, 36 para 3 Enforcement Act, "*Oppositions- und Impugnationsklage*") and in matters of housing (sec 33 para 1 Austrian Tendency Act ["*Mietrechtsgesetz*"]).

If legislation provides for a too strict concentration of proceedings, there will always be the risk that the fact-finding is incomplete. The judge's power to control the subject-matter of litigation, i.e., his power and duty to explore the "material truth" ("*materielle Wahrheit*"), should avoid this. The judge should, thus, investigate the (substantive) facts as completely as possible, but always bear the time factor in mind.

[25] 1049 BlgNR 21. GP 2.

[26] Rechberger in Sailer p. 73.

[27] Klein, Pro futuro (1891) p.75; Klein/Engel, Zivilprozess p. 267.

[28] The purely eventual principle forces the parties to submit their entire assertations during certain parts of the proceeding – otherwise they are excluded – (cf Fasching, Lehrbuch des österreichischen Zivilprozeßrechts[2] [1990] margin no. 710) and does not lead to the desired accelerating effect; on the contrary it is rather counterproductive (cf more in detail Rechberger/Klicka, Österreich und Deutschland, in Centre of Legal Competence [ed], Beschleunigung des zivilgerichtlichen Verfahrens in Mittel- und Osteuropa [2004] p. 17 [p. 45 et seq.]).

4.3. "NEUERUNGSVERBOT"

A most essential element of acceleration of proceedings in the Austrian civil procedure law is that new facts generally may not be produced by the parties in appellate proceedings ("*Neuerungsverbot*")[29]: According to most of the foreign procedural rules, the appeal court conducts new proceedings on the basis of an appeal against a decision rendered by a court of first instance. Due to the Austrian CCP, the parties are neither allowed to produce new facts or means of evidence in the appeal nor in the appellate proceedings. Thus, the appeal procedure is not based on the "principle of renegotiation" ("*Neuverhandlungsgrundsatz*"), because appeal proceedings therefore do no longer serve the purpose of reviewing reality but merely reviewing the rightful course of proceedings before the court of first instance[30]. Hence – to express it in the words of Klein[31] – "not the reality but the proceeding" is under review in appellate proceedings. Accordingly, proceedings are generally only held in writing from the second instance onwards. The inadmissibility of further allegations of fact and evidence is, however, not an invention of *Franz Klein*, but an element of Austrian civil procedural tradition[32].

New allegations may only be submitted for the purpose of demonstrating or rebutting the grounds of the appeal (sec 482 para 2 CCP). The same is to say about facts and evidence concerning matters that are to be observed *ex officio* (for example, requirements of the proceeding and the appeal). There are, however, specific types of proceedings where the "*Neuerungsverbot*" does not apply:

- non-litigious proceedings (sec 49 Non-contentious Proceedings Act);
- proceedings concerning disputes about (individual) labor law matters (sec 63 and sec 50 para 1 Labor and Social Security Court Act) and about the continuation of of the employment relationship and
- disputes about the annulment of a marriage (sec 483a para 1 CCP) and the declaratory judgment on the existence or non-existence of a marriage or a registered partnership (sec 483a para 2 CCP).

If the doctrine criticizes this maxim, it is so due to the fact that this principle reduces the appellate court's function as an instance discerning the facts to a minimum[33]. However, also the critical voices are bound to concede the outstanding effect

[29] W.H. Rechberger, Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa, Ritsumeikan Law Review 2008, p. 101 (p. 104).

[30] Cf Rechberger/Simotta, Grundriss[8] margin no. 423; Rechberger/Klicka in CLC 24 et seq.

[31] Klein/Engel, Zivilprozess p. 403.

[32] It was already inherent in the rules of civil procedure enacted in the end of the 18th century, under the reign of Joseph II. (sec 257 AGO) and has its roots in the 16th century.

[33] Cf Oberhammer in BMJ 58; see also critical comment by Oberhammer, Speeding Up Civil Litigation in Austria: Past and Present Instruments, in van Rhee (ed), The Law's Delay (2004) p. 217 (p. 228).

the "*Neuerungsverbot*" has and that possible disadvantages deriving therefrom – if any – have to be accepted. To sum up, one can say that the admissibility of further allegations is rather counterproductive as it delays proceedings and increases the costs of the appeal procedure[34].

4.4. SANCTIONS AGAINST LAWYERS

The Austrian CCP generally does not distinguish between the parties and their lawyers (sec 39 CCP). The obligation to co-operate in order to enable a quick procedure according to sec 178 CCP is equally valid for a lawyer. As a consequence, the explicit request of a client to bring forward wrongful assertions knowingly does not exculpate the lawyer[35].

Judges cannot punish attorneys-at-law by administrative penalties for contempt of court (sec 200 para 3 CCP). Instead it is the responsibility of the bar association to punish the attorney. For this purpose, the court has to disclose the relevant facts to the bar association (sec 200 para 3 CCP). The usage of dilatory tactics by lawyers may be a violation of legal ethics.

4.5. COST SANCTIONS

The judge can impose the costs for the entire or part of the proceedings on a party who neglects its above-mentioned duties within proceedings. Hence, the judge can encounter dilatory actions of the parties by imposing cost sanctions on them. Attention is to be drawn especially to the so called separation of costs ("*Kostenseparation*", sec 48 Austrian CCP). According to this provision, a party has to bear the whole amount of costs arising during a certain stage of proceedings – regardless of the procedure's outcome – if the delay in assertions and/or applications for evidence is the party's fault and if additional costs for the other party have arisen. In practice, this provision could be applied in a more stringent manner[36].

[34] W.H. Rechberger, „Gerechtigkeit" im arbeitsgerichtlichen Verfahren, in Brodil (ed), „Gerechtigkeit in der Arbeitswelt" (2014) [to be printed].

[35] RIS-Justiz RS0036733.

[36] Rechberger in Sailer p. 72.

4.6. AUTHORITY OF VALUATION OF THE COURT

Another possible way to accelerate civil law proceedings is to replace the procedure of taking evidence by a free valuation of the court ("*Schätzungbefugnis des Gerichts*"). The court can, e.g., estimate the amount of a claim, if

- there are no doubts on the merits;
- it is disproportionately difficult to prove the amount of a claim (sec 273 para 1 Austrian CCP).

This possibility has been complemented by a second kind of valuation: the court can replace the procedure of taking evidence and even decide on the merits according to his free conviction ("*freie Überzeugung*") if the part of the claim that has to be decided on is of minor importance, compared to the total amount of the claim (sec 273 para 2 CCP). Last but not least, the amendment of the CCP 2002 has widened the scope of the application: now, the court can always decide on the merits according to its free conviction if the claim does not exceed the amount of EUR 1,000. This provision, on the one hand, does have a positive effect on the acceleration of the fact-finding process, but, on the other hand, it is alarming. It might therefore be still acceptable to apply sec 273 para 2 CCP if both parties agree with. But it seems to be clearly violating the Convention if one of them demands for an ordinary fact finding-process.

5. LEGAL REMEDIES AGAINST DELAYS IN CIVIL PROCEEDINGS

Last but not least, an effective legal system must offer legal remedies against delays in civil proceedings. All the elements of acceleration would be worthless if the parties could not defend themselves against their violation.

The importance of this issue is once more stressed by the European Convention on Human Rights. Art 13 of the Convention obliges each Member State to provide an effective remedy before a national authority for everyone whose rights and freedoms as set forth in this Convention are violated notwithstanding that the violation has been committed by persons acting in an official capacity. If all domestic remedies have been exhausted (Art 35 of the Convention), any violation of these rights can be brought to European Court of Human Rights.

For being effective it is important, that the involved party does have a right to an appeal and that the authority in concern with this appeal is obliged to pronounce a decision. In order to fulfil these requirements, the Austrian legislator introduced the so-called "*Fristsetzungs-antrag*" – set into force on January 1st, 1990 – in sec 91

of the Courts Act. The procedure is as follows: the parties may file a request with the higher court to order the lower court to perform the requested procedural act within a certain time-limit. If the court performs the requested procedural act within four weeks, the proposal is deemed withdrawn unless the applicant affirms the application within two weeks after notification. Requests are, however, extremely rare, particularly because the remedy itself can lead to further delay.

The European Court of Human Rights has confirmed in several judgments that sec 91 of the Courts Act is an effective remedy in the meaning of Art 13 and 35 of the European Convention on Human Rights. The applicant therefore has not exhausted domestic remedies as long as he has not made an application pursuant to sec 91.

6. HOW TO OBTAIN A DECISION WITHIN REASONABLE TIME?

Many of the dilatory factors that have been identified in the preceding paragraphs, immediately suggest a solution in order to improve procedural efficiency. Some of the suggested measures see the ultimate aim in preventing litigation altogether. An early experiment to avoid litigation is conciliation. Apart from conciliation, arbitration was advocated as a solution in order to avoid delay. In addition to arbitration, other methods of Alternative Dispute Resolution (ADR) are currently very popular. Another way of keeping cases away from the state courts is the introduction of money barriers or the requirement of permission to appeal.

The question remains whether reforming the rules of procedure is a solution for the problems that exist. It is clear to many professional lawyers that a reduction of delay cannot be achieved, or cannot be achieved only by introducing new rules of procedure. More forcefully, it seems that rules may often not contribute to swiftness at all: Sellert[37] reports that litigation at the *Reichshofrat* of the Holy Roman Empire was relatively fast precisely because of the absence of a prescribed procedure. Therefore, reform should at least aim at a simplification of the rules and flexibility. Additionally, errors should only lead to sanctions if the interest protected by the infringed norm has actually been harmed.[38] It is clear that the latter approach should be used with caution, because it leaves a considerable amount of discretion to the judge, making the application of the rules dependent on his or her views.

[37] Sellert, Beschleunigung des Verfahrens am Reichshofrat durch Gerichtsorganisation, in van Rhee (ed.), The Law's Delay p. 257.

[38] Cf Jongbloed, Attemps to accelerate Dutch civil procedure in the nineteenth and twentieth centuries, in van Rhee (ed.), The Law's Delay p. 141 (p. 168).

According to Matscher[39], for many years the Austrian judge at the European Court of Human Rights, one of the most important contributions of the ECHR for the improvement of civil procedure, is the statutory standardisation of the ideal of reasonable time as a subjective right. Precisely because of this guarantee, Article 6 para 1 ECHR is a "thorn in the flesh" and forces all participants, following the principle "*iustitia semper reformanda*" to think about what measures for the acceleration of the process might be useful. It is regrettable that the concentration of procedures is often oversimplified, put on a level with labour and cost savings or fiscal interests. Even if the continuous process reform, in the service of acceleration of the proceeding, cannot be taken seriously enough, realism is also needed. Ultimately, the process will never be fast enough, because in the claimant's point of view, the defendant is already in default with the fulfillment of its obligations at the moment of the initiation of the proceedings. It is to be kept in mind that each decision creates legal security, but just the right decision also creates peace under the law.

It is crucial to exert influence on all "*dramatis personae*" and in this way contribute to an improvement of the process culture. The explanatory remarks of the new Austrian Voluntary Proceedings Act of 2003 ("Außerstreitgesetz 2003") have shown this problem in an impressively clear way with the following wording:

"Procedures should be conducted as quickly as possible and as carefully and thoroughly as necessary. How this guiding principle shall be exercised in each individual case is the task of a committed and active judge. The legislator can support the judges by giving them a good training and offer them a differentiated supervision, but, ultimately, the initiative and the personality of each individual judge are crucial."

Properly understood and preceded with restraint, the intention to ensure faster legal proceedings does not necessarily have to be in contradiction to the intention of having the highest standards of legal protection.[40] Moreover, Matscher interpreted Article 6 ECHR not in a way that it stipulates a perfect procedure, but a "balanced procedure". However, balance often is the result of a compromise between divergent principles[41].

[39] Matscher, Der Einfluß der EMRK auf den Zivilprozeß, in FS Henckel (1995) p. 593 (p. 611 et seq).

[40] Matscher in FS Henckel p. 611.

[41] Cf Matscher, Die Verfahrensgarantien der EMRK in Zivilrechtssachen, ZÖR 1980, p. 1 (p. 26).