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Civil Procedure in Cross-Cultural Dialogue: Eurasia Context

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The idea is to discuss the evolution of civil procedure in different societies, not only in the well-known civil or common law systems, but also in different countries of Eurasia, Asia, etc. Civil procedure in Europe and North America is a subject of enormous scientific and practical importance. We know a lot about these systems. But we do not know enough about civil procedure in the rest of the world. How does it work and what are the main principles? Culture is one of the main factors that makes civil procedure of these countries different. Therefore it is necessary to discuss the main links between different systems of civil procedure.

The discussion was held on the basis of national report from 24 countries, at the all there were participated from more than 40 countries.

CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT

CIVIL PROCEDURE: TRANSCULTURAL DIALOGUE
IAPL–Москва–2012

WORLD CONFERENCE
ON CIVIL PROCEDURE

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MOSCOW STATE LOMONOSOV UNIVERSITY

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- Vyacheslav Lebedev, Chairman of the Supreme Court of the Russian Federation
- Anton Ivanov, Chairman of the Supreme Arbitrazh Court of the Russian Federation
- Pavel Krasheninnikov, Chairman of the Association of Lawyers of Russia
- Alexander Golichenkov, Dean of the Moscow State Lomonosov University Law Faculty

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CONTENTS

FOREWORD

The word «Eurasia» has different meanings. It could be considered as a form of globalization, suggesting that Europe and Asia are integrated. Another conception ascertains that there is a huge territory on the frontiers of Europe and Asia which shares similar cultural characteristics. Moreover, there are sometimes close political, economic and historical backgrounds in Eurasian nations. Their law also has similarities. Civil procedure in this part of the world (and also in others) is under great pressure because of cultural diversity. This process became very impressive during the last decades. While legislation became very similar in Europe and Asia, there is a big gap in the real practice of civil justice between these regions and other parts of the world.

Globalization is not a good word to use with respect to law and civil procedure, although in the contemporary highly interacted and cooperative world national frontiers in law and civil procedure become very transparent. On the other hand national character has become much more glaring. As a result, civil procedure nowdays has two opposite trends: legislation becomes closer and similar, but there are many differences in real civil justice in the realization of this similar legislation. Justice in Europe, Asia and America differs from each other no less than centuries ago even as legislation has become similar. The reason is the cultural difference. It couldn't be erased even in the globalization era. Therefore nowadays we have a unique situation: legislation is similar, but practice is different.

In this new procedural environment, comparative civil procedure has a crucial role. We need to organize international scholarly meetings and discuss the problems that occur in the realization of similar legal constructions in different societies. The International Association of Procedural Law is the best platform for this dialogue. It was founded in 1950 in Europe and during half a century became truly international organization which joins proceduralists from all the continents and 64 countries.

In Russia and other former USSR nations we pay close attention to all IAPL activities. However, just a few Soviet scholars participated in IAPL conferences during the last century (V.Puchinsky, M.Gurvich). During the last ten years Russian participation became much more active and as a result we have invited IAPL to meet in Moscow.

The topic of Moscow conference is «Civil procedure in Cross-cultural Dialogue: Eurasia Context». Its main idea is to discuss the evolution of civil procedure in different societies, not only in the well-known civil or common law systems, but also in different countries of Eurasia, Asia, etc. Civil procedure in Europe and North America is a subject of enormous scientific and practical importance. We know a lot about these systems. But we do not know enough about civil procedure in the rest of the world. How does it work and what are the main principles? Culture is one of the main factors that make civil procedure of these countries different. Therefore it is necessary to discuss the main links between different systems of civil procedure. We have six sessions devoted to the typical civil procedural problems in which cultural specificity plays an important role: 1) Dispute Resolution in Different formal and informal procedures; 2) Goals of civil justice; 3) Civil procedural

systems: pro and contra; 4) Cultural Dimension of Group litigation; 5) Harmonization of civil procedure in Eurasia; 6) Commercial Arbitration in Eurasia.

We want to show that culture in the contemporary world has a much more important role than centuries ago regarding procedural justice. Here in Russia we always had a mix of two different cultural models (collectivism and individualism) and in the entire civil procedural system our legislator tried to establish the best rules for this mix and tried to draft legislation effective for both sides. That's why we have «Eurasia context» in our conference topic. We want to discuss and explore how does the legislator in Russia and other Eurasian countries with mixed cultures draft effective civil procedural legislation at the cultural cross-road of West and East, of Europe and Asia. We want share this unique experience with our colleagues from other countries and think that it could be very useful in the contemporary era of globalization and cultural interaction.

This is the first time that Russia hosts a world conference of the International Association of Procedural Law and it's a great pleasure and honour for us to welcome proceduralists from all over the world and from more than 40 countries!

Moscow, April 2012 Dmitry Maleshin

GREETINGS

Loïc Cadiet
President of the International Association of Procedural Law

At the initiative of the Moscow State University, with the support of the Constitutional Court of Russian Federation, the High Commercial Court of Russian Federation, the Supreme Court of Russian Federation and Association of Lawyers of Russian Federation, the International Association of Procedural Law is happy to welcome you in Moscow on 18–21 September 2012.

I sincerely hope that you can join the community of leading procedural lawyers from all around the world in order to hear and discuss their opinions on «Civil procedure in cross-cultural dialogue». The speakers will deal with a large set of issues combining legal and cultural aspects: Dispute Resolution in Different Societies: formal and informal procedures; Goals of Civil Justice; Civil Procedural Systems: pro and contra; Cultural Dimension of Group Litigation; and Harmonisation of Civil Procedure in Eurasia.

Today the International Association of Procedural Law has nearly four hundred members worldwide, representing more than 50 countries. For the first time an IAPL conference will be held in Russia and for the first time an IAPL conference will focus on procedural relationship in Eurasia. The history of the International Association of Procedural Law, founded in Florence in 1950, is the history of a collective challenge. Generation after generation for over sixty years, we are writing together this history like a novel chain. On behalf the International Association of Procedural Law, I warmly invite you to attend the Moscow conference and write a new chapter of this common novel after our XIV World congress in Heidelberg (July 2011).

Valery Zorkin
Chairman of the Constitutional Court of the Russian Federation

Dear Colleagues!

Dialogue of cultures in legal (including procedural) sphere represents the indispensable condition of construction and development in today's rapidly globalizing society's originally effective system of the law and order. It is therefore quite explainable that the corresponding themes are taken out as main subject of discussion at the World Conference of the International Association of Procedural Law. Only based on dialogue of experts from the different countries mutual enrichment of a legal reality (by studying and learning of the best legal approaches) is capable to lead to a true global convergence in the field of a procedural law.

It is understandable that the main discussion at the Conference is supposed to lead on issues of civil justice. Clearly, the state of the relevant procedural areas of science and practice, in fact, depends crucially on the effectiveness and viability of the entire system of private law. Civil law in its broadest sense, by fixing substantive law, finally cannot be properly put into practice without adequate looking to the needs of civil procedural law. But neither the first nor the other cannot be considered corresponding to modern standards if have not embraced and did not specify the constitutional principles.

Under the conditions occurring before our eyes globalization of the legal space of such problems it is impossible to solve without creative thinking and perception of the legal experience which has been saved up in the various countries and regions of the world. In this regard, it is impossible to overestimate a role and value of the International Association of Procedural Law which is for today of one of the largest international organizations to coordinate scientific work on carrying out of comparative researches on the topical issues arising in the sphere of procedural law.

These include, in particular, the transformation of the role of judicial decisions. Already today, it appears, it is possible to say with confidence that litigation (including the proceedings in civil cases) generally acquires the features not only for judicial enforcement, but also the procedures of compulsory interpretation of legal norms, and often – law-making. Even within the continental law system, where since codifications of the beginning of a XIX century was considered that «the judge - only the lips uttering words of the law», the traditional understanding of the litigation exclusively as a procedure of interpretation and application of the rules currently undergoing into the significant change. I am sure that today is essential to deep the doctrinal interpretation of this phenomenon, carrying out that is called, on a joint of constitutional and procedural legal concepts and categories.

In connection with noted strengthening of regulatory role of judicial acts also the value of legislative guarantees of independent implementation of justice increases more and more. Moreover, independence of court and judges simultaneously is the important guarantee of the right of citizens on judicial protection and a guarantee of impartiality of court as a prerequisite for making a fair decision. It should be noted that the independence,

impartiality and fairness, of course, require real protection from the court, also attempts to pressure not only from other entities and officials of public authorities, but from the other subjects of political, economic and social life. An effective decision of this problem in today's environment requires not only combination of the efforts of procedural lawyers around the world, but also a kind of synergetic fusion of new ideas and approaches generated in the framework of procedural science, and as part of the modern doctrine of constitutionalism.

The rapid development of information and communication technologies opens essentially new spectrum of problems, calls and possibilities before justice. To a formed electronic society and the electronic government with inevitability should corresponded electronic law-making, electronic enforcement. Of course, this does not mean the transformation of justice in the «electronic», but would mean (and already mean) the formation of a fundamentally new environment to realization the constitutional rights and freedoms (including its due procedural rights) and involves the implementation of justice in the making of some new elements. What will be this environment substantially depends on how the content of legal science and practice will fill the space offered by the global electronic forms of technological activity.

On behalf of the Constitutional Court of the Russian Federation, I wish the participants of the World Conference of the International Association of Procedural Law interesting and fruitful studying both listed above, and many other actual problems lying in a plane of procedural activity. I am convinced that the results of your work in this area in the very near future will be embodied not only in the new proceedings, but also in practical improvement of judicial procedures.

Vyacheslav Lebedev
Chairman of the Supreme Court of the Russian Federation

Dear Colleagues!

The subject of discussion of the World Conference in Moscow was on the problems of development of a civil procedural law - system of the rules regulating the proceedings and relationship between court and other legal parties for the implementation of justice on civil cases. This gives to forum a special significance and relevance.

The Russian Federation – a democratic law-governed State. In the Constitution of the Russian Federation it is declared that the man, his rights and freedoms owns the supreme value, and the recognition, observance and protection of the rights and freedoms of man and citizen are duties of the State. The judicial authority solves the problem of protection of these rights and freedoms through the proceedings, and its efficiency is in many respects defined by the quantity of perfect procedure of its implementation..

Procedural law – one of the fundamental branches of law, which has its separate subject and method of research, its history and theory.

Civil process, as a joint activity of court and the parties, directed on a resolution of disputes, classically it is developed and presented back in the Roman law. From those far times, this branch of law is constantly developed and improved. However, despite high enough degree of a readiness of the modern civil procedural law, in no way it is impossible to assert that a science and practice in this direction have stopped in the development.

With occurrence and development of new progressive relations, demanding the legal regulation, the system of procedural law is constantly supplemented with new rules, institutes, branches and becoming more sophisticated and effective.

The special importance and necessity of continuous improvement of a civil procedural law is caused by that circumstance that it directly co-operates with many branches of the law, including civil and, moreover, constitutional, family, real estate, labor, land, criminal etc. norms proclaimed and fixed by the specific rights and freedoms of the man and the citizen.

Procedural law sources are rather various. Among them the Constitution of the Russian Federation, the Civil Procedural Code of the Russian Federation, the rules of other branches of the Russian law, the Hague Convention on Civil Procedure, to which our country jointed in 1967, as well as many international legal agreements and treaties of the Russian Federation with other countries.

It should be mentioned that the conventional principles and norms oof international law and international treaties according to Part 4 of Articles 15 of the Constitution of the Russian Federation are a part of Russian legal system also are widely applied in to practice of the resolution of civil cases by the Russian courts.

Operation of civil procedure gives to legislative norms vitality, determine their legal value. Proclaimed in the Constitution of the Russian Federation and law right and

freedoms are real because their judicial is possible protection and promotion of civil procedural means.

The development of modern procedural law visible trend to the complexity of its procedures, that is understandable, bearing in mind that one of the main tasks States is the maintenance and protection of human rights of citizen, as the legal status of the individual.

Other reason of complication of procedural forms is the constant scientific and technical progress involving more and more wide use difficult expertise, attraction of highly skilled experts, application of technical means for fixing and reproduction evidence etc in the evidentiary purposes.

Finally, the complication of procedural forms caused all increasing array of legislation and other regulatory legal material necessity for the correct and reasonable resolution of civil-law disputes that, in turn, requires specialization and constant improvement qualifications of judges, lawyers, and high legal culture of others subjects of civil relations.

All it confirms the relevance of discussion of scientific and practical problems of development of a procedural law, necessity and timeliness of carrying out of this World Conference on civil procedure.

These and many other important procedural issues expected their resolution. Therefore positive experience of other states represents doubtless scientific and practical interest. Rather interesting and useful to determine how this or that issue has been resolved in the other states.

Welcoming the participants of the World Conference on civil procedure, I wish you, dear colleagues, successful and fruitful work. I am confident that discussion of modern problems of development of a procedural law would allow as to develop scientific approaches to their decision, which will contribute the improving the practice of civil justice.

Anton Ivanov
Chief Justice of the Supreme Commercial Court
of the Russian Federation

Esteemed participants of the Conference!

The International Association of Procedural Law is a well-known and distinguished association of representatives of the judicial community, science and legal business. The Association has been holding conferences on the essential issues of civil procedural law in various parts of the world for several decades.

In September 2012 the Association will host the Conference on the territory of Russia for the first time. The topic of the Conference will be «Civil Procedure in Cross-Cultural Dialogue: Eurasia Context'. It is being organized with the active support of the Supreme Commercial Court of the Russian Federation.

The topic of the upcoming conference is up-to-date for the entire system of the Russian commercial courts, since the amount of disputes with the participation of foreign parties increases year by year.

The mentioned topic is also interesting from the historic point of view, because the modern legal systems of the European and Asian countries now share traditions of civil law as well as of common law. These two origins continue to interact and influence each other.

I consider that the Conference of the International Association of Procedural Law can become an excellent forum for establishing contacts, developing procedural law and sharing experience with regard to the best achievements of the legal doctrine, since distinguished representatives from many countries will take part in its work.

I wish all the participants fruitful discussion and productive exchange of opinions.

Pavel Krasheninnikov
Chairman of the Association of Lawyers of Russia

Dear colleagues!

This year the International congress submits a subject of development and topical issues of a civil procedural law for discussion.

The civil procedural law is a part of the general system of law, submits to its regularities and the general principles of a structure of the law.

Civil legal proceedings and defining civil procedural law should promote legality and order strengthening, the prevention of offenses, formation the respect for the law and court.

Terms of civil procedural law contain in a large number of sources. Obviously, quantitative growth of legal acts in itself isn't an indicator of development of legal regulation of the procedural relations.

In this regard, the increasing urgency gets a question of Improvement of law-enforcement activity, increasing of its efficiency depends on streamlining and providing appropriate quality of the legislation. Similar character activity is called as legislation ordering.

The purposes of ordering are: creation of well-ordered system of the laws possessing qualities of completeness, availability and convenience of using regulations, elimination of out-of-date and inefficient terms, permission of legal collision, elimination of gaps and legislation updating.

The legislator and all citizens need ordering of legal acts.

These and many other questions and problems need discussion and the decision therefore the setting of the international congress represents considerable scientific interest. Improvement of terms of a procedural law, exchange of experience of the solution of different problems takes the integral place in improvement and development of practice of civil legal proceedings.

To all participants of the congress we wish comprehensive studying of actual problems and new ideas on improvement of a civil procedural law.

KEY SPEECHES

Marcel Storme[1]

BEST SCIENCE, WORST PRACTICE?

It must have been nearly 10 years ago, in 2003, when, during a lunch break, Dmitry Maleshin and I were sitting beside the swimming pool in our Mexico City conference hotel, and I was saying to my worthy colleague that it would surely be a good thing if our International Association for Procedural Law were to hold its conference in Russia in the near future.

It was the first occasion on which, as the then Chairman of this Association, I had put forward this proposal. Although the Iron Curtain had fallen in 1989, there had only been one occasion on which we had moved our meetings to Central and Eastern Europe, more particularly to Lublin in 1991. It is true that, at a much later date, we also met in Vienna/Budapest (2005) and in Pécs (2010).

The reason for this was probably that, apart from our Polish and Hungarian «troops», there had been no significant participation in our activities by colleagues from this part of Europe.

All this changed with the involvement of Dmitry Maleshin, who became an active participant in our activities and succeeded in enticing a number of his eminent Russian colleagues into our Association.

I was particularly keen to place this on the record at the start of this Conference, before embarking on my keynote address.

* * *

The starting point for my keynote speech is the statement made by our Honorary Chairman, Federico Carpi, in the first issue of the *Revue internationale de droit processuel* («Problemi prospettive della giustizia civile in Italia» in [2000] *IJPL – RIDP,* 6 et seq.) which reads as follows: «*La divaricazione fra il livello scientifico della dottrina processualcivilistica e la vita pratica di tutti i giorni dei Tribunali*»[2]. This notion of a divergence between theory and practice had already been highlighted by Mauro Cappelletti with his reference to the «noble dream» of legal literature and «the nightmare» of legal practice[3].

From an international survey carried out by myself, it emerged that this fault line was experienced virtually everywhere on this planet. It therefore becomes legitimate to ask the following question on a worldwide level: «*Why, in spite of the excellent standard reached by*

[1] IAPL Honorary President (Belgium).

[2] «The gap between the scientific level of scholarly writing in the field of procedural law and everyday practice before the courts».

[3] *Atti del XVII Convegno nazionale* (1989), Palermo, 1991, p. 273 et seq.

the legal literature in the field of procedural law, does the latter all too frequently fall short of this standard in practice?»

Reasons for this gap

The actors

When seeking to identify these reasons behind this gap we should pay particular attention to the manner in which the actors comport themselves during their involvement in this complex process. As will be repeatedly emphasised later, the human element plays a major part in this. «*The system of civil justice also has a largely human element*» (N. Andrews, *Nurturing civil justice*, p. 2).

What this means is that we should not set our sights on the relevant legislation, legal literature, legal practice or court decisions. Instead, we should focus our analysis on the way in which legislatures, leading authors, lawyers and judges go about their business.

(1) The legislatures

a) There are legislatures which seek to regulate every aspect of society. Given that present-day society has lost its way everywhere on this planet, our lawmakers are seized of the notion that the appropriate way to remedy all this is to issue all manner of laws and regulations.

Many legislatures try to meet the demands of widely diverging interests; at the same time they issue panic-induced legislation as a reaction to sudden random incidents – «hard cases make bad law».

All these developments have a damaging effect on the quality of the legislation issued, which in turn has an adverse effect on the judicial process. Complex laws render it difficult for the parties involved, as well as for the judges, to interpret and apply them. Too much legislation is damaging to the law.

b) There are also legislatures who seek solutions in judicial procedures. It all started with the *Code de procédure civile* of 1806. Even as this Code was being issued, one of its authors, Jean-Baptiste Treilhard, stated that *«Le succès du Code dépendra beaucoup et de l'autorité à qui son exécution est confiée et de la conduite des officiers ministériels qui le pratiqueront chaque jour»*[1] (Locré, T. XXI, p. 5490550).

In the same vein, the author of one of the best Codes of civil procedure (öZP), Franz Klein, averred that the reform of civil procedure can only be achieved *«wenn alle Prozessbeteiligten guten Willens sind und wenn unaufhörlich auf diesen guten Willen hingewirkt wird»*[2].

The Belgian Code of Judicial Procedure (1967) was prepared by a formidable twosome consisting of a lawyer and a judge. This was in order to avoid the Code being inundated with theoretical and dogmatic material.

A similar two-man team ensured that the so-called *Stuttgarter Modell* resulted in a successful amendment of the German Code of Civil Procedure (ZPO). This model was

[1] «The success of the Code will to a large extent depend on both the authorities entrusted with their implementation and the actions of the ministerial officials who will operate it on a daily basis».

[2] «...where all those involved in court proceedings show good will and everyone unremittingly works towards this goal».

achieved thanks to the collaboration between Fritz Baur, Professor of procedural law at Tübingen University, and Rolf Bender, Chairman of the Stuttgart Court. The product of this collaboration can best be compared with the Dutch «case management conference» model *(comparitie na antwoord – C&A*). Following the initial stages of the dispute between the parties – writ of summons and defense pleadings – the parties will appear before the judge and a settlement will very frequently be reached.

Finally, procedural law has experienced a remarkable process of internationalisation and harmonisation, whereas previously, judicial proceedings had been firmly embedded in national laws and regulations.

The first indication of this was a highly interesting project which was entirely in the hands of procedural law experts from Latin America in collaboration with the Iberian Peninsula – namely the *Codigo tipo-iberoamericano*. This Code was incorporated in its entirety into Uruguayan law, whereas some parts have been adopted by a number of South American countries.

I myself subsequently led a working party which formulated, for the benefit of the European Commission, a number of rules aimed at harmonising the rules of judicial procedure within the European Union. The most important outcome of our report was undoubtedly the general acceptance that Europe also had jurisdiction to act in the field of procedural law. Accordingly, a number of EU regulations have been issued in recent years on the subject of small claims, uncontested claims, etc.

Nevertheless, I am seized of the fear that EU policy makers lack the necessary vision to introduce a coherent set of procedural rules (cf. M. Storme, «Harmonisation or globalisation of civil procedure?» in X.E. Kramer and van C.H. Rhee, *Civil Litigation in a Globalising World* (2012) The Hague, p. 379 et seq.; see also X. Kramer, *Procedural Matters, Construction and Deconstructivism in European Civil Procedure* (2012) Rotterdam).

Finally, the «*General Principles*» were formulated by a working party led by Geoffrey Hazard Jr. The idea was that these principles should be observed in the event of transnational judicial proceedings.

(2) The leading authors

In my valedictory address as professor of Procedural Law, I expressed fulsome praise for legal literature, by stating that *«legal literature is an academic paradise, where one enjoys the greatest possible freedom to post new and original constructions. Our lawmakers, on the other hand, are subject to political agreements, compromises and pressure groups, whereas courts must reach their decisions within the boundaries of the facts and the law, and are prevented from delivering themselves of rulings purporting to be generally applicable»* («Ik die bij de sterren sliep en «t haar der ruimten droeg» *Metabletica van her procesrecht*» (1995) Ghent, p. 38. I should, however, point out that, under Russia's rules of civil procedure, «general applicability» (*Allgemeingültigkeit*) constitutes a fundamental rule of procedural law – ZEuP (2012), p. 7 et seq.).

All this explains my ambivalent attitude towards legal literature. Like Janus, the latter can be said to have two faces – one fixing its gaze on scholarship, the other on legal practice.

Scholars who only have regard for legal practice will produce work which has no scholarly merit. If, on the other hand, they confine themselves to theorizing about the law they become divorced from reality.

This is where the question underlying my contribution finds its origins.

Once the law amounts to no more than norm-positive dogmatic, and is no longer regarded as a science which concerns itself with the reality of everyday life, it become a luxury item, and legal practice is left to go faster downhill. Mauro Cappelletti had already described this process in masterly fashion in his foreword to *Access to Justice:*

«We conclude, therefore, by recognising that there are indeed dangers in enacting or even proposing imaginative access-to-justice reforms. Our judicial system has been aptly described as follows: This «beautiful» system is frequently a luxury; it tends to give a high quality of justice only when, for one reason or another, parties can surmount the substantial barriers which it erects to most people and to many types of claims. The access-to-justice approach tries to attack barriers comprehensively, questioning the full array of institutions, procedures and persons that characterize our judicial systems. The risk, however, is that the use of rapid procedures and inexpensive personnel will produce a cheap and unrefined product. This risk must continually be kept in mind.

The enactment of thoughtful reforms, mindful of the risks involved and with a full awareness of the limits and potentialities of the regular procedures, and regular attorneys, is what is really meant here by the access-to-justice approach. The goal is not to make justice «poorer», but to make it accessible to all, including the poor. And, if it is true that effective, not merely formal, equality before the law is the basic ideal of our epoch, the access-to-justice approach can only lead to a judicial product of far greater «beauty» – or better quality – than that we now have».

We are therefore facing the specter of a dichotomy between theory and practice (see also J.P. Van Droogenbroeck, «Le Conseil supérieur de la Justice et la formation des magistrats» in M. Storme (ed.), *Le Conseil supérieur de la Justice, une évaluation après quatre ans* (2005) Brugge, p. 79 at 97). For here, we have identified an important cause of the phenomenon under analysis, i.e. that in the law of procedure there is an inherent link between theory and practice.

(3) The judicial actors

It is my firm view that it is the actors involved in the trial, i.e. the lawyers and the judges, who are the root cause of the gap between theory and practice. The solution must therefore also be found with them.

(*a*) The lawyers

We need an efficient and stimulating system of legal training. The accent should be on training lawyers rather than on teaching law.

When teaching my course on procedural law at Ghent University, I was forever emphasizing the fundamental distinction between those known as the «procedural manipulators» (*les procéduriers*) who use judicial procedures in order to delay proceedings and even make them collapse, and the «procedural engineers» (*les processualistes*), i.e. those who use judicial procedures in order to expedite the course of the trial.

The Italian judge Oberto, Deputy General Secretary of the International Association of Judges, had some sharp words for the former category where he wrote *«Vous ne pouvez même pas vous imaginer quelles ruses cette veritable armée (les avocats) élaborent afin d'arriver à joindre les deux bouts. Les milliers de procedures manifestement mal fondées ... sans que contre ces véritables abus des procedures les juges n'ont n'aient le moindre remède»*[1] (*Le nouveau pouvoir judiciaire*, No. 387, December 2009, 39).

[1] «You cannot begin to imagine the cunning stratagems contrived by this veritable army (of lawyers) in order to have their way. There are thousands of clearly ill-founded proceedings (.....) and there is nothing whatso-

Could it be that there are too many lawyers – given that there is a direct link between the number of lawyers and the number of court proceedings? It appears that there is a great deal more «trial hunger» in areas where the legal profession is oversubscribed. If we look at the most recent figures available for Europe *(CEPEJ*, Report 2010, data 2008, ch. 12, p. 236 et seq.) it is clear that the peak performers in this respect are to be found in Southern Europe. In Greece, there are 350 lawyers for every 100,000 inhabitants, 332 in Italy, 266 in Spain and 260 in Portugal, whereas the average figure is 120!

(*b*) The judges

Although the judges' first and foremost duty is to ensure that their decisions are an expression of justice, there are certain members of the judiciary who prefer to write their decisions in the form of a scholarly paper.

Others are of the opinion that they have to play their part in shaping society. *«Le phénomène Magnaud»* – after the French judge who gave his legal creativity full freedom to favor the weaker party – can still be encountered among the ranks of the present-day judiciary.

Others abuse the formalism of judicial procedures in order to prolong legal proceedings by such contrivances as obtaining a new trial. However, there are other factors which explain why some legal proceedings drag on for abnormally long periods. The manner in which the facts which gave rise to the dispute are presented to the court by the parties and their counsels can sometimes be incomplete and inadequate.

There are also courts where there is no case management at all and their organization becomes crippled, which is not conducive to the timely completion of proceedings.

(*c*) Relations between lawyers and judges

There are many countries where these two groups of actors, even though they are dependent on each other, have become totally alienated from each other. This appears to be the case especially in Italy, although there are other countries, such as France and Germany, where the Bar and the Bench form two separate worlds.

Nevertheless, they are involved in the same joint project – to resolve disputes between humans as expeditiously and justly as possible.

There should be no divergence between the duty to defend and the duty to judge.

(*d*) The parties

Seldom, if ever, is any attention given to the parties themselves, who are, after all, the principal actors in court proceedings[1].

It is they who decide to go to law; who adduce (or fail to adduce) the facts of the case and submit the necessary documents; who are capable of terminating court proceedings; who institute remedies (appeals), etc...

From my own experience, but also by analyzing actual case files, I know that many a delay in court proceedings can be caused by the parties themselves. The object should be to create «*homines novi processuales*» (see below).

ever that the courts can do about these abusive procedures, for that is what they are».

[1] The «Dispositionsmaxime» was also introduced into the procedural law of the Russian Federation during the 1990s (E. Kurzynsky-Singer and N. Pankevich, *Freiheitliche Dispositionsmaxime und sowjetischer Paternalismus im russischen Zivilprozessrecht: Wechselwirkung verschiedener bestandteile einer Transformationsordnung* (2012) ZEuP, 7 et seq.).

Finding an appropriate strategy

«In the same way that some plants
only bear fruit where they do not shoot
too high, so in the practical arts the theoretical leaves and flowers must not
be made to sprout too far, but kept near
to experience, which is their proper soil».
Von Clausewitz, C., *On War*,
Princeton University Press, 1976, p. 61.

Having examined the causes of the difference in quality between legal literature and legal practice, it is appropriate to search for ways of closing this gap.

My first idea was to seek out a strategy which could be used by the judicial actors in order to improve the quality of legal practice. In so doing, I was mindful of two authors – one a Prussian general, Carl von Clausewitz, the other a French lawyer, Jacques Vergès.

A. *Carl von Clausewitz*

During my lectures on civil procedure, I regularly put it to my students that they might derive greater advantage from perusing the book *«Vom Kriege»* (1832–1834) by the Prussian general and military theorist Carl von Clausewitz than from reading the Judicial Code[1].

Indeed, some passages of this work read like a manual on court procedure, as witness the following passages from the work in question:

«Where there is considerable scope for freedom of action, but the available resources are too weak in order to force a military outcome, one could apply the long-term conflict strategy in order to achieve the opponent's moral exhaustion or attrition»

«Where one has powerful resources at one's disposal, and the objective is on the modest side, merely threatening to deploy these resources can persuade an opponent to accept the conditions which one seeks to impose on him and at times cause him more easily to renounce claims of changing the status quo»

On the other hand, there is also a passage which indicates that winning a court action is not invariably the desired solution: *«The ultimate objective of war is peace, and not victory, since peace is the leading idea in politics, and victory is, in fact, merely a means towards achieving this».*

The above passages should not come as a surprise when one reads that Clausewitz uses the law as a metaphor for war. The law as applied by lawyers in court proceedings is not only the product of mutual activity between two parties, as is the case in war, but also a set of general rules which, in practice, are constantly subject to change.

In *Vom Kriege* the author attempts to construct a bridge between theory and practice.

Ultimately, however, he did express his objections to military theorists who elevate rules to the status of dogma: *«They aspire to achieve stable values, but in war everything is uncertain, and it is necessary to make calculations using variable factors»* (H. Strachan, *Vom Kriege van Clausewitz, een biografie* (2009) Amsterdam, p. 78).

[1] See also R. Aron, *Penser la guerre*, *Clausewitz,* Paris, 1976; H. Strachan, *Carl von Clausewitz*, *On war, a biography* (2007).

B. *Jacques Vergès*

The famous French criminal barrister once drew a distinction between *«la stratégie de la connivence»* (co-operation strategy) and «*la stratégie de la rupture*» (confrontation strategy).

The first of these strategies involves lawyers and judges treating each other with considerable courtesy and with a sense of professional fellowship amongst lawyers; they are also as obliging towards each other as possible, and they easily request, and accept, adjournments etc.

Towards the judges they act most respectfully. They refrain from complaining on being informed of an adjournment – sometimes by several months – and show equanimity where the court is slow to reach its judgment.

The confrontation strategy, on the other hand, consists in the strict enforcement of time limits and judicial formalities, in objecting to every adjournment, failing to tolerate any departure from set procedures, demanding the intervention of the Court Principals at every possible opportunity, etc.

This strategy also involves acting in a surly manner towards the judge, criticising the latter's every action, requesting the court registrar to record every departure from set procedures, to complain to the Court Principals for anything which went wrong, etc...

I personally believe there is a third way, called *«la strategie du respect»* (the respect strategy). This involves respecting one's opponent, whilst expecting the same from him; respecting the judges, whilst expecting the same from them, respecting the rules of civil procedure, which means observing the formalities, whilst at the same time respecting the rationale behind the rules which, in turn, means refraining from abusing the formalities, etc...

It is possible to distil a number of approaches from Jacques Vergès's strategies. However, in order to bridge the gap between theory and practice it would appear more appropriate to draw up a list of precise remedies.

* * *

Ten remedies for bridging the gap

1. With a number of exceptions (namely the BRIC countries) the entire world is faced with financial austerity and other restrictions (R. Marcus, *Procedure time of austerity Report,* Heidelberg, 2001).

This naturally also affects the justice budgets. It is for the authorities to ensure a consistent budget, since adequate court decisions are a guarantor of the democratic model of society. Where the state fails to provide sufficient guarantees for the realization of this mission, this means that the citizen seeking justice will have to make a financial contribution himself, which immediately makes access to justice extremely difficult to achieve.

However, that is not all. If the constitutional state is undermined because the rule of law is no longer respected, society becomes increasingly conflictual and the courts become overloaded. The conclusion is clear: strict observance of the basic rule of the constitutional state is of enormous benefit to the Justice departments' budgets.

2. The second remedy is closely related to the first – citizens must be better trained in resolving their problems, whether legal or not, themselves. There are so many cases where this should be possible to achieve – disputes between neighbours, employment relations, family disputes...

3. Legal training must focus not so much on teaching law than on training lawyers, who must become «agents of peaceful change» (P. Gilles, *Theorie und Praxis im Zivilprozessrecht,* München).

The law is the best possible instrument for reforming society in a peaceful manner. Lawyers therefore have a duty to make optimal use of this instrument.

This involves drawing up clear and unambiguous contracts, effecting reconciliation between the parties involved in the dispute, making the jargon of the law accessible, etc.

Special attention should also be given to the training of judges. A powerful, inventive and independent judiciary is the best possible guarantor of adequate judicial proceedings.

4. There must be a great deal of synergy between all those who are involved in legal proceedings – mainly lawyers and judges. To these actors, the prophetic words of Leo Rosenberg, writing in 1956, remain applicable: «*So liegt das Wesen des modernen Zivilprozesses in einer Arbeitsgemeinschaft von Richtern und Parteien, die dafür zu sorgen haben, dass dem Richter die sichere Finding der Wahrheit ermöglicht und in einem lebendigen Verfahren der Rechtsfriede unter den streitenden Parteien wieder hergestellt und damit der Frieden der Allgemeinheit gesichert werde*»[1] (*Lehrbuch des deutschen Zivilprozessrechts* München–Berlin, 1956, I, p. 6). In this vein, it should be recalled that, with the Lord Woolfe reforms, the English law of civil procedure has become «less adversarial and more co-operative».

5. All this must be conducted in accordance with the rules, and this must be monitored on a continuous basis.

The role played by the monitors, who have been unemployed for a long time, is therefore of prime importance. The Chairs of the various Bar Associations, as well as the Court Principals of each court, must, in their «watchdog» capacity, ensure that «their» lawyers and «their» judges comport themselves correctly.

This is all the more pressing because judges, thanks to their independent status, cannot work in a hierarchical manner and must therefore motivate themselves.

6. The fundamental principles of court procedure should also be revised.

I have in the past repeatedly advocated a reversal of the burden of proof – naturally in civil proceedings only. Thus the onus should fall on the party who disrupted the legal order, who failed to perform his/her contractual obligations, or who has caused loss. For more than 20 centuries we have acted in accordance with the «*actori incumbit probatio*» principle, and the complaints about the slowness of court proceedings continue unabated (Storme, M., «Fundamentele beginselen van procesrecht en hun nut voor de harmonisering in Europa» in R. Van Rhee, F. Stevens and E. Persoons, *Voortschrijdend procesrecht,* Leuven, 2001, p. 207 et seq.).

In the same vein, one could advocate the reversal of the procedural burden or, as was advanced by Georges de Leval, «*l'inversion du contentieux*» («Au sujet de l'inversion du contentieux», *Liber amicorum Droit et vie des affaires*, Brussels, 1998, p. 211 et seq.), as happened in Germany with the introduction of the *Mahnverfahren*, in which it is the debtor who must challenge the order made against him.

[1] «Thus the essence of present-day court proceedings is a working partnership between the judges and the parties, whose task it is to ensure that the court can securely establish the truth and that, by means of lively proceedings, the parties involved in the dispute can restore normal relations between themselves, thus achieving a peaceful outcome for society».

7. For Von Clausewitz, war was «*a mere chameleon, because it changes its nature to some extent in each concrete case*». Hence the notion that, in the same way that each war is different, every court action is different and therefore needs to be handled on an *ad hoc* basis. Some disputes require more space; others are given too many opportunities by the procedural rules to drag out the proceedings. Could we not customize each court action?

Arbitration proceedings could serve as an inspiration for this – here, the parties and the arbitrators together determine the arbitration proceedings from the outset.

One fundamentally new approach could consist in demarcating the scope of the civil dispute before it is allowed to reach the court (pre-trial diligence, comparable to pre-contractual diligence). It would then be for the court to bring the dispute itself to a successful conclusion in a manner which is specific to the nature and scale of the dispute – whilst observing the «fair trial» principle throughout. For an interesting application of this approach I would refer to a recent paper by Richard Marcus: «Reviving judicial gatekeeping of aggregation scrutinising the merits of class certification» in *The George Washington Law Review* ((2011) Vol. 79, no. 2, p. 324 et seq.).

8. A few years ago, the European Court of Human Rights correctly ruled that the right to appeal is not a general principle of law.

What reasonable explanation can there be for the same dispute, between the same parties, based on the same facts and presenting the same arguments – in most cases involving the same counsels – emerging as white at first instance and as black on appeal?!!

All over the world, technical procedures are being examined in order to rectify this bane. We should proceed further along this road and drastically reduce the use of appeal procedures.

9. In many countries, the view is abroad that the negative image suffered by the judicial process can in part be ascribed to the media. Obviously, there can be no question of restricting the media's reporting of court proceedings in any way.

However, it is worth paying some attention to the Anglo-Saxon *«sub judice»* principle: *«Everyone should refrain from airing in public their judgment on cases which are pending before the courts and on which the latter have yet to render their ultimate decision»* (M. Storme, *Over de noodzakelijke terughoudendheid der media in gerechtszaken. Sub judice principle revisited* in *Liber Amicorum Jozef van den Heuvel*).

This principle prevents people from virtually acting as joint judges, mainly in cases which involve trial by jury. This guarantees impartiality of adjudication, and therefore also ensures the quality of judicial decision-making. This impartiality is jeopardised by the media who have invaded the courtrooms like barbarians – the expression used by Alessandro Baricco (*I barbari Saggio sulla mutazione* (2006)).

10. Last but not least, there is a role to be played by our International Association in this respect.

During the 1980s the English biologist Rupert Sheldrake developed the doctrine of morphic resonance (*Morphic fields and morphic resonance, An introduction* (2005)). Morphic resonance is the phenomenon whereby, if something happens somewhere in the cosmos, the chances are great that the same phenomenon will repeat itself somewhere else.

The most straightforward example is that of the crossword puzzle. Because most people solve a crossword puzzle in the evenings, the chances are great that they will achieve better results than in the mornings, when only a few people engage in this activity.

Applying the morphic resonance doctrine to the law of civil procedure produces results which, in my view, are quite impressive. In 1973, the Florence access-to-justice project, led by Mauro Cappelletti, commenced operations. In his foreword, the latter justified the project in the following manner*: «At the point, almost no comparative research had been done in this area. From the beginning, the Project was concerned not merely with examining the problems of «access to justice» theoretically; its method was to seek out «promising solutions» which would give a concrete basis to the emerging discussion and contribute to further reform efforts. Without underestimating the working assumption has been that the comparative study of various «solutions» can reveal basic qualities that characterize effective reforms»* (*Access-to-justice* (6 parts), Milano, 1978, Part I, p. IX).

The year 1978 saw the publication of the entire range of comparative studies on access to justice in the broadest sense of the term. In 1980, the entire exercise concluded with a symposium, held in Florence, which was intended as an evaluation and summarising of the research performed.

For the first time, world-wide research was conducted in order to find ways of improving national procedural laws through comparative analysis. Thus was born the phenomenon known as «applied comparative procedural law».

This was also the period in which procedural law started to become a topic of interest worldwide (R.C. Van Caenegem, *History of the European Civil Procedure, International Encyclopedia of Comparative Law*, New York, 1973).

In 1977, the first World Congress of the International Association for Procedural law took place in Ghent. New Codes were drafted, and the search was on for «best practices», and the campaign waged by Alessandro Pessoa Vaz for more oral, rather than written, procedures inspired our «more voices, less paper» symposium in Valencia. In addition, the trend towards a more proactive role for the judge in court proceedings has acquired an unstoppable momentum ever since our Coimbra conference.

My conclusions are clear. Thanks to morphic resonance, the activities of our Association have, throughout the world, helped to ensure that procedural practice also aspires to achieve the level of excellence reached by procedural literature.

Michael Treushnikov[1]

Evolution of the Russian civil procedure at the beginning of the XXI century[2]

Dear Conference, legal scientist and practicing lawyers in the field of civil procedure of the various countries and continents!

I warmly welcome you in capital of Russia the city of Moscow, in its centre near to the Kremlin – the most beautiful architectural construction of the world and the political foundation of the Russian state in the context of government of a state.

[1] Head of Civil Procedural Law Department, Lomonosov Moscow State University Law Faculty (Russia)

[2] The translation from Russian into English was done by Yanis Vafin (Moscow State Lomonosov University).

I express my sincere complacency that the International Association of Procedural Law, founded in 1948 in Bologna (Italy), gathered for their XV Conference in Moscow. For the legal community of Russia – it is a great event.

Students and teachers of Faculty of Law of the Lomonosov Moscow State University and Department of Civil Procedural Law of this educational session join my greeting.

I should thank the Presidium of the World Association of Procedural Law of the decision on the venue of the Conference, for the credibility of the Russian procedural lawyers.

Thanks to Professor Dmitry Maleshin for the enormous organizational and scientific work, ensuring the holding of this forum and its sections and his colleague Associated professor Natalia Bocharova for assisting him in this.

Gratitude words concern all participants of preparation of this scientific event bringing together prominent representatives of the civil procedural thought and judiciary practice of different nations of the world.

I sincerely hope that you will enjoy the city of Moscow and participants of the Conference will spend time meaningfully and interesting.

As a receiving party I will focus further on the evolutionary transformations of civil procedure in Russia at the beginning of the XXI century with the influence and interaction of the legal cultures of the people of a planet and diverse schools of thought.

Civil procedure have the highest social value in any country if it is more or less perfect, and provide confidence of the people of protection of the rights, social stability and respect for people's power. With reference to Russia I will tell that the courts which are carrying out this function, it is annually considered and resolved a large number of legal disputes – civil cases. For example, in 2011 the courts of general jurisdiction of the Russian Federation considered and resolved 12,5 million civil cases. According to latest population census in Russia live 142 million inhabitants. However, the positive tendency to reduction of number of legal action in relation to 2010 is observed. In 2010, courts of general jurisdiction was considered and resolved for more than 14 million civil cases.

I have used for the first time words «courts of general jurisdiction » and I want to expose some legal concepts, concerning formation of our judicial system and civil procedure without understanding that it is difficult to explain the basic stages of modern development of the Russian procedural justice, its legal regulation.

The Russian judicial system consists of three subsystems: Constitutional Court of the Russian Federation, arbitrazh (commercial) courts and courts of general jurisdiction of Russia.

The system of arbitrazh (commercial) courts is created recently, just twenty years ago and in contrast to the arbitrations of foreign countries arbitrazh (commercial) court of the Russian Federation are state, instead of the arbitral tribunals and resolve economic disputes. The procedural form of their activity – civil procedure (arbitration process). The core legislation governing their activities – the Arbitrazh Procedural Code of the Russian Federation. Its constant updating took place. During the ten years from 1992 to 2002 it was accepted three procedural code (RF APC). The last RF APC was enforced ten years ago.

Historically, in Russia there is a system of courts of general jurisdiction which resolve mainly civil cases with civil participation. These courts also exercise a form of civil proceedings and the form of their activity is called as civil process. The basic law regulating this activity – the Civil Procedural Code of the Russian Federation. Civil procedure of Russia

are settled by various procedural sources of the right activity of two judicial subsystems – arbitrazh (commercial) courts and courts of general jurisdiction.

It is known that the development of scientific ideas in the field of civil procedure is reflected in the concepts, i.e. in the theory of process. If the theoretical constructs are supported, approved by the legal consciousness of the population, legislators, practicing lawyers, combined in various corporations, they can turn norms of procedural law, i.e. to become operating regulator of social relations in the legal proceedings.

The Russian theory and practice of civil procedure are based on the postulates expressed and formulated by the well-known Russian legal scientist of a XIX century, the author of three courses on civil procedure by Kronid Malyshev. Back in 1876 in the textbook on civil procedure Kronid Malyshev wrote: «As a fruit of human culture, the theory of the process should be based on materials of a world history and comparative law and keep constantly at level of modern consciousness of the modern educated people. But as the science mainly practical, it shall open to us the manifestation of this, developing in domestic consciousness of the mind in the current legislation of the country and in the Russian judiciary practice»[1].

Except noted fundamental provisions, have uses of experience of other countries modern Russian civil procedure is the heart of development, evolution and its own history, mentality of the people, legal traditions and its legal culture.

In the scientific literature it is noticed that mixture of use of materials of a world history and experience of regulation of legal proceedings of those or other countries with a mechanical loan and simple transfer into another language of the whole laws, separate institutes is erroneous. Typically, this kind of novels does not reflected in legal procedure system of the Russia.

After separation of Soviet Union on a number of independent states the Parliamentary Assembly of the CIS countries (St.-Petersburg) was an attempt to create a common Model code of civil procedure for all these countries. But he was not accepted and the state (the former republics of the Soviet Union) began to develop his own way and have adopted procedural codes regardless of the Model code. In their codes common features remain and own representations about civil procedure are expressed. For example, a procedural doctrine of Russia is always tends to study the principles of civil procedure law, i.e. fundamental provisions of the law. We belong to the legal family of the continental (Roman-Germanic) law system. Nevertheless, the Code of Civil Procedure Rules of the Federal Republic of Germany is the code which is not containing program positions.

In the Civil Procedural Code of Russia 2002 also there is no special chapter under the name principles of civil process when in the Commercial Procedural Code of the Republic of Belarus there was such chapter (Chapter 2 of the Code).

It is represented that the method of comparative law in the conditions of modernity and globalization assumes necessity first of all studying of the common for all people and systems of procedural values. Such values are the conventional and enshrined in international documents fundamental norms (principles) – the principle of access to justice, the right to a fair trial, the right on the reasonable terms of consideration and resolution of cases.

Procedural guarantees of realization of these international principles are different in the separate countries and are created under the influence of the national legal schools, traditions, but interaction of legal cultures, the international experience thus is not excluded.

[1] *Kurs grazhdanskogo sudoproizvodstva, sochinenie Kronida Malysheva,* St.-Petersburg, 1876, p. 2.

Not so long ago, in April 30, 2010, under the influence of jurisprudence of the European Court of Human Rights in Strasbourg in the Russian Federation was adopted a federal law that in order to implement the principle of consideration, resolution of cases and the execution of decisions within a reasonable terms and expedite legal proceedings were introduced new chapter in the Civil Procedural and the Arbitrazh Procedural Code of the Russian Federation (Chapter 27.1 RF APC and 22.1 RF CPC) provide the proceeding in the consideration of applications for compensation for infringement of the right to trial within a reasonable time and the right to execution of the judgment within a reasonable term.

It is possible to result and other example on a theme of a parity of the general and national principles of civil procedure. Class action in civil procedure of Russia were not applied and in a science were not investigated. Investigations on the lawsuit of the Russian legal theories were close or related to the German legal school. In the view of our scientists and experts, the protection of several subjects in the same process should be carried out by means of institute of complicity. Thus evolved our procedural law.

The idea of class action has been rejected by the working group which is engaged in preparation of the Civil Procedural Code of the Russian Federation in 2002.

Nevertheless the idea of class actions, the characteristic kind of procedure for countries with judicial system of the common (Anglo-American) law, has seized minds of some Russian procedural lawyers and studied by them. It has found a practical realization in civil procedure (arbitrazh process). The Federal Law of July 19, 2009 the Arbitrazh Procedural Code of the Russian Federation has been added with Chapter 28.2 «Consideration of cases on the protection of rights and interests of a group of persons».

The development of Russian civil proceedings and the legal regulation of this sphere of public relations is an integral component of the implementation of judicial reform in Russia.

The beginning of the modern judicial reform in our country belongs to 1991. Then was adopted twenty years ago the concept of judicial reform in the Russian Federation by the legislative body – the Supreme Soviet of the RSFSR[1].

It is known that the judicial reforms in various countries are determined accurately only in the beginning, since the completion, as a rule, does not have specific dates. Completion of the judicial reforms is transferred to an indefinite time.

The terminations of judicial reform in Russia since 1992 it is not expected, because the legislation on the judicial system, the status of judges, a criminal, civil, labor, criminal procedural, civil procedural, arbitration procedural law are in a phase of constant changes and additions.

On an example of the Civil Procedural Code of the Russian Federation, its development and adoption will demonstrate that the main momentum (source) of updating of civil procedure was elimination of deep contradictions between regulatory law and the procedure form of its protection.

In the nineties last of the century in Russia there has been enormous economic, political and social changes fixed constitutional, civil, labor, tax, administrative law. The society has refused from monopoly state ownership and there was a variety of ownership's form of subjects of economy. The Constitution of the Russian Federation has fixed the right to the challenge of actions (inactions) of state entities, officials, etc.

[1] *Put' k zakony,* Moscow, 2004, p. 9–12.

The integration of the Russian legal system into the international legal space has begun.

All these tendencies were considered in current Arbitrazh Procedural and Civil Procedural codes to which action has been celebrated for ten years.

For any countries important principle of access to justice and acceleration of the process in civil cases was declaired in the late of XX century and the beginning of the XXI century in Russia by various methods: organizational and procedural. For example, in the courts of general jurisdiction has been created (some lawyers write that it was just restored) institute of justice of peace courts. Justices of peace consider and resolve majority of civil cases which are unobjectionable to the courts of general jurisdiction, on which requirements are based on documents (the writ proceedings), family law disputes, disputes under property requirements at the amount of claim, not more than 50 thousand rubles. In 2010, for example, justices of peace received 10 million 640 thousand judicial cases.

As a measure of acceleration of process it is possible to name legal regulation of the writ proceedings, i.e. issuance of a court order on execution of the property requirements specified in the law, without trial. The consideration of cases in summary proceedings is provided in the arbitration process (Chapter 29 of the RF APC).

By working out on the major procedural codes of Russia the opinion of our foreign colleagues on specific issues of procedural justice rules was considered. The drafting of the civil procedural code of the Russian Federation went in 1999 to the French lawyers. Their expert advice has been received on August 16, 1999 signed by the Jean-Marie Coulomb, Chairman of the Tribunal de Grande Instance of Paris[1]. Were taken into account the comments of French lawyers in relation to strengthening of the principle of adversarial process, the participation of the procurator in civil procedure, the limitation of its role in the process, etc.

The integration continues in the civil procedural law of Russia. A striking example of this are the change from January 1, 2012 in appeal, cassational and supervisory review procedure, i.e. examination in a court of second instance.

The appeal procedure existed up to that time only on the appeal of not entered into force judgments of peace courts, and cassational procedure, in contrast to the generally accepted notions about him, has been designed to appeal is not entered into legal force judgments of all other courts of the first instance. From January 1, 2012 the appeal and cassation in Russia are similar to generally accepted notions in other countries about these judicial instances. However, the assess of these developments is difficult in terms of applicability for our judicial system and the benefits for the protection of rights. For example, most of the remoteness of the district centers were courts of first instance, from the regional centers – locations of courts of appeal, can significantly affect the course of justice on appeal by the rules of examination in the first instance.

In Russia there are some difficultly accessible areas, where access to regional centers difficult and there will be a problem of maintenance of participants on process of consideration and the resolving case again.

Dear participants of the Conference! Information exchange for this scientific symposium, communication of legal scientist and practicing lawyers will undoubtedly promote the development of scientific researches by means of a method of comparative law and will lead to the enrichment of various judicial procedural systems.

Thank you for your attention!

[1] *Put' k zakony* (2004) Moscow, p. 595–612.

Peter Gilles[1]

Some Reflections on the Keywords of the General Topic

Preliminaries

To be appointed as a key note speaker at an extraordinary IAPL World Conference could be on one side a great honor and also a bit pleasure. But on the other side it could be also a heavy burden, in particular at a conference like ours here in Moscow 2012. Why? Because of the general topic and title «Civil Procedure in Cross-Cultural Dialogue: Eurasia Context».

1. General Topic and Goals

This topic might be considered at a first glance as a topic as usual and one of those, we are used to in the long history of IAPL Conferences. But at a second glance it turns out to be a very difficult and challenging general topic of a huge dimension and a high complexity. Besides, this topic draws our attention to very new perspectives and asks for a new way to treat civil procedure, that is in a «cross-cultural dialogue». This ambiguous phrase could mean literally in a narrow sense just a bilateral conversation. But in a broader sense also a multilateral one and perhaps also a dispute or controversy between whom or what ever, between us here in the audience, our nations, continents or cultures.

And all of this – and this makes the general topic most difficult – has to be undertaken in a «Eurasia context».

What was the intention of the organizers, to choose a topic like this? And what could be and should be the goals of this conference and its output?

The answer we can find in one of the preliminary announcements and newly also in the official program of the Moscow Conference, which I allow me to cite verbally:

«The idea of the conference is to discuss the evolution of civil procedure in different societies. Not only in the well known civil or common law systems, but also in different countries of Eurasia, Asia etc. Civil Procedure in Europe and North America is a subject of enormous scientific and practical works. We know a lot of these systems. But we do not know enough about civil procedure in the rest of the world. How does it work and what are the main principles of it? Culture is one of the main factors, which makes civil procedure of these countries different. Therefore it is necessary to discuss the main links between different systems of civil procedure».

We all can be curious, how and to what extent our general and national reporters will be able to fulfill the implicit high expectations of the organizers. The challenges are immense.

Therefore – concerning myself as one of the key speakers – you should not expect a profound, I. e. a comprehensive and stringent key note speech in an anyway limited time of 15 to 20 minutes. What I can offer you are only some reflections concerning the key and catch words of the general conference title.

Even then, I will present more questions than answers.

[1] Johann-Wolfgang-Goethe-University Professor, Frankfurt am Main (Germany).

2. Retrospect

Concerning the relation between civil procedure and culture in general and legal culture in particular many of you will remember the World Conference in Mexico City in 2003, where the general topic had been «Procedural Law and Legal Cultures» with an Inaugural Speech by *Rolf Stürner*[1].

Furthermore, the IAPL dealt more often with themes like the relations of civil procedure in respect to «Legal Families», «Legal Circles» or «Legal Styles», issues, which also had an outspoken cultural impact. This holds true also for the often discussed differences or similarities of «Common Law» («Case Law») and «Civil Law» («Code Law»).This just mentioned theme has been discussed a fiew years ago at the IAPL Meeting at Toronto in 2009 containing specifically the sub topic «Cultural Dimensions of Harmonization» moderated by *Peter Gottwald*.

For the last time the mentioned topics had been treated by the IAPL at the interim conference at Buenos Aires, Argentina in June 2012 with the general topic «Collective Proceedings/ Class Actions». At this conference the special topics «Collective proceedings and class actions from a civil law and common law perspective» (Chair: *Manuel Ortells Ramos*, speakers: *Ada Pellegrini Grinover, Samuel Issacharoff*) and also the special topic of «Collective proceedings and cultural dilemma's implied in its use» (Chair: *Janet Walker*, speaker: *Oscar Chase*) had been discussed.

In so far it is worth to mention that in particular the issue of class action belongs to the main features to divide civil procedures into a civil law or a common law style[2].

At all these international conferences of the IAPL, especially earlier ones, but also at other international events the participation of Russian colleagues (as well as of colleagues from other Eastern European countries) had been quite rare for a long time. Also publications of our Russian colleagues in Western European law journals or collective books with articles written in English or translations into English (or into other western European languages) had been for a long time quite seldom.

Therefore, broader and deeper information about the present Russian and other Eastern European justice systems and court procedures including civil procedure had been missing to a wide extent. But since some years and nowadays more and more colleagues from the eastern part of the world, in particular from Russia, not only join the IAPL Conferences but also publish more and more English written contributions in western law journals about the Russian Civil Justice System in details. Thanks to colleagues like *Dmitry Maleshin*[3], *Vladimir Yarkov*[4], *Maria Filatova*[5] and others the mutual knowledge and understandings are insofar steadily increasing.

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[1] R. Stürner, *Inaugural Speech «Procedural Law and Legal Cultures» – Introduction to the Overarching Topic of the Conference,* in Peter Gilles/Thomas Pfeifer (ed.), *Prozeßrecht und Rechtskulturen/ Procedural Law and Legal Cultures*, p. 8–30.

[2] D.Y. Maleshin, *The Russian Style of Civil Procedure* in *Emory International Law Review*, Vol. 21, p. 543–562.

[3] D.Y. Maleshin, *Some cultural characteristics of the new Russian code of civil procedure of 2002* in *Zeitschrift für Zivilprozess International (ZZPInt)*, Vol. 10, 2005, p. 385–389; D.Y. Maleshin, *The Russian Style of Civil Procedure*, Vol. 21, p. 543–562.

[4] V. Yarkov, *Contemporary Problems of Russian Civil Procedure,* in *Zeitschrift für Zivilprozess International (ZZPInt)*, Vol. 10, 2005, p. 371–383.

[5] M. Filatova, *First Instance Proceedings in Russian Civil Litigation: Main Pillars and Paradoxes* in *Zeitschrift für Zivilprozess International (ZZPInt)*, Vol. 15, 2010, p. 309–329.

From this newer literature I like to pick up just one interesting statement of *Dmitry Maleshin* about the Russian Style of Civil Procedure, containing the question whether it is of a civil law style or of a common law one. Postulating that Russia owes today a Civil Procedure of a very own and unique style, his answer was «neither «a civil law style» nor «a common law style»».

When following the concepts of «whether – or» and «neither – nor» someone may ask; additionally: Why not «as well as»?

These issues concerning the Russian Civil Procedure – or in similar words like the general title and topic of this conference, taking place in the Russian capital – the «Russian Context»-will be and should be a centerpiece of the following reports and discussions but not only.

What is asking for is the «Eurasian Context», a next catch and keyword to think about.

3. Eurasia

As far as I know, the aspect and keyword of «Eurasia» had up to now never and nowhere been expressis verbis in the focus of our association.

I refrain to ask now the distinguished colleagues in the audience and mainly the general and national reporters what this terminus «Eurasia» means in their personal understanding or what it could and should mean usually. To answer this question a look into the voluminous program of the Moscow Conference might be of some help:

When we look at the program we find a list of the Council Members, who are responsible for certain parts of the world like *Oscar Chace* for North America, *Ada Pelligrini* for South America, no one for Central America, *Loïc Cadiet* for Europe*, Masahisa Deguchi* for Asia, no one for Africa or Arabia and *David Bamford* for Australia, and this is what we are looking for our chief organizer *Dmitry Maleshin* explicitly for «Eurasia».

This allows us to assume, that at least his home country Russia belongs to the Eurasian area.

Besides. We can detect the expression «Eurasia» also in the subtitles of session 4 «Harmonization of Civil Procedure in Eurasia» and 6 «Commercial Arbitration in Eurasia». «Eurasia» without further explanations.

What other parts of the world besides Russia could or should belong to Eurasia? Where does Europe end and Eurasia begin and where does Eurasia end and Asia begin? To which part for example does Turkey belong to or Lebanon or Israel? To which area we shall allocate Countries like Moldova and Ukraine in the next neighborhood of Romania and Bulgaria, meanwhile eastern European member states of the EU? And to which areas or cultures countries like Croatia, Montenegro, Bosnia Herzegovina, Macedonia, Albania, Serbia or Kosovo belong to?

Looking for answers in the internet we will find the simple explanation, that Eurasia is only the assemble of two continents into one big piece of the earth surface. But this purely geological and geographical view, does not answer our questions. More helpful could be perhaps historical, political, sociological and/or cultural approaches to find an acceptable definition of Eurasia.

Nevertheless it is interesting to know that in the list of the European Countries found in the internet that for example the European part of the area of Kazakhstan is estimated by 5,4% of the whole area of nearly 147.000 square kilometer while the European Part of Russia as the biggest country in the world with an area of nearly 5.000.000 square kilometer is estimated by 23,16%.

While checking the internet I found by the way some interesting press notes of leading newspapers about the intention and plans of the Russian Prime Minister *Vladimir Putin* to build up a «Eurasian Union» (EAU) until the year 2015.

For this project the European Union (EU) should serve as a pattern, but without all the past and newly miseries of the EU. It seems that in the first step an Economic Union is projected and not at all a re-birth of the former Soviet Union.

Nevertheless this Eurasian Union under construction strives for a membership out of most of the member states of the former Soviet Union and its Republics. These members had been during 1956–1991 Russia, Ukraine, Uzbekistan, Kazakhstan, Belarus, Azerbaijan (where this year the „European «Song Contest takes place), Georgia, Tajikistan, Moldova, Kyrgyzstan, Turkmenistan, Armenia, Latvia, Lithuania and Estonia. I am not sure if everybody in the audience knows exactly where to find these countries on the globe.

After the break down of the Soviet Union the following countries have formed the so called Commonwealth of Independent States (CIS): Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Among them Ukraine has not an official membership like the others, but is only a so called de facto participant. Furthermore Georgia left the CIS in 2008, while the three Baltic States Lithuania, Latvia and Estonia became meanwhile members of the European Union.

Which ones of all these mention countries we can allocate presently as parts of Eurasia remain as an open question? Anyway we should not decide this question just by criteria like national borderlines, political interests or existing associations, treaties, union or communities, but mainly by observations and considerations of European, Eurasian and Asian cultures, the past ones, the present ones and the future ones.

This leads us to a further key word, «Culture».

4. Culture and Un-culture

Some remarks now to the key- and catchword «culture» and its meaning in general, which as phenomenon is seen as one of the most important determinants of civil procedures in all their varieties.

According to my own standpoint it does not make much sense to search now for a generally binding and convincing definition of «culture» in its theoretical and factual impacts. In my understanding culture is just an embodiment or conglomeration packed with masses of different ideal and real elements, criteria, characteristics or facets like knowledge, education, science, skills, origin, tradition, language, scripture, art, music, architecture, literature, customs, habits, attitudes, behavior, abilities, mentalities, feelings, ways of life, ethics, morals, beliefs, philosophy, ideology, religion, myths, form of government, state organization, separation of powers, politics, democracy, constitutional state, rule of law state. And much more, including basic concepts of society like individualism, collectivism, liberalism, communism, socialism, capitalism etc.

Just one branch of culture in general is the so called «legal culture» as a collective term for legal or law phenomena like legal orders and -texts, legal ideals as well as realities, legal science, legal education and legal professions like notaries, prosecutors, lawyers, and judges. Legal institutions and organizations and the whole justice system including administration of justice, court procedures and among these procedures also civil procedures as our main issue of interest.

Whenever jurists, like we are, deal with the item of culture it is noticeable that this term named culture has mostly positive impacts, which are often connected or associated with ideas of civilization, civil society, highly developed nations and/or democratic situations, which all together means something like a «good culture», mostly observed and described by cultivated people. like we are, hopefully.

This kind of view neglects the here so called «bad culture», «anti-culture or «un-culture» in all its negative impacts we can observe in many parts of the world, nowadays very obvious in Inner and Northern Africa, Arabia, Central America, Mexico and elsewhere.

This «un-culture» we may describe or at least illustrate by terms and phenomena like separatism, imperialism, terrorism, fundamentalism, racism, despotism, fascism, extremism, fanaticism, civil war, genocide, coup d'état, putsch, holy war, Taliban, alkaida (al-Qaida), jihad, tyranny, dictatorship, military junta, one party regimes, police state, mafia, camorra, yakuza, drug baron «suicide attacker», honor killing, organized crime, gang criminality, system immanent corruption, so called parallel societies, black economy, money laundering, drug cartels, syndicates, piracy, human trafficking ,etc. All this sounds like a fictive horror scenario, but this is the reality, which we can watch day after day on television.

But in concern of Un-culture form a western point of view we should keep in mind that form the standpoint of a devout Muslim a huge part of the western culture is seen, criticized or even condemned as Un-culture. This holds true particularly in respect of freedom of belief, change of confession, mixed marriage or love affairs between believers and disbelievers, parents- child relationship, religion education, feminism, gender equity, men and women equality, sexual liberty etc., phenomena which are quite often threatened by death penalty.

5. Cross-Culture

In connection with the termini of a Cross-Cultural Dialogue (dialogue means in a narrow sense a talk between two persons or parties) also the terminus «Cross-Culture» needs some explanation. In dictionaries we find several synonyms for the terminus Cross-Culture like trans-culture, inter-culture, bi- or multi- culture. From these expressions we can learn at least, that there is not one single culture at stake but two or more cultures or – in other words – no mono-culture, but a poly-culture or several ones in certain parts of the world, in nations or continents and – in our case – particularly in Eurasia with its European as well as Asian cultures in their further differentiations.

Cross-Culture sounds like a crossing of different cultures, but not necessarily a clash between them. According to my own opinion in a broader sense Cross-Culture means an untroubled or parallel side by side existence or even peaceful and amicable coexistence of cultures as well as cultures in conjunction and cooperation with each other. But it could also mean conflicting, adversarial or hostile relations or confrontation between the cultures.

Finally, Cross-Culture could have the meaning like a mix, conglomerate or melting-pot of different cultures or their assimilation.

6. Governments and Religions as determinants of civil procedure

Concerning the main factors resp. determinants influencing the different civil procedures in the world for sure the different legal cultures containing their justice systems and court

procedures respectively the judiciary or the indicative as so called third power, in which the civil proceedings are imbedded, belong to the main factors for the creation, shaping and evolution of civil in-court or out-of-court proceedings.

A famous scholar, whose name I forgot, taught us already centuries ago: «Show me your civil procedure law and I tell you what political system you have».

Much more influential as factors resp, determinants are the different types of governments, the executive or administration of states and state rulers in their whole variety.

Looking around the world we still can find empires with emperors, kingdoms with kings and queens principalities with princes. Sheikdoms with sheiks on top as heads of the state, being also the highest judges. Besides ,we can find all kinds of democracies with presidential or parliamentary systems, furthermore dictatorships, oligarchies, potentates, , autocrats, people's republics , plebeian tribunes, tribe leaders or other omnipotent people or institutions ,where the executive occupies the judiciary, which has no independence at all and which is in the worst case totally corrupt.

Besides the mentioned factors there exists a bunch of other very influential factors concerning justice and procedures, which are often unknown or ignored by the jurists. This lack of information or ignorance exists in contrast to the fact that we live in an era of an enormous revival of religiosity in many parts of the world.

These very influential factors besides the governmental ones are the different religions, like Christianity, Judaism, Orthodoxy, Islam, Buddhism, Hinduism etc. and all the different confessions , sects and other religious beliefs and cults as elements of cultures or un-cultures for which the following words are significant and illustrative: theocracy, state religion, islamization, holy war, anti-semitism etc., further more the Koran (Qur'an) as the only source of law, Sharia and as actors: high priests, kadis, mullahs, imams, mufties rabbis, gurus, shamans, who all function as experts in law and powerful judges also in respect of civil conflicts, uttering judgment of which kinds ever and proceed in a way which ever.

7. Civil Procedural Principles

As a last point of my introductionary remarks I refer to the main goal of this conference which is the obligation to concentrate our theoretical and practical work on «principles» of civil procedure and this time not in the frame of North America and Europe, but – as *Dmitry Maleshin* would say – in «Eurasia, Asia and the rest of the world».

In all discussions of our Association about basic principles of civil procedure up to now – mostly integrated in questions harmonization, unification, reception or transplantation – those principles played a major role, which delt with the relations of the autonomy of private participants, the power of judges as official participants and the forces of lawyers as professional participants.

As in concern of this scientific area, finally touched, all of you are high ranking experts. Therefore is no need for further reflections.

I thank you all for your attention and patience.

SESSION 1. DISPUTE RESOLUTION IN DIFFERENT SOCIETIES: FORMAL AND INFORMAL PROCEDURES

General Reporter –
Prof. **Oscar Chase**, IAPL Vice-President, New York University School of Law, USA

In many parts of the world informal processes co-exist with formal adjudication. These include mediation, informal arbitration, and «traditional» processes used by indigenous and other homogenous social groups for intra-group controversies. What is the function of these informal processes and how can we account for their role in modern societies?

National Reporters:
- Italian National Report: Prof. **Vincenzo Varano,** prof. **Alessandro Simoni**, Florence Law School, Italy
- English National Report: Prof. **Neil Andrews**, Cambridge University, England and Wales
- Chinese National Report: Prof. **Jerome Cohen**, New York University School of Law, U.S.A.
- Russian National Report: Prof. **Nataliya Bocharova**, Moscow State Lomonosov University, Russia
- C.I.S. National Report: Dr. **Tsisana Shamlikashvili**, Center for Mediation and Law, Russia
- American National Report: Prof. **Carrie Menkel-Meadow**, Georgetown Law School, U.S.A.

Oscar Chase[1]

GENERAL REPORT

The latter decades of the twentieth century witnessed a world-wide efflorescence of «alternative» methods of handling disputes – alternative, that is, to adjudication in state-sponsored and controlled courts. The reports of the distinguished members of this panel underscore the reality that this development shows no sign of abating as the new century unfolds[2]. One of the hallmarks of these «alternative dispute resolution» (ADR) processes

[1] IAPL Vice-President, Professor of New York University School of Law (USA).

[2] Neil Andrews, *Mediation in England* (2012) (notes the rise of mediation in England, exemplified by a doubling in the number of mediations between 2007 and 2009); N. Bocharova, *Dispute Resolution in Russia: beyond*

has been informality – at least compared to court-centered litigation. This procedural revolution has been subjected to extensive examination, with some observers singing its praises, others expressing critical concerns, and most seeing both advantages and problems. Our contributors sharpen our understanding of the formal vs. informal disputing debate by variously focusing on the roots of the informality movment, its achievements, its problems, and its perhaps unanticipated political and economic impact. The diverse jurisdictions that our experts address make the collective work of the panel more valuable than a less cosmopolitan approach could have.

Any discussion of «formal and informal procedures» must confront the taxonomic problem suggested by the binary quality of the categories. How shall any particular process be categorized? What indicia are useful in labeling a process in one way or another? Are any features decisive? It is easy enough to refer as «formal» the processes used to decide cases in a court of law presided over by an official bearing the title of «judge» and to put all other processes into a general category of «alternative» dispute resolution («ADR») with the clear implication that the latter are «informal». The difficulty is compounded by the tendency of «pure» formal or informal systems to appropriate elements of its supposed opposites. A striking example is the criminal process of the United States. When actually applied, the rules governing criminal trials are rule-bound and very formal. But, in actual practice, well over ninety percent of criminal proceedings are resolved by plea bargains that are the product of negotiations between the defendant's lawyer and the prosecutor – a very «informal» process. On the other side of the globe, Professor Cohen tells us, recent legislation in the People's Republic of China has introduced informal «reconciliations» as part of the criminal procedure for some cases. The situation can work in reverse as well, as some ADR processes – notably commercial arbitration – have in practice taken on much of the formality we would associate with classic adjudication. Even mediation, usually considered more informal than arbitration, has in some jurisdictions been «tamed» by requirements of formal rules, Professor Bocharova, for example, cites the formalization of mediation in Russia as the result of a recently adopted statute. Differences among legal systems should also make us wary of too-easy categorizations. A civil trial in Germany, for example can be remarkably informal when compared with the American model. The rules governing the roles of judge and counsel are much less rigid in the German system and the facts are usually brought out in the German trial through a narrative of the parties and witnesses lightly guided by the judge. In comparison, the question and answer technique of the American lawyer governed by a panoply of technical rules of evidence is strikingly rigid and formal.

Some of the national reports prepared for this session explicitly address the definitional problem and explore its implication for evaluating the various processes discussed.

formal proceedings (2012) describing the adoption in the Russian Federation of the Alternative Procedure of Dispute Settlement (Mediation) Act in 2011 which led to the growth of services by mediation centers and mediators; Jerome A. Cohen, *Mediation and Criminal Justice in China* (2012) (describes provisions in the 2012 Chinese Criminal Procedure Law that, for the first time, provide for the «reconciliation» of public prosecutions which allow a less formal path to resolution of certain criminal prosecutions); Carrie Menkel-Meadow, *Informal, Formal and «Semi-formal» Justice in the United States* (2012) (describing the use of «semi-formal» processes); Vincenzo Varano and Alessandro Simoni, *Italian National Report* (2011), noting Italian legislation «which mandates that mediation takes place before the commencement of the proceeding in quite a substantial number of disputes on a variety of subjects from car accidents to urban leases, to medical malpractice, insurance, bank and financial contracts, and many others...» but nonetheless contending that in Italy (and in most civil law countries) «resort to more informal and quick dispute resolution techniques is still looked at with some suspicion».

The report on Italy co-authored by Professors Varano and Simoni observes that there are a number of privatized dispute resolution systems that are «alternative» to the courts but nonetheless prescribe «formal» processes. Italian law recognizes this possibility and, for example authorizes distinct forms of arbitration labeled *arbitrato rituale* and *arbitrato irrituale*, a division which apparently reflects different degrees of formality of process. In Professor their interesting section dealing with «traditional» forms of disputing they observe that the particular cultures or ethnic groups that may follow ancient paths are nonetheless moved to a degree of formality that observers have opined that they are systems of «law».

Professor Menkel-Meadow is particularly interested in the issue of categorization because she sees it connected to her normative assessment of the claims of the ADR adherents. This concern is telegraphed in the title of her paper, *Formal, Informal, and «Semi-formal» Justice in the United States*. As the addition of the «semi-formal» category indicates, she describes the range of processes as falling along a continuum rather than subject to clear categorization. She sets forth several indicia that point to greater formality of a process. To quote Professor Menkel-Meadow, «In summary, conceptions of the core aspects of formal justice include:

• Formal and clear *rules of procedures*, known to or consented to by the parties, including allocation of tasks of production of proof and evidence

• Transparency/*publicity of hearing*

• *Neutrality and disinterestedness of deciders* of both fact (sometimes juries) and law (judges)

• *Access to information* from all parties (under oaths of truth telling), with limited confidentiality or other policy protections

• *Rights or «rule of law» based outcomes and decisions*

• With appropriate and authorized *legal remedies* ordered by

• *Public officials* (judges) or their delegates (juries), with

• *Public and reasoned decisions* explaining outcomes and legal basis of outcomes for

• *Clarification of rules and basis of decision* for the parties, and guidance for others in similar situations

• *Possibility of review of decisions* for error or other faulty process or substantive reasons.»

Disaggregation of the qualities of «formality» helps us to refine our evaluation of its costs and benefits. The concepts of formality and informality when considered abstractly do not necessarily tell us whether one process is preferable to another. We need to know what aspect of formality is at issue, the purpose for which the procedure will be used, and the goals we seek to reach. Importantly, we must take into account the values and defects of alternative processes, be they formal or not. Professor Andrews focuses on the growth of mediation as a dispute resolution tool in England. He explains its dramatic rise in part by comparing the defects of «court litigation». He observes that the latter has been called:

– unpredictable;

– heavy-handed, and a source of expense, delay, and anxiety;

– offers little scope for direct participation by the parties, as distinct from legal representatives;

– final judgment normally awards victory to only one winner;

– and «provides public open justice, visible to mankind in general».

Other panelists have noted, in addition, the role of alternative processes in relieving the burdens on the courts. According to Professors Varano and Simoni, «the most immediate

purpose of ADR is to relieve the official machinery of civil justice which is simply unable, from a quantitative point of view, to meet a growing «demand of justice'». They add that in many cases arbitration and conciliation can provide quicker and less expensive justice than can the ordinary court processes. Professor Menkel-Meadow finds «at least two different motivations for alternative or less formal processes were present – the «quantitative-efficiency» concerns to make justice more accessible, cheaper, faster and efficient, and the more «qualitative-party empowering» ideas that, with greater and more direct party participation, and identification of underlying needs and interests, parties might identify solutions to their problems that would be less brittle and binary than the win/lose outcomes of formal courts...»

A related theme that emerges from these reports – in some quite explicitly – is the role of cultural traditions that have existed for generations and still inform modern procedures either because of continued practice by discrete ethnic or national groups or because they influence the form of contemporary practices. In his section of their report, Professor Simoni describes the traditional informal means of handling disputes used by homogenous social groups such as the people of Sardinia and Albania, in addition to the Roma, for intra-group controversies and points out that these practices can be a source of pride and solidarity. Professor Cohen places current efforts in China to use informal procedures in the context of millennia-long Confucian traditions that have emphasized harmonious relations and consensual resolution of disputes. According to Professor Bocharova, the «existence of informal proceedings in Russia is associated with religious/cultic context or national minorities...» Relatedly, Dr. Tsisana Shamlikashvili describes the traditional informal dispute processes that prevailed in former Soviet republics[1].

Our panelists do not ignore the downsides of informal, non-judicial processes when compared with court adjudication. According to Professor Andrews courts are necessary to handle disputes when the coercive powers of the judiciary are necessary; the powers to «compel witnesses to attend, punish perjury, enforce judgments, and apply their contempt of court power if injunctions are flouted; and the court system can protect parties against the other's non-compliance or bad faith». Professors Varano and Simoni add a deeper concern – that the expansion of ADR can impose limits on the access to justice by establishing a barrier that must be crossed before getting to a judge. Professor Menkel-Meadow expresses uneasiness related to the private nature of informal disputing in a system that largely depends upon a rule of law generated by publicly announced judicial decisions. Summarizing her other concerns, she worries that «increasing complexification, segmentation, and differentiation of process... potentially threatens other justice notions of *consistency, transparency, true consent and knowledge,* as well as *equity, equal treatment, clarity, socially «uniform»* and *just solutions»* (emphasis in original).

Conclusion and Coda

Reform movements are the product of overlapping and sometimes conflicting forces of culture, politics, and economics. The processes used to address disputes are

[1] T. Shamlikashvili, *Report on the Former Soviet Republics* (2011) (discusses history of dispute resolution in Byelorussia, Lithuania, Turkmenistan, Moldavia, and Ukraine).

no exception. I have previously argued that the momentum of the ADR movement in the United States and elsewhere during the last quarter of the twentieth century was fueled by a desire to relieve caseload pressure on courts, a general political trend favoring privatization in many spheres of governance, the «counterculturalism» of the nineteen-sixties and seventies which favored the anti-authoritarian, anti-intellectual, and self-actualization, and communitarian values expressed by many proponents of non-judicial dispute resolution, and by a declining faith in our ability to find facts – a fall out, perhaps, of the scientific challenges to the received verities of earlier times[1]. Has there been also a loss of belief in justice, and in consequence, in the power of courts to do justice? As one who started law studies less than a decade after the U.S. Supreme Court decided *Brown v. Board of Education*[2], I came of intellectual age at the feet of the Warren Court and a internalized the faith that a judiciary sensitive to the deepest values of human rights could be a reliable bulwark against the worst instances of injustice. From this perspective I am troubled by those manifestations of informality that cut off access to a court with the power to find, say, and enforce the law. The most egregious example in my own country is the U.S. Supreme Court's series of decisions enforcing arbitration agreements against employees, small investors, and consumers who may have signed arbitration agreements but did so under duress or in ignorance of the consequences. In my view this is an embrace of privatization that serves economic interests; not the more benign goals of procedural informalism. But viewing the global legal landscape from a higher altitude we see that the trends on which this panel focuses are accompanied by another profound development of recent decades, the striking commitment in many nations to constitutional rights through courts. One scholar described three «waves» of constitutional court creation: first, the Austrian, German, and Italian courts, which immediately followed World War II, then the Spanish and Portuguese courts, which followed the fall of fascist regimes in the 1970s[3] and finally the post-Soviet courts, which also followed the Austrian model, as a third wave in this pattern.[4] To this list one can add the post-apartheid Constitutional Court of South Africa, and the similarly motivated supreme and constitutional courts founded after World War II in a long list of countries that includes such as India, Japan, Pakistan, Korea, and Taiwan[5]. All of these apply processes that can be describes as formal in every sense. When we place this trend on the table along with the informalist movment outlined above, we have reason to be optimistic that a proper balance can be found. Whether this will be the case depends on the continued commitment by you, my dear friends, and scholars like you who appreciate the need for formal and informal dispute resolution but only in appropriate context. Among the many tasks facing us proceduralists the goal of defining and defending the boundaries between the two is among the greatest.

[1] O.G. Chase, *Law Culture and Ritual: Disputing Systems in Cultural Context*, New York University Press, 2005, 94–110.

[2] 347 U.S. 483 (1954).

[3] John Ferejohn, *Constitutional Review in the Global Context* in 6 *N.Y.U. J. Legis. & Pub. Pol'y* 49, 50 (2002

[4] Ibidem.

[5] Ibidem.

Vincenzo Varano and Alessandro Simoni[1]

ITALIAN NATIONAL REPORT

The theme of our panel refers to informal processes which co-exist with formal adjudication. They are meant to include both more diffuse techniques of ADR such as mediation or informal arbitration, and «traditional» processes used by indigenous and other homogeneous social groups for intra-group controversies. We understand that informality is the main characteristic we should address to: therefore, we have decided to exclude from our report a variety of dispute settlement techniques which are out of the state run machinery of civil justice, but tend to be rather formal. Suffice here to refer to ecclesiastical courts, which have jurisdiction on certain matters concerning consenting laymen (such as annulment of religious marriages), bodies and procedures used by sport leagues to settle intra-league controversies, or domestic tribunals for members of professional associations. The same is substantially true of proceedings which can be brought before certain independent authorities, such as the authority for the protection of personal data, or the communication authority, or the electricity and gas authority[2].

Having said that, as a premise to our study, we have decided to divide the paper into two distinct parts. The first part (authored by V. Varano) will give a sketch of the most widely used informal techniques of ADR available in Italy, and the attitude towards them; the second part of the paper (authored by A. Simoni) will try to assess to what extent one can find in the Italian context forms of traditional justice practiced within groups that for different reasons tend to avoid, at least to some extent, the interaction with the machinery of justice of the state, by using dispute resolution techniques which can certainly be very precisely predefined and ritualized, but are, however, based on cultural assumptions radically different from those underlying state justice, and therefore are certainly «informal» in that perspective.

Part I. Alternative Dispute Resolution Techniques

1. *The ADR movement: different attitudes of civil law and common law.*

Comparative experience shows a wide movement towards alternative methods of dispute resolution even in countries with a solid and official environment, which supplement the formal, court-based machinery of justice. Should one attempt at classifying the various meanings of the expression ADR, it could perhaps make some sense to say that, if they are all aimed at solving disputes without resorting to the ordinary proceeding, some of them have nothing to do with it, and are confined to an entirely private sphere. Some controversies may be in fact solved through a variety of techniques of a strictly private contractual nature. This remains true even when these systems are somehow institutionalized, i.e. when banks, insurance or utilities companies offer to their customers the possibility to solve amicably disputes which may arise in connection with the services they provide. They are certainly used in Italy, though perhaps less extensively than in other legal systems. Since these techniques develop entirely in the private sphere, it is practically impossible to have an idea of their dimension.

[1] Professors of University of Florence School of Law (Italy).

[2] On these «administrative alternatives' to ordinary judicial proceedings, see F.P. Luiso, *Diritto processuale civile, vol. V. La risoluzione non giurisdizionale delle controversie*, Milano, Giuffré, 6th ed., 2011, pp. 207–232. The decisions of the authorities will be subject to the control of the ordinary courts.

There are several reasons for the development of ADR. However, we think that, on the one hand, the most immediate purpose of ADR is to relieve the official machinery of civil justice which is simply unable, from a quantitative point of view, to meet a growing «demand of justice». On the other hand, it is also important to understand the idea that justice may not necessarily be found only in the courts, but that it can be found «in many rooms», the idea that certain techniques of ADR, and in particular mediation, serve the purpose of diversifying and enriching the offer of justice, and are better suited to guarantee a satisfactory solution of certain categories of legal disputes.

Not every legal system looks at the ADR explosion with the same favour. If the trend is very clear, and very well accepted in common law countries probably due to the fact that the common law culture has always looked at resort to the courts as something extraordinary from the days of the writs onwards, a different cultural perspective seems to prevail in civil law countries, and in particular in Italy. The latter is due to the emphasis traditionally placed on the decision of the judge as the way of disposing of the controversies. The right to sue is seen as the right to a judge and a decision of the judge. In Italy, in particular, this attitude is strengthened by art. 24 of the Constitution which guarantees that individuals have a right of action and defence in court for the protection of their rights and legitimate interests.

Quite a few civil law scholars have strong feelings against the ADR movement. For instance, Ugo Mattei has recently written: «The birth of the ADR industry transformed the issue of access to justice by limiting as much as possible access to courts of law»[1]. Professor Lindblom, going back to the three waves of the much celebrated Cappelletti's Access to Justice Project, fears that the third wave, i.e. the ADR wave, of access to justice may build up to a tsunami; ADR may prove to be a Trojan horse in the access to justice paddock, a cuckoo in the dispute resolution nest. The hopes that ADR will only complement – not replace – ordinary civil litigation may backfire[2]. On the other hand, there are scholars like Neil Andrews, who share the view that ordinary civil litigation is now itself the «alternative dispute resolution» system, and that litigation should be the last resort[3].

The Italian legal system reflects the general attitude of the civilian culture, and therefore, although our formal system of justice is far from efficient, and the duration of an ordinary civil dispute may take an average of roughly ten years through first instance, appeal and a final recourse to the Court of Cassation[4], resort to more informal and quick dispute resolution techniques is still looked at with some suspicion, even if only for the purpose of alleviating the burden of litigation on the ordinary courts.

In this connection, it is interesting, for instance, to note that when the law of November 21, 1991, no. 374, introduced a new court of first instance for relatively small civil claims and minor criminal violations, staffed by honorary justices of the peace – who, however,

[1] U. Mattei, *Access to Justice. A Renewed Global Issue?*, in K. Boele, W. & S. Van Erp (eds.), *General Reports to the XVII Congress of the International Academy of Comparative Law*, Bruxelles, Bruylant, 2007, p. 385.

[2] P.H. Lindblom, *La risoluzione alternativa delle controversie – l'oppio del sistema giuridico?*, in V. Varano (ed.), *L'altra giustizia*, Milano, Giuffrè, 2007, p. 233.

[3] N. Andrews, *I metodi alternativi di risoluzione delle controversie in Inghilterra*, in *L'altra giustizia*, cit., p. 18. The same author refers to the courts of law as courts of last resort, meaning courts as last resort rather than final appellate courts, and speaks of «[T]he Decline of Public Adjudication': see N. Andrews, *The Modern Civil Process*, Tübingen, Mohr Siebeck, 2008, esp. Part I.

[4] See for more details and some statistical data, V. Varano & A. De Luca (2007), *Access to Justice in Italy*, para. 1, in *Global Jurist*: Vol. 7: Iss. 1 (Advances), Article 6, available at www.bepress.com/gj/vol7/iss1/art.6

must have a law degree and are paid according to the work done, the procedure drafted by the legislator was not as informal as many had recommended, but was rather modelled on that before the higher courts, and therefore bound to be as long, non-concentrated, formalistic, and inefficient as the former. It is probably for this reason that the parties are required to be represented by a lawyer if the amount at 'stake exceeds the relatively trivial sum of 500 euros (6), which has been raised to 1.100 euros by the Law of February 17, 2012, n. 10[1]. At any rate, the justices of the peace have been successful in relieving the ordinary courts of first instance from quite a substantial workload, although there are signs of a troublesome growth of backlog and delay[2].

Notwithstanding this premise, which must be borne in mind, it is unquestionable that there is in Italy too a growing attention towards mechanisms of alternative dispute resolution, more or less traditional, more or less informal, more or less effective.

We shall not deal with formal arbitration, which is the oldest, though certainly far from informal, means of alternative justice. A couple of things, however, have to be said. First, although expensive and formal, arbitration is certainly a more efficient, more rapid, and more confidential alternative to the ordinary proceeding, with its delay and technicalities. For these reasons, in Italy as elsewhere, it has been for a long time the preferred method of solving disputes within the business community. The prevalence of arbitration cannot be precisely quantified, as it escapes from statistical surveys. Second, the original regulation contained in the Code of civil procedure (hereinafter CPC), arts. 816-840, has been reformed by several statutes, and almost completely reviewed and rewritten by the legislative decree of February 2, 2006, n. 40. The end result of the above reforms is a more favorable attitude of the legal system towards arbitration[3].

2. Informal arbitration («arbitrato irrituale»).

Next to the arbitration, called «rituale», which we have just referred to, there are other types of disputes resolution techniques which belong to the same family, in the sense that they end with a decision/determination of the controversy by one or more third parties chosen by the parties to the dispute.

The first type is the so called arbitrato «irrrituale» o «libero», which doesn't follow the rules indicated for the «arbitrato rituale», and is left entirely to the autonomy of the parties. Several statutes refer to specific cases of «arbitrato irrituale», but the main characters of this form of arbitration will be found in art. 808-ter of the CPC. This provision recognizes

[1] Practicing lawyers, who are exceedingly numerous in Italy, are not immune from responsibility for the formalization of justices of the peace. First, the organized bar made a strong, and successful, pressure so that practicing attorneys are eligible for appointment, provided they do not appear as attorneys before the office where they must discharge their judicial functions. Secondly, it is also very clear their interest in a mandatory legal representation before the new court. Please, note that only 2.386 position of justice of the peace are covered out of the 4.690 provided for by law, a shortage of manpower which characterizes the administration of justice in general: 1217 are the vacancies among the ordinary civil and criminal judges out of a total number of 10.151.

[2] See Varano & De Luca, *Access to Justice*, p. 11, fn. 47 and accompanying text.

[3] For a short but exhaustive description in English of the law of arbitration in Italy, both domestic and international, see M.A. Lupoi, *International Arbitration*, in M. De Cristofaro & N. Trocker (eds.), *Civil Justice in Italy*, Tokyo, Jigakusha, 2010, pp. 338–352. Suffice here to say that arbitrators can decide any issue which is relevant to the decision, with only a few exceptions, the most important being the prohibition to issue provisional remedies; that the rules of procedure are largely left to the autonomy of the parties or arbitrators; that the award has the same authority and effect of a judicial decision, and can be enforced only after a formal check of the competent judicial authority; and that a review on the merits of the award is now allowed only in limited cases.

that the parties, on the basis of a specific written agreement, establish that a controversy will be solved by arbitrators by means of a «contractual determination». With this expression the legislator underlines the merely contractual nature of this form of arbitration, as opposed to the judicial nature of the arbitral award. In other words, the arbitrator(s) has (have) the task of determining the relationship between the parties which is the equivalent of the contractual agreement which the parties could have reached by themselves. As a consequence, the contractual determination of the «arbitrato irrituale» does not have as such the effects typical of a judicial decision (enforceability, res judicata). It can be declared null and void by the judge in the course of an ordinary proceeding, for the grounds indicated in art. 808-*ter*, para. 2.

An arbitration largely based on the «arbitrato irrituale» is now available, according to arts. 412–412 *quarter* CPC as rewritten by the law of November 4, 2010, n. 183, also in the area of labor disputes, provided that this form of ADR is authorized by collective agreements. Clearly, it is the change in the conception of industrial relations and in the labor market that has opened the way to arbitration in this area. Traditionally, a substantially «private» justice was supposed to impair the rights of the worker, and deprive her from the more effective protection by the judge.

Art. 832 of the CPC, as amended by the legislative decree 40/2006, recognizes that there are particular forms of arbitration, handled by public or private entities such as the chambers of commerce, which operate through arbitration chambers and usually lay down regulations which the parties accept when they stipulate the arbitration convention to turn to them in order to be assisted in an arbitration, either «rituale» or «irrituale'. Usually, this assistance concerns secretarial support, the indication from their lists of suitable independent arbitrators upon request of the parties, the determination of their compensation which is usually lower than on the free market, the rules to be followed in the proceeding, This type of arbitration is defined **«arbitrato amministrato»**.

Among the various forms of arbitration introduced in recent years in several areas, a method of dispute resolution between customers and institutions operating in the delivery of financial services, such as banks, brokers and the like, seems to be of particular significance. It has been introduced by the Bank of Italy in 2009, pursuant to a law of December 28, 2005, n. 262, and provides an inexpensive, quick and effective solution of the controversies by three independent panels of five arbitrators – sitting respectively in Milan, Roma and Napoli – three of which are appointed by the Bank of Italy, one by the associations of customers, one by the association of the institutions. The fundamental guarantees of fairness must be assured by the procedure. If an institution does not abide to the decision of the arbitrators its name is made public. The decision is not subject to attack, but does not prevent the parties for resorting to the courts if they feel their rights have not been secured by the decision of the arbitrators. The website of the «Arbitro Bancario Finanziario» (www.arbitrobancariofinanziario.it) which, among other things, reports the fully reasoned decisions of the three panels, seems to show a remarkable success of the procedure.

3. *Conciliation*.

Conciliation has a long standing history in Italian procedure too, to be sure not very successful if one thinks of the conciliatory powers vested in the ordinary judges and spelled out in the CPC. The mandatory attempt at conciliation which had to be conducted by the judge during the first hearing was so ineffective as to be considered no more than a mere

formality, and was abolished in 2005. The law no. 263 modified arts. 183 and 185, and placed on the parties the burden of jointly requesting a separate hearing in order to attempt the conciliation – a reform, however, which was not successful, mainly because if the parties are inclined to reach a settlement, they do it out of court and let the procedure extinguish.

Also the justice of the peace can attempt the conciliation of the parties at the first hearing before her, but in this case too the provision does not appear to have any meaningful practical impact. The JP, according to art. 322 of the Code, is also vested with a broad extra-judicial conciliatory function to settle any dispute, without value limits: once again, the practical experience indicates very clearly that these kinds of conciliatory procedures do not work.

The reasons for the failures of judicial conciliation can be summarized as follows. On the one hand, in order to perform successfully a conciliatory activity, time, patience and a positive attitude are needed. The task is obviously very difficult for courts which are overloaded and overcrowded. On the other hand, the idea of conciliation conducted by the judge places the latter in a somewhat ambiguous position, which may induce mistrust and cause the resistance of the parties. This is the reason why certain experiments appear to be preferable, such as those followed in France or in Germany where the judge can refer the parties to out of court settlement proceedings[1].

Labor disputes have experienced a variety of conciliation procedures, none of which has so far met with success, no matter whether voluntary – law of August 11, 1973, no. 533 which introduced in the Code a special procedure for labor disputes, – or mandatory such as that introduced by the law of March 31, 1998, no. 80. The law of November 4, 2010, no. 183, reintroduced the voluntary attempt at conciliation, given the total failure of the 1998 reform, whose only result had been to flood the administrative bodies in charge of the conciliation – the conciliation committees of the provincial labor offices – simply as a formal step before initiating the court proceeding or the arbitration[2].

In recent times, several conciliation procedures have been introduced which show a certain change in the approach to ADR, not so much meant only to attenuate the workload of the courts, but also to provide citizens, in particular consumers, with more adequate – easier, more rapid, more informal, more economical, and probably more competent too – ways to resolve their disputes. One can think of some experimental procedures offered to consumers by large communication (e.g., Telecom Italia) or banking services (see supra, at the end of para. 2), but also of some interesting and promising legislative schemes. For example, the law of December 29, 1993, no. 580 authorizes the chambers of commerce to institute and promote conciliation and arbitration procedures to solve disputes between business concerns and/or between business concerns and consumers. Several statutes concerned with the protection of consumers, which have now been consolidated in the so called «Codice del consumo»[3] have introduced in recent years interesting measures aimed at the protection of collective interests of consumers, and encouraged the non judicial

[1] See art. 131-1 of the French *Nouveau Code de procedure civile*, and § 278, para. 5 of the German *ZPO*.

[2] S. Chiarloni, *Stato attuale e prospettive della conciliazione stragiudiziale*, in *Rivista trimestrale di diritto e procedura civile*, 2000, at p. 463, gave some figures indicating that the provincial labor office of Torino had been overburdened with applications immediately following the enactment of the law of 1998 (7809 as compared to 1215 in 1997), and that, as it might have been expected, it did not succeed to match the new load of work (550 conciliations effected in 1998 as compared to 614 in 1997).

[3] The code of consumers has been enacted by the legislative decree of September 6, 2005, no. 206.

solution of disputes, through resort, among others, to the conciliation procedures set up by the chambers of commerce, managed by conciliators formed within the chambers, not necessarily among lawyers. More recently, the legislative decree of January 17, 2003, no. 5, which was enacted to reform procedure in corporate cases, has raised so many criticism that has been abrogated by the law of June 18, 2009, n. 69, with the exception of the provisions regulating arbitration and conciliation in corporate cases[1]. The latter, in particular, is a form of extrajudicial conciliation before reliable («serious and efficient») bodies which must be registered with the Ministry of Justice, upon request of any interested party. Chambers of commerce which has instituted conciliatory bodies following the law no. 580 of 1993 is entitled to be enrolled in the register as of right.

4. Mediation.

The Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters prompted the adoption in Italy of the Legislative Decree no. 28 of March 4, 2010, which, following a suggestion included in the Preamble of the Directive («whereas n. 8»), extends beyond the cross-border disputes to cover also internal disputes[2].

The Italian legislation connects mediation and conciliation, by defining mediation as the activity through which the mediator helps other parties in the search for an agreement for the solution of a controversy, and conciliation as the result of the activity, i.e. the agreement which settles the controversy.

The most important, and most controversial, provision of Leg. D. no. 28 is embodied in art. 5, which mandates that mediation takes place before the commencement of the proceeding in quite a substantial number of disputes on a variety of subjects from car accidents to urban leases, to medical malpractice, insurance, bank and financial contracts, and many others – in other words, not only disputes characterized by a long-term relationship between the parties which have always been considered as particularly suited for mediation, but practically any kind of dispute. If mediation has not been attempted before the commencement of the proceeding, the judge delays the first hearing so that the parties have the time to comply with the legislative requirement. In any case, the award of urgent or provisional remedies is not suspended by the mediation.

The conciliation which is eventually reached through the mediation procedure may be enforced as a non judicial execution title after it has been approved by the President of the «tribunale», i.e. the court of first instance, of the district where the mediation institution has its seat. If conciliation is not reached, the mediator may make a proposal of conciliation. If the latter is not accepted by the parties, and the judgment of the court «corresponds entirely to the proposal», the winning party who has rejected the proposal will not be awarded her costs, and may be even condemned to pay the costs of her opponent. A more realistic provision says that if the judgment does not correspond to the proposal, the judge may

[1] For a critical appraisal of the «corporate» procedure reform, which reflected the general attitude against it, see F. Carpi, *The Parties and the Judge in the New Commercial Proceedings in Italy*, in *Civil Justice Quarterly*, 25 (2006), p. 70 ff.

[2] On the EU Directive and its implementation in Italy and in a number of other countries, see the book edited by N. Trocker & A. De Luca, *La mediazione civile alla luce della direttiva 2008/52/CE*, Firenze University Press, 2011; on the Italian Decree no. 28, see the more systematic analysis of F.P. Luiso, *Diritto processuale civile, vol. V*, esp. chs. 4 and 5.

nonetheless order, for serious reasons, that the winning party may have her costs awarded. It is clear what is the purpose of these provisions; however, some commentators argue, not without good reasons, against their legitimacy, since they tend to force the parties to accept the mediator's proposal in any case, and so avoid the resort to the judicial proceeding, with the threat of sanctions which may be quite significant in terms of money.

The mediation of Leg. D. no. 28 can be performed by members of the local bar associations as a sort of court-annexed-mediation at the «tribunali», i.e. the courts of first instance, or by other institutions such as the chambers of commerce and other professional association: according to the IV Report on the diffusion of alternative justice in Italy dated March 7, 2011, there are some 160 approved mediation centers, 62 of which are Chambers of commerce[1]. The qualification of mediators is a decisive point for the success of mediation, but its solution in Italy has raised criticisms. No specific degree in law is in fact required (which contradicts the adjudicative purpose the legislator has given the proceeding[2]), but only the attendance of training courses of a theoretical and practical nature. According to the opinion of one commentator, which may be defined as representative of the criticisms, «[It] is doubtful that these courses provide adequate preparation»[3].

It is too early to evaluate the impact which the new mediation may have on access to justice and on the reduction of the workload of the courts. So far, it has not received the support of the bar, to say the least. Attorneys, according to the legislator, should inform clearly their clients about the availability of another door to justice such as mediation, its advantages in terms of cost and delay, and prepare them for it, so as to favor the diffusion and success of mediation. The fear to lose income drives them rather to go through the new proceeding routinely, as a new burden on the way of the ordinary process. Though the new rules have shortcomings which have been underlined by most commentators, they are nonetheless «a step in the right direction»[4].

A final word must be said in connection with another area where mediation has been gradually emerging, and which has been wisely kept separate by the legislative decree n. 28. The area of family relationships, where mediation has been developing informally in separation cases, but is now obtaining legislative recognition and promotion. On the one hand, the intervention of family mediation centers may be required by the judge in connection with restraining orders in cases of family abuses[5]; on the other, the recent law on joint custody provides that the judge may – or must if they so require – refer the parents to a family mediator so that they can try to reach more adequate and stable arrangements[6].

5. Some statistical data.

Obviously, there are no general official statistical data illustrating the success of the above mentioned procedures. Many conciliations, negotiations, mediations, settlements simply do not find their way through the statistics. On the other hand, the impression about the

[1] *IV Rapporto sulla diffusione della giustizia alternativa in Italia*, which can be seen at http://www.camcom.gov.it

[2] See *La mediazione civile alla luce della direttiva 2008/52/CE*. Presentazione by the Editors, p. XII, and, more in detail, F. Cuomo Ulloa, *Chi vuole essere mediatore? Competenza e responsabilità del nuovo mediatore civile e commerciale,* in *La mediazione*, supra, pp. 69–77.

[3] R. Caponi, *Italian Civil Justice Reform 2009*, in *ZZPInt* 14(2009), 143, at p. 146.

[4] Ibidem.

[5] See art. 342-ter of the Civil Code, introduced by art. 2 of the law of April 4, 2001, no. 154.

[6] See art. 155-sexies, introduced by the law of February 8, 2006, no. 54.

procedures administered by the chambers of commerce is rather positive, in that they offer a rapid, easily accessible and economical way of settling consumers' claims. However, the impression is also that the availability of these procedures is not yet as much known as it should be. The above statement seems to be proved by the annual reports on the diffusion of alternative justice in Italy, released by Unioncamere, an entity representative of the Italian chambers of Commerce, Isdaci – a private Institute promoting arbitration, mediation and commercial law, – and the arbitral Chamber of the Milan Chamber of commerce. The latest, published in March 2011, indicate the figure of 93.406 procedures of alternative justice, which however shows a substantial increase over the figure of 48.686 procedures in the years 2005-06, not yet prompted by the mandatory mediation introduced by the Leg. D. no. 28 of 2010[1]. The same sources indicate that the average delay for the solution of the controversies is 60 days and that the costs to be faced by the parties are quite affordable. For instance, the tariffs presently in force in Florence for the new mandatory mediation are rather typical, and provide, for example, a fee of € 52.43 which both parties have to pay if the amount at stake is up to € 1000; € 290 when the amount at stake is between € 10.000 and € 25.000; € 3.146 for amounts between € 2.500.000 and € 5.000.000. An initial fee of € 48.40 is required[2].

Part II. «Traditional» Processes Used by Homogenous Social Groups for Intra-group Controversies

1. Looking for «traditional justice» in Italy.

Italy has no aboriginal communities, and is definitely within the developed Western part of the world. It is thus not one of the typical contexts taken into consideration when the idea of «traditional justice», and its interaction with state justice, is discussed. The weaknesses of the dispute resolution systems based (in one way or the other) on state law and was discussed in the first part of the present report do not bring, therefore, to a generalized competition with «other» justice forms deriving their legitimacy from tradition or religion. Although Italian society has always experienced a high degree of internal diversity, such diversity had not among its most typical expressions the birth of alternative justice systems with a clear-cut structure. A discussion has taken place on the nature of de facto legal orders of major criminal organizations, which can have highly structured systems for the resolution of disputes or the punishment of wrongs, possibly competing with state justice in particular areas and periods. However, we feel that these systems fall out of the scope of the present part, since the source of the source of their legitimacy cannot, in our opinion, be referred to the realm of «tradition»[3].

Moreover speaking about traditional justice meets the obstacle represented by the very limited dialogue between mainstream Italian legal culture and the non-legal disciplines, like anthropology, that more easily can provide help in the identification of cases of self-regulation by specific social groups. Last but not least, a discourse about «traditional justice» has political implications which can affect the presentation and interpretation of available data. Unless a strict separation is made between factual judgments and value judgments,

[1] See *IV Rapporto sulla diffusione della giustizia alternativa in Italia of march 7, 2011*, www.camcom.gov.it

[2] See www.fi.camcom.it, under the item «Conciliazione».

[3] About *mafia* as a legal order, see G. Fiandaca, *La mafia come ordinamento giuridico. Utilità e limiti di un paradigma*», in *Foro Italiano*, 1995, V, c. 21 ss.; on the *onorata società* in Calabria, see N. Zagnoli, *Le tribunal d'humilité*, in *Droit et cultures*, 11, 1986, pp. 38 ff.

to affirm that certain social groups tend to settle disputes avoiding state justice can easily bring risks of stigmatization and stereotyping of minority groups. Symmetrically, these same groups can tend in certain times to overestimate the, historical or actual, importance of their traditional justice for purposes of increasing self-awareness or promotion of identity building. All this can become particularly delicate when the groups concerned experience a tense interaction not only with the state machinery, but also with majority society.

Against the backdrop of these multiple caveats, it is, however, possible to identify a number of cases where specific groups have been described as «keeping at distance» state justice, by resorting to alternative systems of social control that are perceived by the members of the group as having the nature of «group law», predictable and regularly applied. The attention paid to these alternative justice systems can be due to various reasons, depending on the relative visibility of the concerned groups, their status in the Italian society, and the priorities of the scholarly debate in a certain period. «Traditional justice» can live unobserved, at least out of small niches of specialists, for a long time, and then suddenly come to the surface in the media or public opinion. All this makes the sources fragmented and unreliable, with a fair amount of indirect evidence and speculation.

Taking into account such complexity, and the limited space available, we decided to focus on three cases of traditional justices allegedly practiced in Italy which, in different periods, have been the object of scholarly debate and media coverage. They are respectively the revenge system practiced in certain shepherding communities in Sardinia, the customary justice system known as «Kanun» originating in Albania, and the internal justice system of Romani groups. Intuitively, in all three cases the «keeping at distance» of state justice, whatever its actual weight, originates in a difficult relation with state institutions as a whole. In the first case, the context is represented by, what as been until recently, an extremely isolated sub-region of Italy (Barbagia, in the inland of northern Sardinia), characterized by a self-perception of cultural «otherness»[1] vis-à-vis the rest of the country, as well as by a complex history of difficult law enforcement which state authorities described as fight against *banditismo* (outlawry), while local culture described it as affirmation of proudness and autonomy from external control. The other two examples are instead primarily (but not uniquely) linked to recent immigration waves. Albania has been subject to Italian rule during the Fascist regime, during which a significant attention was paid to local culture and customs. After the fall of Enver Hoxha's totalitarian regime, a migration flow originated from the country, which made Albanians one of the major foreign communities in Italy, causing a «rediscovery» of Albanian culture accompanied by stereotyping and prejudice. Roma (partly rooted in Italy, partly of foreign origin) experience even more a difficult coexistence with the majority population, and as in many other countries everything related to their culture is the object of critical scrutiny in the media.

2. The Barbagian revenge system and its place in Italian legal scholarship.

The traditional justice system of Northern Sardinia can be considered as a useful starting point of our exposition also because of its presentation to an international audience thanks to the seminal comparative work edited by Laura Nader and Harry Todd in 1978, *The Disputing Process*, where one of the ten dispute resolution systems selected is indeed

[1] «Even before being a physical place, Barbagia is a *forma mentis*», M. Murgia, *Viaggio in Sardegna*, Torino, Einaudi, 2011, p. 8.

taken from the sheepherding communities in rural Sardinia[1]. The essay published in the volume is based on new and independent field study, but it clearly takes its inspiration from a pre-existing scholarly work authored by Antonio Pigliaru[2], an extremely original intellectual and a legal philosopher from Sardinia who left a deep and permanent mark in the debate on Sardinian culture notwithstanding his premature death in 1969. One of the most famous works by Pigliaru, which in the late '50s caused «something of a scandal in Italian juristic milieu»[3], was indeed devoted to the system of structured and precisely regulated revenge developed in Barbagia, which as mentioned above was one of the then most remote portions of the island, with an economy largely based on shepherding.

Pigliaru did not want to make an anthropological work, and accordingly did not provide a detailed account of his sources, but he rather wanted to present the rules consistently applied in Barbagia as a legal system on its own, something which is clear already from the title «Barbagian revenge as a legal order», and from the core section of the book where the rules of Barbagian society are presented in the form of a small code («The Code of Barbagian Revenge») of twenty-three articles, divided in three sections, respectively devoted to «General principles», «Offences», «Measures of revenge». It is interesting to stress that the system described by Pigliaru, and corroborated with ethnographic evidence in the volume by Nader & Todd, is not a pure «blood feud» system, but something more complex and with recourse to «blood» only as last resort. The system is based on the assumption that an offence intentionally caused to an individual or a group obliges the member of the community who suffered the offence to react in a proportionate way (which does not always impose the spilling of blood) in order to avoid jeopardizing her honor. In the description made by Pigliaru, and in subsequent ethnographic work, this «obligation to revenge» is the overarching principle from which is derived a complex set of rules and sanctions, which – interestingly enough – can also include the use of state courts, but in a purely instrumental function of «revenge tools».

To what extent the rules described by Pigliaru and its followers still apply in those parts of Sardinia is the object of endless debates based on poor anecdotal evidence or common sense, with almost non-existing empirical basis, because of the scarcity of recent ethnographic accounts. Generally speaking, it is commonly perceived that few acts of violence are now linked to the application of traditional rules, with ordinary acts of criminal violence dominating the scene. Intermittently, the *codice barbaricino* is cited in the context of newspapers coverage of violent crimes, which are alternatively labeled as forms of informal justice, or acts of ordinary criminality disguised under «traditional» forms. As stressed by Pigliaru, the revenge system survived also as the product of the way in which the Italian state expressed itself in Barbagia, which was perceived as being in a situation of outlawry (*banditismo*) that for a long time engaged significant police resources. Social and economic conditions are now much changed, although the dissemination of a state-centered mentality in the most isolated shepherding communities must not be overestimated.

Although the ways in which a part of Sardinian society developed and applied dispute resolution systems different from state courts were described also by other authors (e.g. Gonario Pinna), the impact of these studies on Italian legal scholarship as a whole remained

[1] J.L. Ruffini, *Disputing over Livestock in Sardinia*, in L. Nader & H.F. Todd Jr. (eds.), *The Disputing Process. Law in Ten Societies*, New York, Columbia University Press, 1978, p. 209 ff.

[2] A. Pigliaru, *La vendetta barbaricina come ordinamento giuridico*, Miano, Giuffrè, 1959.

[3] V. Ferrari, *Citizenship and Immigration: Introductory Remarks*, in V. Ferrari, T. Heller, E. De Tullio (eds.), *Citizenship and Immigration*, Milano, Giuffrè, 1998, pp. 3–4.

quite limited, and they tended to be appreciated more within non-legal circles, not so much in terms of research on dispute resolution, but rather in the context of broader debates on the cultural identity of Sardinia, its isolation, and its relationship with the Italian nation state, and on modernization processes. Furthermore, these debates had political implications which made it difficult to speak in an objective and detached way on systems of social control which were not only autonomous from the state but made frequently use of actions definitely illegal from its standpoint.

However, the debate on the Barbagian revenge system had a potentially relevant importance for the study of dispute processing systems in Italy, going beyond the purely local dimension. It was indeed an early opportunity to give intellectual legitimacy to the study of autonomous lawmaking and non-state justice systems, without rejecting them out of the scope of legal scholarship. Pigliaru indeed presented the Barbagian system as a fully legal system and in doing so he relied on the lesson of Santi Romano, a famous legal scholar who worked in Italy in the first half of the century, who already in 1918 advanced a very consistent institutionalist theory, according to which in order to affirm the existence of a non-state legal order it is not necessary to show that this is structurally similar to state law. According to Santi Romano «state» is [...] nothing but a *species* of the *genus* «law»[1], where the latter only assumes the existence of effective legal institutions.

3. The Albanian Kanun system as a potential case of «transplanted traditional justice system»?

It is indeed reasonable to believe that the massive population movements consequent to migration flows can have the effect of «importing» certain social practices, and that these tend to be to a certain degree perpetuated in the new country, at least when immigrant communities keep an inner coherence and tend – at least in an early stage – to keep a certain isolation from the surrounding society. This is clearly an enormous field of expansion for empirical research, and the number of immigrant communities that can be «suspected» of keeping a degree of self-regulation and autonomous dispute resolution is huge.

As mentioned above, the distinction between commonsense and stereotyping can be very thin, and it is often neglected also in learned contexts. Caution must be used before putting on a specific group of immigrants a label of autonomy and self-regulation, which becomes in public opinion synonymous of «non-integration. It is for instance doubtful that «traditional justice» systems exist within groups identified by the simple fact of citizenship or nationality («the Chinese», «the Albanian», and so on). Most often, as in the Sardinian case, such systems can be the expression of very specific local cultures existing within the country or region of origin of the immigrants, according to local peculiarities that are usually unknown in the host country.

That of Albanians in Italy is a good example. Geographical proximity and historical connections have made Albanians one of the most important immigrant communities in Italy. Current government statistics provide a figure of more than 490 000 Albanian official residents (while the actual presence is probably significantly larger), representing the second foreign community in Italy after Romanians. When looking for potential situations of «autonomous justice systems», the dimension of this foreign community, matched with its historical and cultural background, make it an unavoidable case study.

[1] S. Romano, *L'ordinamento giuridico*, Firenze, Sansoni, 3rd ed., 1977 (based on the 2nd of 1946), p. 112.

Such a choice is definitely corroborated by the existence in Italy of a well rooted «popular wisdom», describing Albanians as an ethnic group to a large extent regulated by a set of traditional rules named «Kanun», within which blood feud as dispute resolution system has a crucial role, in the context of a patriarchal and violent society. A simple internet search on Italian sites would provide abundant material of this kind, and in May 2011 a journalistic inquiry in a popular TV show («Le Iene»)[1], which presented what allegedly was the blood feud system applied in Northern Albania, caused a vivid debate and strong reactions from the more cultivated members of the Albanian community living in Italy.

Let's see first briefly the question of the existence of an Albanian tradition of dispute settlement from an Albanian perspective, before moving to the Italian side of the Adriatic Sea in order to assess whether there are serious indicators of a «transplant» of customary dispute resolution systems.

Without the ambition of even a cursory coverage of the subject, we will just attempt here at providing some elements for further reflection, starting from the existing materials. A first element which must be taken into consideration is the delimitation of the area where the presence of customary law usually referred to as the «Kanun» is most often discussed. This does not coincide with the territory of the Republic of Albania, but rather covers an area encompassing parts of Northern Albania, as well as portions of Serbia, Kosovo, Montenegro, Macedonia, inhabitated by populations of Albanian language. In this area, indeed, reliable studies and data[2] report the survival of a customary law system which has one of its pillars in the «blood feud» (*gjakmarrja*) potentially free from kin-groups, and accompanied by a system recognizing to certain persons the right to act as mediators. It is, as in the case of Barbagia, an «honor-driven context», where social control is generated by the desire not to loose the honor (*nder*) of an individual or a family.

In this cultural area it appears that this system of traditional justice still keeps solid roots, and fiercely competes with the state for the monopoly of force and violence. Being perceived as incompatible with modern values of justice and human rights, its survival is perceived by many sections of society and by the government as a problem, and a cause of backwardness and individual oppression. The actual survival in Northern Albania, Kosovo, and the surrounding area of the blood feud system and its «correctors» (mediators, «men of peace») is also frequently quoted in the introduction to the most recent editions of the standard collections of customary rules, usually stressing that the traditional justice system has been kept dormant (in Albania) during Hoxha's regime, and revived after its fall.

In our opinion, caution must be used before affirming that this form of traditional justice is likely to have been transferred to Italy in the context of the massive migration flows of Albanians.

Apart from the absence of precise studies, it must be considered that most of the Albanian speaking community in Italy originates from areas different from those where customary law is rooted. The fact that this system of customary law is often referred to Albanians as, a whole, is partly the effect of careless stereotyping of Albanians made abroad, but partly also the by-effect of identity building strategies developed in these last years in the Balkans, where the Kanun is presented as a part of national culture, and its most present-

[1] Le Iene: *Kanun in Albania: in casa per non morire*, May 25, 2011.

[2] M. Mustafa & A.Young, *Feud Narratives: Contemporary Deployments of Kanun in Shala Valley, Northern Albania*, in *Anthropological Notebooks*, 2008, 14 (2): 87–107.

able parts as elements of a national ethos. For example, it is significant that editions of the most famous compilation of Albanian customary law, the Kanuni i Lekë Dukagjinit made in the 20s' by Father Shtjefen Gjecov, are widely widespread in Kosovo where the quest for an Albanian identity is most urgent.

In the specific case of Italy, the increased visibility of the most famous textual representations of Albanian customary law can build over the reminiscences of the identification Kanun/Albanian identity made during Fascism in order to provide a legitimacy of Italian rule over Albania, which was stretched up to identifying a similarity between customary law and Roman law, «an affinity in the general conception of rights and duties, an affinity which pushed to brotherly bind themselves to Rome»[1].

Although in its specific context of origin (which, again, does not coincide with the Republic of Albania), the blood feud system is still a reality and a problem[2], the now increasingly high degree of integration of Albanian immigrants in Italian society makes, also for them with roots in the relevant regions, quite unlikely to observe a system of traditional justice which originates in a secluded social context.

4. Romani Groups and Dispute Resolution: «Gypsy Law» Italian Style?

Almost unavoidably, the survival of an autonomous justice system that can be fairly classified as «traditional» assumes a degree of separation of the persons using this justice system. This can be a separation created or reinforced by geographic context or economic backwardness (as was the case of Barbagia), or can be of a primarily cultural nature, either self-sustained or imposed by the hostility of the surrounding human environment, or the two things together.

In Italy, examples of groups experiencing this kind of separation can be found within the Romani community, which numbers approximately 190.000 persons, of different national origins, lifestyle, culture and forms of interaction with non-Roma. Amidst a complex story of growing intolerance linked also to the arrival of new communities of Roma from Central Europe, the attention of the media for everything which is Roma-related has been enormously increasing in recent years, and eventually also legal literature started to show an attention for «law and the Roma» as a research field, although contributions are of uneven quality, and often show the marks of old stereotypes and little communication with the advancement of Romani studies of a sociological or anthropological nature[3].

Several among these contributions devote some attention to the existence of specific dispute resolution systems applied by Romani groups, which are described relying on disparate sources derived from materials referring to quite different historical periods and geographical contexts, usually considering Romani justice as an unicum extending without significant changes across borders[4], or using information on one specific Romani group and

[1] E. Koliqi, *Il diritto albanese del kanun e il diritto romano – Lezione tenuta presso il Reale Istituto di Studi Romani in Roma il 27 marzo 1942*, in *Studime e Tekste – Studi e testi*, *Dega I – Serie I, Juridike, N. 1 – Giuridica N. 1*, pubbl. dell' Istituti I Studimevet Shqiptare, 1943, pp. 1 ff.

[2] A recent account is contained in the Albanian-American movie *Falja e gjakut* («The Forgiveness of Blood») directed by Joshua Marston and presented to the 61th Berlin Film Festival.

[3] See for several examples concerning Italy, A. Simoni, *Roma and Legal Culture*, forthcoming in *European Anti-Discrimination Law Review*, 2012.

[4] A paradigmatic example of this approach is represented by an extensive article on «dispute resolution in the law of the Gypsies» published in the Italian leading journal of sociology of law: M. Mazza, *I metodi di risouzione*

using it as a basis for a description of all «Romani justice», assuming that there are certain cultural traits (like «nomadism») that influence the structure of all aspects of Romani societies[1]. According to this view, justice in «Gypsy groups» would be constantly administered by judicial bodies defined *kris* (sometimes translated as «Councils of Justice») competent on controversies of any kind (without distinction between civil or criminal matters) and composed by persons of special reputation and prestige, with the possibility, in some cases, to submit the controversies also to a further body called *diwano*, classified as a «council of the elders». Romani traditional justice would thus express itself in forms that are based on adjudication, rather than mediation or other systems.

In doing so, legal scholarship reinforces a view which coincides with that expressed by those Romani activists who are most visible in Italy, and who are usually part of groups settled in Italy since a long time, primarily in some parts of Central Italy like Abruzzi[2]. These persons indeed provide a view of Romani justice systems which is also based on the kris operating as a court-like body[3], since this is the pattern followed in their specific reality. Italian scholars and activists together thus replicate some of the problems experienced in the US in the context of the famous study of Weyrauch and Bell on «Gypsy Law»[4], which also reproduced without a critical assessment a view of the Romani world based on the content of a specialized literature that, for a series of historical and cultural reasons, is unbalanced towards those groups using adjudicating bodies expressed by the community (the «kris»). In doing so, they neglected the fact that many sections of the Romani world do not have judge-like dispute resolution bodies, but rather apply systems based on potential blood-feud, in some cases temperated by the use of mediators. This system this that is less presentable in legal terms (unless one applies the methodological approach used by Pigliaru for the Barbagian revenge), and less in line with the priorities of some Romani activists who tend to overemphasize uniformity as part of a politically rational strategy of identity building, where the idea of the «Gypsy court» can be often useful.

With regard to a group of relatively recent immigration from Kosovo, the *Xoraxané Romá*[5], the account of a leading Italian anthropologist specialized on the Roma, Leonardo Piasere, gives the picture of a dispute resolution system based on blood feud obligations temperated by the resort to «men of peace» for purpose of mediation. As stressed by Piasere, the justice system practiced at the time of his study by this Romani group had nothing of particularly Romani-specific, but simply reproduced the blood feud system practiced by the Albanian population in Kosovo, that the *Xoraxané Romá* adopted during their stay there.

delle controversie nel diritto degli zingari. Profili di antropologia della giustizia, in *Sociologia del diritto*, 2000, pp. 115 ff.

[1] L. Mancini, *Identità culturale e pluralismo normativo: il caso degli zingari,* in *Società multiculturale e diritto. Dinamiche sociali e riconoscimento giuridico*, Bologna, CLUEB, 2000, pp. 37 ff.

[2] The problems linked to the representation of different Romani populations have been recently discussed in A. McGarry, *Who Speaks for Roma? Political Representation of a Transnational Minority Community*, London-New York, Continuum Intl. Pub, 2010.

[3] B.Morelli & G.Soravia, *I pativ mengr. Il nostro onore. La lingua e le tradizioni dei Rom abruzzesi,* Roma, Centro Studi Zingari, 1998.

[4] W.O. Weyrauch & M.A. Bell, *Autonomous Lawmaking: The Case of the Gypsies,* in *Yale Law Journal*, 103 (1993), pp. 323 ff., now with other writings in W.O. Weyrauch (ed.), *Gypsy Law. Romani Legal Traditions and Culture*, Berkeley-Los Angeles-London, California University Press, 2001. For a presentation and a criticism of this study in an Italian perspective see A. Simoni, *Il giurista e gli zingari: lezioni dalla common law*, in *Politica del diritto*, 1999, pp. 629 ff.

[5] L. Piasere, *Gli uomini di pace dei Xoraxané Romá*, in *Popoli delle discariche*, Roma, CISU, 1991, pp. 37 ff.

Thus, paradoxically, a Romani group provides the best case study of an actual transplant in Italy of a system of traditional justice which is normally considered specific of ethnic Albanian populations.

The encounter between Romani justice and state justice is also often problematic in Italy, not so much in terms of the possibility of giving some sort of official recognition by the state to the decisions of those sitting in the *kris*, a request which has never been advanced insofar, but rather with regard to gross misunderstandings of the factual context that can easily arise when criminal courts have to adjudicate on the behavior of persons who have been involved in actual or potential blood feuds involving their kin groups, which can here also include the use of the recourse to state courts as a means of pressure to obtain what is due on the basis of the rules of the traditional justice system[1].

Neil Andrews[2]

ENGLISH NATIONAL REPORT

Introduction

1. The practice of conducting mediation sessions is fully explained in specialist manuals (or rather suggested methods, since this is a flexible art).[3] It is usual for a mediator to be paid jointly by the parties to the dispute. Free-lance mediators do not enjoy security of tenure. Many UK mediators are «accredited» having received professional training from various private organisations.[4] There is no need for the mediator to have a legal training or qualification. However, in England many commercial mediators are «lawyers»: former barristers, solicitors, or judges, or current lawyers. In 2008 the European Commission issued a directive on the topic[5] and a Code of Conduct for mediators.[6] There is (as yet) no formal system of centralised regulation of mediators.

2. The main points will be:

1) civil proceedings before the courts are becoming a system of last resort to be pursued only when more civilised and «proportionate» techniques have failed or could never be made to work;

[1] An example can be drawn from a criminal proceeding in which the author of this part is currently involved as expert witness, where a prosecution for abduction and rape of a minor is likely to have been activated by a Kosovo Romani family in order to make pressure for the payment of part of the bride price. In this same proceeding, a knowledge by the judge of the obligations of blood feud existing in that context would have, moreover, made quite unrealistic the reconstruction of facts made by one of parties.

[2] Cambridge University Professor (England).

[3] K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, 3rd ed., Tottel, London, 2007, especially ch's 11 ff.; A.J. Stitt, *Mediation: A Practical Guide* (2004); M. Liebmann (ed.), *Mediation In Context*, London and Philadelphia, 2000; D. Spencer and M. Brogan, *Mediation: Law and Practice*, Cambridge UP, 2006, especially ch. 2.

[4] K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide* (2000) 15.3 (not in 2007 ed.).

[5] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

[6] http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0718en01.pdf; for the European Code of Conduct for Mediators: http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.htm.

2) the mediator's role is to act as an independent and disinterested third party and encourage the parties to talk and to move towards a possible agreed settlement;

3) the process of mediation and the outcome of that process – a mediated settlement – can be superior to adjudication of the dispute by a court;

4) mediation has become popular in England;

5) Government has a strong interest in promoting ADR because it is less expensive than civil litigation;

6) this «alternative» form of «civil justice» can operate as a complete substitute for civil litigation, or it can supplement that formal process after court proceedings have begun, and even after judgment has been given but an appeal is pending.

7) mediation is possible only if both parties are willing to discuss their dispute, to examine the merits of their position in good faith, and ultimately to consider making concessions, whether tactical or magnanimous;

8) the court system encourages pursuit of mediation;

9) leverage to consider and to pursue mediation takes the form of a «stay» upon current proceedings or the threat of an adverse costs order;

10) an English court will enforce a mediation agreement by ordering a stay of litigation brought in violation of that agreement;

11) confidential communications during mediation are privileged against compulsory production in legal proceedings; however, the mediator does not enjoy any personal immunity against being compelled by a court to provide information or give evidence concerning a mediation;

12) traditional court litigation will continue because it offers a strong form of dispute-resolution; the court's coercive powers are indispensable in some contexts, especially in claims against fraudulent or uncooperative persons; moreover, court litigation also embodies many values, notably the principle of publicly accessible proceedings and reasoned decisions.

Rise of Mediation

3. In England resort to mediation has increased, including within the heartland of commercial disputes.[1]

4. The Ministry of Justice for England and Wales (2010) reported on this[2]: «There is evidence... that the market for mediation in the UK continues to grow. A recent mediation audit carried out by the Centre for Effective Dispute Resolution (CEDR) showed that there had been nearly 6,000 civil and commercial mediations carried out in 2009[3]. Based on the outcome of the 2007 Mediation Audit, the 2009 figure showed there was a doubling of mediation activity since 2007.' There is a National Mediation Helpline[4], listing mediation providers accredited by the Civil Justice Council (CMC)[5] and a Small Claims[6]. Mediation

[1] K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, London, 2007, especially ch's 5, 6, 7; Neil Andrews, *The Modern Civil Process*, Tübingen, Germany, 2008, ch. 11; Neil Andrews, *Contracts and English Dispute Resolution*, Tokyo, 2010, ch. 22.

[2] Ministry of Justice, *Implementation... Paper*, London, 2010 (a consultation paper), at [10].

[3] http://www.cedr.com/index.php?location=/news/archive/20100513_347.htm

[4] www.nationalmediationhelpline.com

[5] www.civilmediation.org

[6] When the financial value of the claim does not exceed £ 5,000.

service. The Ministry of Justice (2010) reports[1] that «between January 2007 and December 2009 the NMH arranged 1892 mediations, of which 1244 settled – a settlement rate of 66 per cent» and that «in the 12 months to the end of April 2010, the small clams mediation service conducted more than 10,000 mediations, settling 72 per cent, and the vast majority of mediations (>90 per cent) are conducted by telephone, saving parties the time and expense of having to travel to a court building».

Reasons for the Rise of Mediation

5. The rise of mediation, not just in England, is largely attributable better knowledge of mediation, and the continuing and to some extent intrinsic evils of the alternative, court litigation:

(1) the mediation process is now better understood, especially within the commercial sector;

(2) there is official enthusiasm and support for mediation; thus leading judges continue to make speeches extolling mediation, including Lord Phillips, President of the Supreme Court[2], and Lord Clarke, a former Master of the Rolls[3]; the courts also regularly encourage litigants to pursue mediation in appropriate cases;

furthermore, court litigation is:

(3) is unpredictable;

(4) heavy-handed, and a source of expense, delay, and anxiety;

(5) offering little scope for direct participation by the parties, as distinct from legal representatives;

(6) final judgment normally awards victory to only one winner;

(7) public open justice, visible to mankind in general.

Mediation and Avoidance of Costly Litigation

6. Litigation remains expensive. As Buxton LJ in the Court of Appeal in *Willis v Nicolson* admitted in 2007[4]:

«*The very high costs of civil litigation in England and Wales is a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole*».

7. Certainly in England, the rise of mediation, notably in high value disputes, is largely attributable to the sheer expense of traditional court litigation. Bill Gates himself, and other modern-day descendants of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims heard by the High Court.

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[1] Ministry of Justice, *Implementation... Paper*, London, 2010) (a consultation paper), [5] to [9]. See also S. Prince, *ADR after the CPR*..., in D. Dwyer (ed.), *The Civil Procedure Rules: Ten Years On*, Oxford University Press, 2010, ch. 17.

[2] Lord Phillips, *Alternative Dispute Resolution: An English Viewpoint*, Judicial Communications office, London, 29 March 2008: http://www.judiciary.gov.uk/NR/rdonlyres/6BBEAB74-204A-4AED-AC83-0624CC358794/0/lcj_adr_india_290308.pdf

[3] A. Clarke, *The Future of Civil Mediation*, Civil Mediation Counctil, London, May 2008: http://www.judiciary.gov.uk/NR/rdonlyres/927B0C45-8C4D-4A3B-BDF7-5FEB7D8A0D1B/0/mr_mediation_conference_may08.pdf

[4] *Willis v Nicolson* [2007] EWCA Civ 199, at [24].

8. The topic of costs is receiving consideration, following Lord Justice Jackson's «Civil Litigation Costs Review», delivered in December 2009[1].

Mediation Scepticism

9. There is, nevertheless, some scepticism concerning the growth of mediation. In her 2008 Hamlyn Lectures, Hazel Genn[2] criticised the assumption that mediation delivers «justice». She prefers the view that mediation involves loss of the opportunity to receive substantive justice through the court system[3]: *«What mediation is offering is simply the opportunity to discount [legal claims] in order to be spared the presumed misery and uncertainty of the adjudication process»*.

10. Genn questions whether it should be government policy to augment the business of mediators and to reduce court lists. This is her conclusion[4]:

«...there is an interdependency between courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping. A well-functioning civil justice system should offer a choice of dispute resolution methods».

And she adds:

«We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination. This is not impossible. But it requires recognition of the social and economic value of civil justice, an acknowledgement that some cases need to be adjudicated, and a vision for reform that addresses perceived shortcomings rather than simply driving cases away».

The Duty to Consider Mediation[5]

11. Parties can agree that they will go through the mediation door. But even an agreement to mediate, perhaps the highest form of commitment to mediate, can be legally enforced only to the extent that commencement or litigation will be stayed in order to re-open the chance to pursue mediation.

12. Parties might be compelled to consider whether to approach the door (as opposed to peremptorily rejecting this requirement to consider).

13. The parties should be free – until a binding settlement is made – to resile from this process even if they have passed through the door (subject only to the possibility of specific contractual terms, consistent with the doctrine of contractual certainty, such as agreed duties to exchange specific items of information).

14. The line between the obligation to consider and the obligation to enter and participate is crucial. For it would be folly, and ultimately a recipe for tyranny, to insist on attendance before a mediator or to compel participation in a mediation session.

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[1] Sir Rupert Jackson, *Review of Civil Litigation Costs*, December, 2009: London, 2010; on which A.A.S. Zuckerman, *The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System* (2010) 29 *CJQ* 263.

[2] H. Genn, *Judging Civil Justice,* Cambridge University Press, 2010, ch. 3.

[3] Ibid., 119.

[4] Ibid., 125.

[5] S. Shipman, *Compulsory Mediation: the Elephant in the Room* (2011), *CJQ* 163.

15. Lord Justice Jackson, in his «Civil Litigation Costs Review», delivered in December 2009[1], emphasised that mediation cannot be thrust on unwilling parties[2]:

«...I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and (d) to penalise in costs parties which have unreasonably refused to mediate...»

Mediation Agreements[3]

16. Many corporations now prefer to use international arbitration in combination with other ADR mechanisms. Such a combination of techniques will be specified in a «multi-tiered» dispute resolution clause[4].

17. The *Cable & Wireless* case (see below) demonstrates that the contractual commitment to mediate is legally enforceable: if a party, in breach of the resolution clause, fails to pursue mediation, and instead prematurely commences arbitration or court proceedings, the remedy may be to halt the relevant premature adjudicative process.

18. The leading English decision concerning mediation clauses[5] is *Cable & Wireless v IBM United Kingdom Ltd* (2002)[6]. In this case the relevant clause was a so-called «tiered» provision. It initially required the parties to endeavour to negotiate a resolution by considering the relevant dispute within their own organisations. The clause stated that mediation would be obligatory if these negotiations collapsed[7]. Thereafter, the parties to this clause contemplated that, if the dispute were still unresolved, proceedings before a court could take place.

19. After negotiation had failed, one party decided to by-pass the stipulated stage of mediation, and prematurely brought a claim before the English High Court. The other party challenged this. Colman J found that there had been a breach of the dispute resolution agreement, because a party had «jumped» the mediation stage and proceeded straight to litigation. To remedy this, the judge placed a «stay» upon those formal court proceedings. The stay would be lifted if a party returned to court and demonstrated that the mediation attempt had been unsuccessful.

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[1] Sir Rupert Jackson, *Review of Civil Litigation Costs*, December, 2009: London, 2010; on which A.A.S. Zuckerman, *The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System* (2010), 29 *CJQ* 263.

[2] Jackson report, ibid., ch. 36, at para. 3.4.

[3] D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, London, 2005, Part III; K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, London, 2007, ch. 9; Centre for Effective Dispute Resolution at: www.cedr.co.uk/library/documents/contract_clauses.pdf; D. Spencer and M. Brogan, *Mediation: Law and Practice*, Cambridge University Press, 2006, ch. 12 for Australian material.

[4] The School of International Arbitration, Queen Mary, University of London, report (2005), available on-line at: http://www.pwc.com/Extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8. I am grateful to Stephen York for this reference.

[5] D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, London, 2005, Part III; K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, London, 2007, ch. 9; Centre for Effective Dispute Resolution at: www.cedr.co.uk/library/documents/contract_clauses.pdf; D. Spencer and M. Brogan, *Mediation: Law and Practice*, Cambridge University Press, 2006, ch. 12 for Australian material.

[6] [2002] 2 All ER (Comm) 1041, Colman J.

[7] Generally, K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, London, 2007, 9.6.4.

20. But, although the stay was appropriate in this case, the judge said that this would not always be so: «For example, there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise».

21. However, in some contexts, statute prohibits exclusion of formal recourse to state-administered courts or tribunals. For example, in *Clyde & Co v Bates van Winkelhof* (2011) Slade J considered a clause[1] within a partnership deed requiring a partner in a law firm to refer any disputes or differences arising from her work for the firm to mediation and then to arbitration. The partner had brought complaints to an Employment Tribunal alleging various statutory breaches by her law firm of equality law, and seeking compensation. Slade J concluded that the High Court could not grant an injunction compelling her to desist from pursuing these Employment Tribunal proceedings. Statute[2] clearly precluded «contracting out» from this tribunal system of rights.

Other Sources of the Duty to Consider Mediation

22. England has not adopted mandatory mediation as a precondition to commencement or continuation of court litigation.

23. The CPR states that: «the courts increasingly take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still likely. Therefore, the prospective parties should consider whether some form of alternative dispute settlement would be more suitable than litigation, and if so, endeavour to agree which form to adopt»[3]. There is also a general «tick box» invitation in the Allocation Questionnaire, enabling each party to indicate whether mediation might be an option.

[1] «41.1 If at any time there is a dispute, difference or question that shall arise between the Members or between the LLP and the Members (including any Outgoing Member or his personal representatives), or any of them, touching the membership of the LLP? or the rights and liabilities of the Members? (together «Referred Matters»), then the Member or Members involved in such dispute, difference or question («parties') shall deal with it as provided in this clause and clause 41.2 below. The matter shall be immediately referred by any of the parties to the Management Board requiring it to meet and to make a decision on the relevant matter within 28 days of the matter being so referred to the Management Board («Decision Period»). The Management Board shall meet and discuss the relevant matter with a view to resolving the issue in a sensible and fair manner. If the Management Board reaches agreement with the parties within the Decision Period the Members agree that such agreement be promptly implemented. If the Management Board fails to agree on any matter within the Decision Period or if the dispute is with the Management Board itself then clause 41.2 below shall apply.

41.2 If a dispute still remains after the application of 41.1 above, including any question regarding the Referred Matters or the application of this dispute resolution procedure, then the parties agree first to refer the matter to the Centre for Dispute Resolution (CEDR) in an attempt to settle the dispute in good faith by Alternative Dispute Resolution (ADR). If the dispute is not settled within 30 days of the request to CEDR by one of the parties, or such further period as the parties shall agree in writing, either party may require that the dispute be referred to and finally resolved under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause 41.2, save that the parties preserve the right to appeal or to refer to the English Courts on questions of law which shall have jurisdiction in such circumstances. The Members and the LLP reserve all their respective rights in the event that no agreed resolution shall be reached in the ADR procedure and none of them shall be deemed to be precluded from taking such interim formal steps as may be considered necessary to protect such person›s position while the ADR procedure is pending».

[2] Equality Act 2010, s 120 and the Equality Rights Act 1996, s 203.

[3] «Practice Direction-Protocols» 4.7.

24. English judges do not themselves conduct mediation during the course of pending court litigation.

25. The English courts' overall responsibility to administer civil justice includes «helping the parties to settle the whole or part of the case»[1] and «encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate»[2].

26. English judges normally wait for a party to suggest that the dispute should be referred to an external mediator. The court might then endorse this as appropriate for this particular case. If so, the court can place a case in suspense (a «stay») while that alternative process is pursued. The court can also issue a recommendation that mediation be considered. Each party will then have a duty to consider mediation.

27. Occasionally, however, a judge might spontaneously recommend to both parties that mediation should be attempted. Again, the duty to consider will then arise.

28. But the courts are not engaged in compelling actual pursuit of mediation, merely in inducing reflection on the possible merits of mediation in that particular case.

29. Thus in the *Halsey* case (2004), Dyson LJ commented[3]:

«It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. ... If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR.

But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. Parties sometimes need to be encouraged by the court to embark on an ADR...

[We] reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust...»

30. Even in the absence of a mediation agreement, an English court can direct that the proceedings be stayed for a month at a time[4] while the parties pursue ADR or other settlement negotiations[5]. A stay merely places the proceedings in a state of suspense. Proceedings can be resumed when this becomes appropriate. The stay can be issued either at the parties' request or on the initiative of the court. The matter is subject to the court's discretion. There is no automatic right to a stay.

31. The English position involves selective judicial recommendation of mediation[6].

32. In the Commercial Court (a part of the Queen's Bench Division, in the High Court), the practice is that a judge will not require the parties to mediate unless one party makes such a request and the suggestion seems to the judge to be reasonable. Parties to litigation in that court are regarded as «sophisticated». They enjoy legal advice concerning the range of dispute-resolution available to them. It would be unduly heavy-handed, therefore, for

[1] CPR 1.4(2)(f).

[2] CPR 1.4(2)(e); Chancery Guide (2005), ch. 17; Admiralty and Commercial Courts Guide (2009), section G and appendix 7 (available on the CPR webpage under «Guides»).

[3] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [9] to [11].

[4] CPR 26.4(3).

[5] CPR 3.1(2)(f); CPR 26.4(1)(2).

[6] For sceptical discussion of any form of mandating or coercing resort to mediation, Matthew Brunsdon-Tully, *There is an A in ADR but Does Anyone Know What it Means Anymore?* (2009), *CJQ* 218–236.

a judge to insist on a stay if neither party has an interest in mediation (2009 conversation with a Commercial Court judge).

33. However, wider language appears in the Admiralty and Commercial Court Guide (2009), which does not rule out judicial initiative[1]: «The Commercial Judges will in appropriate cases invite the parties to consider whether their dispute, or particular issues in it, could be resolved through ADR». Where mediation seems appropriate, the court has devised a formula (rather misleadingly called an «ADR Order») designed to achieve consensus on the nomination of a mediator, and to require reasons to be given to the court for failure to proceed[2].

34. In the *Halsey* case (2004), Dyson LJ explained[3]:

«An ADR order made in the Admiralty and Commercial Court...is the strongest form of encouragement... however, that this form of order stops short of actually compelling the parties to undertake an ADR».

35. Automatic referral systems were piloted in some English courts, in recent times, although litigants were allowed to opt back into the court system, on giving reasons. Hazel Genn has made an official study of this series of experiments. She said[4]: «*Automatic Referral to Mediation was not interpreted by most solicitors as compulsory and many regarded opting out [so as to resume litigation] as a mere bureaucratic hurdle. Considered objections for opting out included the timing of the referral, the intransigence of the opponent, the subject matter of the dispute, and a belief that mediation was unnecessary because the case would settle*».

Costs Sanctions for Failure to Pursue Mediation

36. English courts are prepared, where appropriate, to register censure of a party's unreasonable refusal to engage in mediation. That refusal might be failure to accede to the opponent's call for mediation, or the court's own suggestion, that mediation be contemplated. Indeed in the Court of Appeal in the *McMillan* case (2004) said that if both parties to an appeal spurn the judicial recommendation that mediation be considered, and instead they proceed straight to appeal without attempting mediation, each party will bear its own

[1] Admiralty and Commercial Courts Guide (2009), at G1.3.

[2] Ibid., Appendix 7: *On or before [*] the parties shall exchange lists of 3 neutral individuals who are vailable to conduct ADR procedures in this case prior to [*]. Each party may [in addition] [in the alternative] provide a list identifying the constitution of one or more panels of neutral individuals who are available to conduct ADR procedures in this case prior to [*].*

On or before [*] the parties shall in good faith endeavour to agree a neutral individual or panel from the lists so exchanged and provided.

Failing such agreement by [*] the Case Management Conference will be restored to enable the Court to facilitate agreement on a neutral individual or panel.

The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [*].

If the case is not finally settled, the parties shall inform the Court by letter prior to [disclosure of documents/exchange of witness statements/exchange of experts' reports] what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed. If the parties have failed to initiate ADR procedures the Case Management Conference is to be restored for further consideration of the case.

[3] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [30].

[4] H. Genn, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*, Ministry of Justice Research Series, 1/07: London, 2007, at p. iii; H. Genn, *Judging Civil Justice,* Cambridge University Press, 2010, 107.

costs for that stage of the proceeding, with no opportunity for costs-shifting in favour of the victorious party to the appeal[1].

37. Adverse costs decisions («sanctions») apply if a party fails to satisfy the duty to consider. Such costs sanctions are only justified if a party has failed genuinely and for objectively unsatisfactory reasons to consider properly the opportunity for mediation.

38. In determining the unreasonableness of a party's refusal to pursue mediation, the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust* (2004) listed the following criteria:[2] *«... the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and attending the ADR would be prejudicial; whether the ADR had a reasonable prospect of success*».

39. Shirley Shipman has considered the difficult issue whether the threat of an «adverse costs award» for «unreasonable refusal» to accede to an opponent's mediation suggestions might be contrary to the right of access to court implicit within Article 6(1) of the European Convention on Human Rights. Her tentative suggestion is that this is no more than a possibility[3].

40. It will be more common to apply a costs sanction against a party who not only refused to consider mediation but who also lost the substantive case (or appeal). This type of «refusenik» might be ordered[4] to pay the other side's costs on an «indemnity basis» rather than «standard basis»[5]; indemnity costs, although not punitive, are a full measure of compensatory costs; whereas standard basis costs are a substantial but incomplete measure of such compensation; and the difference between the two measures can be very large, given the high levels of costs incurred by parties in England).

41. An intermediate situation concerns the party B who has lost in a narrow sense, but who has won most of the points pleaded by the opponent, A. Normally B might expect costs to be weighted in his favour. But he will lose this costs advantage if he has unreasonably spruned party A's mediation overtures. This occurred in *Rolf v De Guerin* (2011)[6]. The Court of Appeal made a costs decision adverse to a party who spurned an opponent's mediation overtures. In this case the claimant nominally won the action against a builder, in the sense that she recovered damages from him, but she lost on most of the pleaded contentions. However, the defendant had spurned the claimant's suggestion that they should seek to resolve their dispute by mediation. The Court of Appeal regarded this last factor as crucial

[1] *McMillan Williams v. Range* [2004] EWCA Civ 294; [2004] 1 *WLR* 1858, per Ward L.J.: «[29] Tuckey LJ gave this information for or directions to the parties when he granted permission to appeal: «The costs of further litigating this dispute will be disproportionate to the amount at stake. ADR is strongly recommended». ...The parties should have written to each other along the lines that, «Lord Justice Tuckey has very sensibly suggested ADR. My client thinks that is a splendid idea. Please can we get on with it as soon and as cheaply as possible?»... [30] ... In my judgment this is a case where we should condemn the posturing and jockeying for position taken by each side of this dispute and thus direct that each side pay its own costs of their frolic in the Court of Appeal. I would allow the appeal with no order for costs».

[2] [2004] EWCA Civ 576; [2004] 1 *WLR* 3002, at [16] ff.; for a strong application of this costs regime, in which the *Halsey* criteria were fully considered, *P4 Ltd v. Unite Integrated Solutions plc* [2006] EWHC 2924 (TCC), Ramsey J.

[3] S. Shipman, *Aalternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court*, in D. Dwyer (ed.), *The Civil Procedure Rules: Ten Years On,* Oxford University Press, 2010, ch. 18, especially at 353–354.

[4] *Virani Ltd v. Manuel Revert y Cia SA* [2003] EWCA Civ 1651; [2004] 2 Lloyd's Rep 14.

[5] On the difference between standard basis and indemnity costs, Neil Andrews, *The Modern Civil Process*, Tübingen, Germany, 2008, 9.12.

[6] [2011] EWCA Civ 78 [2011] NPC 17.

to its decision to declare an overall «costs stale-mate»: each party to bear its own costs. It appears that if the claimant had not made mediation overtures, the court would have made an award of costs substantially in favour of the defendant. This would have reflected an issue-by-issue tally of the latter's overall success in winning key issues at trial.

42. As for costs sanctions against a party who has clearly won the relevant court proceedings, the «mediation offeror» (who has lost the case) will bear the burden of showing on the balance of probabilities that the mediation would have had a reasonable prospect of success, assuming the mediation offeree (who eventually won the case) would have participated in the mediation in a co-operative[1]. Satisfying this burden of proof will be an uphill task. In the *Halsey* case, Dyson LJ explained[2]:

«*... The burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success.... the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation*».

Costs Sanctions for Spurning a Judicial Recommendation That Mediation Be Considered

43. The question of a costs sanction against a victorious party is more likely to arise when the party to be sanctioned has rejected a judicial recommendation for mediation (as distinct from a suggestion made by the other side). In this context, robust costs sanctions are likely to be applied if the court (notably the Court of Appeal), when granting permission to appeal, has simultaneously indicated that the parties should consider mediation. If one party fails to respond positively to such a judicial recommendation, the appeal court, when considering the question of costs at the conclusion of the appeal, might deny that party the costs of the appeal even if he has been successful on the merits of the appeal. But it is submitted that costs sanctions are unjustified if the relevant party to the appeal convinces the court that he has considered properly the opportunity to mediate but he has then chosen to bring or respond to the appeal for objectively satisfactory reasons. Once the court is satisfied that the party did properly consider the mediation option, there should be no scope for sanctions.

44. The Court of Appeal in *Dunnett v. Railtrack plc* (2002)[3] chose to disallow the victorious party its costs in the appeal. This costs sanctioning decision was based on the court's perception of the «tactical merits» of the contest.

45. In this case the claimant alleged that, as a result of the defendant company's negligence or other legal breach, her three horses had escaped from their field onto the defendant's track. They had then been killed by an express train travelling down the defendant's track. At trial the claimant lost.

46. After the trial, the defeated claimant sought permission to appeal. This application was considered by reference to documents, without an oral hearing. Schiemann LJ granted permission but added a recommendation that the parties should pursue ADR. In response to this suggestion, it appears that Mrs Dunnett, the appellant/claimant, expressed some willingness to pursue this path. But the company took the view that the formal legal merits of the dispute were clearly in its favour.

[1] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002.

[2] [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [25] to [28].

[3] [2002] 1 WLR 2434, CA, at [13] ff.

47. Although that company was successful in the appeal, the Court of Appeal considered that the company had unjustifiably refused to engage in judicially-recommended mediation[1]. This can be justified only on one of two bases: first, that the litigant had spurned the judicial recommendation as a knee-jerk response, without proper consideration, perhaps even adopting a contumelious attitude (it is very doubtful whether the company had been this foolish!); or, secondly, if it could be shown that mediation would have achieved a settlement because the real contest was not about money but achieving an apology.

48. However, it is more plausible to suppose that the case concerned both money and a wish to demonstrate publicly that the defendant had been culpable. Therefore, the Court of Appeal's costs decision is puzzling and unconvincing. Railtrack seems to have discharged the limited duty to consider mediation. And so there was no legitimate scope for a sanction.

Privileged Mediation Discussion[2]

49. It has long[3] been recognised that non-mediated settlement negotiations can be privileged. This is known as «without prejudice» privilege[4]. In *Cumbria Waste Management Ltd v. Baines Wilson* (2008) it was held that mediated settlement discussions between parties X and Y remain privileged if X or Y is unwilling to waive privilege[5]. *Brown v. Rice* (2007) confirms that a party to a mediated settlement, no less than an unmediated settlement, can adduce the contents of settlement negotiations to prove whether a settlement was reached and to ascertain its terms[6].

50. When the parties have waived privilege in their mediation communications, and the question concerns assessment of costs in litigation subsequent to an unsuccessful media-

[1] [2002] 1 WLR 2434, CA, at [16], per Brooke LJ (in exercise of the broad discretion concerning costs contained in CPR Part 44); for a similar decision, *McMillan Williams v. Range* [2004] EWCA Civ 294; [2004] 1 WLR 1858.

[2] Literature concerning *privilege in the context of mediation or conciliation*: A.F.C. Koo, *Confidentiality of Mediation Communications* (2011) *CJQ* 192; Neil Andrews, *English Civil Procedure* (2003) 25.45 to 25.48; Neil Andrews, *The Modern Civil Process*, Tübingen, Germany, 2008, 11.49 to 11.61; Neil Andrews, *Contracts and English Dispute Resolution*, Tokyo, 2010, 22.20 ff.; Brown and Marriott *ADR Principles and Practice*, 2nd ed., 1999, 22-079 to 22-097; *Cross and Tapper on Evidence*, 11th ed., 2007, 507-8; K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, 3rd ed., Tottel, London, 2007, 7.2 ff.; B. Thanki (ed.), *The Law of Privilege* (2006) 7.24, 7.38 to 7.39; for USA and Australian sources, P. Newman, in M. Liebmann (ed.), *Mediation in Context*, 2000, London and Philadelphia, 188; see also D. Spencer and M. Brogan, *Mediation: Law and Practice*, Cambridge UP, 2006, ch. 9, noting esp. at 329, Australian legislation on this topic; for general comment, Scottish Law Commission's Report, *Evidence: Protection of Family Mediation* [1992] SLC 136 (Report) (June 1992) (containing notes on the draft Bill); the Civil Evidence (Family Mediation) (Scotland) Act 1995; see also comments from various sources collected by Brown and Marriott, ibid. (2nd ed., 1999) 22-089 to 22-091, and the symposium in (1988) 12(1) Seton Hall Legis J.

[3] On the development of this privilege, D. Vaver, *«Without Prejudice» communications-their admissibility and effect* (1974) *Univ Brit Col L Rev* 85 (cited by Robert Walker LJ in *Unilever plc v. The Proctor & Gamble Co* [2000] 1 WLR 2436, 2445, CA).

[4] Neil Andrews, *English Civil Procedure* (2003) ch. 25; Brown and Marriott, *ADR Principles and Practice* (2nd ed., 1999) 22-050 ff.; *Cross and Tapper on Evidence* (12th ed., Oxford University Press, 2010) 472 ff; D Foskett *The Law and Practice of Compromise* (7th ed., 2010), ch 22; C Hollander, *Documentary Evidence* (10th edn, 2009) ch. 16; M Iller, *Civil Evidence: The Essential Guide* (Sweet & Maxwell, 2006), 8-88 to 8-104; P. Matthews and H. Malek, *Disclosure* (3rd ed., London, 2007), 11.121 ff.; *Phipson on Evidence* (17th ed., 2010) 24-18 ff.; C. Passmore, *Privilege* (2nd ed., 2006) ch. 10; B. Thanki (ed.), *The Law of Privilege*, Oxford University Press, 2006, ch. 7; *Zuckerman on Civil Procedure* (2nd edn, 2006) ch. 16; see also J. McEwan, *«Without Prejudice»: Negotiating the Minefield* (1994) 13 *CJQ* 133.

[5] [2008] EWHC 786 (QB) (HH Judge Frances Kirkham sitting as a High Court Judge).

[6] [2007] EWHC 625 (Ch) Stuart Isaacs QC.

tion, Jack J in *Carleton v. Strutt & Parker* (2008) has declared that the courts will consider the «unreasonableness» of positions taken in the mediation[1].

51. Article 7 of the European Mediation Directive (2008) states that the mediator is compellable if both parties agree otherwise[2]. The Directive is right not to accord mediators «autonomous» privilege. Mediators should not have an evidential immunity (exercisable against the parties and against third parties generally) which would continue to protect them even if the parties have already waived privilege in the relevant material.

52. And so, once the parties have waived privilege[3], the mediator is compellable to give evidence. The reasons for this are: first, the mediator is not empowered in the manner of a judge or arbitrator to make binding determinations (judges enjoy substantive immunity; and arbitrators under English law have a qualified immunity from civil liability)[4]; secondly, autonomous mediator privilege would indirectly shield mediators from substantive liability for misconduct during the proceedings; if such substantive immunity is to be created, its merits should be directly debated and not achieved by an evidential side-wind.

53. Consistent with this, in *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)* (2009)[5] Ramsey J upheld a witness summons requiring a mediator to give evidence on the question whether a settlement achieved during the relevant mediation had been procured by duress by a party to that settlement. He distinguished[6]: (1) express confidentiality clause, including a right of confidentiality in favour of a mediator (not the same as a head of privilege); (2) implied rights of confidentiality (not the same as a head of privilege); (3) «without prejudice» communication privilege (a privilege held by the parties, but not by the mediator); and (4) an express clause precluding the parties from calling the mediator as a witness (this was held not to create a separate head of privilege or immunity).

Concluding Remarks

54. *Limits of Alternative Dispute Resolution*: The court system of civil litigation is sometimes needed because some types of dispute are unsuitable for the co-operative style of mediation or even the consensually authoritative award-making process of arbitration. This is because courts enjoy much greater coercive powers than arbitrators or mediators,

[1] [2008] EWHC 424 at [72]; noted on this point by J Sorabji (2008) 27 CJQ 288, 291-2.

[2] Article 7 «Confidentiality of mediation': Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except: where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

[3] Waiver by «mutual conduct' occurred in *Hall v. Pertemps Group Ltd* [2005] EWHC 3110 (Ch); *The Times* 23 December 2005, Lewison J; but implied waiver will not be readily inferred, *Smiths Group plc v. George Weiss* [2002] EWHC 582 (Roger Kaye QC, sitting as a High Court judge).

[4] s 29, Arbitration Act 1996 (this immunity does not extend to conduct or omissions «in bad faith' nor to the consequences of resignation).

[5] [2009] EWHC 1102 (TCC); [2009] BLR 399; 125 Con LR 154.

[6] [2009] EWHC 1102 (TCC); [2009] BLR 399; 125 Con LR 154, at [44], and at [45] ff.

whose powers are subtler and largely moral. Thus state-supported litigation before the civil courts is subject to strong sanctions: courts can compel witnesses to attend, punish perjury, enforce judgments, and apply their contempt of court power if injunctions are flouted; and the court system can protect parties against the other's non-compliance or bad faith, including provision of protective measures such as freezing injunctions. For these reasons the formal civil process is important, even indispensable, in some contexts[1]. Furthermore, the judicial process can establish legal precedents. And it can be used to obtain effective justice against fraudsters and deliberate defaulters. Neither category of defendant is likely to participate constructively in mediation, other than as a cynical means of postponing judgment day. Furthermore, civil litigation before the courts, especially trial within the Anglo-American tradition, involves important attributes of «public» justice: an accessible demonstration of forensic integrity and rigour, and the opportunity for wrongdoers to be held publicly accountable[2].

55. *Potential Litigants' Choice*: The legal process, like the political system, is a democracy. If voters prefer one political party to another, they can do so at the ballot-box. If the court system, or a particular type of court, proves unattractively expensive, or its process lacks proper focus, those who have a choice – citizens, companies, including foreign companies, and even public authorities – will elect to go elsewhere. It is for this reason that Committees of «Courts Users» are important. For judges can then receive critical feedback on the quality of their general administration of civil justice – avoiding, of course, official comment on individual cases. Admittedly, not everyone can choose to avoid the court system. But among those with the power of choice, there is a clear tendency for potential litigants in England to prefer to avoid formal civil litigation before the courts by inclusion of arbitration clauses, or mediation clauses, or by ex post facto resort to either technique, and of course the disputants can decide to reach a settlement with or without mediation, arbitration, or adjudication.

Jerome A. Cohen[3]

CHINESE NATIONAL REPORT

The adoption on March 14, 2012 of major revisions to the Criminal Procedure Law of the People's Republic of China (PRC) was perhaps the country's most important legal development in recent years. During the long drafting period, literally dozens of its provisions and omissions were the subjects of great controversy in informed government, professional and academic circles. Now, they continue to be controversial as officials and authoritative scholars prepare to interpret and implement the new provisions, which go into effect on January 1, 2013, and lawyers prepare to test them.

[1] K. Mackie, D. Miles, W. Marsh, T. Allen, *The ADR Practice Guide*, 3rd ed., Tottel, London, 2007, 3.4.1.

[2] For comment (and further references to literature) on the «public' dimensions of the civil court process, H. Genn, *Understanding Civil Justice* (1997), 50 *CLP* 155, 186–187 and Peter L. Murray (Harvard), *The Privatization of Civil Justice* (2007), 12 *ZZP Int* 283–303 (*Zeitschrift Für Zivilprozess International*: *Germany*).

[3] Professor at New York University's School of Law (USA).

China's Criminal Procedure Law (CPL) is sometimes called as «mini-constitution», because the actual constitution of it as it is of little practical significance, especially concerning criminal justice. China's courts are not permitted to interpret and apply constitutional provisions, and the Standing Committee of the National People's Congress, which is the exclusive authorized vehicle for explicating and enforcing constitutional rights, has been virtually inert in this respect. Thus, it is the CPL to which Chinese nationals, over 20% of the world's population, and all foreigners in China must look for hopefully enforceable norms articulating and restricting the exercise of government power in criminal matters. And it is the CPL that reflects the extent to which the Chinese Communist Party accepts international standards, or at least aspirations, for fundamental fairness in the criminal process.

This entire conference could be devoted to consideration of the many complex questions presented by the newly-revised CPL. Technically, it is an amended version of the CPL adopted in 1996, which itself had substantially revised the PRC's first CPL adopted in 1979. Prominent among the topics deserving analysis are the presumption of innocence; the privilege against self-incrimination; protections against arbitrary search, arrest and detention; notification to family of the fact of, reasons for and place of detention; the timing and scope of access to counsel; prohibitions against torture and exclusion of illegally-obtained evidence; the elements of a fair trial including the appearance of witnesses in court and the right of cross-examination; adjudication by a politically independent tribunal; impartial and adequate appellate review, including review of capital cases; and special procedures for dealing with juveniles, mental illness, national security, terrorism and massive bribery.

Yet the theme of this conference – mediation's role in the resolution of various types of disputes – was not neglected by the draftsmen of the new CPL. Although mediation may not be as compelling a subject as the more publicized issues usually associated with civil liberties, it has long been recognized as a principal feature of the Chinese legal system, past as well as present – «feudal», «bourgeois» or «socialist». Indeed, the last decade has witnessed increasing preoccupation with the mediation of not only civil disputes but also criminal disputes, and especially a particular form of mediation called «criminal reconciliation» or, more specifically, «offender-victim reconciliation».

To be sure, in China this type of dispute resolution is new in name, but not in practice. The situation is a bit like that of the youth who discovers that he has been writing prose all his life. As Chinese scholars frequently recognize, for millennia Chinese have been informally settling criminal-type disputes, as well as others, with the help of third parties. In this paper, «mediation» is a convenient, compendious way to encapsulate the spectrum of techniques short of formal adjudication that Chinese third parties have used to facilitate such settlements. Traditionally, their procedures have ranged from merely getting the parties together or acting as a go-between for them to proposing terms of settlement and even putting the parties under great pressure to accept the proposed terms. In imperial China, which did not classify cases as «civil» or «criminal», much of this mediation was conducted in the name of Confucian harmony outside the official judicial process by village, clan and guild leaders[1].

[1] See Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 *Cal. L. Rev.* 1206 (footnote 28), 1223 (1966).

Today, however, when Chinese Communist spokesmen refer to their nation›s great mediation tradition, they often mean the very substantial extent to which Communist leaders, law enforcement officials and judges emphasized this form of dispute resolution in the «liberated areas» of China that the Communists governed for some two decades before they gained nationwide power in 1949. The total population of those areas, by 1945, had reached ninety million people, most of whom were living in rural, often primitive, conditions that presented significant challenges to governance. It was in those areas that the Chinese Communist Party shaped its attitudes toward law, the legal system and dispute resolution and began to transform inherited imperial era mediation into an instrument for modernizing society and achieving social control according to the Party›s revolutionary purposes[1].

During the six decades since establishment of the People›s Republic of China (PRC), the Party has struggled to introduce profound political, economic and social changes to the entire nation, and, following a tortuous path, has constructed «a socialist legal system with Chinese characteristics» to promote those changes. In the course of these efforts, the prominence of mediation has waxed and waned. For roughly a decade prior to 2005, legal policymakers focused mainly on enacting substantive laws, strengthening legal institutions and procedures for implementing those laws and educating and training the personnel required to staff this formal legal system. Considerable attention was devoted to improving the courts and their adjudication of civil, criminal and administrative cases.

We are now in an era, since 2005, when the Party has again raised high the Red banner of the vaunted mediation tradition of the «liberated areas», apparently in the hope of bolstering its political and ideological campaign to establish a «harmonious society» as well as easing the burdens of overworked courts. Correspondingly, it has de-emphasized the role of courts and formal adjudication, despite the increasingly sophisticated economic and social circumstances of the world's largest population and its second largest economy and land mass and despite the increasing availability of well-trained Chinese judges, prosecutors, legal officials and lawyers.

In the criminal justice field, the Party's recent resurrection of Confucian «harmony» has supported two other new and related trends that have helped to stimulate interest in mediation and criminal reconciliation. Regarding punishment, Party legal officials and scholars trumpeted a policy of «combining leniency and severity» that is especially relevant to efforts to reduce the vast number of executions that have stained China's reputation but that is also deemed to be applicable to lesser punishments. At the same time, the past decade has witnessed a growing Chinese preoccupation with providing greater satisfaction to crime victims, who have long been neglected by society and the legal system, in China as well as elsewhere.

In recent years, criminal reconciliation, a sub-species of mediation, has been increasingly recognized in China as a topic deserving legislative consideration, if not immediate regulation. Although there has been no consensus among influential scholars, officials and lawyers about the proper definition of the practice or even the theoretical articulation of the concept, there has been growing appreciation of the fact that practice, albeit largely undocumented and little studied, has far outstripped theory in this respect. A variety of

[1] Cohen, op. cit. at 1205, footnote 24 citing Ma Hsi-wu, *The People's Judicial Work in the Shensi-Kansu-Ninghsia Border Area During the Stage of the New Democratic Revolution, 1955* (1) *Political-Legal Research*, 7, 12–13. Footnote 25 citing Wang Min, *The Major Significance of the People's Adjustment Work in Resolving Contradictions Among the People,* 1960 (2) *Political-Legal Research*, 27–28. See Chen Guangzhong & Ge Lin, *Preliminary Exploration of Criminal Reconciliation*, 5 *Chinese Legal Science* 7 (2006). Chen Guangzhong, *Further Exploration of Criminal Reconciliation*, 2 *Criminal Science* 4 (2010).

mostly official or semi-official third parties appear to have been playing roles in mediating criminal cases of all types, leading to widespread interest in how to analyze this reality and relate it to «the socialist rule of law».

Not surprisingly, these circumstances generated a great deal of academic and law reform activity relating to criminal reconciliation. In 2006, China's leading authority on criminal procedure, the legendary professor Chen Guangzhong of the Chinese University of Political Science and Law, included a criminal reconciliation provision in the Expert Opinion Draft for a Revised Criminal Procedure Law published by a research group that he headed[1]. That same year he and a colleague also published an essay seeking to bring some analytical clarity to the suddenly mushrooming subject[2].

Their essay added to the scholarly fermentation process by advocating that a distinction be made between criminal mediation and criminal reconciliation, depending on the degree of active involvement of the third party assisting with dispute resolution. Mediation, they maintained, should refer to situations featuring the active intervention of a third party, while criminal reconciliation can be achieved largely by the parties themselves, with only the passive, limited participation of a third party, if at all.

As will be discussed later in this article, for the next five years, while the official process for drafting a revised CPL and the academic debates over criminal reconciliation continued, China›s judicial departments undertook increasingly formal steps to guide developments, and a few scholars launched empirical research to better understand what was taking place[3].

The New Legislative Chapter

Against this background, it is not surprising that the 2012 Revised CPL has a new chapter entitled: «Procedures for Reconciliation Between Parties in Public Prosecution Cases». Its three rather short articles deserve our attention[4]. The first, Article 277, provides:

«Where the suspect or defendant sincerely expresses his or her remorse for the crime and obtains the forgiveness of the victim through compensation for the loss, making an

[1] Chen Guangzhong & Ge Lin, *Preliminary Exploration of Criminal Reconciliation*, 5 *Chinese Legal Science* 11 (2006). Professor Chen referred to his book, 中华人民共和国刑事诉讼法再修改专家意见稿与论证 [*Expert Draft for Re-Amendment to the Criminal Procedure Law of the People's Republic of China and Its Annotations*] China Legal Publishing House 8 (Chen Guangzhong ed., 2006). (Article 20 provides that, if the suspect or the defendant has reconciled with the victim or the victim's close relatives, the People's Court, the People's Procuratorate, and the public security bureau may consider the parties' will to reconcile and decide, depending upon specific circumstances of a case, not to pursue the suspect's criminal liability, to sentence the defendant to a lesser punishment, or exempt the defendant from punishment according to law.)

[2] Ibid., Chen & Ge.

[3] Song Yinghui el al., *An Empirical Study on Criminal Mediation in Public Prosecution Cases*, 3 *Chinese Journal of Law* 3 (2009). This most widely-recognized empirical study was led by Professor Song Yinghui of Beijing Normal University. The project spanned from Sept. 2006 to Dec. 2008. The research team conducted field surveys in Zhejiang, Shanghai, Jiangsu, Hebei, Shandong, Hainan, and Hunan provinces. The interviewees were judges, prosecutors, police officers, and other judicial administrative staff. Questionnaires were issued to legal professionals and the public in Beijing, Shandong, Hebei, Jiangsu, Zhejiang, Anhui, Guangdong, Xinjiang, Tibet, Gansu, Jilin and Liaoning, as well as to judges in the National Judges College, prosecutors in the National Prosecutors College and police officers in the Chinese People's Public Security University. Methods also included tests and observations.

[4] Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China (2012) (promulgated by the Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), art. 108. The Criminal Procedure Law of 2012, art. 277–279.

apology or other means, and the victim voluntarily wishes to reconcile, the two parties may reconcile in the following public prosecution cases:

(a) Cases of a crime caused by a civil dispute and suspected to fall under chapters 4 and 5 of the Special Provisions of the Criminal Law for which a term of imprisonment of three years or less may be imposed;

(b) Cases of a crime of negligence for which a term of imprisonment of seven years or less may be imposed, except for crimes of breach of official government duty.

«Where the suspect or defendant has committed an intentional crime within the previous five years, the procedures prescribed in this chapter shall not apply».

At the outset, one must note that this provision is limited to certain cases of «public prosecution». Since its inception in 1979, the CPL has always contained an authorization for courts to mediate most disputes between the parties in cases of private prosecution, and this provision has been retained in the newly-revised version[1]. The new version endorses, for the first time in criminal legislation, judicial mediation of civil suits that are affiliated with criminal prosecutions, a practice that had been authorized by judicial interpretation in 1998[2].

Another part of the 2012 CPL contains a new provision authorizing what often amounts to, but is not called, plea bargaining in cases that fall into the category deemed appropriate for «summary jurisdiction»[3]. In some instances, this process undoubtedly involves de facto mediation, especially if defendant has the assistance of counsel, as he does in only a minority of cases[4]. Also, a prosecutor, for example, may in effect mediate between the accused and the court, and even a judge may strive to bridge the gap between the prosecutor and the accused.

Yet the new chapter authorizing «criminal reconciliation» in certain cases of public prosecution makes no reference to any of the similar possibilities presented by private prosecution, affiliated civil suits or summary procedures. Nor do the new CPL›s authorizations of those possibilities indicate any awareness of the new chapter on criminal reconciliation.

The 2012 CPL also does not take cognizance of China's 2010 Law on Mediation, which authorizes and regularizes the operations of the nationwide «people's mediation commit-

[1] See The Criminal Procedure Law of 1979 (promulgated by the Standing Committee of the Nat'l People's Cong, July 7, 1979, effective Jan. 1, 1980), art. 127. The Criminal Procedure Law of 1996 (revised by the Nat'l People's Cong., Mar. 17, 1996, effective, Jan. 1, 1997), art. 172 and The Criminal Procedure Law of 2012, art. 206.

[2] See Interpretation of the Supreme People's Court on Some Issues Concerning the Implementation of the Criminal Procedure Law of the People's Republic of China (promulgated by the Supreme People's Court, Sept. 2, 1998, effective Sept. 8, 1998) (Article 96. The court may conduct mediation in affiliated civil cases other than those initiated by a People's Procuratorate). See also Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court (promulgated by the Supreme People's Court, Sept. 16, 2004, effective Nov. 1, 2004) (Article 21. Where the people's court mediates civil litigations affiliated to criminal proceedings, the present provisions shall apply by analogy).

[3] Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China (2012) (promulgated by the Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), art. 80. The Criminal Procedure Law of 2012, art. 208. (2) (A case under the jurisdiction of a People's Court at the grass-roots level may be heard under summary procedures, if the following conditions are met: ... the defendant confesses his or her crime and raises no objection to the charges.).

[4] According to 韩嘉毅(Han Jiayi), Secretary of the Criminal Justice Committee of the All China Lawyers Association, in an interview conducted by 法制日报(The Legal Daily) on Mar. 7, 2011, the overall defense rate in criminal cases in China is less than 30%. 我国刑案辩护率不足30% 高风险促律师规避刑诉[Criminal Defense Rate Is less Than 30%, Lawyers Avoid Criminal Litigation Because of High Risks], 人民网 [The People's Daily] (Aug. 8, 2011), http://legal.people.com.cn/GB/15351638.html (last visited Mar. 31, 2012).

tees» that function at the grassroots level in both rural and urban areas[1]. The Mediation Law carefully avoids the thorny question of the kinds of cases that are subject to the jurisdiction of mediation committees. Prior to that law›s enactment, it was generally acknowledged that such committees could handle «minor criminal cases», although there was no consensus concerning which cases fell within that rubric. The Mediation Law implicitly contemplates the resolution of some kinds of criminal disputes or at least disputes that can become criminal. It provides that, for «disputes suitable for mediation», public security organs as well as courts are authorized to suggest that disputants who come to them for assistance instead resort to a mediation committee. The Law also instructs mediators who are dealing with ugly disputes that may result in minor offenses against public order or in crimes to promptly report them to a public security bureau or other relevant agency[2].

Nothing is mentioned in either the 2012 CPL or the Mediation Law about the possibility of mediating disputes within the ambit of the Law for the Management of Public Order. This is China's police-administered regime for dealing with minor offenses, that is, those unlawful acts that are not thought to rise to the level of criminality, such as petty theft and non-serious assault[3]. Yet that law plainly contemplates police mediation in handling the very broad range of potentially criminal offenses that it proscribes[4].

Article 277 of the newly-revised CPL does not indicate either the role of government in bringing about reconciliation or the consequences of reconciliation for the criminal process. How do the suspect/defendant and the crime victim initiate contact to explore prospects for agreement? Will an official agency facilitate the negotiation process? Will a law enforcement agency scrutinize whether agreement has been reached voluntarily and whether, through compensation, apology or other methods, the accused has sincerely expressed his or her remorse and genuinely obtained the victim's forgiveness? And what benefit can the accused derive from a valid agreement? These questions are answered, if only in part, by the new Articles 278 and 279.

Article 278 provides: «Where both parties reconcile, the public security authority, the people's prosecutor's office and the people's court shall hear the opinions of the parties and other relevant persons, conduct a review of the voluntariness and lawfulness of the reconciliation, and preside over the formulation of the reconciliation agreement». This provision requires a good deal of interpretation, and it is customary in Chinese legislative practice for agencies involved in the administration of criminal justice to jointly or severally issue detailed guidance concerning how a new law should be implemented by the officials under their control. This is what occurred after promulgation of the 1996 CPL, and this will undoubtedly occur in the year or two following enactment of its successor.

[1] People's Mediation Law of the People's Republic of China (promulgated by the Standing Committee of the Nat'l People's Cong., Aug. 28, 2010, effective Jan. 1, 2011), art. 2, 9 (Article 2. The term «people's mediation» as mentioned in this Law refers to a process in which a people's mediation committee solves a dispute by persuading parties concerned to reach a mediation agreement through negotiations on an equal footing by free will. Article 9. The members of the people's mediation committee of a villagers' committee or residents' committee shall be recommended and elected at the villagers' meeting, the villagers' representative meeting or the residents' meeting; while those of the people's mediation committee of an enterprise or a public institution shall be recommended and elected by the employees' assembly, the employees' representative meeting or the labor union.).

[2] Ibid., art. 25.

[3] Law of the People›s Republic of China on Public Security Administration Punishments (promulgated by the Standing Committee of the Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006), art. 2.

[4] Ibid., art. 9.

Although nothing is stated explicitly in Article 278 about the role of official agencies in actively promoting the parties' negotiation, it is obviously understood by those familiar with China's criminal process that one of the law enforcement agencies will very likely have to at least assist in bringing the parties together, if not persuading them to reconcile. It is certainly possible in contemporary China, as it was in imperial China and in subsequent pre-Communist regimes, for an offender and victim to reconcile before any officials might intervene. But that is not the situation contemplated by this section of the new CPL. It appears to assume a situation where the formal criminal process has already begun. That usually means that the accused is being held in detention, because, in China, most suspects or defendants are detained pending disposition of their case. Even if the detained person's family, friends or lawyer themselves start negotiating with the victim or his family, no agreement can be reached without the participation of the accused, and access to the accused generally requires the cooperation of the detaining institution.

It also appears to be understood, again without so stating, that the agency involved – the police, the prosecutor or the court – may play an active role in helping the parties reach agreement. It need not be limited to merely listening to the views of the parties and other participants and checking on the voluntariness and lawfulness of their reconciliation, as explicitly authorized. Article 278 leaves no doubt that, at least by the time the parties seek to put their agreement into writing, the official representative is to «preside over» the process, which could well mean to direct it. Thus, the role of the government agency involved is expected – either implicitly or explicitly – to be that of an active mediator, which plays havoc with Professor Chen Guangzhong's attempt to distinguish between mediation and criminal reconciliation.

Although nothing is mentioned about the site for mediation, it is sometimes likely to be a facility of the agency concerned, such as a room in the detention building, thereby adding to the influence of whatever «suggestions» its representative may make.

Once a valid reconciliation agreement is reached, what is its significance? Article 279 tells us that this enables the police to suggest that the prosecutor treat the defendant with leniency and authorizes the prosecutor to suggest that the court impose a lenient sentence. The article also authorizes the court to treat the defendant leniently and states that «for minor offenses that do not require a punishment»? the prosecutor's office may decide not to prosecute. Yet none of these provisions does more than reconfirm existing powers that have long been exercised for many reasons in addition to victim-offender reconciliation.

What Article 279 does not mention is the broad range of punishment options open to the court under existing law and practice if it decides to grant a convicted defendant lenient treatment. Also, at least in theory, the court need not find the defendant guilty, which presumably would remove the case from the ambit of criminal reconciliation. Nor does the article remind us of the broad range of options open to a prosecutor's office that decides not to prosecute the accused. More surprisingly, the article does not even mention the power of the police, if the parties settle their dispute during the police investigation stage, not to recommend prosecution to the prosecutor's office, or, at an earlier stage of investigation, not to request prosecutorial approval of a formal arrest warrant so that the investigation may continue.

If the above comments are accurate, what should we think of the CPL's new criminal reconciliation chapter? Was it necessary? Is it sufficient to meet the growing demand for

mediating criminal cases? Should it have been expanded to allow reconciliation in more serious cases that the new chapter seems to implicitly exclude from reconciliation? And how should proceedings under this chapter relate to the other mediation-related procedures that have previously been authorized and put into practice?

The Background of the New Chapter

These new provisions, of course, did not spring full-blown from the staff of the Legal Work Committee of the National People's Congress that prepares draft legislation. As early as 2002, local authorities in Beijing, Shanghai, Zhejiang and other provinces – usually the prosecutors' offices, but sometimes in conjunction with police and courts – began to issue tentative rules regulating experiments in criminal reconciliation, mostly for cases of minor personal injury. Yet these modest beginnings only blossomed after the Party Central Committee issued its famous «Resolution on Several Important Issues on the Construction of a Socialist Harmonious Society» in 2006[1]. That document called not only for increasing harmony in society but also for incorporating both leniency and severity in the administration of criminal justice. Criminal reconciliation seemed an excellent vehicle for implementing the new Party line, especially since it offers the promise of affording crime victims a more reliable and prompt method of obtaining compensation for the harm they suffered than the often disappointing civil suits appended to criminal prosecutions.

Although Western theories of «restorative justice» linked to criminal reconciliation had entered Chinese academic circles a generation earlier, they had not attracted much interest from government officials or legislators, despite China's imperial mediation tradition. The new Party line, by contrast, energized many provinces to take up the previously-limited experiments in criminal reconciliation. This led Professor Chen Weidong, one of China's foremost experts in criminal procedure and an opponent of the new chapter on criminal reconciliation, to characterize these developments as «responses to domestic policy expediency» rather than a series of solid and rational legislative initiatives[2]. One might make a similar observation about the sudden effort in certain provinces, following the Central Committee's 2006 resolution, to experiment with «people's jury trials» in order to vindicate the resolution's expressed enthusiasm for enhanced popular participation in the administration of justice[3]. The new Party line also began to make an impact on the national level. I have already mentioned the 2006 efforts of Professor Chen Guangzhong to support the new trend[4]. In 2007 the Supreme People's Procuracy (SPP) called on its cadres to engage

[1] Chen Weidong, *Establishing the Criminal Special Procedure with Chinese Characteristics*, 6 *China Legal Science* 35 (2011). The resolution Professor Chen referred to was passed at the Sixth Plenary Session of the 16th Central Committee of the Chinese Communist Party on Oct. 11, 2006.

[2] Ibidem.

[3] Henan People's High Court launched the experiment of the People's Jury System in 2009. 河南推行人民陪审团制度 保障公民司法表达权 [Henan Carries Out People's Jury System, Ensures Citizens' Freedom of Expression in Judicial Matters], 人民网 [The People's Daily] (Mar. 26, 2012) http://politics.people.com.cn/GB/14562/11232020.html (last visited Apr. 1, 2012). In late 2010, Shanxi People's High Court selected three intermediate courts and eleven courts at the grass-roots level to begin the people's jury experiment. 陕西高院首现人民陪审团 [First People's Jury Appears in Shanxi People's High Court], 法制网 [The Legal Daily] (Mar. 10, 2011) http://www.legaldaily.com.cn/index/content/2011-03/10/content_2507500.htm?node=20908 (last visited Apr. 1, 2012).

[4] Chen Guangzhong & Ge Lin, *Preliminary Exploration of Criminal Reconciliation*.

in greater study and research concerning criminal reconciliation[1]. Soon after the Party Politburo in late 2008 emphasized the policy of combining leniency and severity in further reforming the judicial system[2] and the Party's Central Political-Legal Committee issued the first of two opinions encouraging criminal reconciliation[3], the Supreme People›s Court (SPC) issued its Third Five-Year Reform Agenda for the People's Courts[4] endorsing resort to this method of resolving criminal disputes. In 2010, it prescribed rules for how the courts should use criminal reconciliation in private – not public – prosecution cases, which had long been authorized by the CPL[5]. The next year, the SPP, which appears to have had greater enthusiasm for criminal reconciliation than the SPC, published a document specifically devoted to use of criminal reconciliation in public prosecution of minor criminal cases, summarizing the experiences of local prosecutors[6].

Preliminary Responses to the New Chapter

When, on August 30, 2011, the Standing Committee of the National People's Congress (NPC) interrupted a highly secretive legislative process by releasing a draft of the amended CPL for public comment, the new chapter on criminal reconciliation attracted little popular notice. Public attention was focused on other provisions, particularly those authorizing detention of certain suspects in secret facilities for up to six months without benefit of the conventional criminal procedures.

A few of the 153 members of the Standing Committee who took part in that session did address those provisions, however, and demonstrated a range of opinions. One, Liu Zhenwei, seemed to prefer postponing enactment of the chapter in order to allow time

[1] See Several Opinions by the Supreme People's Procuracy on Implementing the Criminal Justice Policy of Combining Leniency with Severity in Prosecutorial Activities (promulgated Jan. 15, 2007, effective Jan. 15, 2007), art. 26. (Theoretical research on the implementation of the criminal policy of «combining leniency with severity» shall be greatly enforced. The quality of employing this criminal policy as guidance for criminal investigations shall be continuously enhanced. At the same time, we shall step up research on criminal reconciliation, conditions for formal arrests, conditional non-prosecution, requirements for prosecutorial protests, summary proceedings, and other relevant issues, and actively put forward suggestions to improve the implementation of this criminal policy and related mechanisms.)

[2] In Nov. 2008, the Politburo of the Central Committee of the Communist Party of China approved in principle «The Opinions on Several Issues in Furthering the Reforms of the Judicial System and Functioning Mechanisms proposed by the Central Political and Legal Committee» and distributed the document in Dec. 秦旭东 [Qin Xudong], 新一轮司法改革启幕 [To Raise the Curtain for a New Round of Judicial Reform], 财经网 [Caijing Net], (Dec. 18, 2008), http://www.caijing.com.cn/2008-12-18/110040452.html (last visited Apr. 1, 2012).

[3] The Central Political and Legal Committee's Opinions of Several Issues Regarding the Deepening of Judicial Reforms and Working Mechanisms (issued in Dec. 2008). The Central Political-Legal Committee's and the Stability Maintaining Working Unit of the Central Committee of the Chinese Communist Party's Opinions on Advancing Innovative, Just and Honest Law Enforcement to Solve Social Conflicts and Exercise Social Management (distributed by the Office of the Central Committee of the Chinese Communist Party and the Office by the State Council in Dec. 2009).

[4] The Third Five-Year Reform Agenda for the People's Courts (2009–2013).

[5] The SPC set forth rules in principle about criminal reconciliation in private prosecution cases in «The Several Opinions Regarding the Implementing of the Policy of Incorporating Both Leniency and Severity in Criminal Justice» in 2010 (Part 5, Article 40. «We shall conduct mediation as much as possible to resolve conflicts in private prosecution cases, facilitating reconciliation reached by parties on their own»).

[6] Notice of Issuing Several Opinions of the Supreme People's Procuracy on Handling Petty Criminal Cases Where the Parties Had Reached Reconciliation (promulgated Jan. 29 2011, effective Jan. 29, 2011).

for further study. He expressed concern that criminal reconciliation would open the way for wealthy people to unfairly avoid prison by compensating victims to the extent that the victims would agree to withdraw their complaint and the authorities would agree not to prosecute the offender. More broadly, he also seemed to believe that the reconciliation process, by allocating too much discretion to victims and offenders, would encroach upon the authority and solemnity of the criminal justice system[1].

In flatly opposing the new chapter, another legislator, Cong Bin, condemned inserting into criminal legislation a provision concerned with the mediation or settlement of essentially civil disputes. He maintained that, if there is to be criminal reconciliation, it should take place between the state and the accused. The victim is not a primary party to the criminal litigation. He claimed that offender-victim reconciliation enables those two private parties to act against and even defy state power, thus impairing the authority of the state. Although what was to become Article 277 limits the possibility of criminal reconciliation to certain offenses, he said, from the perspective of the importance of protecting society against violation of human rights, those cases involve serious crimes against the person, citizens' democratic rights and private property. Therefore, it is not proper to drop a prosecution or give the offender more lenient treatment simply because he has compromised with the victim. Moreover, Cong argued, criminal reconciliation is not the province of the CPL but of the Criminal Law, and China's Criminal Law does not mention criminal reconciliation. If lawmakers want to introduce criminal reconciliation, he maintained, they should first do so in the Criminal Law. Finally, he said, one goal of the country's socialist Criminal Law is to eliminate disparities in social justice, not to allow the rich to escape punishment through payment[2].

A third legislator who made his views known, Shen Chunyao, supported the new chapter and even suggested broadening its scope to include crimes caused by civil disputes that have a maximum punishment of five – not three – years. Shen praised the new chapter as an innovative initiative to introduce the concept of restorative justice into public prosecutions[3].

Only a few academic experts published their views on the proposed criminal reconciliation provisions between the time of the draft's release for public comment and its enactment in slightly amended form. The most substantial critique was a strong attack by Professor Chen Weidong[4]. Although he termed the provisions a milestone in the efforts of scholars and practitioners to develop a role for criminal reconciliation, he maintained that it would be premature to enact them. The worldwide trend in favor of protecting victims' rights does not necessarily mean that the CPL should authorize criminal reconciliation for cases of public prosecution, he said. He pointed out that, although France and Germany provide for criminal reconciliation in their codes, many countries do not. In the United States, he noted, a great deal of criminal mediation takes place informally through the exercise of the prosecutor's discretion and through the process of negotiating guilty pleas, without legislative recognition. China, he implied, still lacks both the substantive criminal

[1] 刑诉法修改草案引热议：刑事和解是否花钱买平安？[Amendments to The Criminal Procedure Law Arouse Controversies: Does Criminal Reconciliation Means Money Can Buy Freedom?] 中国新闻网 [Chinanews.com] (Sept. 28, 2011) http://www.chinanews.com/fz/2011/09-28/3358875.shtml (last visited Apr. 1, 2012).

[2] Ibidem.

[3] Ibidem.

[4] Chen Weidong, *Establishing the Criminal Special Procedure with Chinese Characteristics*, at 32.

law provisions and the institutional and procedural structures for effectively implementing criminal reconciliation. In China, it would be «an isolated mechanism».

Chen Weidong also expressed grave doubts about the value of criminal reconciliation itself. He regards it as a threat to due process because it emphasizes results rather than procedures. It is damages-oriented and will become «an open market for shameless bargaining» as accused seek to evade punishment through money payments, harming individual dignity and the solemnity of the legal process. In the name of achieving harmony, he argued, even fraud, coercion, threats and extortion may be ignored if the outcome is «successful».

According to Chen Weidong, criminal reconciliation is a poor remedy for the failure of the social system to compensate crime victims. If this failure is cured, enthusiasm for criminal reconciliation will diminish. Moreover, he claims, this practice will foster injustice, since only the wealthy will be able to pay for their release. Although the new legislation contemplates the offender winning the forgiveness of the victim by demonstrating his remorse through apology, compensation and other methods, realistically it is the compensation that inevitably will become the measure of remorse, he emphasized. If there is an immediate need to grant compensation to victims through the judicial system, Professor Chen advocates strengthening existing legislation that authorizes victims to pursue damage claims via civil suits affiliated with criminal prosecutions. This would avoid the spectacle and the reality of the state yielding its power to punish crimes and offenders to private parties, because then the outcome of the civil settlement would be only one of the factors to be taken into account by the court in sentencing.

Another eminent scholar of criminal justice, Professor Wang Jiancheng of Peking University, in an essay devoted to reform of the criminal evidence system, only commented on the evidence aspect of the draft criminal reconciliation provisions. He maintains that in criminal reconciliation the standard of proof normally required for criminal conviction in China – «that the facts are clear and the evidence is reliable and sufficient» – need not be insisted upon, because reconciliation is conditioned upon defendant's guilty plea and demonstration of remorse. Rather than this strict criminal conviction standard, he endorses one similar to that employed in Chinese civil suits, resembling the continental European «free evaluation of the evidence»[1].

A scholarly prosecutor and a young law professor, both surnamed Zhang, offered a positive and more comprehensive appraisal of the draft chapter that made some useful suggestions[2]. First of all, noting that the chapter is entitled «Litigation Procedures for Reconciliation of the Parties in Cases of Public Prosecution» and that nowhere does it employ the term «criminal reconciliation», the authors call for use of «criminal reconciliation» and articulation of a clear definition of the term, preferably equating it with «offender-victim reconciliation». They are also concerned about the content of what became Article 278. To be sure, they say, since the police, prosecutors or courts represent the sovereign authority, they must review the settlement agreement to make certain it is voluntary and legal. But, apparently because the reviewers are government officials, the authors argue that the reviewers should not also be charged with responsibility for presiding over or directing

[1] Wang Jiancheng, *The Significant Reform of Criminal Evidence System and Its Extension*, 6 *China Legal Science* 55 (2011).

[2] Zhang Shuming & Zhang Xiaoxiao, *Thoughts on Several Issues of Criminal Reconciliation- Discussion of Related Issues in the Revision Proposal to the Criminal Procedure Law (Draft)*, 11 *China Criminal Justice Journal* 63 (2011).

the settlement agreement. If their view had been adopted in the revised CPL's final text, that would have supported Professor Chen Guangzhong's attempt to distinguish between criminal reconciliation and ordinary mediation, but the final text implies that third party officials should play an active part in persuading the disputants to reach a written agreement, not merely a relatively passive reviewing role.

The authors believe that, for reasons of history, culture and judicial tradition, criminal reconciliation makes sense for China and that it also comports with foreign experience. Furthermore, they argue that it suits the country's current political circumstances, being rooted in the socialist ideology of constructing a harmonious society and the criminal law policy of combining leniency and severity and preventing excessive punishment.

Zhang and Zhang favor broadening the scope of criminal cases eligible for reconciliation to include those involving juveniles and the elderly. Although they agree with the provision that reconciliation may appropriately take place during any of the three major stages of the criminal process – investigation, indictment and trial, they oppose resort to it during the stage of enforcing the court's judgment. They argue that, in terms of legal theory, the judgment is already final and binding and should be free from the influence of private parties; also, in terms of cost effectiveness and efficiency, it would not be wise to extend the already ended litigation since by that time any attempt at mediation would not save judicial resources but squander them; and the authors have doubts about the voluntariness and remorse that might be demonstrated at that late stage. With respect to the standard of proof required before official acceptance of reconciliation, they insist on the strict standard ordinarily required for conviction, because they are concerned that this newly-authorized procedure might sweep innocent people into its net.

Conclusion

Although the criminal reconciliation chapter of the newly-revised CPL has received little public attention, the issues it presents are no less complex than those involved in better-known provisions and go to the heart of law's relation to Chinese society and considerations of legal and social justice. Given the controversy among academic experts and some legislators surrounding enactment of the chapter, it will be especially interesting to track its application. Police, prosecutors, judges, other legal officials, mediation committee members and lawyers will all have to prepare for the CPL's entry into effect January 1, 2013. How vigorously they may act and in what respects will depend upon how and when the government institutions involved in the administration of justice put flesh on the bare bones of the new provisions. If experience is a guide, we can expect the Supreme People's Court, the Supreme People's Procuracy, the Ministry of Public Security and the Ministry of Justice, either jointly or severally, to issue detailed interpretations and other documents regarding implementation of the revised CPL, including its chapter on reconciliation. At least some of these implementing norms should be issued before the revised law enters into effect. Detailed guidance will surely be required with respect to criminal reconciliation if the fears and predictions of opponents of this legislative innovation are not to be vindicated.

Much of the motivation for this first Chinese legislation authorizing and regulating the important role of mediation in the processing of public prosecution cases reflects the existing criminal justice system's failure to meet the financial needs of crime victims. Like most countries, China lacks a state compensation fund to assist victims. Moreover, the civil

lawsuits that victims may append to criminal prosecutions have often failed to mitigate their plight. Even in cases where defendants have economic resources, judgments in such cases have been difficult to enforce. Thus, there is understandably great and continuing pressure to obtain financial relief for such victims through the handling of the prosecutions themselves.

In recent years, dissatisfied victims have become increasingly outspoken in demanding recognition of their interests, and their petitions and protests have embarrassed a regime that has become obsessed with the appearance of social harmony and stability. Indeed, victims' public demonstrations of dissatisfaction threaten the careers of legal officials whose performance evaluations significantly reflect their ability to prevent such demonstrations.

Criminal reconciliation has been enacted for broader purposes as well. In principle, victim compensation is to be only one element of a process designed to improve relations between victim and offender, reintegrate the offender into the community, ease the spiritual suffering caused the victim and restore a semblance of balance to a society whose fabric has been torn by the crime. Although the concept of restorative justice and its applications in other countries were only introduced to China in the past few decades, similar practices were familiar and widespread in imperial Chinese society. For centuries, by inviting victims for a ceremonial tea or banquet to publicly symbolize their reconciliation, village offenders marked finis to a dispute that might otherwise have gone to the county magistrate's bureau for criminal punishment[1].

Proponents of criminal reconciliation, despite some empirical evidence to the contrary[2], also hope that it will reduce the burdens of a very busy criminal justice system. The over criminalization of misconduct that arises from essentially civil disputes and that does not seriously damage the public interest has intensified the search for new methods of coping with the unnecessary flood of cases.

Yet there are good reasons for doubting whether the benefits of this innovation will outweigh the costs. Equal justice under law is one of the basic aspirations of every modern legal system. China's is no exception. Criminal reconciliation, by allowing offenders with money to escape from punishment or enjoy lighter punishment than those without the funds necessary to persuade victims to agree to a settlement, inevitably undermines the legitimacy of the state. The pursuit of the public interest in suppressing crime should not be turned into a marketplace where justice is bought and sold, especially without equal opportunity for all, even if such bargaining is limited to the disposition of cases that are thought to lack public importance.

It may seem surprising that the recently-declared «socialist legal system with Chinese characteristics», usually so disdaining of China's feudal past, should seek to build upon millennial imperial mediation practice. Yet, as we have seen, in the Maoist era the impact of mediation's perceived importance in both imperial China and the pre-1949 Communist «liberated areas» gave the new Chinese legal system its most distinctive characteristic in comparison with that of the former Soviet Union. Moreover, mediation has been prominently featured as part of the Party's renewed emphasis on the mass line for law since the 17th Party Congress in 2007.

For an American student of comparative law, China's recent formal authorization and regulation of criminal reconciliation is especially interesting since many Chinese legal

[1] Cohen, op. cit.

[2] Song Yinghui el al., *An Empirical Study on Criminal Mediation in Public Prosecution Cases*, at 9.

experts have long been critical of the dominance of plea bargaining in the United States' criminal justice system. Justice and the prestige of the state, they maintain, should never be tainted by officials bargaining with accused. Yet a good deal of low visibility negotiations akin to plea bargaining often seems to occur in their own country during the different stages of the criminal process, as Chinese police, prosecutors and judges necessarily exercise their discretion in dealing with suspects, defendants and their lawyers.

Plea bargaining, of course, has also long been criticized for neglecting the interests of crime victims. It is generally concerned with only the interests of the public and the accused. Yet it has the virtue of its vice in that a wealthy accused normally has little opportunity via plea bargaining to improve his situation by legitimately buying the good will and cooperation of the victim. Criminal reconciliation provides that very opportunity. It dilutes the public interest in suppressing crime in favor of the public interest in compensating victims, but usually only those fortunate enough to have been harmed by offenders with means. Criminal reconciliation risks making the outcome of a criminal case not merely the result of a bargain but of a sale!

It is possible that law enforcement leaders may issue implementing guidelines that will offer some institutional and procedural protections against this risk. The focus on the amount of compensation may be moderated to some extent by emphasizing, in addition to the apology mentioned in the law, alternative, non-monetary incentives for obtaining victims' forgiveness, such as the willingness of an impecunious offender to render in-kind services to the victim. Yet this is unlikely to attract the interest of many victims.

The role of mediators chosen to help finalize these victim-offender negotiations will be crucial, not only to facilitate agreement but also to assure that no abuses occur in order to coerce agreement, such as pressures from the accused, the mediator himself or even the victim, who sometimes gains undue strength from the mobilization of public opinion. Mediators will also have to guard against the possibility that the «offender» is actually innocent of crime. Because official mediators will be operating within an incentive system that rewards them for successfully achieving reconciliations and may punish them for failure, they will generally have a conflict of interest. Perhaps the implementing guidelines will seek to resolve this problem by separating the role of active mediator from that of passive reviewer. This would seem to be very desirable even though it would further complicate academic efforts to distinguish mediation from criminal reconciliation!

If the challenge of coping with the many issues confronting implementation of the new criminal reconciliation authorization is great, the challenge of dealing with the issues of unauthorized criminal reconciliation will be greater, if less obvious. The fact is that mediation affects the disposition of many types of cases that are more serious than those that will now be subject to official reconciliation. Mediation even plays a role in the sentencing of many potentially capital cases, particularly those originating in violence. Will the refusal of the National People's Congress thus far to endorse criminal reconciliation for such cases, while authorizing it in minor cases, lead to efforts to stop the unauthorized practices? Or is the widespread informal reconciliation of some serious criminal cases likely to continue to expand and increasingly cry out for authorization and regulation?

One thing is clear. A massive amount of empirical research that builds on the few excellent studies that preceded the new law will be required in order to inform the next steps for implementation and further law reform.

Nataliya Bocharova[1]

RUSSIAN REPORT:

DISPUTE RESOLUTION IN RUSSIA: BEYOND FORMAL PROCEEDINGS

1. General issues

Cultural and national specifics often reflect law and legal proceedings in different societies. Legislator should always take into consideration mentality and traditions when he sets rules concerning any kind of social relationships. Particularly it regards facts of thoughtless duplication or reception of the legal institutes or certain norms of other country.

The system of dispute resolution deals with a social and cultural phenomena of the conflict. It is acknowledged that just as culture shapes the organization of our thinking and the construction of our world, so it shapes the way we understand a conflict and its resolution, because ways of dealing with conflict are a part of our world[2]. It means that particularly in the field of dispute resolution the legislation and judicial enforcement should as much as possible correspond to cultural features of the nation. Russian legislation is not an exception here. Moreover tradition of existence beyond strict rules and formalities is so vital in Russia that any kind of strict formal rules are just not accepted and violated. Such legal nihilism in relation to imposed norms and proceedings and denial of rationality of these norms and proceedings define specifics of civil procedure and in general system of dispute resolution in Russia.

Before elaborating of the declared issue it is useful to define some terms. In Russian civil procedure law we use term «forms of right's protection» to refer to different forms of dispute resolution. Strictly speaking term «*dispute* resolution» came to Russian jurisprudence from common law countries (mostly from the U.S.) and this term is frequently used to refer to alternative dispute resolution. In Russian legal tradition civil procedure legislation and court system are forming as consistent with the idea of the defense or protection of the substantive right (*versus* resolution of *disputes*). It is determined in Russian Civil Procedure Code that the main task of the courts is to judge a *case* and decide the *case* (versus settlement or resolution of a *dispute*). In addition there are such procedures specified in the Russian Civil Procedure Code that exclude possibility of a dispute (for example a person can bring to the court an application to receive court order for the enforcement of an indisputable obligation or penalty). In Russian civil procedure all forms of right's protection are divided into two groups: judicial and non-judicial defense of rights. Non-judicial form of right's protection includes such statute-established forms as administrative proceedings (competence of executive authority), some notary public proceedings, arbitration proceedings, mediation and self-protection of civil rights. Jurisdiction rules define competence of each authority to protect substantive right or settle dispute and their correlation.

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[2] M. LeBaron Duryea, *Culture and Conflict: A Literature Review and Bibliography*, Victoria BC, University of Victoria Institute for Dispute Resolution, 1992; B.B. Bunker and J.Z. Robin, *Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutch*, San Francisco, Jossey-Bass, 1995.

Division of the proceedings of dispute resolution into formal and informal is not quite available for the Russian civil procedure theory. Direct translation of the terms formal or informal into Russian leads to misunderstanding of the sense of the subject. As far as *form* is concerned arbitration and mediation in Russia are now quite formal proceedings since they have special explicit statutory regulation (e.g. Arbitration courts Act (2002), Alternative procedure of dispute settlement (Mediation) Act (2011)). On the other hand there are still some informal proceedings that one can find in official state court. So this division into formal and informal proceedings is quite ambiguous for Russian scholars.

To define dispute resolution I appeal to Marc Galanter's paper «Adjudication, Litigation and Related Phenomena»[1], who distinguishes several varieties of dispute resolution: three parties form (adjudication, arbitration, mediation, therapy, administrative decision-making, political decision-making), immediate forms of dispute resolution (ombudsman, parental dyad), two parties form (negotiation), one party form (exit, avoidance, self-help, resignation) and no parties form (failure to apprehend remedy). Almost all named forms can be found in Russia. And I suppose that such third party forms as adjudication (by state court), arbitration, mediation (including therapy) and administrative decision-making imply formal proceedings if a forum is formed under the rule of law, and proceedings are held under the rule of law. This conclusion based on the fact that all this forms have been institutionalized and all these forms are statutory determined by special Acts, which specify procedures, principles, requirements to a forum etc. Other named forms can be described as informal in Russia. Some of the informal proceedings can be mentioned in statutes (i.e. Russian Civil Code mentions a binding of negotiations in case of dispute between a carrier and a sender), but they do not institutionalized in such extent as formal proceedings. In addition, in case third-party forms of dispute resolution are exercised beyond rule of law, we also can describe them as informal. Returning to the question of the forms of right's protection that is more familiar for Russian legal system, I should relate formal proceedings to the forms of right's protection and informal proceeding is not legal institute for Russian legal system. Here we should take into account that less than year ago mediation was informal proceeding in Russia. So we can expect emergence or transformation of informal proceedings to formal and otherwise.

2. Minority and religious community informal proceedings

According to the last general census of the population (2010) there are 182 different nations in Russia. Vast majority of people professes Orthodoxy, 5% of population is Muslim, and 1% of population professes other religions and cults (including animism and shamanism). In most cases existence of informal proceedings in Russia is associated with religious/cultic context or national minorities and usually it is third-party form of dispute resolution. Such particular informal proceedings can be found in such national groups as Karagashi, Kumyki, Aleuty, Chukchi, Mansi, Saami and others. Also there are several informal proceedings that bear religious or commune's character. For example members of the religious group of the Old Believers (Orthodox) are living in small closed communes and usually do not use official formal proceedings to resolve their disputes. People from

[1] M. Galanter, *Adjudication, Litigation and Related Phenomena*, New York, Russel Sage Foundation, 1986, p. 152.

Russian Caucasus Republics (e.g. Cechenskaya Respublika or Respublika Dagestan) prefer to use shariah's informal forum («kadi»)[1].

Apparently informal proceedings are not recognized by official authorities and a final award is not binding and enforceable. At the same time number of the informal proceedings is such minor, that the state authority is quite indifferent about them. There is some exclusion, when regional authority supports such informal proceedings, e.g. in Chechenskaya Republic public officer (usually deputy minister for national issues of a local authority) publicly executes the role of an informal forum and resolve disputes.

Mandatory nature of a decision of such informal forum is provided by traditions and commune's acceptance of the authority of the forum. In most cases there are no written legal sources, where rules of such proceedings are set. The function of the forum usually is executed by the community elders or ministers of religion. Mainly, informal proceedings are public and in most cases adversary. Parties get right to present their case before a forum, submit evidence and refer to a norm of custom or written source. Usually authority (prestige) of a forum in such communities is so significant, that even incorrect (from legal point of view) judgment is apprehended as fair act. Informal proceedings of dispute resolution in small groups reminds Solomon's court and judgment, but in some period of community's development this kind of a court to certain extent responds social demands in the field of dispute resolution.

Usually parties of the dispute can indefinitely use formal proceedings to resolve their dispute. There is no such community or religious group which publicly prohibits applying to formal forum. In some cases that is essential to appeal to state court to receive official judicial act, which can be used as legal evidence of the fact or right (e.g. to confirm disputed property rights).

There are several reasons why such informal forums still exist:

1. Informal proceedings of dispute resolution get encouragement from members of a specific group, who can deny the power and the competence of any formal forum.

2. Accessibility and availability of the official formal proceedings for specific group that uses informal forum and proceedings are extremely minor, e.g. a group lives far from a regional center in not easily accessible area.

3. Disputes between members of a group arise on relationship, that is not governed (or forbidden) by official rules, e.g. a man divorces one of his wives and wants to settle dispute concerning «dowry» (Family Code of Russia recognizes only monogamous matrimony and set no dowry, but still in some regions of Russia there are polygamous marriages and practice of dowry).

4. Procedure rules of formal proceedings do not match special circumstances and the needs of a minor group, e.g. general rule of the jurisdiction is that a competent court is defined by the place of residence of the defendant. It's impossible to apply this rule if a defendant (and/or plaintiff) is one of nomadic people.

5. Cases which are appeared before informal forum are usually quite plain and arise from family relations or everyday deals. Complexity, excessive formalities and length of official trial make it inefficient for members of these kinds of groups. It's much easier to apply to a familiar informal forum and get a distinct and practicable decision.

[1] After the parliamentary election candidate from the Republic Ingushetiya appealed to the Ingushetiya mufti's kadi to contest the results of the election. The example is more comical than model but it shows real attitude of people from this region to the shariah traditions and informal proceedings.

Besides informal proceedings in small groups, there is separate «court» system of the Russian Orthodox Church. These courts act under the Church courts Statute. That is quite interesting act from point of view of the procedural law. Other mentioned informal proceedings are really informal, non-statutory and quite primitive. On the contrary proceedings in the church Court are described in detail in the Statute, have their own written principles and even wide court system including eparchy's courts, church's courts, the General Church court and The Synod. The Statute provides norms concerning a subpoena, rejection of a judge, evidence (definition of which fully coincides with the definition of an evidence from Civil Procedure Code), judicial inquiries, burden of proof etc. The competence of a church court is «to restore normal flow of church life and provide compliance of the sacred rules». Church courts have competence only above members of church (the clergy and the laity). There is single form of procedure for criminal and civil matters. Only the Synod has full judicial competence; other church courts have delegated competence, but they are fully independent in their adjudication. That is the first time when the author runs into the conception of «delegated justice» in Russia. That is new and unstudied issue. The General Church and The Synod also act as appeal courts. The proceedings in the church court are divided into stages: commencement of proceedings, pre-trial, trial and appeal. Trials in courts carries out in closed sessions, a report is recorded.

3. Informal proceedings in resolving business activity disputes

There is a separate system of commercial state courts, which adjudicate disputes between legal persons on economic matters. The load of these courts is extremely huge. The High Commercial Court of Russian Federation repeatedly announces necessity of applying formal and informal methods of dispute resolution before applying to a state court or during a trial to achieve a full reconciliation. In the field of corporate and other economic disputes resolution different kinds of formal dispute resolution are quite widespread. There are more than 300 standing arbitration courts. After an adoption of the Alternative procedure of dispute settlement (Mediation) Act in 2011 mediation centers and mediators began to render their formal services. But still there is a strong demand for efficient, rapid and more important professional proceedings. The Arbitration Procedure Code, which regulates trial by commercial courts, enacts a court to undertake measures to reconcile parties. Furthermore parties can settle their dispute by means of conciliation including mediation or other unprohibited, lawful measures even if their case is already in a trial. As was written before, mediation is formal proceedings now, but Alternative procedure of dispute settlement (Mediation) Act in 2011 applies only to disputes arisen from civil, labor and family relations. It means that it does not extend to corporate relations (e.g. shareholder – stock joint company disputes), relation in the security or other financial markets, to disputes with participation of public (official) bodies etc. So there are quite wide ranges of disputes that can be settled by means of mediation but this kind of proceedings will be informal. Indeed formal proceedings that are set by mentioned Act are not used very often now. The state authority does not press parties of the dispute to appeal to formal mediation. But it should be taken into consideration that there were amendments to Civil Procedure Code and Arbitration Procedure Code which incorporated mediation to mentioned Codes. So now a judge has to suggest parties to settle their dispute by means of a mediator. In case parties go to mediator, the trial is held up but only if parties apply to formal official proceedings. The necessity of formal agreement, special requirements to the mediator, limited scope of dispute can be settled to make formal proceedings less convenient than

informal, that can be accomplish immediately in the moment of arising of a dispute. In case when a person for example demands disclosure of corporate information and does not prove that he is a shareholder, who has right to get corporate documents or information (that is not compulsory by the Joint Stock Company Act) and the company has reasonable doubts about his status, the corporate dispute arises. These kinds of disputes make more than 11% of corporate disputes, which are adjudicated by commercial courts. But in fact these disputes can be mediated immediately by a corporate (executive) secretary, who can offer a practical and reasonable compromise. This kind of «private» fast mediation is widely used in corporate practice. More common and general informal forum for corporate disputes was established by The Russian Union of Industrialists and Entrepreneurs. That is The Commission for corporate ethics, which settles disputes concerning corporate relations and compliance of the norm of The Code of corporate behavior (voluntary act). Decisions of The Commission is not boundary but there are some measures of penal community-based correction, which can be quite appreciable for reputation of a company (e.g. there is list of the unreliable companies with poor corporate behavior). The proceedings of this Commission are informal but the efficiency of its activity is very high.

Also there are such kinds of legal relations that make almost impossible all kinds of legal relief in a case of a violation of rights. In the first place derivative's and in general (stock) exchanging markets should be mentioned here. Speed and quantity of market's transactions make it quite complicated to identify a person who has trespassed and then presented such case before a court. Therefore parties of these relations try to avoid disputes, to minimize and to hedge any legal and financial risks before arising of a dispute. This avoiding disputes behavior can be describe as one of the form of preliminary informal proceedings and it was worth to be mentioned here as it is one of the most effective form of dispute resolution. This kind of disputes is almost never adjudicated by the formal state courts.

4. Informal aspects of formal proceedings

Apparently formal official proceeding of the state court is quite alien for Russian people. Cultural background prompts not to trust judge, to be alerted and dictates some stereotypes about complexity of formal proceedings. A person who is new to courts proceedings can be seriously confused by strictly formal litigation and necessity to be active in the adversary process. The load of the courts system explains speed of courts session, limited time to explain procedural rights and obligations. So a person who has no representative can lose a case just because he gets lost in all judicial formalities. Civil procedure code offers the balance between court activity and adversary character of a trial. A court in Russia has quite considerable competence in the field of proof-taking: court defines the scope of proof, contributes to obtaining evidence, and has right to offer party to present particular evidence etc. So it can be stated that a court has paternalistic character of his activities in civil courts. But still it is not enough to facilitate parties' participation in the process. Judicial practice elaborates some informal proceedings to communicate with a party of a dispute in less formal situation. For example in pre-trial a court has to perform procedural acts in courts sessions (with record) or in other established forms. But there is informal proceeding called «appointment» or «interview» during which a judge without a report chats with parties about their claims and objections and possibility of a conciliation. Parties have chance to get used to a judge, a court and can state their position before the court. These kinds of proceedings are so widespread

that The Supreme Court of Russian Federation in one of his Resolutions containing voluntary interpretation of legislation and judicial practice recognizes such practice as usable.

5. Conclusion

A dispute is an ordinary phenomenon in every community. Different societies offer various forms of dispute resolution but in general they are quite similar. The history of a contemporary court system and litigation in Russia is just a process of long development from traditional informal proceedings through complex, detailed formal litigation to simple, cheap, efficient and probably «electronic» justice. In XIX century in Russia arbitration was informal proceeding, with no strict regulation and non-boundary decisions. Now, Russian citizens and companies apply to international arbitration and we have complex system of norms concerning recognition and execution of an arbitration decision. The arbitration procedure is set in detail in special statues. Some society's group is not ready yet to all these compound formal proceedings, also in some cases formal proceedings do not respond group's demands. In this case group works out their own suitable forms of dispute resolution or use old forms (like sharia's courts). Probably in the future these groups will recognize that these informal proceedings are not convenient anymore, but before that a state should be patient to these cultural specifics.

Tsisana Shamlikashvili[1]

C.I.S. REPORT

Arbitration in Byelorussia[2]

According to N.L. Duvernoit, a researcher of litigation in Old Rus', «through the entire era of domination of traditional law, the most common forms of trial were arbitration and other related forms of dispute resolution». Arbitration was first mentioned in early of the13th century, namely in paragraph 33 of a treaty signed by Smolensk, Vitebsk and Polotsk princedoms and Riga, Gotland and German cities in 1229. O.V. Martyshin notes that at that time Novgorod knew two methods of settlement-based conflict resolution, namely agreement between the parties based on mutual concessions, and third-party solution. These two methods were quite popular due to their accessibility to anyone, quick procedure, wide-spread trust in freely elected judges and, the most important, absence of litigation fees. Most of the disputes mentioned in the documents of that time would be refer to court.

Since 1840, when Russian law took effect also on Byelorussian territory, arbitration was regulated by several acts, the most important of which was the 1831 Statute of arbitration. According to this statute, Russia allowed two forms of arbitration, voluntary and legal. The latter specialised on settling disputes between members of an association and, more gener-

[1] President of Center for Mediation and Law (Russia).

[2] Based on the article *History of Emergence and Development of Arbitration in Byelorussia* by V.A. Korobeynikov, published in *Treteysky sud,* 2003 (issue 4).

ally, all disputes related to joint-stock companies. Legal arbitration court was instructed to follow rules and traditions of custom in merchants' practice.

Procedure rules were identical for both voluntary and legal arbitration. The main principle for the procedure was competition between the parties. Arbitration only considered evidence was presented by parties themselves. However, if it is needed, a party could apply for arbitration's help in obtaining necessary evidence. Any state authority possessing the necessary document was obliged to present the evidence to the party at the arbitration request.

Grand Duchy of Lithuania. Settlement in a State with a Progressive Legal System in the Middle Age[1]

One of the most progressive codices that have influenced to the development of law abroad was the 1588 Statute of the Grand Duchy of Lithuania. It was in effect across a vast territory (including the entire modern Byelorussia and Lithuania, as well as parts of Ukraine, eastern Polish provinces and parts of western Russia), lasting over 250 years until the mid 19th century. For example, the Statute stipulated a body authorised to resolve disputes, as well as voluntary settlement. The Grand Duchy of Lithuania also had so-called amicable courts, or third-party compromise courts which scrutinised and settled various disputes and cases, excluding criminal cases and cases involving the state's budget. An amicable court comprised several judges, or commissaries chosen from the same rank and estate (social class defined by the law), as the parties. They aimed at amicable settlement first, and only in case it couldn't be reached they would offer a solution. The solution was definitive unless the commissaries failed to completely agree on their positions[2].

Third-party Conflict Settlement in Kazakh Tradition

Judiciary power was mostly possessed by judges, or *biys*. But not any *biy*, or clan elder, could become a judge *biy*. Good knowledge of *adat* (non-Islamic in origin, but recognised traditional law by Muslim peoples) and a reputation of an unbiased judge were required. In Kazakh steppes, the title of *biy* was neither hereditary nor granted privilege – it was an honorary title that had to be earned by personal merit[3]. A *biy* could neither be appointed or elected. Primary requirements were comprehensive knowledge of customary law, eloquence and honesty. An immaculate reputation was both a requirement and eligibility for justice. Trials were open and competitive; all cases, criminal or civil, were based on claim. *Biys* were selected by agreement of the parties. Scrutiny of a case began with the claimant and the respondent throwing their whips in front of the judge, symbolising their consent with the composition of the court and with the judges' future decision[4].

Rulings were issued in oral form. The process ended in symbolic cutting of a rope, which testified to the irrevocability of the ruling. The *biy* would receive *bilik*, or fee, including ten

[1] Based on the thesis of D.L. Davydenko, *Amicable Agreement as a Means of Extrajudicial Settlement in Private-law Disputes as Practices in Russia and Several Foreign Countries*, Moscow, 2004.

[2] Paragraph 4, article 85, On Amicable arbitration court.

[3] http://lib.kazsu.kz/libr/vestnik/TEXT%5CBIY1.TXT

[4] A. Yerkin, *History of State and Law of the Republic of Kazakhstan since Earliest Times to Early 20th Century,* Astana, 2000.

per cent of the claim's worth and all penalties imposed for breaching procedural norms. The execution of a ruling was the respondent's responsibility. Public opinion tended to blame an attempt to evade the responsibility not on the respondent himself but on his relatives and clan elders. Openness of the court process and the dependence of a *biy*'s authority on the fairness of his decisions effectively prevented *biys* from abusing their authority and stimulated them to come up with rulings that would satisfy both parties as much as possible. Thus, the goal was reconciling the parties rather than seeking the truth.

Maslahat (people's court) in Independent Turkmenistan

When there was a misunderstanding between Turkmen tribes or individuals, it was settled either by a variable number of individuals trusted by people and selected for every such occasion, or by *qadis*. In most cases, independent Turkmens would trust their cases to honored individuals known under an assortment of vernacular names.

Such gatherings of honored individuals were called *majlis* or *maslahat* (council). Usually a *maslahat* convened outdoors, near a mosque or outside an honored village dweller's tent; all hearing would be conducted exclusively in oral form. Parties and their witnesses, as well as anyone willing, could be present at the hearing.

All cases involving independent Turkmen's were civil and could be concluded in a settlement.

Trial in Moldavia[1]

In Moldavia, like in other early feudal states, courts were not separated from the government. All administrative structures at the same time functioned as courts. Personally unfreeze peasants and slaves were tried by their owners, who, however, could not have them executed. Feudal law also encompassed so-called «great [miss] deeds», i.e., «soul-ruining» (murders and adultery), theft, girl kidnapping etc.

All judiciaries were effectively subject to the hospodar, or supreme ruler. He could personally solve any case, cancel any solution or pass the case to anyone as he saw fit. All personally free citizens could file a complaint or request him. However, in reality not everyone could afford it. In most cases, it was the vornik (senior official) who did justice in the name of hospodar. He deal with cases involving court officials and all of the most important criminal cases; he held supremacy over all lower-instance courts; he had the right to otder executions of brigands, murderers and church thieves.

Ukraine

Ukrainian customary law is described in History of state and law of Ukrainian Soviet Socialist Republic, a study by a Ukrainian law researcher B. M. Babiy, who only mentions kopny trial. He describes neither the customs that lay in the foundation of that trial nor its procedural regulations. Details can be found in Brockhaus and Efron Encyclopedicc Dictionary[2]: «A kopny trial is the name of an ancient people's trial in rural communities.

[1] O.I. Chistyakov (ed.), *History of Our Country's State and Law, Part One*, Moscow, 1999.

[2] http://be.sci-lib.com/article097972.html

Every rural community had its own people's gathering (a kopa, or kupa, or gromada, or a velikaya («great») gromada). Only sedentary house-owners had the right to take part in a gathering, and opinions of elderly people were held in particular respect. A kopa would gather in the central place of a rural community, known as kopovische or kopische; when studying criminal cases they could gather at the locus delicti, while for land ownership disputes they could gather at the disputed lot».

History of state and law of Ukrainian Soviet Socialist Republic, a study by a Ukrainian law researcher B.M. Babiy, dedicates a few words to courts in Zaporozh'e Sech: «Scattered Cossack communities (or sechi) were united in a cosh. A cosh judge was elected by the Cossacks' Rada for a year, to study civil and criminal cases. Sentences were ratified by the kosh's leader, while death penalties were to be approved by Cossacks' Rada (council of all Cossacks, supreme authority)».

There was no written source of law in Zaporozh'e Sech. Kosh judge, as well as all the other judges, was guided by customary law and «common sense». All rulings of the kosh trial were definitive, not subject to complaint and to be executed immediately.[1] [Writer Nikolay] Gogol describes in Taras Bulba (3rd chapter) punishments assigned by kosh trials in Sech: If a Cossack stole the smallest trifle, it was considered a disgrace to the whole Cossack community. He was bound to the pillar of shame, and a club was laid beside him, with which each passer-by was bound to deal him a blow until he was beaten to death in this manner. He who did not pay his debts was chained to cannon, until some one of his comrades should decide to ransom him by paying his debts for him. But what made the deepest impression on Andrei was the terrible punishment decreed for murder. A hole was dug in his presence, the murderer was lowered alive into it, and over him was placed a coffin containing the body of the man he had killed, after which the earth was thrown upon both. Long afterwards the fearful ceremony of this horrible execution haunted his mind, and the man who had been buried alive appeared to him with his terrible coffin.

Carrie Menkel-Meadow[2]

AMERICAN REPORT:

Informal, formal and «semi-formal» justice in the United States

I. Introduction: What does «formality» have to do with justice?

The movement for more «informal» justice in the United States in the late 1970s and early 1980s[3] drew its inspirations from a variety of sources, including the desire for qualitatively better options and solutions for dispute resolution problem solving in sub-

[1] B.M. Babiy, *History of State and Law of Ukrainian Soviet Socialist Republic*, Kiev, 1987.

[2] A.B. Chettle, Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center and Chancellor's Professor of Law, University of California, Irvine.

[3] Richard L. Abel (ed.), *The Politics of Informal Justice: The American Experience*, Academic Press, 1982.

stance[1], and more party participation in procedure and process. The impetus for much procedural reform, however, came from courts and judicial officials, including then Chief Justice Warren Burger, who sought to shorten dockets and case processing time, reduce litigation cost and complexity, and for the cynics among us, move cases away from federal courts to other fora, including state courts, small claims venues, and other processes outside of the courts, tied together in the nomenclature of «alternative» dispute resolution. Thus, from the beginning, at least two different motivations for alternative or less formal processes were present – the «quantitative-efficiency» concerns to make justice more accessible, cheaper, faster and efficient, and the more «qualitative-party empowering» ideas that, with greater and more direct party participation, and identification of underlying needs and interests, parties might identify solutions to their problems that would be less brittle and binary than the win/lose outcomes of formal courts, with «limited remedial imaginations»[2].

In recent years the progress of dispute resolution variations has been labeled, by this author, as «process pluralism»[3] and by others as «appropriate» (not alternative) dispute resolution, connoting recognition that not all matters should be subjected to the same treatment – «one size of legal process does not fit all». Different kinds and numbers of parties, issues, structures of disputes, and legal matters might dictate different formats of dispute processing[4]. This is a serious questioning of the American procedural ideal of «transsubstantive» procedure[5] and such claims invoke both notions of «technocratic» assignment of cases to efficient or appropriate fora[6], as well as more deeply jurisprudential concerns about whether different processes are necessary to ensure different kinds of justice in different situations. Must «all cases» be treated «alike» or if «like cases» are to be treated «alike» how do we know which cases are «like enough» each other to be treated with the same process and procedure?

Debates about «the vanishing trial»[7] and the loss of formal procedures, as fewer and fewer cases make it all the way to full adjudication in the United States (only about 2% of cases filed in a wide variety of courts, both federal and state, general and specialized now go to full trial), have raged among scholars, judges and lawyers, as there is now concern, on the part of some, that not enough cases are available to generate the precedents we need in a common law, *stare decisis* legal regime to transparently produce reasoned rules and principles for the governance of our society[8]. As I argued some years ago, this is a question

[1] Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754 (1984).

[2] Ibidem.

[3] Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 *Georgetown Law J.* 553 (2006).

[4] Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy*, Ashgate Press, 2003.

[5] S.N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the «One Size Fits All' Assumption*, 87 *Denver University Law Review* 377 (2010).

[6] The idea that the «forum should fit the fuss» was originally Professor Maurice Rosenberg's, (Columbia University) now captured by Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 *Negotiation J.* 49 (1994).

[7] M. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. of Empirical Legal Studies* 459 (2004).

[8] S.N. Subrin, *Litigation and Democracy: Restoring a Reasonable Prospect of Trial*, 46 *Harvard Civil Rights-Civil Liberties Law Review* 399 (2011); O. Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073 (1984).

of «Whose Dispute Is It Anyway»[1]? – the parties seeking dispute resolution, or the larger society that needs transparent and certain kinds of (adversarial?) processes to produce law and justice for the «many» out of the disputes of the «few». The relationship of process to assessments of justice is a serious jurisprudential question, considered by many procedural theorists. A separate field of «procedural justice» or «the social psychology of justice» has claimed for decades, through empirical study, that users of dispute resolution process assess the «justice» and «fairness» of processes independently from the outcomes parties achieve[2]. From the American side, I have long claimed that Lon Fuller is our «jurisprude of process»[3], for in a series of articles Fuller has argued that each different process, whether adjudication, arbitration, mediation, legislation or regulation (and other processes, such as voting, etc.) has its own «integrity» – that is, its own norms, ethics, and types of outcomes produced[4].

In the modern day experience of so many varied processes used for dispute resolution (reviewed below) I often ask if Lon Fuller would approve of the great *hybridization* of process that has occurred in recent decades with such new forms as mediation and arbitration combined to form *med-arb* or *arb-med*[5] (in labor, family, commercial disputes), «*early neutral evaluation*»[6] or «*settlement conferences*», a process comprised of both judges and lawyers, giving evaluative feedback to counsel and parties in pre-trial settings[7], «*summary jury trials*»[8] (jury advisory opinions in public courts for settlement purposes), «*mini-trials*»[9] (private hybrid processes using witness testimony, argument, negotiation, mediation and sometimes arbitration, «*private judging*»[10] where private parties hire judges to adjudicate matters in secrecy, with full appellate processes and protection of the courts (as is authorized by state constitutions and statutes, such as in California), and now even *private juries*[11] are hired to resolve disputes outside of the courts so there is independent lay fact-finding, but no public record of the outcome or deliberations. What would Lon Fuller, and what should we, scholars and practitioners of procedural law, make of all these various processes? How do we know if these processes are fair, just, and appropriate for either the parties themselves or the larger system of legal dispute resolution?

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[1] Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in some cases)*, 83 *Georgetown Law Journal* 2663 (1995).

[2] E. Allan Lind & Tom Tyler, *The Social Psychology of Procedural Justice,* Plenum Press, 1988; Nancy Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 *Journal of Legal Educ.* 49 (2004).

[3] Carrie Menkel-Meadow, *Mothers and Fathers of Invention. The Intellectual Founders of ADR*, 16 *Ohio State J. of Disp. Res.* 13 (2000)

[4] Lon Fuller in Kenneth Winston (ed.), *The Principles of Social Order: Selected Essays of Lon Fuller*, Revd ed., Hart Publishing 2001.

[5] Carrie Menkel-Meadow, Lela Love Andrea Kupfer Schneider, Jean Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, 2nd ed., Wolters Kluwer, 2011, at 526–529.

[6] Wayne Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 *U. Chi. Legal F.* 303.

[7] Carrie Menkel-Meadow, *For and Against Settlement: The Uses and Abuses of the Pre-Trial Settlement Conference*, 33 *UCLA L. Rev.* 485 (1985).

[8] James Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 *Ohio State J. of Disp. Resolu.* 213 (1989).

[9] CPR, *Mini-Trial Handbook* (1982).

[10] Cal. Civ. Proc. Code §§ 638–645 (West Supp. 2004); Fla. Stat. Ann. § 44.104 (West 2003 & Supp. 2004); Ann Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 *Duke L. J.* 166 (1994).

[11] Margaret Jacobs, *Legal Beat: Private Jury Trials: Cheap, Quick and Controversial*, *Wall St. J.,* July 7, 1997.

In this short essay I will address these questions by suggesting that, in the United States, we now have more than «formal» or «informal» processes —we have many «semi-formal» processes, and the question is how shall we evaluate the efficacy, efficiency and legitimacy of so many different kinds of process. In the United States we have a very elaborate *formal justice system of federal and state rules of procedure (both civil and criminal)*, as well as countless specialized tribunals with their own procedural rules, such as in bankruptcy, labor, family law, securities, technology, trade, patent and trademark, and taxes. We also have many *informal fora* for dispute resolution, including private uses of mediation, arbitration and related processes, religious courts and mediation agencies, specialized business and industry panels of dispute resolution (e.g. banking, insurance, franchise, construction, technology, sports and energy, among others), using both mediation and arbitration techniques[1], community and neighborhood dispute resolution processes[2], online consumer forms of dispute resolution[3], internal organizational forms of dispute resolution (Ombuds or «IDR» (internal dispute resolution[4]), including grievance processes in large corporations, universities, trade unions, government agencies, and non-governmental institutions[5]), as well as dispute resolution fora even in illegitimate enterprises – gangs[6] and organized crime. We now also have a more hybrid set of processes which can be called *«semi-formal» forms of dispute resolution*, which utilize both private and public processes with increasingly structured and formal aspects of process, even if there is little to no recourse to more formal adjudication or appellate review. These include the «ADR» programs «annexed» to courts, with a great deal of federal and state variations in rules, and access to courts after use, mandatory arbitration clauses found in many consumer and business contracts, which obligate parties to use structured out of court arbitration tribunals, some with very detailed procedural rules, but little to no appeal to courts (under the Federal Arbitration Act's limited grounds for vacatur of an arbitration award[7]), as well as the elaborate structure of international commercial arbitration which is now quite «formal» in its conduct, if still mostly unattached to formal courts[8].

[1] CPR Industry Panels Dispute Resolution.

[2] Sally Merry and Neal Milner, *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*, University of Michigan Press, 1993.

[3] Ethan Katsh & Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey Bass, 2001.

[4] Lauren Edelman, Howard Erlanger and John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *Law & Society Rev.* 497 (1993).

[5] William Ury, Jeanne Brett and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut Costs of Conflict*, Jossey Bass, 1988.

[6] Sudhir Venkatesh, *Gang Leader for a Day,* Penguin, 2008.

[7] 9 U.S. C. § 10.; *Hall Street Associates v. Mattel,* 552 U.S. 576 (2008).

[8] Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and The Construction of a Transnational Legal Order*, University of Chicago Press, 1996. But see Alec Stone Sweet, *Arbitration and Judicialization*, 1(9) *Onati Socio-Legal Series* 1 (2011) arguing that some forms of international arbitration (state-investor arbitration) are becoming increasingly judicialized by explicitly publishing rulings, giving reasons in opinions and decisions, which include common legal doctrines like proportionality and balancing, allowing *amicus curiae* briefs, treating past decisions as precedential and arguing for appellate processes. Some scholars (I am among them, see Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?*, in Peter Gauch, Franz Werro, Pascal Pichonnaz (eds.), *Melangés en l'honneur de Pierre Tercier*, Schulthess, Geneva, Switzerland, 2008) think that even international commercial arbitration, a creature of private contract, is in fact, dependent on the state – national courts for enforcement and recognition of awards, pursuant to a public international law treaty and that international commercial arbitration is, in fact, creating a

For purposes of this paper I use the term «semi-formal» from American etiquette dressing requirements («smart casual» is the British equivalent) to connote the attempt to locate dispute processes half way between formal tuxedos or «black tie» and evening gowns of the by-gone days of formal gatherings, and the totally informal or casual dress more common in today's variety of professional, family, and entertainment gatherings. To request «semi-formal» dress is to ask the gentlemen to wear ties and jackets, if not tuxedos, and to hope the women will wear, if not dresses and skirts, than at least «fancy pants». The idea is to preserve some notion of order, elegance, solemnity and seriousness to the social event. Thus, «semi-formal» uses of mediation and arbitration in the courts, suggest (sometimes falsely) that someone is looking over or supervising the choice of mediators or arbitrators and ensuring their competence and ethics, and in some cases, permitting a further appeal to the black robed (and formal) adjudicator.

For example, the elaborate rules of the American Arbitration Association, if not full-on Federal Rules of Civil Procedure, still provide for some discovery and mandatory information exchange, that old American practice of document production and factual inquiries of the other side, in person (depositions), and through detailed (and costly) document and now computer searches, preliminary relief, and in some cases the same relief (punitive damages) as courts would provide in the United States. Though virtually all of this occurs without full public transparency or appellate review, at least (in theory) everyone knows the rules they have selected (usually through contract or selection of a particular arbitral administering institution). Recently in the United States, many efforts to challenge the true «voluntariness» of these now «mandatory» clauses to arbitrate contract, consumer, business, and employment disputes have failed, as the formal courts, including the United States Supreme Court, have sustained contracts which require certain forms of dispute resolution (usually arbitration) even where consumers and employees don't really know or understand what they are signing[1].

Totally casual or informal forms of dispute resolution are now called «litigation-lite» (arbitration) or «mediation-heavy» (evaluative mediation where third party neutrals decide or strongly suggest solutions to parties, rather than simply facilitating party negotiation[2]) that occur without formal clarity about the procedural rules applied or what can happen if the process fails. The question here is whether «semi-formal» processes can legitimately operate in a space between the transparency and presumed consistency of formal justice, and the confidentiality, flexibility, and self-determination of informal processes. Should we be subjecting different kinds of process to different kinds of evaluative criteria or should all process be judged by the same criteria?

This increasing complexification, segmentation, and differentiation of process which was all intended to express and be justified by such important justice values as *party choice, consent, self-determination* and *party-tailored solutions to problems,* now potentially threatens other justice notions of *consistency, transparency, true consent and knowledge,* as well as *equity, equal treatment, clarity, socially «uniform»* and *just solutions.*

common law of modern *lex mercatoria*, Thomas Carbonneau, *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant,* Kluwer Law International, 1997.

[1] See, e.g., *Gilmer v. Interstate/Johnson Lane Corp*. 500 U.S. 20 (1991); Jean Sternlight, *Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, 16 *Dispute Resolution Magazine* 5 (2009); Jean Sternlight, *Is the US Out on a Limb? Comparing the US Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 *U. Miami L. Rev.* 831 (2002).

[2] Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 *Florida State Law Review* 937 (1997).

By describing and reviewing some of the more interesting current developments in modern American process pluralism here I hope to expose the difficulties, paradoxes and contradictions of processes that have different goals and purposes (especially if parties have different goals and purposes within the same dispute), especially when «semi-formal» is neither formal nor informal. Consider, as reviewed below, the paradox of enforcing private arbitral awards in public courts, the absence of clear enforcement rules for private mediation, the conflicts of private religious «courts» with public values expressed in formal state courts[1], the role conflation of judges who mediate or manage settlement conferences rather than adjudicate, and the absence of records by which to judge any of this when parties choose to take their informal or semi-formal dispute resolution processes to entirely private settings. To what extent do we need «formalism» in the form of public or transparent, uniform rules of process and procedure to judge the legitimacy, fairness or justice of any particular dispute resolution process? To what extent should different processes be permitted to have different forms of legitimacy or justification? Is «process pluralism» itself a «just» good?

II. The Characteristics of «Formal» Justice

Conceptions of formal justice in modern American jurisprudence include, in a trial or formal hearing setting, transparency or publicity of proceedings, reasoned legal arguments based on legal precedent and «proven» facts, including witness examination and testimony, and discovery of facts, documents, and information, even from adverse parties and sources, public officials (whether elected or appointed in both state and federal variations) as judges who advise fact finders (juries) about the law or engage in fact-finding themselves, as well as make legal rulings, write formal, reasoned opinions that have precedential or *stare decisis* impact on other, like, cases, and most importantly, are governed by formal rules (Federal (or state) Rules of Civil or Criminal Procedure), and are subject to appellate and other review procedures[2]. For Lon Fuller adjudication or «formal justice» is warranted when there is a need for reasoned argument to decide disputes, not only for the immediate disputants, but to elucidate rules for the larger society, especially when *rights* (and especially competing rights) are at issue. Adjudication requires the decision of «authoritative» and «neutral» decision makers who explain their reasons (assumed to be agreed to or binding on the disputants and the larger society in which they are embedded), which are derived from what we now commonly call «the rule of law», or properly enacted law (legal positivism) or common law interpretive law.

The third party neutral judge or «universal third» (as historian Martin Shapiro describes the role) is expected to be detached from the parties and the issues and to «rule» on the basis of agreed to substantive and procedural rules. This assumes the foundational principle of «consent» to the juridical form and «jurisdiction» (power to speak) of the tribunal. Many Anglo-American writers on formal justice also assume a particular kind of process – adversary argument, with assumptions that «truth», as well as justice will be produced by

[1] Michael A. Helfand, *Religious Arbitration and the New Multi-culturalism: Negotiating Conflicting Legal Orders*, 86 *New York University Law Review* 1231 (2011); Ellen Waldman, *Mediation Ethics*, ch. 9, Jossey-Bass, 2011.

[2] Lon Fuller, *The Forms and Limits of Adjudication*, in K. Winston (ed.), *The Principles of Social Order* and 92 *Harvard Law Review* 353 (1978); O. Fiss, *Against Settlement*; Martin Shapiro, *Courts: A Comparative and Political Analysis*, Univ. of Chicago Press, 1981; David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Georgetown Law Journal* 2619 (1995); Judith Resnik, *Managerial Judges*, 96 *Harvard Law Review* 374 (1982).

hearty and contested, if «policed,» production of evidence, and arguments from «both» (assuming two) sides[1]. The neutrality and disinterestedness of the «decider» or «arbiter» in formal justice is so important to many jurisprudes of formal process that any departure from the distinctive adjudicative role (such as to «manage» or mediate cases) is regarded as sullying the basic process[2].

In summary, conceptions of the core aspects of formal justice include:

• Formal and clear *rules of procedures*, known to or consented to by the parties, including allocation of tasks of production of proof and evidence

• Transparency/*publicity of hearing*

• *Neutrality and disinterestedness of deciders* of both fact (sometimes juries) and law (judges)

• *Access to information* from all parties (under oaths of truth telling), with limited confidentiality or other policy protections

• *Rights or «rule of law» based outcomes and decisions*

• With appropriate and authorized *legal remedies* ordered by

• *Public officials* (judges) or their delegates (juries), with

• *Public and reasoned decisions* explaining outcomes and legal basis of outcomes for

• *Clarification of rules and basis of decision* for the parties, and guidance for others in similar situations

• *Possibility of review of decisions* for error or other faulty process or substantive reasons

• All of these elements define various aspects of the content of the American (and Anglo) conception of «due process». Unfortunately (for formal justice and the parties), even some of the strongest proponents of the need for «adjudication» in some circumstances (e.g. when «rights» are necessary to make «right») acknowledge that some situations call for different elements of dispute resolution or decision making both at the individual (e.g. family or workplace) or societal (the polity) level. Lon Fuller acknowledged both that some relationships (family, workplace, repeat commercial customers) and some matters (the «polycentric» dispute with many intersecting and mutually affecting issues) were better handled in other forms of resolution (mediation with trades, in some settings, votes of aggregate masses in democratic legislatures, arbitration when privacy, speed and consistency are desired).

Thus, for Lon Fuller, «other» processes are themselves morally, politically, socially, and legally legitimated by what parties might want or need, or the situation requires. Fuller's (and my own[3]) claims for other processes are based on the «integrity of process differences» themselves, not just the need for faster, cheaper, or more efficient forms of traditional adjudication. Parties might want to preserve relationships or communities or workplaces without brittle and binary decisions (which could lead to desires for revenge or retribution in repeat play settings). Parties might want to «share» (e.g., children in divorce) or preserve, rather than divide, resources. Rules of law might give both or «all» sides to a particular dispute similar or non-dispositive claims of right. Coordinated, rather than competitive, action could lead to creative new outcomes and solutions to new or unlegislated for problems or

[1] See Stuart Hampshire, *Justice is Conflict*, Princeton U. Press, 2000.

[2] See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*; Judith Resnik, *Managerial Judges*.

[3] See, e.g., Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving* and Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multicultural World*, 38 *William & Mary L.Rev. 5* (1996).

issues[1]. Some communities might prefer to resolve their disputes or solve their problems within their own community norms[2].

III. Informal Justice in the United States

Although there is a long history of informal justice in the United States, with religious, local community, and business groups negotiating, mediating, or arbitrating their own disputes since the early colonial period and continuing to the present[3], modern informal dispute resolution in the United States is derived from several different substantive fields (labor[4], commercial law, civil rights[5], environmental[6] and family law[7]), a judicial movement (docket clearing efficiency[8]) and a social movement (party empowerment, consumer[9] and civil rights accountability and more tailored solutions to social and legal problems) of the 1970s and 1980s, which together produced a turn to private negotiation, mediation[10], community consensus building[11], and commercial arbitration processes[12].

Modern American dispute resolution has a strong intellectual grounding[13] in decision sciences[14], game theory[15], international relations, economics, social and cognitive psychology[16], anthropology[17], sociology[18], and political science, as claims for «better» solutions to legal and social problems were articulated with reference to «interest and needs» – based

[1] Menkel-Meadow, *Aha! Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 *Harvard Negotiation Law Review* 97 (2001).

[2] Oscar Chase, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context,* NYU Press, 2005; P.H. Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective*, Academic Press, 1979; Laura Nader & Harry Todd (eds.), *The Disputing Process – Law in Ten Societies*, Columbia University Press, 1978; Clark Freshman, *Privatizing Same-Sex Marriage Through Alternative Dispute Resolution: Community Enhancing Versus Community Enabling Mediation*, 44 *UCLA L. Rev*. 1687 (1997).

[3] Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers*, Oxford, 1983.

[4] Jerome T Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement*, Jossey Bass, 2004.

[5] Wallace Warfield, *From Conflict Resolution to Social Justice*, Alicia Pfund (ed.), Continuum Press, forthcoming.

[6] Lawrence Bacow & Michael Wheeler, *Environmental Dispute Resolution,* Springer, 1984.

[7] Gary Friedman, *A Guide to Divorce Mediation*, Workman, 1993.

[8] Warren Burger, *Isn't There a Better Way?*, 68 *A.B.A. J.* 274 (1982)

[9] Christine Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*, Greenwood Press, 1985.

[10] Carrie Menkel-Meadow, Lela Love & Andrea Schneider, *Mediation: Practice Policy and Ethics*, WoltersKluwer, 2006; Carrie Menkel-Meadow (ed.), *Mediation: Theory, Policy and Practice*, Ashgate, 2000.

[11] See, e.g., Lawrence Susskind, Sarah McKernan and Jennifer Thomas-Lermer, *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, Sage Publications, 1999; Ray Schoenholtz, *Neighborhood Justice Systems: Work Structure and Guiding Principles*, 5 *Mediation Quarterly 3 (1984)*.

[12] Soia Mentschikoff, *Commercial Arbitration*, 61 *Columbia Law Review* 846 (1961).

[13] Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in Michael Moffitt and Robert Bordone (eds.), *Handbook of Dispute Resolution*, Jossey Bass, 2005.

[14] Richard Zeckhauser, Ralph Keeney and James Sebenius (eds.), *Wise Choices: Decisions, Games and Negotiations*, Harvard Business Press, 1996.

[15] Duncan Luce and Howard Raiffa, *Games and Decisions: An Introduction and Critical Survey*, Dover, 1987.

[16] Kenneth Arrow, et.al, *Barriers to Conflict Resolution*, W.W. Norton, 1995; Dean Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate and Settlement*, McGraw Hill, 2004.

[17] Kevin Avruch, *Culture and Conflict Resolution*, USIP Press, 1998.

[18] Lewis Coser, *The Functions of Social Conflict,* Free Press, 1956.

negotiations[1], pie-expanding, not dividing, resource allocation[2], efficient information sharing and processing[3], and a move away from purely «competitive» processes to collaborative and coordinated decision making[4].

In the 1970s and 1980s theorists of better problem solving, combined with judicial and political activists, called attention to many processes «alternative» to court and formal based dispute resolution, including dyadic and multi-party negotiation, mediation, arbitration, and hybrid processes like community consensus building, ombuds within organizations, and victim-offender mediation in criminal matters[5]. What was formerly «under the radar screen» (negotiation as the most common form of dispute resolution, through settlements prior to, during, or even after trial) became the subject of formal instruction in law schools, empirical and social science study[6], and policy making by courts[7]. Judges, like Chief Justice Warren Burger, who wanted to reduce case loads in the courts touted the advantages of more responsive, private forms of dispute resolution in out of court negotiation, mediation and other forms of dispute resolution. The United States Congress appropriated money for «neighborhood justice centers» which were to deal with «minor disputes», using both lawyers and non-lawyer mediators for such matters as neighborhood disputes, minor (misdemeanor) crimes, small commercial disputes, landlord tenant disputes, and a variety of other matters. Restorative justice, in the form of victim-offender mediation, «healing» and «sentencing circles» were derived from American (and Canadian and Australian) indigenous («Indian») groups to provide community based alternatives to criminal punishment, especially, but not exclusively, used for juvenile offenders. Such efforts at community-based restorative justice are now used even in felony and serious crimes in a few pioneering states (e.g. Wisconsin)[8].

Specialized areas of law, like family law and labor law[9] had long used informal processes, like negotiation and mediation, for dispute resolution, but the practices of both family and labor mediation began to be applied and «opened out» to a greater variety of legal (class actions, torts and contracts claims), political (resource allocation, environmental disputes, local government disputes) and social disputes (community policing, racial tensions, ethnic tensions, educational institutions). Lawyers and law students, as well as other professionals, began to seek training in mediation and the «healing arts», as well as continuing study

[1] Carrie Menkel-Meadow, *Chronicling the Complexification of Negotiation Theory and Practice*, 25 *Negotiation J*. 415 (2009).

[2] Roger Fisher, William Ury and Bruce Patton, *Getting to YES*, Penguin, 3rd ed., 2011.

[3] Carrie Menkel-Meadow, *Know When To Show Your Hand, Negotiation Newsletter, Program on Negotiation,* Harvard, 2007.

[4] John Nash, *Two Person Cooperative Games*, 21 *Econometrica* 129 (1953); R. Walton and R. McKersie, *A Behavioral Theory of Labor Negotiations*, McGraw-Hill, 1965; Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes,* Yale University Press, 1973.

[5] Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does it Work?*, 3 *Annual Review of Law and Social Science* 10:1 (Annual Reviews, Stanford, 2007).

[6] Carrie Menkel-Meadow, *Dispute Resolution*, in P. Cane & H. Kritzer (eds.), *Oxford Handbook of Empirical Legal Research,* Oxford, 2010.

[7] Carrie Menkel-Meadow and Bryant Garth, *Civil Procedure: Policy, Politics and People*, in P. Cane & H. Kritzer (eds.), *Oxford Handbook of Empirical Legal Research,* Oxford Press, 2010.

[8] Jeanne Geske, *Why do I teach Restorative Justice to Law Students*, 89 *Marquette Law Review* 327 (2005).

[9] Carrie Menkel-Meadow*, The National Labor Relations Act Legacy: Collective or Individual Dispute Resolution or Not?*, 26 *ABA Labor & Employment J*. 249–266 (2011).

of more conventional litigation skills. To this date, however, there is virtually no official licensing or credentialing for mediators or other dispute resolution professionals[1].

Perhaps most interestingly, various forms of «informal» dispute resolution have been used to great effect in «extra- non or il-» legal enterprises. The film *The Godfather* dramatized the use of «elder» mediation in resolving disputes within the «costa nostra» (Mafia), and more recently, sociologist Sudhir Venkatesh gained access to both internal gang mediation and informal «community policing» mediation of gang-related disputes in Chicago, within gangs, and in relations that gang members have with the larger community[2]. I have come to call this form of informal dispute resolution A[2] (*alternative* alternative) Dispute Resolution, when I learned some years ago about the effectiveness of gang leaders in mediating disputes in the favellas of Rio de Janeiro[3].

Those who were dissatisfied with the «limited remedial imaginations» of courts' limited power to order creative relief[4] or the «adversarial culture» of legal problem solving[5], and others who wanted to encourage more direct party participation, without the need of professionals (lawyers and judges) in dispute resolution, combined to form what was later called the «informal justice movemen»[6]. This social movement encouraged individuals and communities to seek resolution of social, political, economic, and even legal problems outside of the courts, using community mediation, consensus building, group organizing, and strategies that allowed more than two parties to seek resolution of problems by negotiated and «consensual», not court commanded, solutions. Over time these «informal» processes were criticized for «privatizing» justice that many thought should remain in the public and formal sector[7] for transparency of process, generation of public precedential rulings, and equalization of unequal power or economic endowments. Others, including this author, continued to maintain that some aspects of «informal» dispute resolution (absence of some formal rules, confidentiality, «trading of preferences», creation of new party-specific norms and tailored solutions to problems) produced better «justice» for some, if not all, disputants. Thus, core claims of value for «informal» justice included:

- Direct *party empowerment and participation* in case «presentation» and resolution
- *Self-determination*
- *Consent*
- *Tailored solutions*, based on party needs and interests, not necessarily «rights» and claims of law (utilizing tailored individual, religious, ethical or communitarian principles for resolution, e.g. «joint custody» in divorce and children's custody)
- *Non-monetized outcomes* and solutions (apologies, trades, in-kind, other forms of «relief»)

[1] A few states (e.g. Florida, Texas, Massachusetts, California) require some limited training and certification to perform mediation or other dispute resolution services in the courts, but not in private practice.

[2] Sudhir Venkatesh, *Gang Leader for a Day*, Penguin, 2008, at 96–111; 158–163.

[3] First National Congress of Mediation, Brasília, Brazil, March 2008.

[4] See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*.

[5] Robert Kagan, *Adversarial Legalism: The American Way of Life,* Harvard Press, 2001; Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue*, Random House, 1998.

[6] See Richard L. Abel (ed.), *The Politics of Informal Justice: The American Experience*; Christine Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*.

[7] See e.g., Richard L. Abel (ed.), *The Politics of Informal Justice: The American Experience*, David Luban, *Settlements and the Erosion of the Public Realm*; Judith Resnik, *Managerial Judges*; O. Fiss, *Against Settlement*.

• *Future,* not just past, *oriented problem solving*, without need necessarily of fact finding or assessment of blame

• *Confidentiality*, producing the opportunity for changed «positions», trades and non-precedential accommodations or solutions, as well as *privacy* protection for disputants of all kinds, individuals and organizations

• Inclusion of more than two litigant «parties in interest» (*multi-party dispute resolution*)

• *Reduction of elite and professional decision makers* in parties' lives and disputes, utilization of party «consent», not command, as legitimating value

• *Flexible, situation specific, rules* and practices of proceedings

• *Contingent solutions* (capable of being revisited with changing conditions) without precedential force or rigidity

• «*Reorientation» of the parties to each other*[1] – promoting *healing relationships*, not rupture and continued conflict and resentment of formal litigation or punitive results in criminal matters[2]

• Potentially *faster and cheaper dispute resolution* («efficiency»)

• Greater *legitimacy of and compliance with* party-chosen outcomes

The relative success and power of some forms of informal processes led, beginning in the 1980s, to adaptations and transformations of private informal processes like negotiation, mediation and arbitration, and their hybrids, to use in more public settings – thus courts began to «annex» mediation and arbitration processes (and in some cases to make them mandatory), business began to formalize, in contracts, uses of mandatory arbitration, and a variety of organizations began to «internalize» and mandate the use of informal grievance processes as a condition precedent of any recourse to public and formal litigation processes. At the same time, even formal public court processes began to use and transform themselves into more «informal» processes, such as «problem solving courts» in drug, youth, family, mental health, and vice courts[3], the pre-trial settlement conference morphed into a mediation session[4], and multi-party participatory consensus building fora turned into public «negotiated rule-making» proceedings in administrative and regulatory law and proceedings[5], all of which eventually received legal recognition in formal rules and legislative authorizations[6]. Uses of informal negotiation and dispute resolution processes (hybrids of mediation and arbitration) were increasingly used to settle mass class actions in tort, consumer law, securities, employment and other matters[7], and even single dramatic mass disasters like

[1] See, e.g., Lon Fuller, *Mediation: Its Form and Its Functions*, 44 *So. Cal. L. Rev.* 305 (1971).

[2] Mark Umbreit, *The Handbook of Victim-Offender Mediation,* Jossey Bass, 2000.

[3] *Center for Court Innovation, 2011 Annual Report* (New York); Greg Berman & John Feinblatt, *Good Courts; The Case for Problem Solving Justice*, New Press, 2005.

[4] Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 *Ohio J. Disp. Res.* 271 (2011); Peter Robinson, *Judicial Settlement Conference Practices and Techniques*, 33 *American J. of Trial Advocacy* 113 (2009).

[5] Phillip Harter, *Negotiating Regulations: A Cure for the Malaise?*, 71 *Georgetown Law Journal* 1 (1982); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1 (1997).

[6] See Menkel-Meadow, Lela Love, Andrea Kupfer Schneider and Jean Sternlight, *Dispute Resolution: Beyond the Adversary Model,* 2nd ed., WoltersKluwer, 2011, ch. 12 and 13.

[7] Deborah Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Texas Law Review* 1587 (1995); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 *Cornell Law Review* 1159 (1995).

the deaths arising out of the September 11, 2001 terror attack on New York[1] were dealt with by use of informal settlement processes with public funds and public recognition. The «informal» has become «semi-formal».

IV. «Semi-formal» Justice in the United States

With the expansion and acceptance of ideas of informal consensual problem solving and dispute resolution in the early 1990's, all branches of the US government responded. Courts began, at both federal and state levels, to offer, at first voluntary, then later, mandatory programs of court annexed mediation and arbitration processes, and later included such processes as «early neutral evaluation» (a process in which counsel in a case meet with a volunteer or paid lawyer to review claims, schedule discovery and information exchange, pursue settlement and get an informal «evaluation» of the merits of the case. A few innovative judges, like Thomas Lambros in Ohio and Jack Weinstein in New York began to adapt private settlement techniques for public cases. Lambros originated the «summary jury trial» in which lawyers (and witnesses) presented shortened versions of their cases (usually in no more than one day) to those in the jury venire for an «advisory opinion» by the jurors for use in further case settlement negotiations. This practice was criticized as conflating the public function of the jury[2], whose members came to court expecting to find facts in a litigated case, and instead were used to assist private negotiation discussions. Summary jury trials were often used in high value fact disputes (asbestos and other mass claims) in order to set baseline lay fact evaluations of the quality of formal proof and evidence. When some judges ordered the use of this process in individual cases (e.g. civil rights) against the will of the parties, litigants began to appeal to higher courts and the process has declined in usage in recent years. Legal questions also were raised about whether there could be public access to these proceedings, which were a hybrid of private negotiations, but conducted in a public courtroom[3].

Federal District Judge Jack Weinstein, among others, used the formal Civil Procedure Rule permitting the use of Special Masters (Fed. R. Civ. Proc. 53) to organize discovery and case evaluation in complex cases (also asbestos and other mass claims and class actions, as in the famous Agent Orange case[4]) and then permitted Special Masters (such as the now similarly famous Ken Feinberg (special master of the 9/11 Fund) to act as mediators in settling such cases, with some controversial imprimatur of the judicial office[5].

The 1980s and 1990s saw modification of the Federal Rules of Civil Procedure to allow the use of some of these settlement practices (Rule 16 was amended to make negotiation of settlement an explicit part of the pre-trial conference and many federal courts used the local rule power of Fed. R. Civ Proc. 83 to craft local rules for the use of ADR in «court annexed» programs[6]). The federal courts in New York City, San Francisco, Boston and

[1] Kenneth Feinberg, *What's A Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11,* Public Affairs, 2006.

[2] Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 *U. Chicago L. Rev.* 366 (1986).

[3] *Cincinnati Gas & Elect. Co v. General Electric Co*., 854 F.2nd 900 (6th Cir. 1988).

[4] Peter Schuck, *Agent Orange On Trial*, Harvard Press, 1988.

[5] Jack Weinstein, *Individual Justice in Mass Tort Litigation*, Northwestern University Press, 1995.

[6] John Maull, *ADR in the Federal Courts: Would Uniformity be Better?,* 34 *Duquesne L. Review* 245 (1996).

Washington DC were among the early pioneers of complex menus of ADR choices and requirements to use some form of ADR[1]. Now, by virtue of federal legislation, the *Civil Justice Reform Act of 1990* (requiring all federal courts to implement some cost and delay ameliorative programs, *the Judicial Improvements and Access to Justice Act of 1988* (allowing experimentation with mandatory arbitration in federal courts), the *Administrative Dispute Resolution Act of 1990* (authorizing the use of negotiated rulemaking processes in administrative regulation) and finally, the *Alternative Dispute Resolution Act of 1998* (requiring all federal courts to implement some program of ADR, while allowing each district court to decide what is best for its region), virtually every federal court in the US has some form of ADR. These courts report on the usage rates of mediation, arbitration, and settlement programs. Statistical reports available from many of the most populous states (including NY, California, Texas, and Michigan) demonstrate high usage of a variety of non-trial forms of dispute resolution, within the formal court, with «settlement rates» ranging from 30% to over 70% in some courts. Virtually all of the federal courts of appeals now have formal mediation programs, most with full time staffs, a few rely on volunteer mediators[2] (this author has been a mediator in the District of Columbia Circuit Court of Appeals).

Even the Executive branch of the US government strongly encouraged use of ADR. During President Clinton's Presidential term, Attorney General Janet Reno required mediation training of herself and her senior staff (I performed this training), authorized an «ADR czar» position in the Justice Department, currently Program of Dispute Resolution in the Justice Department, allocated funds for the settlement of cases involving the federal government, and changed policies having to do with federal government participation in arbitration and mediation programs. In addition, an Interagency ADR Working Group representing all the major federal agencies, began to meet regularly to discuss dispute resolution programs throughout the federal government. Many agencies now provide for «collateral duty» in which employees in one agency act as mediators or dispute resolution consultants to other agencies in the government (thus providing some neutrality and lack of conflict of interest in internal agency matters). An awards program honored such branches of the government as the Army Corps of Engineers and the Navy for instituting non-litigation dispute resolution processes in procurement contracts, and later even in dispute resolution issues in war zones[3]. In addition, many federal agencies now have internal dispute resolution programs, including ombuds to resolve internal conflicts[4] (employment, policy), as well as to deal with disputes with clients or customers of particular agencies (e.g. Environmental Protection Agency, Securities and Exchange Commission, National Institutes of Health, Department of Energy, etc.)

These uses of «informal» dispute processes within the formal government are one form of «semi-formal» dispute resolution, sometimes, but not always, authorized by regulation, other times just by agreed to practices or recommendations. Practices can change with the change of political administration. To what extent should formal rules of procedure,

[1] See, e.g., N.D. California Rules of ADR.

[2] Shawn P. Davidson, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 *Ohio J. of Disp. Res.* 1 (2006).

[3] Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 *Negotiation J.* 219 (2007).

[4] Howard Gadlin, *The Ombudsman – What's In a Name?*, 16 *Negotiation J.* 37 (2000).

requirements of transparency, publicity, rule of law, appeals from decisions or mediation or negotiated agreements be applied to such processes? To what extent are such processes really «consensual»? And if, instead, they are «mandated», what redress is there to formal courts? Finally, questions have been raised about whether these processes really do live up to their promises and intended goals.

In the middle of the 1990s the federal government supported a major $5million research program (fielded by the RAND Corp.) to determine if ADR in the courts really did «reduce cost and delay». The results were decidedly mixed and controversial. RAND found that there was little actual reduction in cost and delay in courts that used mediation, arbitration, or early neutral evaluation processes[1], but the RAND study itself was criticized for studying a moving target. Many of the courts in the study were changing their policies to conform to the legislation discussed above as the study was ongoing. Courts in the federal system that were «matched» because of similar caseloads for comparison and «control» purposes were, in fact, quite different, geographically, culturally, and in terms of their caseloads[2]. At the same time as the RAND study was conducted a smaller study, also funded by the federal government, by the Federal Judicial Center did find that certain ADR practices in the courts were effective in reducing time to trial and total costs for final dispute resolution[3]. Both studies found considerable user satisfaction with different court-based dispute resolution options, even where respondents had no comparison base because they could not take their single dispute to different or controlled treatments for comparison[4]. Thus, the effectiveness, efficiency, and efficacy of ADR in the courts, as compared to an ever shrinking number of cases actually tried in courts (what is an appropriate «baseline» measure of «normed» dispute resolution?) continues to be vociferously contested and debated among legal practitioners and scholars.

As the courts and formal governments have made more use of informal processes, there has also been a growth and extension of informal processes becoming more «semi-formal» in the private sector. With the modern growth of ADR in the 1980s, the prime movers were actually large American corporations who in 1979 founded the Center for Public Resources to promote the uses of mediation, arbitration, and other private consensual processes in American business[5]. Commercial arbitration has

[1] James Kakalik, Terence Dunworth, Laural Hill, Daniel McCaffrey, Marian Oshiro, Nicholas Pace and Mary Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, RAND, 1996.

[2] Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes Of its Own: Conflicts Among Dispute Professionals*, 44 *UCLA L. Rev.* 1871 (1997); Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the District Courts*, Federal Judicial Center, 1996; Craig McEwen and Elizabeth Plapinger, RAND Report Points Way to Next Generation of ADR Research, 10 *Dispute Resolution Magazine* (1997).

[3] Donna Stienstra, Molly Johnson, Patricia Lombard, and Melissa Pecherski, *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990,* Federal Judicial Center, 1997.

[4] E. Allan Lind, Robert MacCoun, Patricia Ebener, William Felstiner, Deborah Hensler, Judith Resnik and Tom Tyler, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences,* RAND, 1989.

[5] CPR's private corporate strategy was picked up in the UK with Karl Mackie's founding of CEDR (Center for Effective Dispute Resolution, www.cedr.com) in London, and now the International Mediation Institute, www.imimediation.org (headquartered in the Netherlands, as an attempt to promote and certify commercial and «cultural» competence in mediation (encouraged by the passage of the European Directive on Mediation 2008/52 Directive of the European Parliament and Council, May 21, 2008).

always been a common way to resolve disputes among and within participants in the same industry[1], but in the 1980s large corporations, through CPR, signed a «Pledge» to pursue ADR first when disputing with each other (within and across industries). Though not all members were compliant –many corporations continued to use traditional lawsuits, CPR used its bully pulpit and private funds to promote the use of both traditional forms of «A»DR and help develop new ones—such as the «mini-trial.» The Mini-trial allowed private companies (the first big case was *TRW v. Telecredit* in a patent infringement dispute) to privatize their dispute (protecting confidentiality of evidence, trade secrets, customer lists, experts), choose the decision makers (expert arbitrators or facilitative mediators), and the form of process (negotiation, mediation and witness examination), and control costs and evidence presented. Mini-trials were used in a wide variety of large cases in the 1980s and 90s, concurrent with continued use of courts in cases where large companies were sued by customers or in class action securities, mass torts, consumer or employment matters.

Thus, private ADR was often combined with public ADR and different processes are selected for use against and with different classes of parties. In general, many courts allowed stays of public litigation while parties pursued various forms of private ADR. CPR, as well as the American Arbitration Association, another private provider of dispute resolution services, also developed formal protocols for industry-wide and specific forms of dispute resolution – thus, oil and gas, franchise, construction, health care and hospital, labor-management, mass disasters, environmental, pharmaceutical and other industry specific « model rules and clauses» for dispute resolution were drafted and disseminated. In some industries the success of these private protocols and «model rules» provide a fully formalized alternative to the public justice system.

In addition to these private tribunals serving industry, several new providers of dispute resolution services emerged in the 1980s. The Judicial Arbitration and Mediation Service (now known solely by its acronym «JAMS») was founded by a state court judge in California who retired from the bench to found one of the most successful purveyors of private dispute resolution services, now serving all the major commercial centers in the United States, and beginning to compete with the international tribunals (the International Chamber of Commerce in Paris, the London Court of International Arbitration, the AAA's Center for International Dispute Resolution) for arbitration and mediation services. Former judges and private attorneys now earn upwards of $ 5,000/day for private dispute resolution services. In international settings, arbitration may be enforced in national courts where countries have signed on to the UN New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards; domestically enforcement is through the Federal Arbitration Act, as if a court judgment has been rendered (with a limited number of grounds for vacatur). In contrast, mediation agreements in the United States have no more formal legal force than a contract and must be sued on for enforcement as with any private contract. This is in contrast to some other countries (e.g. Israel) which now treat mediation agreements, in some settings, as if they were arbitration awards, with relatively easy enforcement in courts.

[1] See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *Journal of Legal Studies* 115 (1992).

As commercial arbitration has emerged as an important (but still not the only preferred) form of dispute resolution[1] between and among commercial parties, large companies, ranging from telecommunications, health and hospitals, banks, car rentals, computers, etc. have now imposed mandatory «private» arbitration on consumers and employees, a practice that has been sustained against many legal attacks, by the US Supreme Court[2]. The United States is an outlier in permitting this form of private dispute resolution to be mandated in private contracts, without, so far, guaranteed recourse to a public court challenge, except in a few limited instances. Even claims of unconscionability or other coerced contract defenses have been rejected in this context. Thus, «informal» private contractual arbitration (often dictated by the terms of a form contract written by a powerful corporation) has become the «norm» for many kinds of disputes. Recently a courageous (former lawyer) individual complainant has tried to use small claims court as a way around some of the contractual limits of arbitration and class action litigation. Her victory in small claims court is now on appeal by the losing company (Honda)[3]. There have been increasing efforts to attempt to regulate private consumer and employment arbitration (so far through unsuccessful efforts to pass federal legislation, The Arbitration Fairness Act, prohibiting the use of mandatory pre-dispute contractual arbitration in consumer, employment and franchise disputes). A few states (like California) have managed to add a few protections for consumers (conflicts of interest of arbitrators) through civil procedure rules or other state legislation (which is now often invalidated in federal court as pre-empted by the Federal Arbitration Act). This attempt to «regulate» consumer arbitration, has however, also led to some efforts in the private sector to make consumer or employment arbitration subject to some basic «Due Process Protocols[4].

In addition to private contracting, both at the industry and individual level, smaller communities have also continued to use informal out of court processes in a variety of contexts. Religious and ethnic groups have long offered their own courts, mediation and arbitration services for disputes within their own communities. Recently, tensions have been exposed when, as in family law, the formal court must still be the final authority on divorce or spousal or child support, when one party asks for acceptance of the agreement of a religious court, or when one party seeks public court control to require another party to satisfy legal requirements of the religious court for secular benefit[5]. The interplay of private religious courts and doctrines for dispute resolution has become a legal issue in a variety

[1] Theodore Eisenberg and George Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 *DePaul Law Review* 3335 (2007) (finding that many large companies are not using arbitration clauses in their contracts with each other, though they are often imposing such clauses on their contracts with individual consumers).

[2] See Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *Stanford Law Review* 1631 (2005); see, e.g., *AT& T v. Concepcion,* 131 Sup Ct. 1740 (2011).

[3] Jerry Hirsh, *Honda Civic Loses Unusual Small Claims Suit (to Heather Peters)*, Feb. 1, 2012, Los Angeles Times Business Section at 1.

[4] See, e.g., Employment Due Process Protocol; John Dunlop and Arnold Zack, *Mediation and Arbitration of Employment Disputes*, Jossey Bass, 1997; Christopher Drahozal and Samantha Zyontz, *Private Regulation of Consumer Arbitration*, http://ssrn.com/abstract=1904545 (2011).

[5] See, e.g., Michael A. Helfand, *Religious Arbitration and the New Multi-culturalism: Negotiating Conflicting Legal Orders*; Michael Grossman, *Is This Arbitration? Religious Tribunals, Judicial Review and Due Process*, 107 *Columbia Law Review* 169 (2007); Caryn Litt Wolfe, *Faith Based Arbitration: Friend or Foe?*, 75 *Fordham Law Review* 427 (2006).

of multi-cultural nations, including the US, Canada[1], the UK, and Australia in the common world and France and other legal regimes in Asia and Europe. Recently, several states in the United States (Oklahoma, Arizona, Nebraska) famously used their «democratic» referenda and legislative processes to ban the use of «foreign, international or Shar'ia law» in their state courts[2]. Many other states (e.g., Alabama, Texas, South Carolina, Wyoming, South Dakota) are attempting in one form or other to do the same thing. Most of us in the legal academy and many, but not all, of those on the bench (the judiciary) believe these laws are unconstitutional, but they represent a strong sentiment to police the use of communitarian, religious and ethnic enclaves' use of their own formal rules and laws, as well as processes. Religious courts or arbitration or mediation centers in family matters are used by Jews (Bet Din[3]), Christians[4], and Muslims[5], and for the most part have had their outcomes confirmed by courts which apply the regular standards for enforcing arbitration awards under the Federal Arbitration Act.

Local communities have also used informal processes (consensus building, deliberative democracy, public policy mediation[6]) to resolve land use, environmental, cultural and ethnic conflict, budget allocation and other disputes, outside of formal processes. With a new cadre of professionals specifically trained to engage complex communities in such disputes and group decision making, complex multi-party disputes may be resolved with agreements, often contingent, and monitoring programs (such as in resource management, land use and zoning, waste siting) which straddle public and private decision making rules and bodies[7]. The legal issue often then involves whether a public body, such as a regional zoning land-use or federal resource agency must participate and approve agreements reached in private settings, outside of formal court, legislative or administrative hearings. These processes may themselves now be quite «formal», adhering to community developed rules of engagement, delegation of state, federal or local authority, but such negotiated agreements still often require formal governmental approval and what was accomplished through these creative informal processes may unravel when returned to more formal and adversary proceedings[8].

Thus, the conundrum, paradox and issues in these «semi-formal» forms of dispute resolution are the relation of the private form of dispute resolution and its «outputs» or agreements to the state – when and if one party seeks to move dispute resolution

[1] The Premier of the province of Ontario in Canada sought to ban the use of faith-based family arbitration in his jurisdiction, see Michael A. Helfand, *Religious Arbitration and the New Multi-culturalism: Negotiating Conflicting Legal Orders,* at n. 30, while the Archbishop of the UK called for the inclusion of Shar'ia law in British family law determinations. Ibidem.

[2] This referendum has been held to be unconstitutional, see *Awad v. Ziriax* No. CIV-10-1186-M 2010 WL 4814077 (W.D. Oklahoma).

[3] See, e.g., *Kingsbridge Ctr. Of Israel v. Turk*, 469 N.Y.S. 2d 732 (App. Div. 1983); *Kovacs v. Kovacs*, 633 A.2d 425 (Md. 1993).

[4] Glenn Waddell & Judith Keegan, *Christian Conciliation: An Alternative to «Ordinary» ADR*, 29 *Cumb. L. Rev.* 583 (1999).

[5] *Abd Alla v. Mourssi*, 680 N.W. 2d 569 (Minn. Ct. of App. 2004).

[6] Susan Carpenter and W.L. Kennedy, *Managing Public Disputes: A Practical Guide for Professionals In Government, Business and Citizen Groups*, Jossey Bass, 2001.

[7] Carrie Menkel-Meadow, *Getting to Let's Talk: Commentary on Collaborative Processes in Environmental Dispute Resolution*, 8 *Nevada L. J.* 835 (2008).

[8] See, e.g., Alejandro Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 *Stan. Envtl. L.J.* 269 (2005).

from one sector to the other – for appellate review, appeal to public or state values, or to get state enforcement of relief, or to reverse what was accomplished in the more informal process.

V. Assessing Justice in Plural Procedural Practices

Dispute resolution in the United States is now characterized by multiple or parallel tracks, what I and others have called «process pluralism». Parties, depending on their economic and legal circumstances, may often choose between formal legal proceedings or less formal forms of dispute resolution. On the other hand, some parties may have no choice at all (such as the «helpless» consumers and employees who are required to agree to mandatory arbitration processes in their form (adhesion) contracts). In many matters well endowed disputants may switch from one form of dispute resolution to another – starting with litigation and then shifting to either court mandated or chosen mediation, negotiation or arbitration, using private or publicly paid for third party neutrals. In other cases parties may choose informal forms of dispute resolution and then seek enforcement of mediation or negotiated agreements or arbitral awards in public courts for enforcement (injunctive relief or execution on assets). The terrain is diverse, uphill, downhill and often rocky for the uninitiated or not so well endowed. Although the «ADR» movement was originally formed to make access to justice easier and to reduce the reliance on legal or other professionals, the truth is the landscape of disputing has indeed become more and more complex, with the predictions of outcomes, costs, and strategies harder and harder to produce with any degree of accuracy.

The field of dispute resolution and litigation in the United States now contains both scholars and practitioners who urge the return to courts and trials for more transparency, equalization of rules and process and general monitoring of both processes and outcomes, many claiming that a trial rate (in civil matters) of less than 2% of all matters filed is an inadequate number for a democratic society to produce legal precedents and fair process. For these commentators, informal or even «semi-formal» process may be considered to be «empty suits» (no visibility or accountability to those outside of the dispute resolution process), to continue the social dressing metaphor. Others among us, and I am one of those, still prefer to see process pluralism as offering the opportunity for party choice, both about process and about the kinds of outcomes that might be possible (trades, new creative solutions, shared commitments to agreements). I have always preferred a full closet from which to select my clothes for a particular event!

Yet, I remain haunted or affected by Lon Fuller's claims that each process has its own «integrity» or purpose – one set of values (privacy, on-going relationships, spider web- like intertwined issues in a single problem) for one kind of problem may dictate one kind of process (mediation) that would be inappropriate for another kind of problem (the elimination of injustice in a public institution like education (*Brown v. Board of Education)*. Thus, Lon Fuller and others would suggest that we should be clear about both purposes and uses of each process. Attempts to specify in advance particular processes for particular kinds of disputes have not been particularly successful in the United States (some courts prohibit the use of ADR in constitutional cases, prisoner's cases, civil rights matters, *pro se* (self-representation); others do not), in part because, in the hands of skilled parties, lawyers, and third party neutrals, almost any informal or semi-formal process can be made more

flexible, cheaper, faster and more creative than formal processes so process choice and effectiveness often turns on the particular actors in the process, not on the structure itself. Fuller's attempts to uncover the jurisprudential bases for process choice is now being applied to international or transnational disputing too, where «the formal» has been even less effective, in public, if not private dispute resolution[1]. Yet, it remains unclear whether it is structure and function or personality[2] that determines how fair, just and effective a particular process is.

Some years ago when I was consulting for a major international organization I was asked to develop a formula for assessing the «success» of any system of dispute resolution. The exercise was instructive for me because I realized that we need both qualitative and quantitative measures of effective dispute resolution, and also that «measures» of success for a «system»[3] may be different from measures of «justice» or «satisfaction» for disputants or users of any process. I offered the following set of criteria, variables, and factors in the assessment of dispute processes (a combination of «objective» and «subjective» measures), while recognizing that no single study could ever hope to include measures of them all:

Quantitative or «objective» measures:

- Number of conflicts or disputes in relevant «universe» (which and how many form into formal claim or complaint)
- Number of contacts or cases (in a particular process, as compared to the full «universe» of possible cases or comparable cases in another process)
- Numbers of issues
- Number of cases resolved/settled/closed/disposed of («settlement rates»)
- Number of cases referred to another process
- Number of cases dropped
- Case types (categories within systems, e.g., employment promotion, dismissal, communication, etc.)
- Numbers of parties
- Types of agreements, resolutions, outcomes
- Time to process case
- Cost of processing case — to complainant, to (third-party neutral), to program or system
- Comparisons (where possible) of all of above of comparable cases in different systems
- Comparisons of pre-conflict resolution program claiming (grievance systems, litigation) or violence with post-programmatic claiming
- Comparisons of rates of compliance with agreements, judgments, or orders
- Durability/longevity of outcomes

[1] Ralf Michaels, *A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution*, 2 (2) *Journal of International Dispute Settlement* 417 (2011).

[2] Daniel Curran, James Sebenius and Michael Watkins, *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 *Negotiation J.* 513 (2004).

[3] The new field of «dispute system design» in the United States (and other countries) is tasked with both developing and evaluating «systems» of dispute resolution in both public and private settings where there are iterative disputes, see special issue Dispute System Design, 14 *Harvard Negotiation Law Review* (2009).

- Longitudinal comparisons of changes in usage, time for processing, case types, etc.
- Demographic data on users, third-party neutrals, and other facilitators or professionals
- Variations in usage, outcomes, solutions by demographics, and differential characteristics of disputants and third-party neutrals, e.g., «experience» ratings
- Awareness of ability to choose different processes (an attitudinal measure)

Qualitative or subjective measures:

- Criteria for selecting particular processes
- Client satisfaction
- Improved relationships (post-conflict societies (e.g., Rwanda), families, workplaces, commercial relations)
- Improved communication
- Enhanced workplace productivity
- Learned conflict resolution/communication/relational skills («transformative» mutual intersubjective understandings or learned use of new processes, e.g., lawyers using mediation and other forms of problem solving)
- «Better» outcomes (more creative, individually tailored, deeper solutions)
- Perceived self-determination/autonomy/control over decision making
- Compliance with national, systemic, family, company, workplace, contractual norms/rules when legitimacy less questioned
- Perceptions of fairness, justice, and legitimacy of process
- Trust in institutions, both dispute processing and others
- Resolution of systemic issues (proactive conflict resolution, policy changes)
- «Value added» to organization or institution

But this list, whether exhaustive or not, cannot quantify, combine or «equalize» measures of «justice» with measures of «efficiency,» and disputants cannot subject themselves either simultaneously or sequentially to formal, semi-formal, or informal processes to determine which works best for them in a particular matter. Yet, I worry that while formal processes produce some modicum of review through formal procedures, court scrutiny, and published decisions and data, and informal processes promise only that the parties can do what they want «if they agree» (consent based), then «semi-formal» processes are perhaps the most problematic processes. Informal processes are those we believe the parties have consented to – are they? «Semi-formal» processes may be monitored («court annexed» or use of private arbitration tribunal rules of procedure) or made more formal by accessing state power (whether judicial or otherwise) for enforcement, but often, they aren't. Court annexed programs do not necessarily get reviewed by judges or other government officials. Private mediation and arbitration agreements and awards are not generally available to parties outside of the processes. Those who choose private processes, even with elaborate internal rule systems also may have no recourse to subsequent review, especially when agreements are confidential. (Perhaps this explains why so many of the newer international dispute resolution organizations are now using or proposing appellate processes, e.g. the World Trade Organization Appellate Body, ICSID, etc., both for review and for transparency and consistency of results[1]). Is Process

[1] Alec Stone Sweet, *Arbitration and Judicialization*.

Pluralism always a good thing (is there a time when too many choices may be a bad idea[1]) and how are we to know? When we have so many choices, and so many different possible measures of what constitutes a fair, just or good process, it may be virtually impossible to come up with a uniform and universally satisfying dress code. So, in the United States, for the near future, it may be «come as you are» – formal, informal or «semi-formal». Perhaps in a country this diverse the choice of dispute process should be similarly diverse, but it makes one wonder, along with Lon Fuller, whether each process choice must or should have its own integrity. I wouldn't wear a ball gown to a barbecue and I wouldn't wear a bathing suit to the courthouse.

[1] Chris Guthrie, *Panacea or Pandora's Box? The Costs of Options in Negotiation*, 88 *Iowa Law Review* 601 (2003) – is a rosé a good choice when some of the dinner guests want red wine and the others want white?

SESSION 2. GOALS OF CIVIL JUSTICE

General Reporter –
Prof. **Alan Uzelac**, IAPL Council member, University of Zagreb Faculty of Law, Croatia

How do the goals differ from country to country? What is the role of civil justice in the contemporary world?

National Reporters:

- Austrian National Report (with additional information on Germany): Dr. **Christian Koller**, University of Vienna, Austria
- Brazilian National Report: Prof. **Teresa Arruda Alvim Wambier**, Catholic University of São Paolo, Brazil
- Chinese National Report: Prof. **Fu Yulin**, Peking University, China
- Hong Kong National Report: Prof. **David Chan**, Prof. **Peter Chan**, City University of Hong Kong, Hong Kong
- Hungarian National Report: Prof. **Miklós Kengyel**, Andrassy University, Budapest, Hungary
- Italian National Report: Prof. **Elisabetta Silvestri**, University of Pavia, Italy;
- Dutch National Report: (with additional information on Belgium and France), Prof. **C.H. (Remco) van Rhee**, Maastricht University, Netherlands
- Norwegian National Report: Dr. **Inge Lorange Backer**, University of Oslo, Norway
- Russian National Report: Dr. **Dmitry Nokhrin**, Constitutional Court of the Russian Federation, Russia
- American National Report: Prof. **Richard Marcus**, University of California, Hastings College, USA.

Alan Uzelac[1]

GENERAL REPORT

I. Introduction

1. This general report is a product of a process initiated when it was decided that the IAPL Moscow Conference 2012 should revisit one of the fundamental topics of civil procedure, the goals of civil justice. The organizers of the conference gave as a direction only two very general questions:

– How do the goals differ from country to country? and
– What is the role of civil justice in the contemporary world?

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2. I accepted to serve as the general reporter during the Pecs Colloquium in September 2010. One of my first duties was to elaborate the two questions given as a direction, and to find the national reporters who would be willing and able to provide in-depth information about their national systems. It was quite a challenging task, as the mission to report on the «role of civil justice in the contemporary world» needed a global approach. At the same time, it was suggested, for organisational reasons, not to engage more than six national reporters. After an exchange of views with the organizers, I got permission to slightly increase the number of reports, so finally there were ten national reports, provided by twelve national reporters. Capturing the global differences from country to country still seemed as an impossible mission. Yet, I had a great luck and a privilege of working with knowledgeable reporters who were able to bring profound insights from almost all corners of the globe. Of course, one cannot make a claim that all globally relevant national systems of civil justice are covered, but at least this report can draw on the insights collected from Europe (Austria, Belgium, Croatia, France, Germany, Hungary, Italy, the Netherlands, Norway, Russia), Asia (China: both PRC and Hong Kong), North America (the USA) and South America (Brazil). Insofar, it can be claimed that both the common law countries (USA, Hong Kong) and the civil law countries (the rest) are included in the survey, and that the main branches of civil law jurisdictions (Romanic and Germanic, Scandinavian, Latin American) are represented. In the context of the topic of this report (and the venue of the conference), it is important to note that the reports cover the span of ideologically very different countries (e.g. the USA and mainland China), but also contains materials regarding the countries that may be generally categorized as countries in a (pre&post)transition (Hungary, Russia, Croatia[1]). The jurisdictions covered also display various level of trust in their civil justice, which often corresponds to rather diverse level of its overall effectiveness; it suffices to note the contrast between the generally well-functioning systems such as Norway or the Netherlands, and those burdened with systemic deficiencies, such as Italy or Croatia.

3. The national reports collected for this paper were the following[2]:

– Report Austria (with additional information on Germany), by Dr. Christian Koller (University of Vienna);

– Report Brazil, by Prof. Teresa Arruda Alvim Wambier (Catholic University of São Paolo);

– Report China-PRC, by Prof. Fu Yulin (Peking University);

– Report China-Hong Kong, by David Chan & Peter C.H. Chan (City University of Hong Kong);

– Report Hungary, by Prof. Miklós Kengyel (Andrassy University, Budapest);

– Report Italy, by Prof. Elisabetta Silvestri (University of Pavia);

– Report Netherlands (with additional information on Belgium and France), by Prof. C.H. van Rhee (Maastricht University);

– Report Norway, by Dr. Inge Lorange Backer (University of Oslo);

– Report Russia, by Dr. Dmitry Nokhrin (Constitutional Court, Saint-Petersburg); and

– Report USA, by Prof. Richard Marcus (University of California, Hastings College).

[1] There was no formal national report from Croatia, but I included some references to my home jurisdiction in order to extend the scope of comparisons.

[2] The reports are ordered in alphabetical list of main countries covered; in the rest of the text, they will be quoted by the reference to the country and the number of paragraph in the text of the report.

Some national reporters circulated their reports to further experts from different jurisdictions, whose names and functions are noted in the published text of the national reports. To all national reporters, as well as to all other colleagues who helped in any way in the progress of the work on national reports (and the general report) I owe my sincere gratitude.

4. The national reporters were invited to produce their report on the basis of the questionnaire that was circulated among them in March 2011[1]. Further on, several national reporters held a meeting with the general reporter during the Heidelberg Congress in July 2011, where the format of the reports and the calendar for their submission were agreed. Most of the reports were submitted in draft or final version until the end of 2011. The general report is finalized in the April 2012.

5. The structure of this general report will follow the structure of the questionnaire. It will start with the chapter on general attitude and doctrinal opinions on goals of civil justice. However, as ideology often differs from reality, in the following chapters some particular topics which can help explain the goals will be discussed:

– The matters regarded to be within the scope of civil justice (in particular, whether the goal of civil justice is confined to litigation, or also to other, non-contested matters);

– The balance between the protection of individual rights and the public interest;

– The balance between the desire to reach accurate results («material truth») and the need to ensure trial within reasonable time;

– The level to which civil justice system sees its goal in the handling of «hard cases», as opposed to the routine mass-processing of a large number of cases;

– (Non)recognition of the principle of proportionality;

– The level to which civil justice sees its task as resolution of complex, multi-party matters;

– The balance between the strict formalism and the wish to reach equitable and fair results;

– The precedence of approaches to civil justice: problem-solving v. case-processing;

– The level to which civil justice is understood as a freely available public service – as opposed to the quasi-commercial source of revenue for the public budget

– Self-understanding of the goals of civil justice – user-orientation (satisfying the wishes of the public), or self-centred goals (satisfying the criteria set by «insiders» – judges, higher courts, lawyers etc.).

II. Goals of Civil Justice

6. For some, the topic of goals of civil justice may seem to be an old, exhausted subject. The standard textbooks of civil procedure pay lip-service to this issue. It is usually a part of an obligatory introduction, repeating the outworn formulas, with more or less attempt to exercise private style or originality of the author. Defining the general goals of civil justice at least in some of the national legal systems does not stir much interest among legal community, and the focus is rather on pragmatic and practical solutions, on micro-management of affairs[2].

[1] The Questionnaire for national reporters is attached as Annex of this General Report.

[2] See Report Italy, at 1.

7. Yet, the vast majority of the submitted national reports demonstrate that the topic of goals of civil justice is tending to be revived, and that a thorough discussion or even a full reconceptualization of it may be a precondition for successful procedural reforms – especially if it is desired that such reforms be deep, far-reaching and effective. The most successful procedural reforms of the past, from Franz Klein's reform in the 1890s to the Lord Woolf reforms in 1990s, were rooted on the profound perception of the procedural goals – social function (Klein), or overriding objective (Woolf) – of the civil justice. Today, the goals of civil justice are being discussed and used as arguments and counter-arguments in the context of many jurisdictions. Among those which supplied reports, the conceptual discussion contrasting various perception of the goals of civil justice is going on e.g. in the Netherlands[1], and it was also behind the 2009 reform of the CJR in Hong Kong[2]. Even in the common law countries such as the United States, where civil justice evolved organically and its founding principles were traditionally not a subject of scholarly work, the goals of the process became an interesting topic, as demonstrated by the works of Damaška, Scott and the others[3]. The oscillating balance between the opposed goals is behind many important changes in procedural law and practice, which can be best illustrated on the examples of the countries that undergo dynamic social changes, such as mainland China, transition countries in Europe, Russia etc. As pointedly put forward by Professor Silvestri, some justice systems require radical reforms, «and no radical reforms can be devised unless they are prepared by a thorough process aimed at identifying which goals must or can be reached»[4].

8. In several national reports it was mentioned that there is no general consensus about the goals (functions, purposes, aims) of civil procedure. Indeed, there may be many forms of expressing the ideas upon which civil justice is founded. But, it is striking that, in the end, all collected national reports speak about the goals of civil justice in surprisingly similar terms. The words may be different, but in all of the collected reports the goals are being presented as a contrast of two main approaches, whereby any given system of civil justice may be defined by the balance (or disbalance) reached between them.

9. The two main goals of civil justice may be in the broadest sense defined as:

– **resolution of individual disputes** by the system of state courts; and

– **Implementation of social goals**, functions and policies.

In various doctrinal works, these goals had different names. For the first, it was often spoken about the conflict resolution (dispute resolution, conflict-solving,) goal. The second, policy implementation goal, is more difficult to denote uniformly, as the social policies and functions that civil justice should have may be rather diverse and serve different political or social ideologies or paradigms[5].

10. The two goals of civil justice are almost never fully separated. But, the balance between them may be very different, and may shift over time. The relative weight and importance attributed to the interests of the individuals in the dispute, and the level and scope to which others (including the state and its officials) may or should intervene in order to protect trans-individual (collective, social, political, national, state etc.) interests may be

[1] See Report Netherlands, at 3.

[2] See Report Hong Kong, at 2–5.

[3] See Report USA, Ch. III.

[4] Report Italy, at 1.

[5] On the general level, the conflict resolving and the policy implementing goals are elaborated in the still topical book of Mirjan Damaška, *The Faces of Justice and State Authority,* New Haven, 1986.

quite different. The tasks of civil justice or matters regarded to be within its scope may also be influenced by the one or the other goal – e.g. while the conflict solving goal would use civil justice only for settlement of contested matters, the policy goal may have an impact on transfer of jurisdiction to civil justice for a number of other purposes (from holding of public registers to decision-making in non-contested matters) – see more *infra,* Ch. III. Moreover, the implementation of social goals may also play a role at the level of system design, as the state may encourage or discourage the use of civil justice (or its use in a particular way) for reaching the other, external goals (i.e. private enforcement of the public law rights, as is the case in the USA; correcting the inappropriate government activity, as is the case in Brazil; or reaching of social harmony, as is the case in China)[1]. In order to explain the opposition of the two goals, it may be useful to briefly present the extremes, which may serve as the ideal type models, or reference points for the presentation of the current situation.

11. The exclusive focus of civil justice on conflict resolution goal was historically associated with the liberal states of the 19th century. In its purest form, this goal concentrates only on the enforcement of challenged rights of the individuals, and sees the function of civil justice in providing a neutral forum which is put at the disposal of the litigants in order to evade resorting to self help. As an instrument of the reactive liberal state, the civil justice had to provide its services in the way that would ensure a minimum of intervention. Just as the *laisse- faire* economy refrains from intervening in the business transactions between private parties, the liberal system of civil justice refrains from intervening into the legal transactions of private law, by giving the maximum powers to the litigants. In the same way as the owners in a classic liberal state possess an absolute freedom to dispose with their property, the litigants in a civil litigation have an absolute freedom to dispose with their claims and with the process as a whole – they are *domini litis,* the masters of civil litigation. Under the principle of minimum intervention, the role of the state and its officials – judges – is limited to the role of a referee, who passively observes the interplay of the parties, maintains the observance of the rules of the game, and only in the end (if ultimately necessary) intervenes and makes a decision. The end result, in the interest of putting an end to the conflict, must therefore be final – *res iudicata* – but it affects only the parties (*facit ius inter partes*), and is none of the business for anybody else. From the state perspective, the only systemic interest is to keep its conflict resolution services running at the minimum cost[2], while at the same time still fulfilling the main task – diverting the private parties from resorting to forcible self-help.

12. The other extreme as regards the balance between the individual and collective interests may be found in the Marxist critique of the (private) law. In fact, the most radical approach argues that the conflict resolving machinery of the state is, by its focus on the interests of private individuals (private property, private entrepreneurs), in its essence bourgeois and anti-social, and that is should be abandoned or at least radically restructured. As Lenin argued, the comfortable illusion about the neutrality and the objectivity of the liberal justice system was wrong. He stated that «all bourgeois law is private law», and as such reflects a capitalistic, imperialist, exploitative system of government. In reversing this submission, all law, on the contrary, should become public law, meaning that civil justice (to the extent that it temporarily remained indispensable), should also become an instrument of economic and

[1] See Report USA; Report Brazil; Report China.

[2] See Posner, cited in Report USA, at 7.

social policy of the socialist state. Insofar, the conflict resolving function in civil procedure would in principle have no particular value in itself – it should be viewed only in a broader context of implementation of desired social and political goals. Individualist element should be controlled and put in the function of social (ist) aims and targets. Even more so because it was also, as an expression of *a priori* negative remnants of private rights and private property, ideologically suspect. Therefore, in a system of civil justice founded exclusively on policy implementing goals, we may encounter an interesting mix of two features – general marginalization of civil justice, and the paternalistic state control of individual litigants. The weak powers of the parties in the process could be in theory contrasted to the strong powers of the judge. But in fact, the state intervention needed to control private actions of the parties, and steer them towards the benefit of the society, could happen on the multiple levels (from local to national, from the lowest to the highest courts and judges), by a multitude of officials (most prominently, by state prosecutors), and at any point in time (irrespective whether the decision has become formally final or not). Insofar, the passive parties in such an activist state were not contrasted by active judges. The judges were rather passive – bound to follow the political instructions (either directly or through the concept of «socialist legality»), and controlled and scrutinized at many levels (including the political control at the time of their appointment and periodical re-election). Insofar, the concept of civil justice rooted on an extreme policy implementing goal leads more to general passivization and marginalization of the civil procedure, rather than the (as sometimes incorrectly interpreted) civil procedure characterized by an omnipotent judge and passive parties.

13. All national reports summarized in this general report depict civil justice systems that see their role and social task somewhere between these two extremes. None of them is pure, in the sense that none of them denies completely either the conflict resolving, or the policy implementing goal of civil justice. Several reports speak about the multitude of goals, but in my opinion all of them could fall either under the first or the second main goal. The systemic position and relative importance of the first or the second goal is, of course, different. The first apparent contrast may be between the jurisdictions that generally shy away from resolving disputes by court judgments, like mainland China, and those that, on the contrary, tend to use the courts and court judgments in private matters in a large number of matters, also in cases that would in other places be handled by other means, like the USA. However, this contrast may be softened by closer examination. While Professor Fu clearly states that the «courts [in China] are viewed as a tool to promote political policies», and that «the judiciary is inclined to adjust its goals to serve political needs»[1], the analysis of Professor Marcus may also imply, although in a somewhat different sense, that the civil justice in America has a clear political purpose[2] of serving as a substitute for administrative modes of enforcement of legal rules. The ample use of class actions and the use of punitive damages as a method of influencing or altering behaviour at the larger scale may also serve as examples that American civil justice has far advanced from the pure conflict resolving model of liberal state[3].

[1] Report China, at 1.

[2] A good illustration for opposition to conflict resolving approach is the quote from Fiss, who argued that «social function of the lawsuit should be not trivialized to only resolving private disputes». Report USA, at 10.

[3] At least due to the relative infancy of collective litigation schemes, the civil justice systems of continental Europe and Latin America may be categorized closer to the classical liberal concept than the USA.

14. In the civil law countries, the «dualist conception»[1] of the goals of civil procedure – the one that recognizes both conflict resolution and the implementation of trans-individual policies – is expressed in other terms. While the conflict resolving goal is often phrased similarly (as enforcement of substantive rights and obligation, authoritative determination of rights by provision of enforceable judgments, or resolving of disputes between individuals and businesses in accordance with the law), the expression of the policy implementing goals is less uniform. Several reports express the trans-individual function of the civil justice in terms of **legal order**: «civil justice protects legal order as a whole» (Hungary), «the goal is to maintain social order» (China), «legal order proves itself through civil proceedings» (Austria), or «the aim of civil procedure is to strengthen legality and law and order» (Russia). Some other formulas reveal more precisely the content of this goal and the way in which it transcends individual interests of the litigants. Professor van Rhee speaks of two such particular goals – **demonstrating the effectiveness of private law**, and **development and uniform application of private law**[2]**.** These two aspects include the elements of general prevention (based on the assumption that the citizens will be more likely to act in accordance with the law if they see that it works in the practice), and the element of general recognition and acceptance of civil justice (based on the assumption that the citizens will be more likely to respect their obligations, if they have a clear horizon of expectations, and see that the law is uniformly and reasonably interpreted by the courts, in the light of the social changes and the new requirements of the society)[3]. It is safe to argue that these two aspects are among the most generally accepted and the least controversial aspects of the policies that are viewed as the goal of civil procedure (however, new debates in the Netherlands may show its relevance in a new light, see *infra* at 21 and Ch. XI). In a narrow sense, the both goals may even be compatible with the liberal, conflict resolving concept of the goals of civil justice (if they are viewed exclusively from the perspective of effectiveness and costs).

15. As a supplement to the preventive function of civil justice, some reports speak about the **educational goal and purpose** of civil procedure. This purpose is e.g. noted in Art. 2 of the CPC of the Russian Federation[4]. It is also noted in respect to China, though with the note that it is generally not achieved due to the easy and frequent challenges of final judgments[5]. The educational function was also frequently cited in the former Socialist states, where it was put in the context of demonstration of political ideology. For that reason, this function is today rarely cited in the other states, especially the (post)transition states.

16. Another indication of the policy implementing goal of civil justice may be found in the concept of **socialization of civil justice**, understood in the sense that civil justice should promote social justice, and bring the justice closer to the needs of the society at large. Although this concept was only reported in one report, with a note that it was influential in 1970s and early 1980s, and that it has today a «retro flavour»[6], the ideas of the access to justice movement should not be completely disregarded. It seems that, at least in continental

[1] Report Hungary, at 1.

[2] Report Netherlands, at 2.

[3] The preventive function is also noted in respect to Russia as one of the «auxiliary aims» of civil procedure. For Germany, *Rechtsfortbildung* (development of law) is recognized as one of the important functions of civil procedure.

[4] See Report Russia, at 4.

[5] Report China, at 31.

[6] Report Italy, at 4.

Europe, it is often considered that civil courts should promote equal opportunities of both parties to protect their rights and represent their interests in the process, which may require some forms of proactive behaviour of the judges in order to secure the equal chances of the weaker party in the proceedings.

17. In the same direction, but a little bit further, goes the demand that civil procedure be in the service of achieving the overreaching social goal of **social harmony.** This concept is, after the brief period of the strengthening of conflict resolving goal, since the 2000s again gaining momentum in China[1]. In the Chinese context, the emphasis on harmonious development of society is combined with the channelling of the civil cases towards judicial mediation. The «broader aim of social harmonization» is also noted among the goals of civil justice in Russia[2]. In Russia, but also in former socialist states of Central Europe such as Hungary or Croatia, another value that is or was listed among the goals of civil procedure, is the pursuit, assertion and revelation of **material/objective/substantive truth**[3]. This goal, so Professor Kengyel, was in the centre of civil action of socialist procedural law[4]. From the national reports, it seems that this goal plays, to the extent that it is still recognized in some countries, a much less prominent role today. However, establishing the truth in the proceedings is ranked among the goals of civil procedure also in Austria, as recognized by its highest court[5]. In the German procedural theory, finding of substantive truth in civil procedure is also noted, but has an instrumental value, serving as a means to achieve parties' acceptance of the decision, as well as to the aim of legal certainty[6]. Whether or not the goal of civil proceedings is to establish substantive truth, may be relevant for the concept of active or passive judicial role in the proceedings, but can also have an effect on their overall effectiveness (or the lack thereof).

18. The discussion about the role of substantive truth (and substantive justice) is also connected to general evaluation of the role of **procedural formalism** in the achievement of the goals of civil justice. Under a liberal conflict resolving model, the procedural forms have a purpose in themselves. They are nothing but the rules of the game that have to be meticulously observed to guarantee the fairness of the outcome. But, it seems that the times when the procedural formalism was a goal in itself are long gone. Even in Germany, which is often regarded as the fortress of formalism, there is a well-established line of case law originating from the *Reichsgericht* decision that held that procedure must not impede the enforcement of rights, and argued that even *res iudicata* must give way to the «paramount goal of civil justice, which is, to reach justice in the individual case»[7]. The instrumental function of civil justice (or, as Bentham called it, the «adjective function» of procedural law)[8] rejects the inherent values of the procedure, or at least trades them against the external goals that have to be reached through the administration of justice. But, although «excessive

[1] Report China, at 3.

[2] Report Russia, at. 14.

[3] See Report Hungary, at 1; Report Russia, at 14. The Russian report also mentions as a general aim the search for «social truth».

[4] Report Hungary, ibid.

[5] Report Austria, at 10. However, the same court (OGH) balances this goal with the other goals, and notes that the pursuit for truth does not as such render the taking of illegally obtained evidence admissible (ibid. – see).

[6] Report Austria, at 5, citing Brehm.

[7] Report Austria, at 9.

[8] See Report USA, at 7; similarly the German *Reichtsgericht* spoke about the instrumental function (*dienende Funktion)* of procural law, see Report Austria, ibid.

formalism» is today rejected even at the constitutional level (through the case law of the European Court of Human Rights)[1], it can hardly be argued that all procedural forms are a priori harmful, and that they should be gradually eliminated (as was the ideology in the Soviet times). The formalism contributes to legal certainty and predictability, and insofar can be compatible with moderate policy implementing concepts.

19. The **bare effectiveness** – ability to produce, in as many cases as possible, any sort of decision on civil rights and obligations within a reasonable time – also appears in the context of discussion about the goals of civil justice. Although a functional and capable system of civil justice should be among the preconditions, and not the goals of civil justice, the grave problems in dealing with the caseload and securing appropriate and foreseeable time of handling the matters entrusted to civil justice led to the focusing on only one goal – to keep the system from falling apart, hoping to reduce the caseload and shorten the length of the proceedings[2]. Italian case may be one of the most dramatic ones, but many other civil justice systems, in particular in South Eastern Europe, suffer from systemic deficiencies that sublimate all procedural goals and their employment in only one direction – fighting with the tide of new cases and handling the overcrowded dockets of long-overdue matters. Whether this may be categorized as a goal in itself, or just a symptom and the reason for absence of any (other) goals, may be a topic for discussion.

20. Partly for reasons described in the preceding paragraph, but also for several different reasons, a rather prominent and influential trend of reconceptualization of procedural goals has emerged. It is the trend which seeks to improve the cost-effectiveness of civil litigation, to reduce the expenses for civil justice paid from the taxpayers' purse, or even to require the civil justice system to produce revenues for the state budget. One of the forms of these trends is advancing the goal of **proportionality**, or – as reported by Chan & Chan for Hong Kong – to the concept of justice «under which procedural efficiency is just as important as the correctness of the judgment»[3]. Such efficiency requires that the limited public resources for justice system be distributed fairly and appropriately, inter alia by saving cost and time by active judicial case management and a continued effort to streamline procedures[4]. According to Zuckerman's «**three-dimensional concept of justice**», a contemporary civil justice should not focus on **accurate and lawful decisions** only, but should also take into the same equation the **time** and **costs** needed to deal with the case.

21. But, while the «three-dimensional concept» in theory needs careful balancing of several factors (social and individual importance of the court case, the expectations and needs of the society and the litigants, and the available resources), the cost-awareness may be in some countries driven less by conscious attempts to improve the effectiveness, fairness and quality of the proceedings, and more by the external factors, e.g. by the general policy of cutting public funds and expenses for public services. Such a situation, according to Professor van Rhee, may be traced in the Netherlands, where the governmental policy to reduce expenses for civil justice has produced controversial plans of increasing court fees and mandating mediation. This is all happening under the same policy – the policy of discouraging litigation which has to be only the *ultimum remedium,* the last resort if all other

[1] See more infra at 55.
[2] Report Italy
[3] Report Hong Kong, at 3.
[4] Ibid., at 5.

attempts of private parties to resolve the dispute fail. These plans led to a «clash between the government on one side and lawyers and legal scholars on the other as regards the goals of civil justice», whereby the government advocated more-or-less a conflict resolving model, while the other side opposed the reforms with references on beneficial public effect (so-called positive externalities) of litigation on public order[1].

22. The transposition of general concepts of the goals of civil justice in concrete procedural designs may better be illustrated by analysing how the perception of procedural goals affects various topical issues of contemporary procedural law. Many topics were already announced in the preceding paragraphs. Therefore, the following overview of such issues will deal only with the issues that have not already been covered *supra*.

III. Matters within the scope of civil justice

23. The goals of civil justice may be closely connected with the scope of its work. As described above, the conflict resolving goal is in many legal systems seen as the very core of the goals of civil justice. However, it is interesting to note that dealing with dispute resolution, i.e. with **disputed matters**, for many national systems of civil justice constitutes only a minor part of their overall caseload[2]. Obviously, in most uncontested (or **extra-contentious**) cases[3] the policy goals and reasons are in the forefront. It is also noted that, in essence, the tasks of the courts in such proceedings are «more or less administrative in nature»[4]. In fact, while the public and cultural picture of judicial work is associated with adjudication, in the cases like issuing excerpts from land registers, appointment of guardians, or stamping of payment orders while collecting uncontested debt, there is very little adjudication indeed. The use of courts for essentially non-judicial, administrative purposes is also the reason for the significant divergences among national justice systems: all civil courts deal with adjudication, but it depends on the political choice of each state how many other tasks will be transferred to the judiciary. Evaluated by the universal standards of due process, as expressed in the Art. 10 of the UN Human Rights Declaration or Art. 6 of the European Human Rights Convention, the residual right to have a contested case dealt by the *courts* cannot be outsourced; but, all other matters and tasks are subject to a discretionary and changeable choice of the state authorities. As modern societies become more complex, one can rarely encounter pure and logical distribution or functions, i.e. courts that only deal with dispute resolution and the state or local administration that deals with the rest. Entrusting the judiciary with other duties, based on different motives and different reasons, seems to be popular in many parts of the world. In many countries, more and more «externalities» are being transferred to the courts, from the regulation of family relations to the control of local elections[5].

[1] See Report Netherlands, at 6.

[2] E.g. in Croatia, the contested matters constitute only about 25% of the annual caseload of all courts, while the rest is composed of enforcement, public register cases and other non-contentious matters.

[3] Their names are different, what reflects the lack of uniformity: *ex parte* or voluntary jurisdiction; *jurisdiction gracieuse* (fr.), *Freiwillige Gerichtsbarkeit, Ausserstreitverfahren* (ger.) etc.

[4] See Report Netherlands, at 9; Report Austria, at 13 (*Verwaltungstätigkeit im Bereich der Privatrechtsordnung*); Report Italy, at 7.

[5] For Austria, it is noted that „the legislator decided to submit more and more matters to non-contentious jurisdiction which do not share the same characteristics as those matters forming traditionally the core of non-contentious jurisdiction». Report Austria, at 11.

24. The national reports confirm this description. None of the reported jurisdictions confines their civil justice systems to dealing with «proper court cases» i.e. with contested matters only. But, the relative share of the uncontested matters in the overall work of the civil courts is different from country to country. Professor van Rhee points to the fact that, though Dutch civil courts deal with diverse types of uncontested matters, the more administrative (i.e. uncontested) matters «do not play such a preponderant role [in the Netherlands] as in some other jurisdictions»[1]. Compared to the Netherlands, the share of non-contentious matters is apparently bigger in Austria and Germany. The Austrian report notes «numerous non-contentious matters» and lists several categories of cases: matters which «traditionally encompass areas of civil law which require an active intervention by the judge in the interest of parties not in a position to adequately protect their interests»; administration of land and commercial registers, guardianship, estates, cartel matters, bankruptcy, forcible execution of judgments and other titles etc. Even more non-contentious matters may be within the scope of the Italian judiciary: Italian report speaks of a «vast array of proceedings dealing with non-contested cases» regulated in an entire book of the Italian Code of Civil Procedure and in a number of special statutes[2].

25. Whether judiciary is the best forum to resolve non-contentious matters is another topical question. Reporting on Brazil, Professor Wambier notes the concerns regarding the quality that judicial branch of government may provide in non-contentious matters («voluntary judicial proceedings») where the «judge plays a chiefly administrative role». Based on such considerations, some procedures are being reformed so that they do not require intervention of a judge any more. These reforms include transfer of jurisdiction in matters such as amicable divorce or execution of testaments to other legal professionals (such as public notaries or registrars)[3].

26. Does involvement of courts in a smaller or bigger number of non-contested matters change the overall assessment of the goals of civil justice? Or, does it only complicate and multiply the goals? Professor Silvestri in her report states that intensive involvement of courts in non-contested matters is questionable, and that it creates a «multifaceted puzzle» of *giurisdizione volontaria*[4]. User-friendliness, clarity and efficiency may be only some values that may be jeopardized by a too colourful mix of diverse tasks «pushed» by the legislator to state courts[5]. But, there may be even worse consequences than confusion for those who use the services of state justice system. The judges, as those who are bound to enforce the procedural rules, may confuse their roles and the goals of particular types of proceedings. It is considered that the proceedings in non-contested matters should be simpler, faster and less formal than the «regular» proceedings in disputed matters. Is this really the case, and whether there is an overspill of unnecessary formality and complexity from the default model of proceedings in contested matters is a topic that deserves attention. The overspill in the opposite direction may be even more disastrous: if the large number of cases encountered in practice of judicial work is pure administration, the same attitude

[1] Report Netherlands at 10.

[2] Report Italy, at 6.

[3] Report Brazil, at 5–6.

[4] Report Italy, ibid.

[5] The engagement of judges in the supervision of the parliamentary and local elections exist e.g. in Belgium and Croatia (see Report Netherlands – quoting B. Allemeersch – at 10).

may reflect on their method of acting in «proper» court cases which require a prudent, reasonable and professional adjudication.

27. While the scope of matters may influence the perception of the goals of civil procedure, the overarching goal of the procedure may influence the matters within the scope of the proceedings and the method of dealing with them. The most apparent example is China, where the goal of social harmony imposes obligation on all courts to see to it that, irrespective whether the case is a contested or uncontested, it is primarily settled in an amicable way, and only very exceptionally by a decision that would not be voluntarily subscribed by all of the participants in the proceedings. In such a manner, the specific goal of civil justice in China leads to an interesting contrast with the European judiciaries. Whereas in Europe the chief product of civil justice is still adjudication (production of enforceable titles), the chief products of civil justice in China are conciliation and mediated settlements[1]. Some convergence, however, may be observed in the more recent developments both in Europe and in China. While mediation becomes more desirable and prominent at the European level, civil procedure reforms in China since 1990s have introduced more space for classical adjudication, although the «transplanted» Western procedures are still treated as an oddity[2].

IV. Protection of individual rights v. protection of the public interest

28. The general aspects of the underlying tension between the approaches to civil justice focused on the protection of individual rights, as opposed to the civil justice which is a part of the mechanisms for implementation of policies aimed at promotion of public interest, were already discussed *supra* in Chapter II. The issues that will be elaborated here deal with the fine-tuning between the two opposing targets, as well as with the particular forms in which their pursuit takes place.

29. The first issue may be observed as a link between the scope of matters entrusted to civil justice, and the objectives of the process. The pronounced inclination of the American civil justice is a good example of a justice system which has extended the target of protection of individual rights to a more overarching target of public interest goals. As reported by Professor Marcus, the aims of American civil justice are frequently going beyond the context of bi-partisan dispute resolution. American civil justice does not only take on some essentially administrative tasks – it replaces state administration: «The very heart of the common law system contemplates that the courts themselves will develop and enforce – via private litigation – the sorts of legal protections that are ordinarily adopted by legislative or administrative actions in other legal systems»[3]. The resemblance to the European fashion of entrusting courts with many essentially administrative tasks and obligations exists, but is superficial. Namely, while in Europe it is legitimate to view this process as bureaucratization

[1] See Report China, at 4–5. As professor Fu notes, the goal of social harmony is even emphasized in the enforcement proceedings, where «reaching a settlement has become almost a norm (usually achieved by court mediation)».

[2] A good example from the Chinese report is the introduction of the system of collection of uncontested debt by payment (dunning) orders, for which „the goal of rights protection is still to be fully entranched». The inclination to mediated solutions leads to ample opportunities to evade the payment, which results in an ineffective procedure that currently „accounts for no more than 1% of the first instance civil cases in China». Report China, at 6.

[3] Report USA, at 18–19.

of the state judiciary, in the USA one may speak about the judicialization of the matters otherwise dealt by the state bureaucracies. Not only that private litigation is a good substitute for governmental law enforcement, the essentially judicial, adjudicative manner in which the American courts deal with the mass claims, collective actions and class litigation provides conclusive proof of this submission (more on multi-party litigation see *infra* at VIII.).

30. The (North) American situation may be in some aspects exceptional, but its general attitude is not entirely alone. The Brazilian report also emphasizes the «judicialization of politics» in Brazil. The judicial branch of government in Brazil is being given more powers to interfere with the activities of the government, and exert control over public administration[1].

31. In cases where legislation entrusts the courts with implementation of statutory provisions that express certain public policies, the courts would, in theory, have to follow faithfully such public policies and protect the public interests at stake. The element of public interest is particularly expressed in some fields, e.g. in family law. Still, as some issues in those fields are a matter of public controversy, the judicial implementation of the public policies may take its own course. As Professor Silvestri notes, in Italy sometimes happened that «courts ... opposed the very policy they were expected to implement»[2].

32. Something like that would hardly be imaginable in China, where, «in the context of a «socialist» society based on public ownership, the consciousness of protection of public interest permeates civil justice»[3]. Accordingly, the Chinese judges have a very large discretion to intervene for reasons of public interest into the parties' disposition of their private rights. The courts have the duty to control whether the parties' actions in civil cases violate the «interests of the state, social and public interests, or «third party» ... interests»[4]. At least in theory, the courts have vast powers: if, in their view, the public interest is disregarded, they may deny the claimant the right to withdraw the claim; control the court judgments irrespective of the parties appeals; refuse to enforce the arbitral awards etc.[5] The extra-judicial influences motivated by local interests or the views of the ruling elites occur more often through non-official than official channels, examples being the phone calls of the government officials to the court, «the masses filing administrative petitions against the court or staging sieges on the internet» etc.[6] The courts have special closed committees which discuss the cases, and whose records cannot be accessed by the parties or the public, but only by those who have the power to supervise the courts.

33. The Russian approach to the role of public interests in the civil proceedings is closer to the «balance of private and public rights and interests»[7]. Still, some recent cases demonstrate dynamic development, as well as some tensions between the two goals – protection of individual rights and the public interest. In some cases, the public interest played a role in the form of protection of proprietary interests of the State[8]; in the other, it was referred

[1] Report Brazil, at 11–12.

[2] Report Italy, at 9 – citing the case of Eluana Englaro, a girl that had gone into the permanent vegetative state in 1992, and the court action of her father who asked for permission to disconnect life-supporting medical equipment.

[3] Report China, at 7.

[4] Ibid., at 8.

[5] Ibid. Professor Fu notes, however, that in practice those measures are rarely applied.

[6] Ibid., at 10.

[7] Report Russia, at 24.

[8] Ibid., at 25–26.

to when various Russian courts prohibited (for «reasons of public morals») the Gay Pride marches[1]. As noted by D. Nohrin, it was due to Russian doctrinal position according to which «homosexuals in Russia aren't exposed to any real discrimination, because Russian legislation does not recognize sexual orientation as a circumstance in any way significant»[2].

34. European and American systems of civil justice generally deny that in core matters processed by the courts such extra-judicial influences or political considerations play an important role[3]. In Western systems of civil justice, to the extent that it exists, the involvement of public interest in the operations of civil justice is reversely proportionate with the share of matters of non-judicial (administrative) nature entrusted to them[4]. The non-contentious matters are often motivated by public interest. For instance, the court administration of public registers has as its motivation safeguarding of legal security regarding real estates and land transfers[5]. On the contrary, in conventional, bi-party civil law litigations, the doctrine of judicial independence dictates the detachment of court decisions and actions from the policy-related considerations. The courts «must apply the relevant norms to the facts established in the proceedings... not bound by any overriding policy or national interest that would necessarily affect their decision»[6]. The public interest plays a role in conventional litigations only in the matters that are transcending the interests of the individual litigants, e.g. in cases where the interests of children or people with mental disabilities are concerned. In the same category are also labour and housing cases; cases regarding environmental or consumer protection; antitrust cases etc. In the latter two cases, the trans-individual and supra-individual interests are often combined with the special types of proceedings, such as collective or representative actions – see more *infra* in Ch. VIII.

35. In spite of the Western ideological rejection of the idea that the civil courts should in their dealing with private law matters directly serve societal, national or governmental goals, there is a trend in many European and non—European countries that the courts exert more active role in the process and engage in a number of matters on their own initiative, even against the dispositions of the parties. For instance, in France, Austria, Germany, the Netherlands and many other jurisdictions of the European Continent, the courts have to apply the applicable procedural and substantive law *ex officio* when administering justice[7]. A number of countries also give right (and obligation) to explore facts *ex officio* – see *infra,* Ch. V.

36. One goal related to the protection of public interests plays however an important role in almost all contemporary systems of civil justice. It is a goal that, though policy-based, may be defined as the *intrinsic* goal of civil justice – the goal of efficient and fair administration of justice. In England and Hong Kong, this goal is expressed in terms of

[1] Report Russia, at 27–28.

[2] Ibid., at 29. The decisions in those cases led to the finding of the violation of the human right of peaceful assembly, together with the violations of the right of an effective remedy and the prohibition of discrimination (Arts. 11, 13 and 14 of the ECHR). See *Alekseyev v. Russia*, ECtHR ap. nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

[3] Some features of the US system, such as the possibility to award punitive damages, show a higher level of inclination to use the individual case for general goals of changing behavior in a larger segment of society.

[4] On such matters see supra Ch. III.

[5] Report Austria, at 16.

[6] Report Austria, at 19. See also Report Netherlands, at 11.

[7] Report Netherlands (also supported with comments by F. Ferrand regarding France).

the overriding/underlying objective which lies at the centre of recent civil justice reforms[1]. Civil justice as another important public service should be «effective, efficient and fair»[2]. The active case management, and, where necessary, *ex officio* actions by the court, should be in the function of swift, streamlined and inexpensive proceedings, foreseeable timing of the procedure, and prevention of abusive and delaying behaviour of the parties. Interesting new development in this direction can be observed in the recent reforms and the subsequent case-law in Hong Kong, where the courts now may (and will) strike out the claimant's case for inordinate delay[3]. In a striking contrast, the civil justice systems of the European socialist and post-socialist countries, while formally adhering to an active role of the judge and the high level of importance of (external) public interest, in the areas of intrinsic procedural values usually show their rather weak, passive face. Poor case-management and time-management and the resulting inefficiency are often confirmed by the findings of systemic deficiencies and the violations of the right to a trial within a reasonable time before the European Court of Human Rights.

37. In the cases in which public interest elements are recognized, one may inquire whose role is it to enforce them. Is it the task of judges (only), or of some other participants or the internal/external stakeholders? In about the half of the reported legal systems, an important side-body that may participate or intervene in the civil proceedings is the state prosecutor (public prosecutor, public minister, and procurator). The names of the office may be different, but the function of intervention on the side of trans-individual interests is always the same. The scope and reach of the prosecutorial intervention varies. In China, it is a continuing power to supervise the courts and challenge their judgments (even those that were already became effective)[4]. In Russia, the intervention takes a twofold form: the prosecutor can either initiate public-interest litigation as a claimant; or, he can appear as a quasi-neutral evaluator of legality that provides «impartial» opinions to the court[5]. Similar regime exists also in France and the Netherlands, where the members of the Public Ministry may initiate various proceedings (e.g. for annulment of marriages), and issue the advisory opinions (*conclusions*). At the highest court level, the advisory opinions are issued by the Procurator General and the Advocates General (*avocats généraux*) at the Supreme Court (*Cour de cassation)*[6]. The procurator at the highest court may also challenge final and binding judgments in the interest of law, but – in the French and Dutch case – the decision has only an exemplary effect and does not affect the rights and duties of the applicant[7]. The German

[1] Report Hong Kong, at 5, 11, 15.

[2] A. Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, *City University of Hong Kong Law Review,* 2009, vol. 1(1), p. 49–71, at 54.

[3] See *Nanjing Iron & Steel Group International Trade Co Ltd and others v. STX Pan Ocean Co Ltd and others,* HCAJ 177/2006. The case was dismissed because the claimant has not taken any action in the case for two years, with the explanation that «in the absence of some compelling reason, it is contrary to the ... objective ... to ensure that a case is dealt with as expeditiously as is reasonably practicable ... for a party to allow an action to languish for 2 years once the same has been commenced ...simply is no excuse for such a long delay» – ibid., p. 13.

[4] The powers of the procurators were in China recently reinforced and augmented. See Report China, at 13–14.

[5] The two coliding functions of the prosecutor in Russia caused issues with the fairness of the proceedings – see Report Russia, at 35; similar considerations in the transition countries led to reform and/or abandonment of the prosecutorial intervention in civil cases.

[6] Report Netherlands, at 12.

[7] On the contrary, in the socialist countries that knew the prosecutorial challenge of final judgments, the effect of the successful challenge was the reversal of the decision, with the full effect on the parties to the proceedings.

and Austrian systems, on the other hand, do not have comparable bodies with broad powers, although some modest forms of prosecutorial intervention exist there as well. For example, the public prosecutor in Austria has the right to commence proceedings for annulment of the marriage; the chief financial state attorney, *Finanzprokurator,* may intervene in order to protect public interest)[1]. In Germany, all powers of the public prosecutors to intervene in the civil proceedings were abandoned, and the direction of development in several post-socialist countries is the same (e.g. in successor countries of former Yugoslavia)[2].

38. The protection of public interest plays a special role in the multi-party proceedings and other forms of collective litigation – see *infra,* Ch. VIII.

V. Establishing the facts of the case correctly v. The need to provide effective protection of rights within an appropriate amount of time

39. Contemporary systems of civil justice vary considerably in their attitude towards substantive truth as the goal of civil procedure. Naturally, the accurate fact-finding is always recognized as an important target in the proceedings. At the end of 19th century, Franz Klein wanted to shape a model of civil procedure in which establishing substantive truth, and engaging in efficient case management, would be two mutually non-exclusive goals. Yet, in the course of history it was proved that, in the extreme cases, the ideological demand for objective (or even absolute) truth could overshadow all other goals of the procedure. The Soviet doctrine thought that the principle of material truth is embedded in the principle of (Socialist) legality[3]. The need to establish «material truth» was the ideological justification for the paternalistic supervision through the reports by the highest courts and the Prosecutor Office[4]. With the same background, in the socialist period the truth-finding was also placed at the pinnacle of all procedural values in Hungary. The pursuit of truth was the duty of the judge, who had to actively control the parties and their dispositions. The spirit of paternalistic inquisitorialism was motivated by the distrust in individual freedom and the suspicious attitude towards private initiative[5].

40. In 1990s, as a counter-reaction, new approach to the role of truth in the civil proceedings occurred in many former Socialist countries. In Hungary, for instance, the pursuit of truth was deleted from the procedural principles contained in the procedural code. This was supported by the Constitutional Court decision that «there was no constitutional guarantee relating to the revelation of the material truth»[6]. Consequently, in the new Hungarian CCP, the fairness of the proceedings (impartial decision-making based on the principle

[1] Report Austria, at 22. The apparently broader powers of the State Financial Procurator were int eh practice limited through the case law of the OGH.

[2] For instance, in Croatia the powers of the public prosecutor to challenge final judgments (so-called *request for the protection of legality*) were dismantled in 2003, just as the third-party intervention by the public prosecutor. The only remaining role of the public prosecutor is to initiate certain public interest litigations. This happens in practice infrequently and has only marginal importance.

[3] Report Russia, at 36. Under Art. 14 of the Russian CCP of 1964, the judge had to «take all measures ... for full and objective investigation of the real circumstances of the case» irrespective of the parties disposition.

[4] Ibidem.

[5] See Uzelac, *Istina u sudskom postupku* [The Concept of Truth in Judicial Proceedings], Zagreb, 1992.

[6] See Report Hungary, at 9 (quoting CC decision of 9 December 1992, I.30.).

of party representation and the right to be heard) replaced the revelation of truth as the principal procedural goal[1]. In more recent times, though, the exclusive focus on acceleration of proceedings raised criticisms that speed was put above the accuracy of the results. These critiques may lead to the (moderate) rehabilitation of the value of truth-seeking in the process[2]. The «change of paradigm» also happened in Russia, where many scholars today advocate the concept of «formal truth»[3].

41. While the debates about the place of objective/absolute truth in civil procedure often had a highly ideological context and background, the more important set of issues today is linked to the rights and obligations of trial judges to investigate factual issues on their own motion. One issue is whether judges may order taking of evidence *ex officio.* Another issue is whether judges have the duty to actively stimulate parties to state the facts and produce evidence. If there is an obligation of the judge to give instructions to the parties, advise them and encourage them to put forward all their procedural material in a truthful and comprehensive manner[4], we may ask about the consequences of eventual failures to do so. The description of the systems in Austria and Germany may indicate that speedy and accurate civil procedure is not incompatible with the active judicial involvement in the evidence-taking process. On the other side, in some post-socialist jurisdictions, such as Croatia, the pronounced expectations that the court (and not the parties) actively investigate facts and supply evidence led to several systemic anomalies: to passive and abusive behaviour of the parties, to protracted and de-concentrated style of the proceedings («the piecemeal trial»), and to the practice of successive remittals of the judgments based on the argument that the court has to «try harder» and continue to investigate what really happened (even if the parties have not actively contributed to the clarification of disputed facts)[5].

42. The problem as such disappears in common law systems that are concerned «with legal truth and not material truth»[6]. The clarification of all disputed facts is in common law systems regularly seen as the more-or-less exclusive obligation of the parties. Since the Woolf reforms, the trend is not only to burden the parties with gathering of facts, but also to compel the parties to collect, present and verify their procedural material at the earliest possible stage of the proceedings («front-loading of facts»)[7].

VII. Proportionality between case and procedure

43. The axiology of civil procedure gets its flavour from cases that may be considered typical for the national civil justice system. But, the spectrum of cases is rarely uniform: most national judiciaries handle «small» and «big» cases; complex and routine cases; unique

[1] Report Hungary, at 10.

[2] Ibid., at 12–14.

[3] Report Russia, at 37.

[4] See Report Austria, at 23, on situation in Austria and Germany.

[5] One foreign observer of the practice of Croatia courts argued that the usual approach of the appeals courts in civil trials was «no stone should be left unturned». The practice of successive remittals was repeatedly found to be among the «systemic deficiencies» of civil procedure in Croatia, Slovenia, Poland, Hungary, Bulgaria, Ukraine, Romania and Russia. See A. Grgic, *The Length Of Civil Proceedings In Croatia – Main Causes Of Delay,* in: Uzelac/van Rhee (eds.), *Public and Private Justice: Dispute Resolution in Modern Societies,* Antwerpen etc., 2007, p. 153–173, at 158.

[6] Report Hong Kong, at 19.

[7] Ibid., at 20.

cases and repetitive/cloned cases. Two issues arise in this context: first, whether some types of cases are for one or the other system more «typical»; and, second, whether or not the goals and modalities of their implementation are in each given system adjusted to the different nature of the case at hand. The national reporters were invited to comment whether goals of civil justice are more or less viewed from the perspective of resolving the «hard cases» (difficult legal matters that raise new issues of law and fact), or the perspective of mass-processing of routine, repetitive matters. It was also asked about the proportionality between the methods of treatment of cases, and their social importance. The issues that occur here are also related to the application of filtering mechanisms and various summary proceedings adjusted to processing of small claims. The specific procedures regarding court processing of collective, diffuse and group interests are dealt with separately, in Ch. VIII.

44. A very clear reply on «hard cases» question and their treatment in China is given by Professor Fu: «Hard cases are not welcomed in courts and are frequently refused [at the initial stage of the proceedings]»[1]. This is, seemingly, not only a feature of Chinese exceptionalism. A straightforward answer to the question about the goals of process is also given by Elisabetta Silvestri: «at present, Italian civil justice is more about processing a huge amount of ordinary cases than handling «hard cases». She also point to the relativity of the «hard case» notion; namely, in a dysfunctional legal system, poorly drafted legislation and systemic inability to deal with the everyday caseload may cause that cases that would otherwise be regular and simple look like an irresolvable puzzle[2]. But, also for most other civil law systems it can be stated that they have an inclination to focus on the resolution of a large number of average and small cases, rather than on exemplary dealing with the socially significant individual cases. Not only for Italy one can say that the goal of the system is first to survive the influx of matters, and only secondary to produce high-quality justice. In such a situation, it is not surprising that separate mechanisms, developed outside of state justice system, are getting a momentum: today, arbitration is, for instance, taking over the primacy in dispute resolution in complex and valuable international commercial cases. The new trend in some countries is to discourage litigation and keep the cases that do not belong in courts away. Efforts of the new Dutch government to suppress litigation, fostering early settlements and out-of-court mediation may serve as an example for this trend[3].

45. The bureaucratic excellence in dealing with a large number of repetitive cases is a feature that has become a hallmark of Austrian and German civil justice. The Austrian example of automated, IT-supported order for payment proceedings (*Mahnverfahren*) may serve as a model example of a system that corresponds to the goal of fast and cost-effective mass processing of cases and fast filtering of uncontested claims[4].

46. The processing of small claims poses bigger challenges for many legal systems. While common law countries have generally a policy of putting the small cases off judicial dockets by various means (including the high costs of litigation), the civil law world is more sympathetic to small claims. The principle that judges should not waste their time on irrelevant, small matters (*de minimis non curat praetor*) is generally rejected by the European systems

[1] Report China, at 18.

[2] Compare Report Italy, at 15.

[3] See Report Netherlands, at 17. On the other hand, the intention of the Dutch reforms may be mixed, and attributed more to a policy of saving of public funds than to a well-considered plan to secure optimal, proportionate court procedures – see ibid., at 24.

[4] See Report Austria, at 30.

of civil justice. In extreme cases, e.g. in Italy or Croatia, «it is inconceivable that courts refuse to take into consideration cases which are deemed trivial or inappropriate». After a long and exhausting process, «frivolous and groundless claims will end up being rejected, but not to entertain them would amount to a denial of the fundamental right of access to justice»[1]. In Hungary, up until 2009, there was no special procedure in small cases, and the same procedural rules applied for all cases, irrespective of their value[2].

47. In most countries, however, some proportionality is aimed by channelling small claims to special courts or special summary proceedings[3]. It is also aimed by availability of early provisional relief, e.g. by the conditional judgments (*Vorbehaltsurteil*) in Germany[4]. In spite of introduction of the European Small Claims Procedure in the EU (which has only added to the maze), the national reports display that the approaches to small claims are dissimilar and varied even if we focus only on European territory. While Italy has justices of the peace (*giudice di pace*), the Netherlands and France use *référé* proceedings (*Kort Geding*)[5], and Austria and Germany channel small claims to the jurisdiction of special courts (*Bezirksgerichte, Amtsgerichte*)[6]. The procedure before such courts is also a special one: «formalities are kept to a minimum, emphasis is put on the oral part of the proceedings, and admissibility of appeals is restricted»[7]. The Austrian reporters had to note that «it would be incorrect to conclude that [small] cases are considered less important based on their amount in dispute» and pointed to the constitutional limitations to simplification and streamlining.

48. The procedure in small cases may be less formal, but it is still regulated. An exception is German law, which leaves the procedure in cases where the amount in dispute does not exceed 600 EUR entirely to the court discretion (but, only if it is in conformity with the constitutional guarantees)[8]. The relationship between the proportionality and specialization reveals interesting problems and paradoxes. Legislative division into cases and courts that have to deal with matters in special proceedings with a differing level of formality may be more formal and less flexible than a regime which would give courts full discretion to deal with cases in the way they deserve. Bureaucratic inertia may, however, prevent the courts to use such discretion in the way that would be appropriate. But, excessive specialization, accompanied by the multiplication of courts of different type and procedures with special features may be confusing, ineffective and contrary to the wish to secure foreseeable and appropriate standards for all cases. It can also contribute to blurring and fuzziness of the goals of civil justice.

VIII. Multi-party litigation and collective actions

49. A short summary of all replies on the role of class litigation would end up in a simple division – «only in America» on one side, and all other jurisdictions on the other side.

[1] Report Italy, at 20.
[2] Report Hungary, at 15.
[3] See reports for Austria, Brazil, Hong Kong, Italy, Hungary.
[4] See Report Austria, at 31.
[5] Report Netherlands, at 16.
[6] Report Austria, at 28.
[7] Ibid.
[8] Ibid., at 29.

A case like *Daar v. Yellow Cab Co*.[1] in which the court ordered the taxi company to charge unduly low prices to future customers because unidentifiable customers were overcharged in the past, cannot happen in any other place, not even today when many systems are flirting with some forms of collective proceedings (and the cited Californian case has a history of over four decades in the USA).

50. The replies from all other jurisdictions are diverse, but reflect the same basic attitude: in all other countries civil justice is still predominantly focused on «one-on-one» resolution of individual disputes. As to the multi-party and aggregate proceedings, it is stated that «multi-party litigation is still in its infancy» (the Netherlands); that the reception of it is «far from stellar» (Italy); that «the handling of complex multi-party matters cannot ... be considered as a major goal of civil justice» (Austria); that «judges are reluctant to process multi-party cases» (China) etc. A notable exception is only Brazil, for which it is stated that it has «a very well developed class action system» within which «complex matters are frequently handled»[2].

51. In spite of low use and poor reception in the practice, legislators of many countries show a continuing interest for regulation in this field, from Hong Kong[3] to Germany[4]. But, the scepticism and critical attitudes are also strong[5].

52. The ambition to include resolution of complex multi-party matters in the goals of civil procedure is certainly present in many systems of civil justice. Several reporters[6], just like other legal scholars, share the view that in complex contemporary societies the courts should be equipped to address complex social matters. Some types of proceedings which provide right to conduct representative litigation to certain associations or independent public bodies (e.g. *Verbandsklage*) exist in several jurisdictions, but have all gained more theoretical interest than practical relevance. In reality, very few civil justice systems are ripe for adequate processing of multi-party claims even by means of conventional methods of case and court administration (merger of cases, strategic litigation etc.). This will, obviously, remain the challenge to be addressed in the future.

IX. Equitable results v. Strict formalism

53. Is the goal of civil procedure **substantive justice**, or should it be the **correct application of legal provisions**? There are many way to attack this question as a false dilemma. Indeed, in an ideal case the both should converge. However, it is undeniable that the inclination towards substantive justice vs. formal legality varies considerably. This was also noticeable in the national reports.

54. The preference for substantive justice may be diagnosed in the systems as different as China and the United States. As explained by Professor Fu, «in the Chinese legal culture and judicial custom, achieving an equitable result and substantive justice has always been the

[1] *Daar v. Yellow Cab Col*, 433 P.2d 732 (Cal. 1967). See Report USA, at 14. Richard Marcus argues that this case is an example of «behavior modification view» which «favor creative use of the class action».

[2] Report Brazil, at 36.

[3] New initiative pending since 2009, see Report Hong Kong, at 27.

[4] Koller and Oberhammer present the «experimental law» on pilot cases of investors in the capital markets (*Kapitalanleger-Musterverfahrensgesetz*, which combine the elements of a collective action and a test-case procedure. Report Austria, at 23.

[5] Such criticisms caused that the Civil Justice ReformA ct of 2007 could not be passed in Austria – ibid., at 34.

[6] E.g. Koller and Oberhammer (at 19), Silvestri (at 22).

priority, and less emphasis is placed on strict compliance of formalism or entrenchment of the principle of legality»[1]. In the 1990s, more emphasis was put on the principle of legality, but in the 2000s a contrary trend under the concept of «active justice» has emerged[2]. On the other side, the active use of civil justice for policy implementation in the United States[3] and the American reliance on civil litigation for the purpose of public law enforcement can hardly be manageable on the basis of strict legal formalism.

55. Stronger loyalty to strict legalism may be diagnosed in the civil law environment. The civil law judges are in most cases predominantly «concerned with finding the correct legal solution to solve a dispute»[4]. The principle of legality is, as expressed by Koller/Oberhammer «enshrined» in Austrian and German constitutions, while the principles of equity and observance of basic principles of justice, though present incidentally in statutory law, are far lower in the hierarchy of values[5]. Moving to the Eastern Europe, it seems that the adherence to formalistic behaviour is even more pronounced there. At least, it may be an inference from the jurisprudence of the ECtHR that often found violations of the fair trial rights on the basis of excessive formalism in several countries of European East and South[6].

56. In some countries, a movement away from «unnecessary formalism» may be diagnosed. Professor van Rhee states that since 1970s «the keyword in Dutch civil procedure has been «deformalisation»[7]. The loosening of strict formal requirements are at least in part motivated by the approaching to the goal of substantive and equitable results, as the intention of the reforms is to prevent the parties to use the rules of civil procedure to twist the result in their favour on formal grounds. The traditional sympathy for solutions based on equitable results and substantive justice is also attributed to Norway[8].

X. Problem solving v. case processing

57. The contrast between the goal of substantive justice and the goal of strict legalism is mirrored in another opposition of values. The reporters were invited to comment on the way how national civil justice systems and their main actors predominantly view their aim and purpose – whether they regard the administration of justice as an activity that should focus on finding adequate solutions to the problems underlying the disputes; or whether, on the contrary, the main systemic goal is to efficiently process the cases within their jurisdiction, engaging the least efforts and expenses.

58. In the comments given by the national reporters, it was sometimes suggested that balance between those two objectives would be a best solution. However, evaluated on the content of their replies, it may be concluded that the balance has decisively shifted towards

[1] Report China, at 25.

[2] Ibidem.

[3] See Report USA, ch. III and IV.

[4] Report Brazil, at 37.

[5] See Report Austria, at 37–40.

[6] E.g. Croatia, Russia, Greece, Ukraine, Czech Republic, Russia etc. See F. Fernhout, *Formal Rules in Civil Procedure and Access to Justice: Striking a Balance Between Excessive Formalism and 'Anything Goes*, in van Rhee/Uzelac (eds.), *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ*, Antwerpen etc., 2008, p. 207–216.

[7] Report Netherlands, at 21.

[8] Report Norway, at 28.

the case processing. As noted by Professor Kengyel, in the times of economic crisis, the pressure on courts increases and everything is directed «at solutions requiring the least efforts and expenses»[1]. Where the justice system is not working, the «idea of courts as problem-solvers is met with a good measure of scepticism»[2]. Sometimes the idea of problem-solving is rejected on doctrinal grounds. Professor van Rhee states that «problem solving is not, according to the majority of Dutch authors, a primary goal of the civil justice system», although it may be its by-product[3]. Prof. Inge Lorange Backer also notes the recent trend in Norway that puts a stronger emphasis in the efficient management of cases[4]. For Austria, in spite of Franz Klein's heritage that requires civil justice to resolve social conflicts and fulfil welfare tasks, «the need to solve the parties' problem does not prevail over the goal of civil procedure to swiftly decide the case»[5]. Finally, even for China, which cherishes court settlements the most, the short time limitations of 3 to 6 months within which the courts have to dispose of civil matters «strongly compel the courts and judges to focus on case-processing»[6]. Mediation is, of course, supported in many jurisdictions, but it seems that this support rests today more on the ideas of case-processing (how to dispose of the case quickly; how to keep cases away from courts) than on the ideas of finding adequate solutions for the problems of the individuals and the society.

XI. Freely available public service v. quasi-commercial source of revenue for the public budget

59. Should civil justice be a free and accessible service opened to everyone, or should it be run as a business corporation which is cost-aware and cost-efficient? Should civil justice be funded by the tax payers, or should its operations be funded by the concrete users of its services via court fees? Should civil justice be an expense, or a source of revenue for the state budget? All these issues may also be viewed as «goals», or at least targets closely connected with the more general understanding of the goals of civil justice.

60. In the light of comments from different sides of the globe, it seems that we can speak of **commercialization of civil justice**. Only in France, Iceland, Luxembourg, Monaco and Spain the parties to civil litigation still do not pay any court fees due to the adherence to the principle of free access to courts[7]. But, even in the countries which used to be model examples of social state such as Norway, trends are changing. While «civil justice was originally largely perceived as a freely available public service ... nowadays, court fees as well as lawyer's salaries have risen to such an extent as to make civil litigation an expensive exercise for the ordinary citizen»[8]. It may get even worse: in the Netherlands, the government is proposing legislation that would dramatically increase the court fees, seeking to raise the level of self-financing of the civil justice system[9]. In Austria, civil justice is already covering

[1] Report Hungary, at 18.
[2] Report Italy, at 24.
[3] Report Netherlands, at 23.
[4] Report Norway, at 29.
[5] Report Austria, at 41.
[6] Report China, at 26.
[7] European Judicial Systems. Facts and Figures, 2010 (CEPEJ Report, http://www.coe.int/cepej), p. 63.
[8] Report Norway, at 30.
[9] Report Netherlands, at 24. The target is to cover approximately 64 percent of the costs by court fees.Similar projects are underway in Germany, see Report Austria, at 45.

its costs by 110,9 percent, effectively subsidizing other branches of justice system[1]. Interestingly, ever since the courts started to operate as dispute-resolution providers in China in 1980s and early 1990s, they were «operated like commercial institutions» and were expected to «cover budgetary deficiencies». As even at present the local governments still plan their expenditures for courts in relation to the courts' contribution towards the local treasury, Professor Fu concluded that «given such background, the Chinese civil justice remains a quasi-commercial source of revenue for the public budget»[2].

61. In the jurisdictions that are raising court fees, the intention of introducing higher court tariffs is not always focused exclusively on an increase of contributions to the budgets of state or local administration. Another reason is, as testified by Professor Silvestri, in reducing the caseload of the courts[3]. This reason may have a pragmatic background; it can also have a systemic justification, in the context of the proportionality principle. However, for all countries that consider it, the increase in the court fees raises the issue of access to justice, in particular if – as stated for Italy – the citizens cannot count on a modern and adequately funded system of legal aid[4].

XII. User orientation?

62. The ultimate goal of civil justice may be captured in the question regarding the ultimate purpose and aim of the civil justice system. Here is one of the possible phrasing of this question – does civil justice have to serve the interests of its ultimate users, or do citizens and other members of the society have to serve the interests of civil justice? It may be seen as a mean and apparently unscientific question. However, many of the reports confirm directly or indirectly that a lot can be done to establish and improve user-friendly attitude of national civil justice systems. The ecosphere of civil justice is all too often polluted by eco-centric – or even ego-centric – attitude, and the «insider's» values often prevail over the values that serve the interests of users as one-shoters and «outsiders»[5].

63. A direct example comes again from the admirably sincere report of Professor Fu. The politics, she says, in principle plans legislation keeping in mind the interests of users. But, as the «participants of the legislative process are mainly senior judges and top-notched professors, procuratorate, and only a small number of lawyers» the initial intentions often become diluted[6]. Professor I. L. Backer also suggests that «it is probably not unfair to say that the goals of civil justice used to be somewhat self-centred»[7]. The concept of judicial independent also feeds the views that it is rightly so, and only in recent years the needs and wishes of the court users are being explored independently of judges and lawyers[8].

[1] Report Austria, at 44. The high revenue of the civil justice in Austria can, though, be connected with its engagement in some non-contested matters, such as land and company registers, as well as with the fees collected from the automated payment order processing (*Mahnverfahren*).

[2] Report China, at 28.

[3] Report Italy, at 25.

[4] Ibid., at 26.

[5] See more in A. Uzelac, *Turning Civil Procedure Upside Down: From Judges' Law to Users' Law* in *Tweehonderd jaar/Bicentenaire Code de Procédure civile*, Kluwer uitgevers, 2008, p. 297–309.

[6] See Report China, at 30.

[7] Report Norway, at 32.

[8] Ibid., at 33.

64. Currently, a fashionable method of proving (rightly or wrongly) the level to which civil justice systems cater for the needs of the users is conducting user satisfaction surveys. In the Netherlands, such surveys are being conducted on a regular basis since the start of the new millennium. The Dutch results of the surveys are relatively favourable – e.g. 84 per cent of the users are generally satisfied, but the users are less happy with the length of proceedings, the empathy displayed by the judge and some other special issues[1]. The results of similar user satisfaction surveys are more ambiguous in Austria, where seemingly different polls organised by different organisations have resulted in significant differences in results. For example, contrary to the usual view about the Austrian judiciary as fast and efficient, a poll organized by the Bar Association of Lower Austria showed that 86 percent of participants thought that judicial proceedings last too long or «much too long»[2]. Most surveys in Austria in Germany still display at least an average satisfaction (in Germany, 60 percent of population have a fair or considerable trust in German courts)[3]. In general, the civil justice systems of the nations of European North and West still seem to do a fairly good job in relations to their users. But, improvements are possible even there, and the self-centred goals (e.g. judicial independence, good financial status and job security) are still better protected than the wishes and the needs of the users.

65. The situation in some other countries is much worse. In the dysfunctional systems of civil justice even the weak and unreliable results of user satisfaction surveys are missing. There is, however, a strong feeling of dissatisfaction: some systems do not work, and all users are unhappy – even the professional ones[4]. The crisis is usually a good motive for change, but change may need a long time, and the society may suffer from the *status quo.*

XIII. Conclusion

66. The goals of civil justice are a topic that needs rethinking. Civil justice should serve the interests of the society of the XXI century, and the new social context imposes the need of significant changes. These changes need clear starting points. Without clearly stated goals, it is hard to make solid and consistent plans, produce indicators of their success and maintain the momentum of the reforms. The study of diverging goals in different justice systems helps us to compare and understand the differences in procedures and legal institutions. Maybe, if we realize that some of our goals are the same, it will also help us to reduce comparative differences, and improve our judiciaries even there where everybody believes that any reform is doomed to fail.

Annex

Questionnaire for National Reporters

General framework: The purpose of reports on this topic is announced by the IAPL in two questions:

– How do the goals of civil justice differ from country to country?

– What is the role of civil justice in the contemporary world?

[1] Report Netherlands, at 25–26.

[2] Report Austria, at 46.

[3] Ibid., at 48.

[4] Report Italy, at 27. The general attitude in Croatia is not very far from the one described by Professor Silvestri.

The National Reporters are invited to present their views and the current state of affairs in their jurisdictions (and, if so agreed, in other similar jurisdictions), and comment (however briefly) on all or any of these issues:

1. *Prevailing opinions on goals of civil justice.* Please state doctrinal sources and relevant case law.

2. *Matters regarded to be within the scope of goals of civil justice:* Are goals of civil justice limited to litigation (decision-making in contested matters), or they also encompass non-contested matters? What is the portion of the work of civil justice in matters such as enforcement, holding of registers (land, company registers), collection of non-contested debt, regulation of future relationships between the parties etc.? To which extent are goals of civil justice viewed from the perspective of such tasks of the civil courts?

3. *Protection of individual rights v. protection of public interest* (conflict resolution v. policy implementation). Please comment:

a. to which extent is considered that the system of civil justice should pay attention to matters of public interest (public policy, morals, infringement of the rights of the third persons);

b. to which extent should civil procedures reach results that are in line with certain policies (national interest, views of ruling elites or classes, governmental programmes, suppression of illegal activities, reasons of national security, confidentiality obligations, professional privileges etc.);

c. what are the issues that the court should (in the context of goals of civil procedure) determine *ex officio;*

d. Which other actors or bodies (except the court and the parties) have an obligation to secure that the goals of civil justice are being reached; which actors or bodies have right to intervene in the judicial process on that account.

4. *«Material truth» v. fair trial within a reasonable time.* Please comment the attitude in your jurisdiction on the desirable balance between the wish to establish the facts correctly and the need to provide effective protection of rights in an appropriate time. What has precedence: the accuracy of adjudication, or the need to afford parties legal security and effective remedy in due time?

5. *«Hard cases» v. mass-processing of routine matters.* Please comment to which extent are the goals of civil justice viewed from the perspective of resolving difficulty legal matters which raise new issues of law and fact, and to which extent are they connected with the need to secure steady and routine handling of courts' workload, coping with backlogs and administrative requirements of efficiency.

6. *Principle of proportionality (de minimis non curat praetor) or same standards and processes to everyone, irrespective of the importance of the case.* To which extent is it considered that the goal of civil justice is to afford as much attention to the cases as they deserve it, discarding all the matters that do not belong there? What filtering mechanisms are available? Or, is it considered that refusal to deal with a case in the same manner would be denial of justice? What are the real differences in the way and style of handling «small claims» and «proper court cases»?

7. *Bi-party proceedings v. resolution of complex, multi-party matters.* To which extent are the goals of civil justice limited to handling simple matters in which only rarely the cases involve more than two parties? Or, is handling of complex, multi-party matters, where the courts have to exercise complex functions of social regulation, also considered to be the core goal of civil justice system?

8. *Equitable results and substantive justice v. strict formalism and principle of legality.* Is the goal of civil justice to reach an equitable result, or to find correct legal solution by strict application of law?

9. *Problem-solving or case-processing.* Is the dominant view that the civil justice system needs to approach the cases trying to find adequate resolution of the underlying problems? Or, those cases have to be efficiently solved by means requiring the least efforts and expenses by the competent authorities?

10. *Civil justice as freely available public service, or as a quasi-commercial source of revenue for the public budget.* Is the goal of civil justice system (in particular: courts) to be available at no expenses to everyone who needs legal protection, or is it just another social service that has to be paid by those who use it? What is the level of the court-fees and is their rationale to cover the costs of functioning of the civil justice?

11. *Orientation towards the users, or self-centred goals?* Are the goals of civil justice defined to cater the needs and wishes of the users? How is the perception of users regarding the fulfilment of goals of civil justice established who represents it? Or, are the goals defined mainly from the perspective of the civil justice system itself – by its professional actors (courts, judges, lawyers), and not by those whose rights are at stake?

Christian Koller[1]

AUSTRIAN NATIONAL REPORT
(including additional information on Germany)

I. Introduction

1. The present report is based on the questionnaire prepared by Professor Alan Uzelac for his general report on Goals of Civil Justice to the International Association of Procedural Law in Moscow (September 2012). It will focus on the goals of civil justice from an Austrian perspective and include references to German law.

II. Prevailing opinions on goals of civil justice

A. *Legal doctrine*

2. Theories on the goals of civil justices are numerous and have triggered numerous scholarly writings[2]. Most commentaries or textbooks on civil procedure start by discus-

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[2] This is particularly true for Germany, see, e.g, Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, *AcP* 168 (1968), p. 27 et seq.; Henckel, *Prozessrecht und materielles Recht* (1970), p. 41 et seq.; F. von Hippel, *Wahrheitspflicht und Aufklärungspflicht* (1939), p. 170 et seq.; Idem., *Zur modernen konstruktiven Epoche der «deutschen Prozessrechtswissenschaft»*, *ZZP* 65 (1952), p. 431 et seq.; Meyer, *Wandel des Prozessrechtsverständnisses – vom «liberalen» zum «sozialen» Zivilprozess?*, *JR* 2004, p. 1; Pawlowski, *Aufgabe des Zivilprozesses*, *ZZP* 80 (1967), p. 345; Stürner, *Prozesszweck und Verfassung*, *FS Baumgärtel* (1990), p. 545; the issue has been less controversial in Austria, for an overview see Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, 2nd ed., 2000, Einl para. 11 et seq.; for a more detailed analysis see Böhm, *Bewegliches System und Prozesszwecke*, in Byd-

sing and/or listing the «goals», «function» or «purpose» of the procedure[1]. However, no general consensus has emerged.

3. It is often stated that civil justice provides a means for the citizens to enforce and determine their substantive rights and obligations[2]. Consequently, enforcement of individual rights forms one of the main goals of civil justice. At the same time, the existence of an effective enforcement mechanism affects the level of compliance with legal norms in society at large. It might, therefore, also be argued that the legal order proves itself through civil proceedings (*Bewährung der Rechtsordnung*) and is thereby implemented[3]. It is, however, doubtful whether the implementation of the legal order amounts to a goal of civil justice of its own. Protection (and enforcement) of individual rights and implementation of the legal order (in general) rather form two sides of the same coin[4].

4. In Austria the procedural ideology of *Franz Klein* (who prepared, in 1893, the draft on which the Austrian Code of Civil Procedure[5] was based) has strongly influenced theories on goals of civil justice. According to *Klein's* procedural thinking each legal dispute qualifies as an «evil in society» (or a «social conflict») negatively affecting the functioning of modern economy[6]. Following this ideology, civil procedure serves as a remedy to cure such deficiencies in an expedient and efficient way[7]. In other words, it was *Klein's* understanding that civil procedure realises a «social function» (*Sozialfunktion*). Settling specific disputes is, therefore, not the sole purpose of civil procedure, it rather also serves (and fosters) welfare (*Wohlfahrtsfunktion*). *Klein's* procedural thinking is reflected in the opinion prevailing in Austria according to which civil justice not merely serves the enforcement of individual rights but also has the goal to provide an instrument for the resolution of «social conflicts». Consequently, it fulfils public welfare tasks[8].

linski/Krejchi/Schilcher/Steiniger (eds.), *Das bewegliche System im geltenden und künftigen Recht* (1986), p. 211; Klein, *Reden*, *Aufsätze, Briefe I* (1927), p. 117 et seq.; Klein/Engel, *Der Zivilprozess Oesterreichs* (1927), p. 190; Novak*, Die Stellung des Zivilprozeßrechts in unserer Gesamtrechtsordnung*, *JBl* 1961, p. 64; Kuderna, *Soziale Funktion und soziale Elemente des Zivilprozesses*, *RdA* 1986, p. 182; Schoibl, *Die Verbandsklage zur Wahrung öffentlicher oder «überindividueller» Interessen im österreichischen Zivilverfahrensrecht, ZfRV* 1990, p. 3; Sprung, *Die Grundlagen des österreichischen Zivilprozeßrechts*, *ZZP* 90 (1977), p. 393.

[1] As already aptly noted by Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, p. 27.

[2] See Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 11; Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 22nd ed., 2003, vor § 1 para 5; Murray/Stürner, *German Civil Justice* (2004), p. 4; Rauscher in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2008, Einl para. 8.

[3] Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 6; Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 11.

[4] Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 12; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 1 para. 9.

[5] Hereinafter referred to as «ZPO»; RGBl. Nr. 113/1895 as last amended by BGBl. I Nr. 21/2011.

[6] See Klein/Engel, *Der Zivilprozess Oesterreichs,* p. 190 and 280; cf. Oberhammer/Domej, *Delay in Austrian Civil Procedure*, in van Rhee (ed.), *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* (2010), p. 257 with further references.

[7] Oberhammer/Domej, *Germany, Switzerland and Austria (CA. 1800–2005)*, in van Rhee (ed.), *European Traditions in Civil Procedure* (2005), p. 121; Ballon, *Der Einfluß der Verfassung auf das Zivilprozeßrecht*, *ZZP* 96 (1983), p. 427.

[8] See, e.g., Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 12; Ballon, *Einführung in das österreichische Zivilprozessrecht*, 12th ed., 2009, para. 7; Holzhammer, *Zivilprozessrecht,* 2nd ed., 1976, p. 2.

5. Moreover, civil procedure has the goal to provide legal certainty (*Rechtssicherheit* and *Rechtsgewißheit*) for the parties by putting their dispute to an end (*Rechtsfriedensfunktion*)[1]. The significance of the latter function is evidenced by the provisions on res judicata (see, e.g., Sec. 411 ZPO and Sec. 322 German Code of Civil Procedure[2]) which ensure that a (final) decision cannot be re-litigated in subsequent proceedings but is binding for the parties (and courts). Establishing the substantive truth in civil procedure enhances the parties' acceptance of the decision and thereby fosters legal security. It follows that discovery and determination of the substantive truth do not as such form goals of civil justice but rather serve as a means to achieve other goals, most notably legal certainty and security[3].

6. In German legal literature it is argued that the further development of the law itself (*Rechtsfortbildung*) and its uniform application rank among the functions of civil procedure[4]. Such submission is, *inter alia*, based on Sec. 132 para. 4 GVG (Judicature Act) according to which an adjudicating panel of the Supreme Court may submit an issue of fundamental importance to the Grand Panel[5] for a decision if it deems such submission necessary for the development of the law or for its uniform application[6]. Although case law is not legally binding (*stricto sensu*) it does have an influence on courts exercising their discretionary power in subsequent cases. It is, therefore, legitimate to assume that civil procedure contributes to the further development of the law by the adoption of certain court practices[7].

7. In special areas of law, such as consumer protection law, unfair competition law, environmental law and labour law, certain (representative) bodies are granted the right to file an action on behalf of collective interests (*Verbandsklage*)[8]. The control mechanism implemented by this instrument primarily serves the protection of public or collective (non-individual) interests[9]. Consequently, the protection of public interests ranks, at least within the scope of application of such actions, among the goals of civil justice[10].

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[1] Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 13; Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 7; for a different opinion see Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 1 para. 10.

[2] Hereinafter referred to as «dZPO», BGBl I, p. 533 as last amended by BGBl. I, p. 3044 of 22 December 2011.

[3] Cf. Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 25; Zeuner, *Rechtsvergewisserung und Wahrheitsermittlung als Funktionen des zivilgerichtlichen Verfahrens und ihre Beeinflussung unter persönlichkeitsrechtlichen Aspekten in der neuen Entwicklung des deutschen Rechts*, *FS Beys* (2003), p. 1790; Böhm, *Bewegliches System und Prozesszwecke*, p. 227.

[4] Cf. Brehm, *Rechtsfortbildungszweck des Zivilprozesses*, *FS Schumann* (2001), p. 57; Böhm, *Bewegliches System und Prozesszwecke*, p. 230.

[5] According to Sec. 132 para. 5 GVG the Grand Panel for civil matters shall be composed of the president of the Supreme Court and one member from each of the (twelve) civil panels.

[6] Cf. Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 7; Rauscher in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*; but see Murray/Stürner, *German Civil Justice*, p. 4, referring to the improvement of the law itself as a «by-product» of civil justice.

[7] Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 23.

[8] Cf. Koch, *Non-Class Group Litigation under EU and German Law*, *Duke Journal of Comparative and International Law*, Vol. 11 (2001), p. 358; Rechberger, *Class Actions*, in Verschraegen (ed.), *Austrian Law – An International Perspective. Selected Issues* (2010), p. 156.

[9] It also enhances legal protection; see Schoibl, *Die Verbandsklage zur Wahrung öffentlicher oder «überindividueller» Interessen im österreichischen Zivilverfahrensrecht,* p. 3 et seq.

[10] See, e.g., Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 17; Murray/Stürner, *German Civil Justice*, p. 4.

8. The question of whether one goal of civil justice takes priority over the other has led to some controversy in legal doctrine[1]. According to the better view, the interplay between different goals of civil justice has to be analysed in each case individually when interpreting procedural norms instead of applying a strict hierarchy that is unable to comprise the civil justice system as a whole.

B. *Case Law*

9. Not surprisingly, the general question of what goals underlie civil justice is not addressed in case law. However, reference to the goals of civil justice has been repeatedly made when interpreting procedural provisions[2]. The German *Reichsgericht*, for instance, already held that the aim of the provisions of the code of civil procedure is not to impede the enforcement of rights, but rather to provide a functional and swift procedure to decide a dispute[3]. This is sometimes referred to as the «auxiliary function» (*dienende Funktion*) of procedural law which is, however, an overly simplistic expression. The enforcement of individual rights is, occasionally, invoked as a goal of civil justice in order to overcome formalistic results. By contrast, the need to comply with formal requirements stipulated in the code of civil procedure is in some cases justified by reference to legal certainty and security as goals of civil procedure[4]. This discrepancy shows that goals of civil justice may serve as interpretative tools to reach a certain outcome in a particular case[5]. A similar line of reasoning is applied in German case law that permits res judicata to be overturned on the basis of an action in tort (i.e. Sec. 826 BGB)[6]. The German Supreme Court[7] argues that the principle of res judicata, which aims to establish legal certainty, must give way to the «paramount goal of civil justice, which is, to reach justice in the individual case»[8]. The question is therefore framed as one of «justice vs. legal certainty»(*Gerichtigkeit vs. Rechtssicherheit*). While justice was given priority in the case law overturning res judicata according to Sec. 826 BGB, the BGH, most interestingly, based a narrow reading of the grounds upon which re-opening of the proceedings may be granted (see Sec. 580 dZPO et seqq.), which also allow for a setting-aside of res judicata, on the principle of legal certainty. The inconsistency underlying the varying reliance on different goals of justice regarding the interpretation of Sec. 826 BGB, on the one hand, and Sec. 580 dZPO et seq., on the other hand, has attracted criticism[9].

[1] Cf. Böhm, *Bewegliches System und Prozesszwecke*, p. 219.

[2] Cf. Henckel, *Prozessrecht und materielles Recht*, at p. 47.

[3] See RG III 120/22, 8 December 1922, RGZ 105, 421 (427); cf. BGH III ZR 310/51, 8 October 1953, NJW 1953, 1826.

[4] See, e.g., BGH V ZB 31/54, 14 December 1954, NJW 1955, 546, justifying the requirement for certain written submissions to be personally signed by an attorney by relying on the (procedural) goal of achieving legal certainty and security; cf. BGH VIII ZR 154/86, 3 June 1987, NJW 1987, 2588.

[5] Cf. Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, p. 39 et seqq., who critically comments on the developments in case law.

[6] For the reversal of judgments on the basis of Sec. 826 BGB just see Hess, *Abuse of Procedure in Germany and Austria*, in Taruffo (ed.), *Abuse of Procedural Rights* (1999), p. 172; cf. Wagner in Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Sec. 826 para. 156 et seqq.

[7] Hereinafter referred to as „BGH».

[8] BGH III ZR 210/50, 21 June 1951, NJW 1951, 759 («In allen diesen Fällen muß der Grundsatz der Rechtskraft, der dem Rechtsfrieden und der Rechtssicherheit dient, dem höchsten Zweck der Rechtspflege, Gerechtigkeit zu wirken, weichen»); cf. BGH VI ZR 160/97, 30 June 1988, NJW 1998, 2818 with further references.

[9] See Gaul, Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, p. 41 with further references.

10. Specific references to goals of civil justice in Austrian case law are rare. The Austrian Supreme Court[1] has, however, in a number of decisions stated that the goals of civil procedure need to be taken into account when interpreting procedural acts of the parties[2]. Similar to the BGH, the OGH has consistently held that the provisions that allow for the proceedings to be re-opened (Sec. 530 ZPO et seq.) need to be interpreted restrictively since they interfere with the res judicata effect of a decision and thereby with legal certainty[3]. Additionally, the OGH acknowledged that establishing the truth ranks among the goals of civil procedure[4]. According to the OGH this goal does, however, not as such render the taking of illegally obtained evidence admissible[5].

III. Matters falling within the scope of civil justice

11. Under Austrian and German law matters falling within the scope of civil justice are not limited to contested matters[6]. Matters dealt with by civil courts in non-contentious proceedings are numerous and traditionally encompass areas of civil law which require an active intervention by the judge in the interest of parties not in a position to adequately protect their interests[7]. Moreover in matters such as the administration of (land and commercial) registers, guardianship, estates, and the like, non-contentious proceedings serve the protection of public interest. It has, however, become increasingly difficult to draw a clear distinction between contentious and non-contentious jurisdiction since the legislator decided to submit more and more matters to non-contentious jurisdiction which do not share the same characteristics as those matters traditionally forming the core of non-contentious jurisdiction[8]. Therefore, goals of civil justice viewed from the perspective of contentious proceedings cannot be clearly distinguished from those goals pursued by non-contentious proceedings. They are rather as diverse as the matters falling within the scope of non-contentious jurisdiction[9]. However, the characteristics underlying

[1] Hereinafter referred to as «OGH».

[2] See, e.g., OGH 7 Ob 604/92, 15 October 1992, EvBl 1993/44 = RZ 1994/30; OGH 3 Ob 146/93, 24 November 1993; for further references see RIS-Justiz RS0017881 and RS0037416 (online available at: www.ris.bka.gv.at).

[3] See, e.g., OGH 17 Ob 31/08w, 23 September 2008; OGH 3 Ob 72/08x, 11 June 2008 («[...] die Wiederaufnahmsklagemöglichkeit [ist] als außerordentlicher Eingriff in die Rechtskraft und damit in die Rechtssicherheit und den Rechtsfrieden einschränkend auszulegen».)

[4] See OGH 2 Ob 708/54, 3 December 1954; OGH 2 Ob 590/56, 17 October 1956 („Ziel des modernen Zivilprozesses ist die Erforschung der Wahrheit; der Richter hat sich daher nicht passiv zu verhalten, sondern sich von Amts wegen im Sinne des Prozeßzweckes zu verhalten.»)

[5] OGH 6 Ob 190/01m, 27 September 2001, RdW 2002/289.

[6] See, e.g., Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 1 para. 16 et seqq. In Austria and Germany, as in many other jurisdictions, a distinction is made between contentious and non-contentious jurisdiction. In Austria the latter are governed by the Non-contentious Proceedings Act of 2003 (*Außerstreitgesetz*) which entered into force in 2005; cf. Klicka/Oberhammer/Domej, *Außerstreitverfahren*, 4th ed., 2006, para. 2, in Germany by the Law on the Procedure in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* or *FamFG*).

[7] Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 10; Murray/Stürner, *German Civil Justice,* p. 443.

[8] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 11 para. 1; Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 9 and 17.

[9] Including, e.g., appointment of a guardian (Sec. 117 et seqq AußStrG), adoption (Sec. 86 et seqq AußStrG), divorce by consent (Sec. 55a EheG), probate proceedings (Sec. 143 et seq AußStrG), proceedings for a delcaration of death (Sec. 14 TEG), administration of the company register (Sec. 75 para. 2 GBG) and the land reg-

non-contentious proceedings in certain areas of law and the specific functions of such proceedings add (the following) additional goals of civil justice to the list enumerated above (see point II.):

12. According to the Official Comment on the (new) Austrian Non-contentious Proceedings Act the major focus of non-contentious proceedings is not so much the settlement of individual disputes but rather the regulation of long term legal relationships between parties that are dependent on one another; such relationships may, for instance, be rooted in marriage law, family law, inheritance law or joint-ownership[1]. Moreover, non-contentious proceedings sometimes serve the formation of legal relationships or legal rights (*Rechtsgestaltung*). This is, for instance, the case in certification proceedings (*Beurkundungsverfahren*), registration procedures, e.g. based on applications for entries in the land or company register provided they have constitutive effect, and proceedings involving matters of personal status (e.g. guardianship)[2]. At the same time, these proceedings form part of the so called preventive administration of justice by providing legal security for the parties in certain transactions[3]. It has, however, correctly been pointed out that court decisions having the effect of changing legal relationships or rights (*Gestaltungswirkung*) are not only rendered in non-contentious proceedings[4].

13. Traditionally, matters of legal welfare (*Rechtsfürsorgematerien*) are dealt with in non-contentious proceedings. It follows that the principles of party control over the subject matter (*Dispositionsgrundsatz*) is restricted, i.e. the so-called *Offizialmaxime* applies instead of the *Dispositionsgrundsatz*. Moreover, the court has, at least in principle, the power to establish the facts of the case *ex officio*, following the so-called *Untersuchungsgrundsatz* as opposed to the *Verhandlungsgrundsatz*[5]. In general, the procedure is more flexible and less formal[6]. This is particularly important for multi-party proceedings in which the parties involved cannot be divided in two groups, i.e. claimants' and respondents' side, such as probate proceedings or proceedings concerning certain condominium and tenancy law matters[7]. It is often noted, both with regard to German and Austrian law, that non-contentious proceedings are more administrative in nature or qualify as «administrative activities in the area of private law» (*Verwaltungstätigkeit im Bereich der Privatrechtsordnung*)[8]. This is particularly true for adoption proceedings under Austrian law (see Sec. 88 et seq. AußStrG) and the supervisory functions Austrian courts have with regard to the administration of assets of people placed under guardianship (see Sec. 132 et seqq. AußStrG). By the same token, proceedings concerning the appointment of a guardian for minors (see Sec. 1773 et

ister (Sec. 15 et seq. FBG), joint ownership disputes (Sec. 838a ABGB), certain tenancy law matters (Sec. 37 MRG); for a detailed list see Mayr/Fucik, *Das neue Verfahren außer Streitsachen*, 3rd ed., 2006, para. 37 et seq.

[1] See the Official Comment (ErläutRV) 224 Blg 22. GP at p. 7 (AußStrG).

[2] See Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 11 para. 4.

[3] Cf. Brehm, *Freiwillige Gerichtsbarkeit*, 2nd ed., 1993, § 1 para. 12 et seq.

[4] See Pabst in Rauscher (ed.), *Münchner Kommentar zur Zivilprozessordnung* (2010), § 1 FamFG para. 12.

[5] See, e.g., Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 10; Mayr/Fucik, *Das neue Verfahren außer Streitsachen*, para. 17; cf. for German law Murray/Stürner, *German Civil Justice,* p. 443.

[6] Mayr/Fucik, *Das neue Verfahren außer Streitsachen*, at para. 17; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 11 para. 7.

[7] Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 12.

[8] See Borth/Grandel in Musielak/Borth (eds.), *FamFG*, 2nd ed., 2011, § 1 para. 2; cf. *Koch/Diedrich*, Civil Procedure in Germany (1998) p. 11; Murray/Stürner, *German Civil Justice,* p. 443; Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 13.

seq. BGB) or the invalidation of documents (see Sec. 466 et seqq. FamFG) under German law are administrative in nature[1].

14. In Austria civil courts also serve as competition authorities, namely the Viennese court of appeal as cartel court and the OGH as cartel court of appeal. The AußStrG also applies to proceedings before cartel courts.

15. In addition, Austrian and German courts are involved in the forced execution of judgments (and other titles)[2]. It goes without saying that enforcement proceedings have the goal to enforce the creditors' rights by using coercive power (if necessary)[3]. By contrast, the purpose of insolvency proceedings, which also fall within the jurisdiction of civil courts, is twofold: on the one hand, insolvency proceedings aim at the liquidation of the debtor's assets in order to (jointly) satisfy the creditors' claims on the basis of the *par conditio creditorum* principle. On the other hand, more and more emphasis is placed on the debtor's reorganization as a major goal of insolvency proceedings[4].

IV. Protection of individual rights v. protection of public interest

16. On the basis of *Franz Klein's* procedural ideology, it might be argued that civil procedure as such serves the protection of public interest by realising a «social function» (*Sozialfunktion*)[5]. According to his understanding settling specific disputes is not the sole purpose of civil procedure it rather also serves (and fosters) welfare (*Wohlfahrtsfunktion*)[6]. Additionally, the administrative activities assigned to civil courts in non-contentious proceedings[7] often serve public interest and/or the interest of third parties. The administration of land registers, for instance, guarantees legal security as regards land tenure and land transfers. Such positive externality also serves public interest. Apart from that, cases in which the Austrian and German civil justice system aim to vindicate public interest are rather limited:

17. A notable exception from those provisions of Austrian and German law that grant certain associations or independent public bodies the right to bring representative actions for injunctive or declaratory relief in specific areas of law (so called *Verbandsklagen*), most importantly consumer protection law and competition law[8]. The *Verbandsklage* also serves public (or supra-individual) interest by providing an effective law enforcement mechanism in those cases in which traditional instruments of control and law enforcement fail[9]. In Austria the *Verbandsklage* is enshrined in the following provisions[10]: Sec. 14 of the Act against Unfair

[1] See Brehm, *Freiwillige Gerichtsbarkeit*, at § 1 para. 12.

[2] See Murray/Stürner, *German Civil Justice*, p. 445.

[3] Rechberger/Oberhammer, *Exekutionsrecht,* 5th ed., 2009, para. 1.

[4] See, e.g., Pape in Uhlenbruck (ed.), *Insolvenzordnung*, 13th ed., 2010, § 1 para. 1 et seqq.

[5] See Klein/Engel, *Der Zivilprozess Oesterreichs,* p. 190 et seq.

[6] See supra point II. A.; Schoibl, *Die Verbandsklage zur Wahrung öffentlicher oder «überindividueller» Interessen im österreichischen Zivilverfahrensrecht*, p. 3.

[7] See supra point IV.

[8] See, e.g., Koch, *Sammelklage und Justizstandorte im internationalen Wettbewerb*, *JZ* 2011, p. 442; Murray/Stürner, *German Civil Justice,* p. 4; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht,* 17th ed., 2010, § 47 para. 2 et seq.; Rechberger, *Class Actions*, p. 156.

[9] Koch, *Non-Class Group Litigation under EU and German Law*, p. 360; Schoibl, *Die Verbandsklage zur Wahrung öffentlicher oder «überindividueller» Interessen im österreichischen Zivilverfahrensrecht,* p. 3.

[10] Cf. Rechberger, *Class Actions*, p. 156 et seq.

Commercial Practices[1] empowers certain bodies[2] to bring an action to enjoin parties from violating specific competition law rules; Sec. 28 of the Consumer Protection Act[3] provides the basis for a *Verbandsklage* against unfair and illegal clauses in general contract terms and under Sec. 28a KSchG a representative claim against noncompliance with consumer protection standards can be raised[4]. Sec. 29 KSchG assigns the right of action to certain associations and chambers[5], most notably the Consumer Information Association. By the same token, a number of German laws provide for actions by certain qualified associations or interest groups[6]: According to Sec. 1 of the Act on Injunctive Relief[7] qualified consumer associations and commercial interest groups have the right to ask for injunctive relief against the use of unfair standard contract terms. Sec. 2 UKlaG provides for such action with regard to violations of all provisions protecting consumer rights[8]. Moreover, under Sec. 8 of the Law against Unfair Competition[9] associations having the purpose to promote commercial interests are granted the right to bring a claim for injunction in case of certain violations of competition law[10]. Another instrument that needs to be mentioned in this context is the so called *Gewinnabschöpfungsklage*, i.e. an action for the recovery of ill-gotten gains according to Sec. 10 of the German UWG. This provision empowers certain organisations and so called «qualified entities» to bring an action for the recovery of gains obtained by intentionally violating competition law to the detriment of a large number of customers. The action seeks the payment of the recovered sum to the public purse. In addition, the German Competition Act[11] authorizes organizations for the promotion of commercial or independent professional interests to file a complaint in case of a violation of the GWB or of (ex) Articles 81 and 82 EC (now Articles 101 and 102 TFEU). In general, the private enforcement of competition law through state courts serves the protection of both public and individual interest.

18. It follows from the foregoing that civil litigation does, unlike in the United States, not serve as a prime tool to vindicate public interest in Austria and Germany[12]. This is also

[1] Hereinafter referred to as UWG (*Gesetz gegen den unlauteren Wettbewerb*).

[2] I.e. the Austrian Federal Economic Chamber, the Austrian Federal Chamber of Workers and Employees, the Board of Directors of the Austrian Chamber of Agriculture, the Federation of Austrian trade unions and the Consumer Informationa Association.

[3] Hereinafter referred to as KSchG (*Konsumentenschutzgesetz*).

[4] For a detailed analysis see Kühnberg, *Die konsumentenschutzrechtliche Verbandsklage* (2006).

[5] Such as the Austrian Economic Chamber, the Federal Chamber of Labour, the Council of Austrian Chambers of Agricultural Labour, the Presidential Conference of Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Consumer Information Association and the Austrian Council of Senior Citizens.

[6] See, e.g., Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation – Germany*, p. 4 published online: http://globalclassactions.stanford.edu/sites/default/files/documents/Germany_National_Report.pdf; cf. Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 47 para. 2 et seqq.

[7] Hereinafter referred to as UKlaG (*Unterlassungsklagengesetz*).

[8] Sec. 28 et seq. KSchG as well as the provisions of the UKlaG that sever consumer protection constitue an implementation of the EU Directive on Injunctions for the Protection of Consumers› Inerests, European Parliament and Council Directive No. 98/27, 1998 OJ (L 166) 51; see Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation – Germany*, p. 5.

[9] Hereinafter referred to as German UWG.

[10] Cf. Halfmeier, *Popularklagen im Privatrecht* (2006), p. 89 et seq.

[11] Hereinafter referred to as German GWB.

[12] This seems to be generally the case for Europe; see Kötz, *Civil Justice Systems in Europe and the United States*, 13 *Duke J. Comp. & Int'l L.* 61 (2003), p. 75.

evidenced by the fact that instruments similar to punitive damages are not part of the Austrian and German legal system.

19. Austrian and German courts must apply the relevant legal norms to the facts established in the proceedings[1]. In doing so they are not bound by any overriding policy or national interest that would necessarily affect their decision. Even if the court is of the opinion that a certain provision is unreasonable it cannot simply «correct» national legislation by interpreting the relevant provision against its wording, the legislator's clear intention and its underlying rationale[2]. However, traditional interpretative methods require the courts to take into account policies, societal values, goals and interests underlying the provisions applicable to the specific case. All of these elements might have changed in the period between the enactment of certain legislation and its application[3]. In other words, the policy enshrined in a certain provision is indirectly implemented by the courts in civil procedure. Consequently, governmental programs or «views of ruling elites» only have an influence on the outcome of civil proceedings to the extent they are reflected in existing law.

20. Under Austrian and German law a number of persons are either excluded from giving testimony altogether or may invoke professional privileges to refuse to give testimony on a certain matter[4]. In these cases professional privileges might have an impact on the result of civil proceedings, be it because the court does not have the benefit of hearing the testimony or because a claim of privilege may, in some instances, give rise to commonsense inferences[5]. However, contractual confidentiality obligations do generally not grant the right to refuse to give evidence[6]. The broad scope of witness privileges in German and Austrian civil procedure can be seen as a protection against excessive intrusion by state (represented by the court) into the private (or most personal) sphere[7].

21. Under Austrian and German law the parties have control over the subject matter in contentious proceedings[8] according to the so-called *Dispositionsmaxime* (i.e. principle of party control)[9]. However, within the framework of the subject matter of the dispute the court

[1] The rule-of-law principle is stipulated in Article 20 para. 2 of the German Constitution and in Article 18 para 1 of the Austrian Constitution.

[2] See, e.g., BGH 16 August 2006, VIII ZR 200/05, NJW 2006, 3200. In this case it was disputed whether under German law the seller is entitled, in cases where goods not in conformity are replaced, to payment by way of compensation for the benefits derived by the purchaser from the use of those goods until their replacement with new goods. The BGH expressed doubts regarding the unilateral burden thus placed on the purchaser but stated that it sees no way of correcting national legislation by means of interpretation (*contra legem*). Cf. Wenzel, *Die Bindung des Richters an Gesetz und Recht*, *NJW* 2008, p. 347. See also *OGH* 25 October 1972, 1 Ob 211/72, *JBl* 1974, 99, where it was held that the strict requirements for a divorce on the ground of irretrievable breakdown (in force at that time) could not be loosened by way of interpretation. According to the OGH it is not the judiciary's but rather the legislator's task to change unsatisfactory legal provisions.

[3] Cf. Haas, *The Relationship between the Judge and the Parties under German Law*, in Lipp/Fredriksen (ed.), *Reforms of civil procedure in Germany and Norway* (2011), p. 94.

[4] E.g. Clergypersons, journalists and professional persons to whom confidential information is entrusted; cf. Murray/Stürner, *German Civil Justice*, p. 298 et seq.; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht* (17th ed., 2010), § 120 para. 20 et seq.; Rechberger in Rechberger, *Kommentar zur ZPO*, 2nd ed., 2006, § 321–322 para. 2 et seq.

[5] See Murray/Stürner, *German Civil Justice*, p. 305.

[6] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 120 para. 20.

[7] See Murray/Stürner, *German Civil Justice*, p. 303.

[8] For the court›s powers in non-contentious proceedings see supra point III.

[9] Cf. Oberhammer/Domej, *Powers of the Judge – Germany, Austria, Switzerland*, in van Rhee (ed.), *European Traditions in Civil Procedure* (2005), p. 295.

has the power, and in some cases even duty, to raise a number of issues *ex officio* (which in turn casts light on the goals of civil justice in general): the judge has a duty to discuss relevant factual and legal aspects of the case with the parties, to ask appropriate questions, for instance in case of incomplete allegations, and to give necessary instructions[1]. This is particularly important for the goal of civil justice to provide an efficient mechanism for the enforcement and determination of individual rights and obligations since the duty to ask questions and give instructions is a crucial instrument to foster procedural economy[2]. At the same time, it protects the parties from being taken by surprise by the court's decision, which in turn guarantees the parties' right to be heard, and to some extent places the parties at a level playing field[3]. Overall, according to said duty the court bears responsibility for the proceedings to be conducted in a fair and non-arbitrary way, which, *inter alia*, aims at establishing the truth[4] and prevents injustice in the individual case[5]. Moreover, it is the court's task to take care of the formal course of the proceedings on its own initiative[6], which (again) correlates with civil justice goal of enforcing individual rights and obligations. Austrian and German law also follow the maxim *iura novit curia* according to which the court is assumed to know the law (including foreign law) and apply it *ex officio*[7]. The *iura novit curia* principle not only serves the enforcement of rights but also the implementation of the legal order in general. Additionally, the court is, at least to a certain degree, entitled to take evidence *ex officio*[8]. The judge may, for instance, take expert evidence or order the production of a certain document provided one of the parties has referred to it[9]. The court's power to take evidence *ex officio* can be considered, at least according to *Franz Klein's* procedural thinking, as a tool to advance the process in establishing the truth[10]. On balance, the strong position afforded to the judge in German-speaking countries can, at least today[11], best be characterized as a contribution to the goal of civil justice to provide a swift and efficient determination of the parties' rights and obligations which in turn establishes legal certainty by putting the parties' dispute to an end. Finally, the court has to decide *ex*

[1] See Sec. 139 dZPO and Sec. 182 and 182a ZPO; cf. Oberhammer/Domej, *Powers of the Judge – Germany, Austria, Switzerland*, p. 300; Murray/Stürner, *German Civil Justice*, p. 166 et seq.

[2] Oberhammer, *Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos «Een nieuwe balans» aus Sicht des deutschen Rechtskreises*, in Ingelse (ed.), *Commentaren op fundamentele herbezinning* (2004), p. 91.

[3] See, e.g., Wagner in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2008, § 139 para. 1.

[4] See Stadler in Musielak (ed.), *Zivilprozessordnung*, 8th ed., 2011, § 139 para. 1.

[5] Murray/Stürner, *German Civil Justice*, p. 166.

[6] Oberhammer/Domej, *Powers of the Judge – Germany, Austria, Switzerland*, p. 302.

[7] See, e.g., Oberhammer/Domej, *Powers of the Judge – Germany, Austria, Switzerland*, p. 302; Haas, *The Relationship between the Judge and the Parties under German Law*, p. 93; Rauscher in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, para. 306.

[8] Cf. Oberhammer/Domej, *Powers of the Judge – Germany, Austria, Switzerland*, p. 304; Haas, *The Relationship between the Judge and the Parties under German Law*, p. 100.

[9] See Sec. 182 ZPO and Sec. 142 dZPO. However under Austrian law the hearing of a witness and the taking of documentary evidence (ex officio) is not permissible if both parties object to it.

[10] See Parker/Lewisch, *Materielle Wahrheitsfindung im Zivilprozeß*, in Bundesministerium für Justiz/Lewisch/Rechberger (eds.), *100 Jahre ZPO – Ökonomische Analyse des Zivilprozesses* (1998), p. 206.

[11] Historically the discussion on the judge's power in German-speaking doctrine was mainly influenced by ideological implications (i.e. the question of «liberal vs. social view of civil procedure»); see, e.g., Oberhammer, *Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos «Een nieuwe balans' aus Sicht des deutschen Rechtskreises*, p. 90; Oberhammer, *Zivilprozessgesetzgebung: Content follows method*, in Honsell et al. (eds.), *Festschrift Kramer* (2004), p. 1040 et seq.

officio on a number of procedural requirements (so-called *Prozessvoraussetzungen*) that need to be fulfilled for the court to take a decision on the merits of the case. These procedural requirements, *inter alia*, include questions of jurisdiction, procedural capacity of the parties, res judicata, lis pendens and so forth.

22. The responsibility for the goals of civil justice to be reached is shared between the parties and the court. Other actors and bodies do generally not have the duty to secure the achievement of goals of civil justice in the particular case. Bodies similar to the French «*avocats généraux*» or the admissibility of *amicus curiae* briefs, which form part of common law systems, are unknown to the Austrian and German legal system. In Austria the public prosecutor (*Staatsanwalt*) has the right (and duty) to file an action for annulment of a marriage, especially if the marriage was entered into for the sole or prevailing purpose of obtaining a certain name or the Austrian citizenship[1]. In this context the public prosecutor acts as a representative of the state in order to protect public interest by initiating civil proceedings[2]. Apart from that, Austrian law assigns the task to the State Financial Procurator (*Finanzprokuratur*) to intervene (in proceedings) in order to protect public interest and to file all requests and legal remedies available if the urgency of the case requires such immediate intervention or no other administrative body considers itself to be competent[3]. However, the State Financial Procurator's function has never played a significant role in practice[4]. The OGH has repeatedly decided that the State Financial Procurator does not have the power to intervene in all civil proceedings but rather only in limited cases where public interest is directly affected by the subject matter of the decision. Indirect ramifications on matters of public interest do not suffice for the State Financial Procurator's intervention[5]. Under German law the public prosecutor does no longer have any power to intervene in civil proceedings[6]. The competence of the public prosecutor to bring an action for annulment of a marriage based on certain grounds, i.e. legal incapacity (Sec. 1304 BGB), bigamy (Sec. 1306 BGB), intermarriage (Sec. 1307 BGB) and so forth[7], was transferred to administrative bodies of the respective (German) state[8].

V. «Material truth» v. fair trial within a reasonable time

23. According to *Franz Klein* the concept of the active judge had a dual function: on the one hand, it aimed to reach a correct and just decision by establishing the substantive

[1] See Sec. 28 para 1 Austrian marriage law (hereinafter referred to as «EheG»). Additionally, the public prosecutor has the right to intervene in proceedings for the declaration of death according to Sec. 20 et seq. *Todeserklärungsgesetz – TEG*.

[2] See Kralik, *Die Wahrung öffentlicher Interessen im österreichischen Zivilverfahren, Landesreferat zum IX. Internationalen Kongreß für Rechtsvergleichung*, Teheran, 1974, Wiener Rechtswissenschaftliche Studien (vol. 13, 1974), p. 66 et seq.

[3] See Sec. 3 para. 6 of the State Financial Procurator Act (*Finanzprokuraturgesetz*). Setion 3 para. 6 explicitly mentions the State Financial Procurator's task to secure and collect charitable donations *mortis causa*.

[4] Kralik, *Die Wahrung öffentlicher Interessen im österreichischen Zivilverfahren, Landesreferat zum IX. Internationalen Kongreß für Rechtsvergleichung*, p. 66.

[5] See, e.g., OGH 19 September 2002, NZ 2003/66; cf. RIS-Justiz RS0071582.

[6] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 27 para. 1.

[7] For an exhaustive list see Hilbig in Rauscher (ed.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2010, Sec. 129 FamFG para. 1.

[8] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 27 para. 2.

truth *ex officio* (which was truly important for *Klein*) and, on the other hand, efficient case management by the judge provided an effective method for accelerating the proceedings without impairing their quality. Ensuring the quality of decisions and accelerating proceedings are, in *Klein's* view, not mutually exclusive goals. He emphasized that the courts should not strive for speedy proceedings at the cost of the quality judgements[1]. In the authors' opinion differentiating strictly between substantive and formal truth seems rather naïve considering procedural practice. On the one hand, the «battle» between the parties to enforce their rights and/or the court's fact-finding measures will always lead to a (more or less adequate) convergence of those facts on which the court's decision is based and reality. On the other hand, it would be illusory to assume that a system existed which guarantees the establishment of substantive truth within a reasonable time and with reasonable effort[2]. However, an analysis of Austrian civil procedure law shows that it aims at balanced approach, i.e. the accuracy of the decision does not prevail the need to ensure legal security and provide the parties with an effective remedy in due time (and vice versa). According to Sec. 178 ZPO each party is obliged to bring forward factual allegations supporting their requests *truthfully* and *comprehensively*. In other words, this provision enshrines a duty of truth (so-called *Wahrheitspflicht*). Equally, the judge is responsible for establishing the «true» facts underlying the rights and claims brought forward by the parties by exercising his/her duty to ask questions and give instructions under Sec. 182 para. 1 ZPO[3]. In general, the judge's power to take evidence *ex officio*[4] serves as an instrument to establish the truth and render a judgment on that very basis. In the interest of procedural efficiency the «search for the truth» in civil proceedings is, however, limited, which can be exemplified as follows: firstly, according to Sec. 183 para. 2 ZPO the judge has no power to order the production of documents or hear a witness if both parties object. Secondly, it is settled case law that the court has to consider factual allegations made by one of the parties but not contested by the opposing party to be correct and bases its decision on those facts without further examination[5]. Exceptions to this rule are only made where (i) it is generally known that the uncontested fact is incorrect, (ii) the factual statement in question contradicts generally acknowledged principles derived from experience (so-called *Erfahrungssätze*) or (iii) the judge found out about the incorrectness of the uncontested fact when exercising his/her official activities[6]. Thirdly, new factual submissions are, in most cases, not admissible at the appeal stage under the ZPO[7]. Finally, Sec. 179 ZPO empowers the judge to dismiss late allegations if

[1] Klein, *Vorlesungen über die Praxis des Civilprozesses* (1900), p. 10; cf. Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, in van Rhee (ed.), *Within a Reasonable Period of Time: The History of Due and Undue Delay in Civil Litigation* (2010), p. 260.

[2] Oberhammer, *Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos «Een nieuwe balans' aus Sicht des deutschen Rechtskreises*, p. 90.

[3] Parker/Lewisch, *Materielle Wahrheitsfindung im Zivilprozeß*, p. 207.

[4] See surpa point IV.

[5] See, e.g., OGH 21 November 1988, 5 Ob 631/89, JBl 1990, 590; OGH 16 September 2011, 2 Ob 89/11v; RIS-Justiz RS0039949, RS0040110; this view is, however, rejected by the prevailing view in legal doctrine, cf. Rechberger/Simotta, *Zivilprozessrecht*, 8th ed., 2010, para. 775.

[6] Cf. Rechberger/Simotta, *Zivilprozessrecht*, para. 775.

[7] See Sec. 482 para. 2 ZPO; cf. Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, p. 271.

they were not made earlier due to gross negligence and provided their admission would significantly delay the proceedings[1].

24. The German approach, *cum grano salis*, corresponds to the Austrian. Consequently, it also tries to strike a balance between taking a decision on a solid factual basis while at the same time ensuring a speedy and efficient decision-making process. A number of provisions of the dZPO indicate that civil procedure aims at establishing the substantive truth[2]. Sec. 138 dZPO, for instance, enshrines the parties' duty to tell the truth[3]. Moreover, Sec. 286 dZPO provides that the court has the power to freely evaluate evidence in order to decide whether a factual allegation is to be deemed *true* or *untrue*. According to Sec. 395 para. 1 dZPO a witness shall be instructed to tell the truth prior to his/her examination[4]. Also under German law the judge has the power to take evidence *ex officio*[5]. On the other side of the spectrum, the process of establishing the truth is limited by the admissions of one party of the facts submitted by the other party[6], the restriction to plead new arguments before the Court of Appeal[7] and the judge's power to dismiss late submissions of means of attack or defences under Sec. 296 dZPO[8]. On the basis that there is no equivalent to the civil law concept of limited legal capacity of minors in civil proceedings[9] it was submitted that the interest of securing efficient proceedings would, in this very case, prevail over the minor's individual personal interest to influence the truth-finding process[10].

VI. «Hard cases» v. mass-processing of routine matters

25. In Austria access to the OGH has been gradually limited since the enactment of the ZPO. While originally all cases (except those where a very small amount was in dispute) could be brought before the OGH, today access to the OGH is, on the one hand, only admissible if the amount in dispute (in the second instance) exceeds EUR 5'000, and, on the other hand, depends on the existence of a question of law of considerable importance to legal uniformity, legal certainty or the development of the law[11]. If the amount in dispute

[1] Cf. Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, p. 271; Oberhammer, *Speeding up Civil Litigation in Austria: Past and Present Instruments*, in van Rhee (ed.), *The Law's Delay* (2004), p. 227.

[2] This seems to be widely accepted in legal doctrine, see Zeuner, *Rechtsvergewisserung und Wahrheitsermittlung als Funktionen des zivilgerichtlichen Verfahrens und ihre Beeinflussung unter persönlichkeitsrechtlichen Aspekten in der neuen Entwicklung des deutschen Rechts*, p. 1788 et seq. with further references.

[3] The exact limits of that duty are, however, disputed among scholars, see Haas, *The Relationship between the Judge and the Parties under German Law*, p. 91.

[4] See also Sec. 451 dZPO.

[5] See, e.g., Haas, *The Relationship between the Judge and the Parties under German Law*, p. 100.

[6] See Sec. 288 dZPO; cf. Prütting in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2008, § 288 para. 32 et seq.

[7] See Gottwald, *Defeating Delay in German Civil Procedure*, in van Rhee (ed.), *The Law's Delay* (2004), p. 128.

[8] Gottwald, *Defeating Delay in German Civil Procedure*, p. 126.

[9] This is, however, not the case in non-contentious proceedings.

[10] Zeuner, *Rechtsvergewisserung und Wahrheitsermittlung als Funktionen des zivilgerichtlichen Verfahrens und ihre Beeinflussung unter persönlichkeitsrechtlichen Aspekten in der neuen Entwicklung des deutschen Rechts*, p. 1792. This trend is, however, reversed in those proceedings where parties are granted procedural capacity irrespective of their legal capacity under civil law; cf., in detail, ibid, p. 1796.

[11] See Sec. 502 ZPO which also stipulates some exceptions to the value limit, especially in family law, tenant law and labor law matters; cf. Rechberger/Simotta, *Zivilprozessrecht*, para. 1038 et seq.

ranges between EUR 5'000 and EUR 30'000 the admissibility to file an appeal to the OGH depends on a permission to appeal granted by the second instance[1]. According to Sec. 8 of the Supreme Court Act (*OGHG*) the OGH's decision has to be taken by an enlarged panel (*verstärkter Senat*) of eleven members if (i) the decision on a legal question of fundamental importance would lead to a deviation from the OGH's established case law or a decision of an enlarged panel, or (ii) the legal issue of fundamental importance in question has not yet been answered in a uniform manner by the OGH. It follows form the Austrian appeal system that different goals of civil justice are implemented at different stages of the appeal process. While the lower courts are, in principle, responsible for mass-processing of routine matters it is the OGH's task to provide guidance with regard to new matters of law and thereby to contribute to the development of the law. This is generally referred to as the OGH's leading role (*Leitfunktion*)[2]. The problem of civil procedure becoming a mass-phenomenon correlates with *Franz Klein's* procedural thinking that civil litigation has a social function, economic ramifications and serves public interest. Legislative measures taken in that respect, such as the adoption of small claims procedures (see *infra* point VII.) can, therefore, be seen in the context of the just mentioned civil justice goals.

26. The role and function the BGH has in the German civil justice system is very similar to that of the OGH in the Austrian system. In other words, access to the BGH depends on the significance of the legal issue in question to the system of justice as a whole[3]. As a result of the civil procedure reforms in 2001 access to the BGH is limited to cases in which appeal has either been granted by the second instance or the BGH itself[4]. According to Sec. 543 para. 2 dZPO an appeal to the BGH is only admitted if (i) the legal matter is of fundamental significance, or (ii) the further development of the law or the interests in ensuring uniform adjudication require a decision by the BGH. Moreover, Sec. 132 para. 4 GVG provides that an adjudicating panel of the BGH may submit an issue of fundamental importance to the Grand Panel for a decision if it deems this necessary for the development of the law or in order to ensure uniform application of the law[5]. It follows that mass-processing of routine matters is handled by the lower courts while the BGH is responsible for rendering decisions on (new) legal issues or «hard cases» having an impact on the entire civil justice system. Both the OGH and the BGH do generally not decide issues of fact.

27. Interestingly, the caseload of the OGH is quite similar to that of the BGH, even though Germany has about ten times as many inhabitants as Austria. In 2010, for instance, the OGH completed 2'050[6] cases (excluding labour and social law matters) and the BGH 3'530[7]. This might indicate that the OGH employs a more general understanding of the «importance» of cases[8].

[1] In case the amount in dispute exceeds EUR 30'000 the parties can file a so-called extraordinary *Revision* and bring the case before the OGH irrespective of whether the second instance denied permission to appeal.

[2] See, e.g., Rechberger/Simotta, *Zivilprozessrecht*, para. 1037.

[3] See Murray/Stürner, *German Civil Justice,* p. 386.

[4] See, e.g., Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 141 para. 1.

[5] Cf. Jacobs in Stein/Jonas, *ZPO*, 22nd ed., 2011, § 132 GVG para. 2 et seq.

[6] See http://www.statistik.at/web_de/services/stat_jahrbuch/index.html (item 35).

[7] See https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/Gerichtsverfahren/Tabellen/Gerichtsverfahren.html;jsessionid=562303AE9E5BD0AEA4B848038EFB9BC5.cae2.

[8] Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, p. 274.

VII. Principle of proportionality (de minimis non curat praetor) or same standards and processes to everyone, irrespective of the importance of the case

28. Under both German and Austrian law small claims fall within the jurisdiction of special courts: In Austria, the *Bezirksgerichte* are competent for all cases where the amount in dispute is not higher than EUR 10'000[1] and for certain cases of landlord and tenant law and family law (with regard to these matters irrespective of the amount in dispute). Similarly, in Germany the *Amtsgerichte*, inter alia, have jurisdiction for cases involving a dispute of up to EUR 5'000 (and irrespective of the amount in dispute – especially cases of landlord and tenant law and family law). In both countries, the general rules on ordinary proceedings also apply to these «small claims proceedings». In addition, however, a number of provisions (Sec. 431 to 447 ZPO and Sec. 495 to 510b dZPO) provide for detailed rules in order to simplify these proceedings. The procedure according to these rules provides many features of a typical small claims process, e.g. formalities are kept to a minimum, emphasis is put on the oral part of the proceedings, and admissibility of appeals is restricted[2]. Additionally, in most cases, the representation by attorneys is not required; as a consequence, the provisions mentioned afford the judge a stronger position especially with respect to his role in the fact-finding-process[3]. The differentiation between small claims procedure and ordinary proceedings might be interpreted as an implementation of the proportionality principle. It would, however, be incorrect to conclude that these cases are considered less important on the basis of their amount in dispute. The simplified procedure rather aims at making the enforcement and determination of rights and obligations easier. At least in Austrian court practice the number of cases decided in small claims proceedings before the *Bezirksgericht* by far exceeds the number of cases dealt with in ordinary proceedings[4].

29. Unlike Austrian civil procedure law, the dZPO provides for (even more) simplified proceedings in cases where the amount in dispute does not exceed EUR 600[5]. According to Sec. 495a dZPO the procedure is entirely left to the court's discretion in such cases. However, oral proceedings are obligatory if one party requests an oral hearing. In addition, the party's fundamental rights granted by the German constitution limit the court's discretion with respect to the procedure[6].

30. The Austrian procedure for an order for payment (*Mahnverfahren*) does not really qualify as a special procedure but rather a specific form of commencing ordinary proceedings. All money claims up to and including an amount of EUR 75'000 have to be filed in the form of a request for an order for payment (*Mahnklage*). Subsequently, the court issues an order for payment (*Zahlungsbefehl*) which is sent to the defendant and becomes binding and enforceable if the defendant fails to object within four weeks. If the defendant

[1] According to a most recent legislative proposal this amount sould be raised to EUR 25›000; see government bill 1685 BlgNR 24. GP (2012) p. 9.

[2] See Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, p. 274.

[3] See, e.g., Sec. 432 ZPO.

[4] See Kodek/Mayr, *Zivilprozessrecht* (2011), para. 835.

[5] Cf. Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 108 para. 17 et seq.

[6] See Federal Constitutional Court (*Bundesverfassungsgericht*) 21 March 2006, 2 *BvR* 1104/05, *NJW* 2006, 2248.

timely objects the proceedings are continued in the ordinary way. Consequently, it might be stated that ordinary procedure under Austrian law provides a «multi track» procedure, reserving a fast track for smaller claims[1]. The German procedure for an order for payment significantly differs from the Austrian, most notably it provides for a two-step procedure and the claimant can choose between commencing ordinary proceedings and applying for an order for payment.

31. In addition, German civil procedure law provides for «summary proceedings» in which only documents and party interrogation are admissible evidence[2]. These proceedings apply to cases where the claim is based upon a document or a promissory note. The procedure is dived in two parts: In the first part, the court issues a «*Vorbehaltsurteil*» (conditional judgement) which forms an executory title. However, the defendant has the right to present its case without any restrictions as to the means of evidence in a subsequent «*Nachverfahren*» leading to a definitive judgement. It is the goal of summary proceedings under German law to offer creditors an efficient and fast mechanism to enforce their claims.

32. In cases where the amount in dispute does not exceed EUR 2.700 Austrian law restricts the grounds that can be raised in an appeal against the court's decision. According to Sec. 501 ZPO an appeal (so-called *Bagatellberufung*) can only be based on nullity and incorrect legal evaluation. Under German law an appeal against a judgement of the court of first instance is only admissible if the amount in dispute exceeds EUR 600[3].

33. Moreover, the requirements for the admissibility of an appeal to the OGH and BGH (see *supra* point VI.) serve as a filtering mechanism. This mechanism leads to the result that both cases in which a certain amount in dispute is not exceeded and disputes, which do not raise significant issues of law, are dealt with differently. Such differentiation is, however, not considered a denial of justice.

VIII. Bi-party proceedings v. resolution of complex, multi-party matters

34. Despite intense discussions in legal doctrine and recurring events leading to mass tort, in the wake of the financial crisis in particular damages arising out of investments[4], the Austrian legislator has not yet adopted specific provisions for class or group actions. Consequently, the handling of complex multi-party matters cannot, at least as regards matters falling within contentious jurisdiction[5], be considered a major goal of civil justice. To overcome the legislative *lacuna* a sort of group litigation based on traditional procedural tools was developed in practice[6]. Under the label of «Austrian style group action» (*Sammelklage österreichischer Prägung*) harmed individuals transfer their claims to an association

[1] Oberhammer/Domej, *Delay in Modern Austrian Civil Procedure and the Legislator's Response*, p. 274.

[2] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 163 para. 2.

[3] See Sec. 511 para. 2 dZPO.

[4] See, e.g., Oberhammer, *„Österreichische Sammelklage» und § 227 ZPO*, in Fucik/Konecny/Lovrek/Oberhammer (eds.), *Jahrbuch Zivilverfahrensrecht* 2010, p. 248.

[5] For non-contentious matters see supra point III.

[6] Cf. Kodek, *Collective Redress in Austria*, in Hensler/Hodges/Tulibacka (eds.), *The Globalization of Class Actions, Annals of the American Academy of Political and Social sciences*, Vol 622 (2009), p. 87 et seq.

(in most cases a consumer association). Subsequently, the association (or another legal entity) brings all collected claims in one action on its own behalf before the court on the basis of Sec. 227 para. 1 ZPO (*objektive Klagenhäufung*)[1]. In 2007 a draft law based on a text prepared by an expert working group set up by the Austrian Ministry of Justice was presented. It was later called Civil Justice Reform Act 2007 (*Zivilverfahrensnovelle* 2007). The draft provides for a new «group litigation procedure» (*Gruppenverfahren*) and a «test case procedure» (*Musterverfahren*)[2]. However, due to criticism the draft has not passed parliament and the adoption of a group litigation procedure, therefore, remains on the political agenda[3].

35. Like Austrian law, German civil procedure law does not provide for a class or group action, as it is known in other jurisdictions, most prominently the United States. As a consequence of the Deutsch Telekom case, in which thousands of individual securities claims were filed against Deutsch Telekom, the German legislator adopted the Act on the Initiation of Model Case Proceedings in respect of investors in the Capital Markets[4]. In simplified terms the KapMuG provides for a (interlocutory) procedure in which factual and legal issues common to a group of similar actions are decided. The decision rendered has binding effect for the individual cases. The hybrid procedure combines elements of a test-case procedure and a collective procedure[5]. The KapMuG was originally adopted as «experimental law» and its trail period of five years was extended until 31 October 2012. The German legislator has recently submitted a draft bill according to which the KapMuG shall be maintained and slightly modified. Consequently, the scope of application of the KapMuG remains limited to certain rights and claims of investors. The draft bill does not propose to incorporate the procedure in the civil procedure code and enlarge its scope of application arguing that it has not yet been sufficiently tested[6]. It follows that the resolution of complex multi-party matters is only gradually considered as a goal of civil justice.

36. In addition, Austrian and German law grant certain associations or independent public bodies the right to bring a representative action for injunctive or declaratory relief in specific areas of law (so called *Verbandsklage*)[7].

IX. Equitable results and substantive justice v. strict formalism and principle of legality

37. Both in the Austrian[8] and German[9] constitution the principle of legality is enshrined. In general, courts, therefore, have to decide the case in accordance with the applicable legal norms. It is yet a more difficult question in how far the court's decision needs to take into

[1] See, e.g., Rechberger, *Class Actions*, p. 162 et seq.

[2] Cf., in detail, Kodek, *Collective Redress in Austria*, p. 89 et seq.; Rechberger, *Class Actions*, p. 166 et seq.

[3] Rechberger, *Class Actions*, p. 166.

[4] *Kapitalanleger-Musterverfahrensgesetz*; hereinafter referred to as KapMuG; see, e.g., Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation – Germany*, p. 7.

[5] Cf. Lange, *Das begrenzte Gruppenverfahren* (2011), p. 82 et seq.

[6] See BT-Drucks 17/8799, p. 1.

[7] See supra point IV.

[8] See Article 18 para 1 of the Austrian Constitution.

[9] See Article 20 para. 2 of the German Constitution.

account basic principles of justice underlying the legal order as such if they conflict with applicable legal norms[1].

38. In some cases reference to equity is made in the law itself. According to Sec. 904 Austrian Civil Code (*ABGB*), for instance, the court may be requested to fix an equitable time of performance if the parties agreed that the debtor may perform his/her personal and not inheritable duty at any time. Sec. 78 AußStrG might serve as an additional example. It empowers the judge in non-contentious proceedings to deviate from the general rule that costs are awarded to the successful party if equity so requires[2]. In Germany, Sec. 81 FamFG even provides that the court has «equitable discretion» in deciding which party shall bear the costs. On the basis of these isolated provisions it can, however, not be established that reaching an equitable result would form part of the goals of civil justice.

39. By way of concluding an arbitration agreement and empowering the arbitrators to decide the case *ex aequo et bono* Austrian and German law offer the parties a possibility to opt out of the strict application of the law. However, Sec. 603 para. 3 ZPO and Sec. 1051 para. 3 ZPO require that the parties expressly authorize the arbitral tribunal to decide *ex aequo et bono*.

40. As regards a parties' failure to comply with formal requirements stipulated in the civil procedure code neither Austrian nor German law apply a very strict approach. In general, parties are given the opportunity to correct formally incorrect submissions within a certain time-limit[3]. If the error is corrected within the given time-limit the date of the submission will even remain the date of the initial filing under Austrian law.[4] In Germany, Sec. 295 dZPO stipulates that violations of non-mandatory procedural provisions, and in particular of rules governing the form of procedural acts, can no longer be raised if the party has waived the rule's application, or if the party has failed to timely object to the irregularity.

X. Problem-solving or case-processing

41. Under Austrian and German law these goals do not seem to be mutually exclusive. The goal of problem solving can, on the one hand, be viewed from the parties' perspective and, on the other hand, from the society's perspective. Regarding the latter in Austria the view prevails that civil justice also serves the resolution of «social conflicts» and thereby fulfils public welfare tasks[5]. Additionally, several provisions of the Austrian ZPO suggest that it is, at least to some extent, also a goal of civil justice to find an adequate solution for the parties' dispute without necessarily deciding the case by rendering a judgement. Sec. 258 para. 1 ZPO, for instance, requires the judge to undertake the attempt to settle the case. According to Sec. 204 para. 1 ZPO the judge can (*ex officio*) try to facilitate an amicable settlement of the dispute, or even of single issues in dispute, at any stage of the

[1] This might be illustrated by reference to the cases law mentioned above (point II. B.) in which the BGH permits res judicata to be overturned on the basis of an action in tort under Sec. 826 BGB.

[2] Cf. Klicka/Oberhammer/Domej, *Außerstreitverfahren*, para. 148.

[3] See, e.g., Sec. 84 ZPO et seq.; with regard to the statement of claim see Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 96 para. 47; Becker-Eberhard in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2008, § 253 para. 154.

[4] See, e.g., Rechberger/Simotta, *Zivilprozessrecht*, para. 708 et seq;

[5] See supra point II.A.

oral hearing. However, the need to solve the parties' problem does not prevail over the goal of civil procedure to swiftly decide the case. Again it seems the approach is a balanced one (see already supra point V.).

42. German law generally takes a favourable stance towards voluntary settlement of legal disputes[1]. Sec. 278 para. 2 dZPO, for instance, lays down an obligatory conciliation hearing (*Güteverhandlung*) in all cases except those where the parties have unsuccessfully attempted to settle the case before an out-of-court settlement institution or in which there is obviously no hope that a successful settlement will be reached[2]. This provision already shows that problem-solving should not be forced at the expense of case-processing. Moreover, Sec. 278 para. 1 dZPO authorizes the judge to take an active role and encourage a settlement between the parties when appropriate[3]. Besides, following the enactment of the new Mediation Act (*Mediationsgesetz*, MediationsG) in 2011 the concept of conciliatory judges (*Güterichter*) has been extended[4]. This in-court conciliation replaces the so-called in-court or judicial mediation (*gerichtsinterne Mediation* or *Richtermediation*) that was introduced as a «pilot project» at several courts and was included in the government bill. Today, Sec. 278 (5) dZPO authorizes the judge to refer the parties to a requested or commissioned judge not only for the purpose of the preliminary conciliation hearing but also for a further attempt at conciliation[5]. At the same time, however, the German civil justice system does not sacrifice procedural efficiency for voluntary dispute resolution[6].

XI. Civil justice as freely available public service, or as a quasi-commercial source of revenue for the public budget

43. Neither in Austria nor in Germany access to the civil justice system is free of charge. The level of court fees depends on the type of dispute. In most cases, however, court fees as well as attorney fees are calculated on the basis of the amount in dispute[7]. The claimant (or applicant as the case may be) has to pay the entire court fees in advance[8]. If the amount in dispute is, by way of example, EUR 10'000 the court fees (in the first instance) will amount to EUR 673 in Austria[9] and EUR 588[10] in Germany. For an appeal in the just mentioned example the court fee in Austria amounts to EUR 1'036[11] and in Germany to EUR 784[12].

[1] Cf., in detail, Murray/Stürner, *German Civil Justice*, p. 486 et seq.

[2] See, e.g., Oberhammer/Domej, *Conciliation and Other Types of Alternative Dispute Settlements – Germany, Austria, Switzerland*, in van Rhee (ed.), *European Traditions in Civil Procedure* (2005), p. 220; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht,* 17th ed., 2010, § 104 para. 15 et seq.

[3] Murray/Stürner, *German Civil Justice*, p. 487.

[4] See BT-Drucks 17/8058, p. 17.

[5] BT-Drucks 17/8058, p. 21.

[6] See, e.g., Murray/Stürner, *German Civil Justice*, p. 488.

[7] For Austria see Court Fees Act (*Gerichtsgebührengesetz*, hereinafter GGG) and for Germany the Act on Court Costs (*Gerichtskostengesetz*, hereinafter GKG).

[8] See, e.g., Murray/Stürner, *German Civil Justice*, p. 344.

[9] See Sec. 2 para. 1 lit a GGG, tariff item 1 (*Tarifposten* 1).

[10] See Sec. 34 GKG, Attachment 1, No. 1210 and Attachment 2.

[11] See Sec. 2 para. 1 lit c GGG, tariff item 2 (*Tarifposten* 2)

[12] See Sec. 34 GKG, Attachment 1, No. 1220 and Attachment 2

For parties having insufficient financial means access to court is ensured by a developed legal aid system according to which a party is fully (or partially) exempt from paying fees[1]. In addition, it is quite popular in Germany and Austria to purchase legal cost insurance offered by private insurance companies[2].

44. According to the information published on the website of the Austrian Ministry of Justice 73 per cent of the overall costs of the justice system, including civil and criminal justice are covered[3]. Data limited to the civil justice system are only provided by the report of the European Commission for the Efficiency of Justice (CEPEJ) on «Efficiency and quality of justice»[4]. According to this report (see p. 63) the court fees in Austria cover 110.9 per cent of the court's budget. The high level of court fees in Austria arguably results from the court's responsibility for land and business registers. Acquiring information from these registers or recording modifications, for instance, triggers court fees. At the same time a high degree of standardization and computerization of the judiciary, especially in the branches with large numbers of cases, enable courts to keep costs low and allow revenue[5]. However, since revenue derived from court fees is, arguably, used to cross-subsidize other parts of the justice system, most notably the costly area of criminal justice, it would be difficult to conclude that court fees qualify as a «quasi-commercial source of revenue for the public budget».

45. In Germany, court fees on average cover 40 per cent of the costs of the justice system[6]. This rationale is considered to low and, *inter alia*, caused the Ministry of Justice in November 2011 to spur into action and prepare a draft for the second Act for the Modernization of the Law on Costs[7].

XII. Orientation towards the users or self-centred goals?

46. At least in theory many of the civil justice goals, such as quick and efficient enforcement and determination of rights and obligations, legal certainty and the like, positively

[1] See, e.g., Murray/Stürner, *German Civil Justice*, p. 116 et seq.; Rechberger/Simotta, *Zivilprozessrecht*, para. 442 et seq.

[2] Murray/Stürner, *German Civil Justice*, p. 124. According to the statistical report of the Austrian Insurance Association only in the year 2009 almost three million new legal cost insurance contracts were concluded; see http://www.vvo.at/jahresbericht/index.php. Taking into account that the population in Austria approximately stood at 8.3 million at the beginning of 2010 it can be easily concluded that legal cost insurance is very popular in Austria.

[3] See http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a921079062e5.de.html;jsessionid=433D2829175BBD00521117745088034B.

[4] See https://wcd.coe.int/ViewBlob.jsp?id=1700697&SourceFile=1&BlobId=1694098&DocId=1653000. Hereinafter referred to as CEPEJ-report.

[5] See CEPEJ-report, p. 63.

[6] See the final report of the 82nd conference of the ministers of justice held on 18 and 19 May 2011 in Halle; online available at http://www.justiz.bayern.de/imperia/md/content/stmj_internet/ministerium/ministerium/jumiko/2011/i_8_kostendeckunsgrad.pdf. The percentage, however, varies from federal state to federal state. At least in 1995 the court fees covered 100 per cent of the court's budget in Bavaria and Baden-Württemberg; see Blankenburg, *Europäische Justizindikatoren: Budgets der Justiz, Richter und Rechtsanwälte*, *Betrifft: Die Justiz* Nr. 105/2011, p. 19 et seq.

[7] 2. *Kostenrechtsmodernisierungsgesetz* - 2. *KostRMoG*, online available at http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RefE_Zweites_Gesetz_zur_Modernisierung_des_Kostenrechts.pdf?__blob=publicationFile.

affect the users of the system. In practice, the Austrian judiciary works efficiently and effectively which is evidenced by the fact that the majority of cases, at least in contentious proceedings, are resolved within a year or even a shorter period of time[1]. Interestingly, however, the user's perception does not correspond with the just mentioned objective data. By contrast, recent opinion polls draw a different picture: According to the opinion poll organized by the bar association of Lower Austria 86 per cent of the participants hold the view that proceedings last too long or even «much too long». Other polls show slightly more positive results: 75 per cent of respondents believe that the length of proceedings is inappropriate. The poll commissioned by the Ministry of Justice, however, reveals that only 10 per cent of respondents have an «overall negative impression» of proceedings and characterized them as being slow, complicated, or long. 16 per cent of respondents to this poll voiced an «overall positive impression» of the system and indicated that this was due to the «fast handling» of cases. On balance, the level of user satisfaction ranks between high and average. This is not only confirmed by the poll commissioned by the bar association according to which 79 per cent of respondents trust in the Austrian justice system but also by the most recent poll[2]. The scientific value of such polls, however, remains doubtful since users usually do not differentiate between civil and criminal justice. Regarding the latter, cases involving public figures have led to extensively negative media coverage in Austria and thereby negatively influenced the image of the justice system in general[3].

47. At least as regards the use of modern means of communication and IT-matters in general (so-called «e-justice») the Austrian civil justice system takes a very user-friendly stance. It does not only provide for electronic filing of claims but also, for instance, for the online publication of court edicts, such as bankruptcy edicts, court auctions, and publications from commercial registers[4].

48. Equally, in Germany confidence in the civil justice system seems to be widespread[5]. This is confirmed by a recent pool indicating that 60 per cent of the German population place a lot of trust, or at least a fair amount of trust, in German courts[6]. According to said poll, however, the length of the proceedings seems to exceed the German users' demands. 76 per cent of respondents having participated in court proceedings indicate that the process lasts too long. Moreover, 67 per cent of the respondents share the view that those who can afford legal representation will be successful in the proceedings[7].

49. On balance, the goals of civil justice are defined, on the one hand, from the perspective of those whose rights and obligations are at stake and, on the other hand, from the perspective of the society in general and its need for an effective civil justice system.

[1] See, e.g., Mayr, *Neue Rechtstatsachen aus der Zivilgerichtsbarkeit*, *AnwBl* 2009, p. 62.

[2] This poll, however, indicates a slightly lower number of 65 percent; see *Karmasin Motivforschung*, p. 7 and 24; online available at http://www.justiz.gv.at/internet/file/2c94848534e6045f01353d1854d30356.de.0/studie.pdf;jsessionid=C3AF8ED72D64755004594238139D3655.

[3] This is confirmed by the Karmasin poll, p. 19.

[4] See www.edikte.justiz.gv.at.

[5] See, e.g., Murray/Stürner, *German Civil Justice*, p. 631.

[6] Roland Rechtsreport of 2011, p. 12; online available at http://www.roland-konzern.de/media/downloads/roland_rechtsreport2011_kl.pdf.

[7] See Roland Rechtsreport of 2011, p. 19, 20.

Teresa Arruda Alvim Wambier[1]

BRAZILIAN NATIONAL REPORT

I. Introduction

1. The goal of civil justice in Brazil is, according to most Brazilian legal writers, (academics), to solve conflicts or disputes[2] between A and B[3] in accordance with the law[4]. When we say in accordance with the law in Brazil we mean statutory law, as Brazil is a civil law jurisdiction[5]. This is a typical academic approach.

2. But in fact on many occasions civil justice has the goal of solving problems generated by inappropriate activity of the government[6] and in these cases judges have to decide based on norms which are verbally formulated with the use of vague or cloudy concepts and legal principles, which sometimes are not even written. In statutory law these cases are normally solved in the context of class actions[7].

3. Exactly in this kind of conflict between society, represented by one of its bodies, and the government, arises the serious issue of Judicial Activism. Judges have to «create» solutions, ways to solve problems, because in most cases they have to find a way to solve conflicts which were not previously thought of by the legislator. Many times judges act as if they were part of the administrative branch (of the government)[8] (*Pouvoir Exécutif*).

II. Matters within the scope of civil justice

4. It is within the scope of the scope of the Judiciary in Brazil to organize and oversee certain activities which, while having legal connotations, are not encompassed by the legal sphere such as, for example, property deeds and debt collection. However, these activities do not qualify as judiciary activities though they are monitored and organized by the Judiciary Branch.

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[1] Professor of Pontifical Catholic University of São Paolo (Brazil).

[2] Our civil procedural code was conceived in a very individualistic society. Thus, its structure is in fact suitable to solve disputes between individuals and not group conflicts (T.A. Zavascki, *Reforma do sistema processual civil brasileiro e a reclassificação da tutela jurisdicional*, *Revista de Processo*, 1997, vol. 88, p. 173).

[3] Although, as will be seen below, we have a very well developed class action system it is, however, not in our CPC.

[4] In fact, contemporary legal writers recognise that civil procedure also has social and political goals. It serves to allow individuals to exercise their citizenship (C. Dinamarco, *Instituições de direito processual civil*, 6. ed. São Paulo, Malheiros, 2009, vol. 1, p. 135).

[5] Although there are some typical chacracteristic of common law systems: e.g., small claims are treateal in a special fashion and, as was said before, we also have class actions, inspired by the North American system. (J.C. Barbosa Moreira, *Notas sobre alguns aspectos do processo (civil e penal) nos países anglo-saxônicos*, *Revista de Processo*, 1998, vol. 92, p. 87).

[6] In fact, inappropriate activity of the government generates lawsuits and also their conduct during proceedings is not always ideal, but there are unfortunately not very reliable statistics on this problem.

[7] There are often nowadays lawsuits (normally class actions, but not only) against the Government to obtain medicines (RE 607381/SC – STF) or a specific medical treatment (REsp 872733/SP – STJ) or the restructuration of hospital and maternities for them to respond in an adequate fashion the needs of the under privileged (REsp 1041197/MS – STJ).

[8] The Judiciary can exceptionally play this role, mainly when the government refuses citizens the attainment of essential goods, in relatetion to their social rights (Arguição de Descumprimento de Preceito Fundamental no. 45).

5. Furthermore, it is thought that certain procedures that are carried out before a judge require them to perform acts which many are reluctant to qualify as being within the scope of the judiciary. This occurs mainly with proceedings which, in Brazilian civil procedure, are known as «voluntary judicial proceedings» and in which, according to the majority of legal doctrine, the judge plays a chiefly administrative role, as opposed to those procedures marked by the existence of a conflict of interests.

6. The concern with the quality of the performance of the Judiciary Branch, in these voluntary judicial proceedings, is unequivocal. Proof of this is the attempt to simplify some of the procedures, as was noted with regard to the specific hypotheses of amicable divorce and testament executions, which can be processed without the intervention of a judge and before an extrajudicial registrar/notary.

7. Finally, it should be noted that in Brazil we have a mechanism (judicial proceedings) very similar to the judicial review. Our Supreme Court verifies in a proper kind of action or proceedings, known as *Ação Declaratória de Inconstitucionalidade*, that a statutory law or norm does not violate or contradict the Federal Constitution.

8. Legal writers say call this a no-party, no-claim and no-defence lawsuit.

9. But besides that, the main task of civil justice in Brazil is to solve disputes. It is considered that for the Judiciary to play its role (solving disputes) in an effective way, it has to have three functions: 1) to create or to maintain practical conditions favourable to the effectiveness[1] of a judicial decision, i.e., in order for a judicial decision to be able to generate desirable effects; 2) to state if the claimant has rights (that is a declaratory function); and 3) to carry out enforcement activities[2].

10. Activities concerning holding of registers of land or companies are not within the scope of the Judiciary's functions.

IV. Protection of individual rights v. protection of public interest

11. It is stated, in Brazilian tenets, that the Federal Constitution of 1988 introduced mechanisms that increased the judicialization of politics in Brazil, therefore enabling the Judiciary Branch to exert control over public administration activities. One reaches this conclusion, among other reasons, because of the awarding of greater powers to the Judiciary to control the constitutionality of the actions of government bodies/public authorities, the broadening of the scope of public civil actions and the establishment of the writ of injunction (by means of which the government/authorities is/are prompted to regulate the safeguarding of constitutional right and freedom)[3].

12. This judicialization of politics, in so far as it interferes with the activities of the government, consequently also generates discussion regarding certain public policies.

[1] The main concern of legal authors is to provide a fair trial with fair results (minimal standards related to substantial due processo f law) through interpretation of statutory law and creation of new legal mechanisms) (C. Dinamarco, *Instituições de direito processual civil*, 6. ed., São Paulo, Malheiros, 2009, vol. 1, ch. 1 a 5).

[2] José Carlos Barbosa Moreira says exactly that, also telling that this correspond to the classifications of the types of lawsuits – cognition, enforcement and measures (*O novo processo civil brasileiro*, 25th ed., Rio de Janeiro, Forense, 2007, p. 3).

[3] C.A. Silva, *O processo civil como estratégia de poder: reflexo da judicialização da política no Brasil*, Rio de Janeiro, Renovar, 2004, p. 134–141.

13. Moreover, it is also possible to state that the system of civil justice in Brazil takes into consideration public policy, morals, disrespect of rights of a third party to give the judicial decision its final shape or design only if the case at hand (which has to be solved) can be considered a *hard case*. e.g. according to our criteria, hard cases are those which cannot be solved by traditional thinking of civil law.

14. Traditional thinking of civil law consists of finding a statutory provision which fits the case at hand. Nevertheless, the complexity of contemporary societies brings before our Courts cases which cannot be so easily solved. Judges sometimes have to make a real mixture of elements to support their decisions: statutes, analogy, legal principles[1]. Sometimes it is necessary, and this conduct could be understood as Judicial Activism, in my opinion.

15. To exemplify:

I) should maternity leave, awarded to a mother after a baby's birth, also cover cases of adoption, if statutory law only refers to the word mother?

II) Should the prisoners of the *Grupo de resistencia antifascista del primero de octubre*, who were on hunger strike and therefore likely to die, have been force fed?

III) Can artificial insemination by a third party be considered adultery?

IV) Does the policy of benign quotas respect the principle of equality?

16. But the expression «judicial activism»[2] can also refer to the attitude of judges who decide according to their own mind/political ideas/personal convictions, ignoring the law, on the pretext of developing the law. That happens also, but very rarely. To some extent, Judicial Activism, in this sense unduly compromises predictability.

V. Civil procedure and policy implementation; ex officio powers of the court

17. Procedures[3] should reach results that are in line with certain policies when this is expressly required by statutory law.

18. The general rule is that in ordinary civil matters the parties decide on the beginning, the end and the scope of proceedings. This rule has a long tradition and is often elevated to a fundamental principle – Dispositionsmaxime / *principe dispositif*[4]. Courts cannot[5] initiate proceedings or change its scope. The possibility of *cognitio ex officio* during proceedings is

[1] Our Supreme Court has recently declared, on the basis of the solidarity principle, the unconstitutionality of the *taxa de matricula* for the public universities – public ENSINO should be totally public (RE 510378) and also, based on the principle of human dignity, that handicapped should not pay for public transportation (ADIN 2.649).

[2] Legal writers attribute different meanings to the phrase «judicial activism»: a judge who decides *contra legem*, a judge who collaborates with the parties, a judge who innovates, creating law etc. (Maria Elizabeth de Castro Lopes, *Ativismo judicial e ônus da prova no processo civil*, *Revista do Instituto dos Advogados de São Paulo*, 2007, vol. 19, p. 221).

[3] Naturally, when the Judiciary interprets the Federal Constitution, it ends by touching political matters. Inevitably, a judge who is part of our Supreme Court interferes in political themes, for these themes represent the contents of the Federal Constitution (C. Dinamarco, *Instituições de direito processual civil*, 6. ed., São Paulo, Malheiros, 2009, p. 467).

[4] According to Brazilian legal writers, the «*Dispositionsmaxime*» means also that a jugde depends on the initiative of the parties to take eviedence, i. e., on which facts parties have alleged. *iudex secundum alega et probata partium iudicare debet* (Antônio Carlos de Araújo Cintra, *Teoria geral do processo*, 25. ed., São Paulo, Malheiros, 2009, p. 64).

[5] The «*Dispositionsmaxime*» has very few exceptions in Brazilian law, which are in fact not really significant (J.C. Barbosa Moreira, *Reformas processuais e poderes do juiz*, *Temas de direito processual*, 8.ª série, São Paulo, Saraiva, 2004, p. 57).

extremely rare in Brazilian law. Judges can determine *ex officio* some procedural matters as for example lack of standing (lack of *legitimatio ad causam* and *ad processum*) or *res judicata*.

19. As a rule, a judge is limited by the claim[1] presented by the plaintiff, by the terms of the defence[2] and by the evidence brought to the proceedings, which, by the way, can be brought as a result of a judge's request[3], complementary of the parties' activities.

VI. Other bodies responsible for securing goals of civil justice

20. In Brazil, there are other actors or bodies, besides the court and the parties, who must assure that goals of civil justice are being reached. They are basically two: the *Ministério Público* (organ very similar to the French *Ministère Public*) and the *Amicus Curiae*.

21. The MP can intervene in various hypotheses, e.g. when there is a minor involved in the proceedings as a claimant or as a defendant. The members of the MP can even take the initiative of filing a lawsuit (playing the claimant's role) in very special cases described specifically and explicitly by statutory law and in class actions.

22. The *amicus curiae* have been very recently introduced in Brazilian law. For now, it is established that it can intervene in special situations described by statutory law. But there is a clear trend in the sense that a judge can ask for the intervention of an *Amicus Curie* when he or she thinks that this could lead to a better decision[4].

23. Some years ago, an interesting change took place in Brazil with the creation of the «Conselho Nacional de Justiça» (CNJ). Although it is a body belonging to the Judiciary Branch (cf. art. 92, inciso I, da Constituição Federal), most of whose members (a total of 15) emerge from other bodies of this branch, the CNJ has several functions related to the quality control of judiciary activities from the point of view of the «consumer of justice» (cf. art. 103-B, § 4º). In other words, ensuring that the objectives of the judiciary activities are attained is one of the aims that motivated the creation and the shaping of the role of this atypical judiciary entity,[5] a very recent and peculiar situation in the history of Brazilian civil procedure.

VII. «Material truth» v. «fair trial within a reasonable time»

24. What has precedence: the accuracy of adjudication, or the need to afford parties legal security and effective remedy in due time? This is considered the most delicate bal-

[1] In fact the *petitum* expresses simultaneously the will of claim and what the party expects from the Judiciary. (L.R. Wambier et al., *Curso avançado de processo civil*, 9th ed., São Paulo, Revista dos Tribunais, 2007, vol. 1, p. 297).

[2] A judge is limited to the facts brought by the parties but not to the legal aspect. He or she can win on very different basis as far as the law is concerned (F. Didier Jr., *Curso de direito processual civil*, 10. ed., Salvador, Podivum, 2008, vol. 1, p. 290).

[3] This corresponds to a very recente trend in Brazilian law: a judge is considered to have more powers or a stronger power in what concerns the production of evidence. This is considered to be a valid parth to reach real equality between the parties (José Roberto dos Santos Bedaque, *Direito e processo: influência do direito material sobre o processo*, 2. ed., São Paulo, Revista dos Tribunais, 1994, p. 72).

[4] In the «ação declaratória de inconstitucionalidade» n 4451 (which is very similar to the American Judicial Review), the Supreme Court admitted the Workers› Party as *amicus curiae*. The possible unconstitutionality of the statutes which prohibited any jesting or degrading manifestation toward a candidate running for any political office, or his/her party, were then discussed.

[5] This body controls Judiciary and Judges of each and every instance (C. Dinamarco, *Instituições de direito processual civil,* 6. ed., São Paulo, Malheiros, 2009, vol. 1, p. 420).

ance by Brazilian legal writers. Although one recognises the importance of the search for truth in the proceedings, one also admits that this search cannot compromise reasonable duration of proceedings[1].

25. On the other hand, one cannot state that, in Brazilian civil procedure, there is an absolute and irrevocable choice between either option. [Search for truth/reasonable duration of proceedings][2]. In recent decades, perceptible efforts have been made by Brazilian legislators to balance the two needs, that is, to combine speed and certainty.

26. In some situations, the legislator favors the timeliness of relief and allows the party to benefit in advance from the effects which would normally only be attained in the final judgment. However, a judicial provision on these terms is an exception and presupposes the fulfilment of some prerequisites, among which is the risk of losses being incurred by the party who claims the rights and the existence of elements that, at least, appear to prove the claimed rights.

27. Brazilian law is today generous in remedies based on incomplete cognition[3] (*fumus boni iuris*). That means that a judge can advance the claimant the whole effect (or just part of it) of the final judgment or decision, if there is urgency (*periculum in mora*). Normally, these effects are entirely or partly advanced under the condition of the possibility that the situation turns, in case of loss, to the *status quo ante*. However, if the above-mentioned prerequisites are not fulfilled, the party must generally wait for the final judgement, based on exhaustive cognition, to then be awarded the claimed rights.

VIII. «Hard cases» v. mass-processing of routine matters

28. Some procedures in Brazilian law are, by their very nature and applicability, better suited to the discussion of complex legal issues, which can reflect on the sphere of rights of many members of society. This is noted in procedures aimed at the achievement of the abstract control of constitutionality, as well as those that target the protection of collective rights.

29. Besides that, Brazilian civil procedure has several tools to render practical and easy proceedings involving cases which revolve around the same issues of law (legal issues)[4]. These procedural tools are entirely appropriate to solve, for example, tax matters.

30. On the other hand, hard cases, which involve the application of general clauses, vague concepts, legal principles or even total absence of explicit regulation by statutory law, are judged, decided, awarded in a proper way, taking into consideration special aspects of the case at hand.

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[1] One of the goals of Brazilian civil procedure is to reach the truth, but certainly not the only one, for proceedings cannot last forever (J.M. de Arruda Alvim, *Manual de direito processual civil*, 9. ed., São Paulo, Revista dos Tribunais, 2005, vol. 2, p. 379).

[2] The various imperative deadlines of Brazilian civil procedure can be considered a device or a method to avoid eternal proceedings (E.M. de Aragão, *Comentários ao Código de Processo Civil*, 2. ed., Rio de Janeiro, Forense, 1976, vol. 2, p. 99). To avoid eternal proceedings, there is in Brazilian civil procedure a provision saying that if the defendant does not respond within a certain deadline, facts alleged by the claimant can be considered true by a judge, depending on the context and on certain conditions. It is a technique to speed up proceedings (C. Dinamarco, *Fundamentos e alcance do efeito da revelia. Fundamentos do processo civil moderno*, 3. ed. São Paulo, Malheiros, 2000, p. 951).

[3] Procedimento monitório (J.R.C. e Tucci, *Tempo e processo*, São Paulo, Revista dos Tribunais, 1997), *passim*.

[4] The Brazilian civil procedural code authorizes the hearing of appeals which revolve around the same legal issue in a collective way (arts. 543 B and C).

IX. Principle of proportionality in civil justice

31. In 1999 the Small Claims Act (Lei 9099) took effect in Brazil. According to two criteria: complexity and value of the claim, some lawsuits are filed before small claims courts. These courts are composed of lay judges, mediators and regular judges. Immediately after that, Act no. 10.259/2001 was passed, creating the Special Courts within the sphere of the Federal Justice.

32. It is currently thought that both the Acts mentioned make up the legal micro-system of the special courts, defining the specific procedures which they adopt. There is a heated debate as to whether small claims courts are mandatory or whether they are just a choice to be made by plaintiff.

33. In addition, it is thought that the informal nature of proceedings before special courts could harm the party's right to defence, especially with regard to the presenting of evidence. For this reason too, it is said that it would not be possible to prohibit parties from filing a claim before another competent legal entity in accordance with the law[1].

34. There is not any real difference in the way a judge deals with small claims and proper court cases[2]. In Brazil it is considered that refusal to deal with a case which could be seen as not so important, according to some criteria, in the same manner as to other admittedly important case, is a denial of justice. A petition cannot be refused (and neither can an appeal). There is only one filter, similar to the *Grundsätzlichebedeutung* of the German Law, applied only to the appeals to our Supreme Court.

X. Bi-party and Multi-party litigation

35. Generally speaking, social regulations are the task of Legislative and Administrative Branches. When something does not work or works badly, (when there is a dysfunction) then the Judiciary intervenes, normally provoked by a single party, or in a class action, filed by an entity expressly authorized by statutory law. Example: An action was filed against the Prefeitura de São Paulo (City Council) and the judge ordered it to reserve vacancies at a day care centre for mothers to leave their children when they go to work[3].

36. In Brazil we have a very well developed class action system[4]. In fact, complex matters are frequently handled within this context. In class actions, mainly when they are filed against the government, courts have to exercise the complex functions of social regulators, for example. This role is being increasingly considered one of the main goals of civil justice[5].

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[1] Nesse sentido: C. Dinamarco, *Instituições de direito processual civil*, 4. ed., São Paulo, Malheiros, 2004, vol. 3, p. 775.

[2] Maybe the only visible difference is the major duty of judges to try to settle the parties.

[3] See REsp 736.524/SP, Rel. Min. Luiz Fux, STJ, 21/03/2006.

[4] We could speak of a scientific revolution (E. Venturi, *Processo civil coletivo*, São Paulo, Malheiros, 2007, p. 24).

[5] On the subject: Rodolfo de Camargo Mancuso, *Ação civil pública*, 9. ed., São Paulo, Revista dos Tribunais, 2004; Pedro da Silva Dinamarco, *Ação civil pública*, São Paulo, Saraiva, 2001; P. Lenza, *Teoria geral da ação civil pública*, São Paulo, Revista dos Tribunais, 2003; Ricardo de Barros Leonel, *Manual do processo coletivo*, São Paulo, Revista dos Tribunais, 2002.

XI. Equitable results v. strict formalism

37. In most cases[1], a judge is concerned with finding the correct legal solution to solve a dispute. Of course, when a hard case has to be solved, the solution is not explicitly described or established by statutory law. It has to be built according to analogy, legal principles or even from a reference to the predominant «ethos».

38. Statutory law indicates/states that a judge must take into consideration statutory law, analogy, customs and general legal principles when making decisions (LICC – Decreto Lei 4057, 4/set./ 42 now called *Lei de Introdução às Normas do Direito Brasileiro*, art. 4.). Our Federal Constitution (1988) says: nobody is obliged to do or not to do something, unless as a result of the law –

39. A trend has been noted in the last 30 years: an increase in the amount of *hard cases*. In fact, access to justice and the complexity of societies brought to the Judiciary unique and complex issues, frequently not expressly dealt with by statutory law. Therefore, a judge often has to make decisions based on a mix of elements: statutory law, analogy and legal principles.[2]

XII. Problem solving v. Case processing

40. Is the dominant view that the civil justice system needs to approach the cases trying to find adequate resolution of the underlying problems? Or, those cases have to be efficiently solved by means requiring the least efforts and expenses by the competent authorities? Of course, we do also have a delicate balance here. However, I would not hesitate to state that civil justice is clearly oriented toward the goal of solving problems, if possible, with the least amount of effort[3], expense and reaching efficient[4] results[5].

XIII. Freely available public service v. quasi-commercial source of revenue for the public budget

41. Civil justice is not free. One has to pay to use it. Nevertheless, it is not at all expensive and the amount paid is used in the Judiciary itself (e.g. to buy equipment). Besides that,

[1] To legal writers, examples of equity judgements would by *quantum* of child support, custody of minors, fees, and coercitive fines fixed in injunctions (C. Dinamarco, *Instituições de direito processual civil*, 6. ed., São Paulo, Malheiros, 2009, vol. 1, p. 332).

[2] On the basis of the free initiative principle, our Supreme Court has already decided that the supplier cannot be obliged to sell his products at a price lower than the real price of what he sells (RE 598537). On the other hand, based on the good faith and loyalty principles, our Superior Court of Justice also decided that it can be considered an abuse on the part on the Insurance Company to try to sign a contract with a client on a total different basis from what was previously agreed (REsp 1105483).

[3] That is why there is a very heavy criticism on the part of Brazilian legal writers on the excessive quantity of appeals of our system. It can be at least partly the cause of high costs, excessive duration and lots of work for judges (J.C. Barbosa Moreira, *Breve notícia sobre a reforma do processo civil alemão*, *Revista de Processo,* 2003, vol. 111, p. 105).

[4] The concern with results is obvious for instance in our Small Claims Statute (art. 59, da Lei 9.099/95) which limits the forms of attack to a judicial decision.

[5] In fact, this is an old and very traditional principle of civil law jurisdctions: the least possible amount of effort should result in satisfactory efficiency (Antônio Carlos de Araújo Cintra et al., *Teoria geral do processo*, 25. ed., São Paulo, Malheiros, 2009, p. 79).

those[1] who really can't pay for it can have the benefit of gratuity (legal aid). According to the current Brazilian law, a statement declaring poverty or insufficient means signed by the party and his or her lawyer is enough.

42. Furthermore, Act 9.099 (Small claims) says that in any case the first instance is free.

XIV. User orientation or self-centred goals?

43. In the last 30 years, many alterations have been included in Brazilian Law to improve access to justice. It is considered that access to justice deals with the question of how easy or how difficult it is for a potential party to make use of the judicial system. High costs and long duration of proceedings are two factors which render access to justice difficult.

44. It is undeniable that in Brazil solutions have been thought up for this problem: class actions, small claim courts, legal aid (as an exception) and we begin to consider, rightly it seems to me, that ADR also means access to justice. Access to justice must not be understood as an access to public justice. Several tools to stimulate the use of ADR are being conceived.

45. We cannot deny that there are some characteristics of Brazilian civil justice which are visibly oriented toward solving the problems of the system itself, for example.

46. But there are of course others oriented toward users. The goals of civil justice in Brazil are to a large extent oriented or defined by the needs of the system itself and its professional actors, courts, judges, lawyers. They usually propose amendments to the Federal Constitution (Association of judges, OAB etc.). It is true, we have to admit, that the needs of lawyers or judges do not always correspond to a benefit to those whose rights (legal situation) are at stake.

47. Sometimes there is a coincidence between what judges want lawyers and other actors of the judicial scenario and the users. And if the result is a Judiciary with a better performance, everybody is happy.

Fu Yulin[2]

CHINESE NATIONAL REPORT

I. Introduction

1. Civil justice in China is on the path of rapid transformation. The Civil Procedure Law of the People's Republic of China (**CPL**) was first enacted in 1982. Before then, civil cases were mainly disposed by judicial mediation while judgments were rarely rendered. After the enactment of the current CPL (**CPL 1991**), judicial reform spearheaded by the Supreme People's Court (**SPC**) started to emphasize on private rights protection and the checking and restraining of judicial power by procedural formalization and regulation of

[1] Including small companies, according to STJ, AReg no REsp 1226316/RS, rel. Min. Arnaldo Esteves Lima and Embargos de divergência em REsp 1015372/SP.

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judicial mediation. However, since the turn of the century, the dramatically increase of caseload has led to the overuse of the summary procedure. This situation is particularly serious in the basic people's courts, which are responsible for disposing about 80% of all civil cases in China. Meanwhile, the increasing difficulty with enforcement and the rising number of reported judicial error have compelled a partial revision of the CPL 1991 in 2007. The revision focused only on retrial procedure/reopening proceedings and enforcement. In a recent draft of a comprehensive revision to the CPL 1991 (which is likely to be passed in 2012), achieving procedural diversity based on a variety of values and goals has become the theme for reform. There is a tendency of judicial retreat in that the courts are often viewed as a tool to promote political policies. The judiciary is inclined to adjust its goals to serve political needs[1].

II. Goals of Civil Justice

2. Article 2 of the CPL 1991 sets out 11 'tasks' of civil procedure. The prevailing opinion categorized these tasks into two main goals of civil justice: (1) to protect parties' rights; and (2) to maintain social order.

3. The predominant view of scholars is that there is a need to find a delicate balance between these two main goals (or even multiple goals) with a strong emphasis on protection of private rights. The courts, however, mainly focus on maintaining «social order» (instead of «legal order»). As to the goal of dispute resolution, some scholars stress the importance of enhancing the parties' role in disposing their own private interests and their participating rights in proceedings[2]; while the courts are increasingly emphasizing on dispute resolution for the purpose of channelling the mounting caseload through mediation under the notion of «social harmony». Since the turn of the century, the goal of «rights protection» has been superseded by the goal of «maintaining social order».[3]

III. Matters within the scope of civil justice

4. Under Article 3 of the CPL 1991, the scope of civil justice covered judicial decision-making or mediation of civil disputes, declaration of non-contested matters, collection of non-contested debt by dunning order, and enforcement. It seems that the goals of civil justice are not only embodied the litigation of disputes but extend to other matters, especially enforcement.

5. According to the prevailing opinions, the main goal of enforcement is to realize the creditor's rights by forcing the debtor to perform its obligations; but in actual court practice, the goal of «social harmony» is emphasized in enforcement procedure. Reaching a «settlement» at the enforcement stage has become almost a norm (usually achieved by way

[1] Compare the annual reports of the Supreme People's Court with the reports of the Central Committee of the Chinese Communist Party before/around the same time.

[2] Tong Weijian, *Market Economy and Looking into the Future of Civil Procedure Law*, in *Forum of Politics and Law* 1/1997.

[3] See the Supreme People's Court: *Opinions on providing judicial guarantee for the construction of socialist harmonious society,* 30 January 2007 (法发[2007]2号) ; *Opinions on further playing positive role of judicial mediation in the construction of socialist harmonious society,* 5 March 2007. Compare the above with the decision of the Central Committee of the Communist Party of China: *Decision to construct socialist harmonious society,* 11 October 2006.

of court mediation). Pursuant to the goal of harmony, the bankruptcy procedure is rarely utilized so as not to trigger unemployment.

6. In the collection of non-contested debt (the dunning procedure), the goal of rights protection is yet to be fully entrenched. The regulations have made it easy for the debtor (at no cost at all) to present frivolous objections to the transfer of a non-contested debt to the litigation procedure. The regulations have made it far too difficult for the creditor to transfer a non-contested debt to the litigation procedure as the debtor may easily object to the transfer. That is why the dunning procedure accounts for no more than 1% of the first instance civil cases in China. The drafters of the revisions to the CPL is urging for an easier mechanism to transfer a non-contested debt from the dunning procedure to the (contentious) litigation procedure.

IV. Protection of individual rights v. protection of the public interest

7. In the context of a «socialist» society based on public ownership, the consciousness of protection of public interest permeates civil justice. But this predisposition has resulted in the conferral to the judges too much discretion to intervene with the parties' disposition of their private rights.

8. According to the principle under Article 12 of the CPL 1991, the parties are entitled to exercise or dispose of their procedural or substantive rights in civil proceedings. But the court shall check that the exercise of such rights does not violate the interests of the state, social and public interests, or «third party» (parties not involved in the litigation) interests. If such violations exist, the court may (among other measures) deny the plaintiff's withdrawal (Article 131 of the CPL 1991), completely review the first instant judgment disregarding the limitation of appellate claims[1], and refuse to enforce arbitral awards (Articles 213 and 258 of the CPL 1991). Nevertheless, the above measures are rarely applied in actual practice[2]. And even if judges really take policy into consideration, they rarely include them in their judicial reasoning unless the parties expressly argue policy related issues[3]. The only exceptions are family cases and labour cases. In family cases, judges shall consider factors such as the interests of the children and the elderly, ethics and local customs. In labour disputes, both the law and the courts are inclined to protect the employee. For these cases, public policy considerations are usually declared in judgments no matter whether the parties have argued policy related issues[4]. But there seems to be no other privileges available pursuant to policies.

9. Policy considerations do influence judicial decisions all the time. But policy considerations are not made public (as they are not expressly stated in judgments). It is difficult for judges to ignore policy considerations when the overriding ideology of the courts (against

[1] Article 36 of the Opinion of the Supreme People's Court on Issues of Reform of Civil Justice, 1999 (最高人民法院《关于民事经济审判方式改革问题的若干规定》第36条).

[2] Instead, these rules are more often applied to protect the legal interests of a «third party» in litigation.

[3] This frequently happens in enforcement of interational awards, but courts hardly grant/deny such reasons/excuses as «public interests», «public order», or «public policy».

[4] See Articles 47–49 of Mediation and Arbitration Law of Labour Dispute(《劳动争议调解仲裁法》) enacted on 29 December 200l. Related cases can be located on the legal website http://www.lawyee.net/Case/Case.asp; http://vip.chinalawinfo.com/newlaw2002/cas/index.asp.

which the performance of a judge is evaluated) requires civil justice to realize the «integration of legal effect and social effect».

10. The concept of «judicial independence» is new to the Chinese. The influence of national or local interests and views of the ruling elites or the masses over civil adjudication throws the legitimacy of the affected judgments into doubt. While even the lawyer may request the court to take these extra-judicial factors into consideration in some cases, only a few judges would openly accept and include them in their judgments. These extra-judicial influences occur frequently through non-official channels. Examples of such influences are government officials calling the court or issuing a memorandum to the courts, the masses filing administrative petitions against the court or staging sieges on the internet, experts commenting on legal issues of a party's motion or occasionally pursuant to the court's invitation, and so on. Sometimes, such extra-judicial considerations are kept on the record of the «judicature committee» of the court and only accessible by those who have power of «judicial supervision» and never by the parties or the public.

11. The prevailing view is that policy matters should be properly considered and determined by the court exercising its own discretion, with publicized reasoning in the judgment. National interest and security issues should be decided *ex officio*; and other matters such as governmental programmes, suppression of illegal activities, reasons of national security, confidentiality obligations, professional privileges etc., should be presented by the parties.

12. Apart from the parties and the court, the procuratorate is deemed a proper body that has power and duty to secure goals of civil justice, with authority to intervene with the judicial process.

13. Under Article 129 of the PRC Constitution, the procuratorates (at all levels) are state organs for legal supervision. Accordingly, the procuratorates' supervision over judicial activities is claimed to be a principle of the CPL and the CPL1991. Accordingly, the procuratorates are authorized to challenge effective judgments and mandate the courts to reopen proceedings to correct judicial errors in 13 situations listed in the CPL 1991 and supervisory powers were even broadened and enhanced in 2007 revision of the CPL 1991.

14. Debates on the procuratorates' supervision over judicial activities have never ceased since the introduction of the CPL. Prevailing opinions agree that the procuratorates' authority should be limited within a narrow scope of circumstances or cases, such as judicial decisions against judicial precedent (if it exists in the future in China), civil identity relationship involving public order and good custom, litigation in connection with mass torts and public interests, and bankruptcy cases affecting the social and economic order. However, the procuratorates' supervision powers survived the debates and even augmented in the current Chinese political landscape. The procuratorates are even striving for more supervisory power over the courts in enforcement proceedings.

15. Except for the procuratorates, the people's congresses also has the power to supervise the work of the courts (and the procuratorates) by reviewing their annual reports, appointing and removing their presidents, periodically checking judicial works (including specific rulings), and transferring the parties' complaints with or without instruction. In practice, the above powers of people's congresses may exert pressure on the court presidents who has legal power to direct the judicature committee to make or overturn adjudicatory decisions.

V. Establishing the facts of the case correctly v. the need to provide effective protection of rights within an appropriate amount of time

16. Since 1990s, the courts have been endeavouring to strike a balance between the wish to establish the facts correctly and the need to provide effective protection of rights within an appropriate timeframe. Paradoxically, the overemphasis of procedural expediency has resulted in a high rate of appeal (as a consequence of the parties' complaints about judicial errors) and the frequent retrial that made the whole system increasingly inefficient and costly.

17. Under the CPL 1991, a civil case of first instance is required to be closed within 6 months under the ordinary procedure and 3 months under the summary procedure, with further 3 months for the second instance proceedings (as final instance). And most of the basic courts are carrying out a reform known as «fast track» in which a case must end within no more than 30 days or so, and even the right to appeal may be waived with the agreement of both parties. Yet civil justice is seriously undermined and judicial credibility severely damaged by the unendurable defects of judiciary, the lack of judicial uniformity, the increase of public complaints, and the abuse of the retrial procedure. Many scholars call on the courts to slow down the proceedings so as to allow adequate time to promote fairness in adjudication. Now the SPC and many local courts are trying to distinguish complicated cases from simple cases such that the former category produces model judgments and the latter category embodies efficiency.

VI. Developing new case law v. mass-processing of routine matters

18. Hard cases are not welcomed in courts and frequently refused at the stage of «register check» (docketing) using the excuse of «want of jurisdiction». The SPC once issued opinions to instruct the lower courts not to accept some new types of cases temporarily. These instructions were fiercely criticized by scholars. Local courts frequently refused to register those cases typically falling in the courts' civil jurisdiction if such cases are closely related to social policies or premised on new legal innovation. Even if such cases survive the strict «register check», they are mostly mediated by the courts. So it is hard for the public to secure a judicial decision on a «hot» issue because the hotter the case, the greater the chances that it will result in a court-mediated settlement or the plaintiff's withdrawal.

19. The main reason of the exercise of judicial deference is that the courts as a whole have not acquired a status strong enough to handle these new types of cases vulnerable to the influence of politics. The other important reason is that the prevailing goal of civil justice (i.e. the maintenance of social harmony) is a key influence over each and every judge. As a judge regards the case as a dispute or trouble to be resolved, rather than a harmed right to be protected or a damaged norm to be declared/rectified, the judge tends to pay attention to the trouble itself and prefers to avoid existing trouble (hard cases) and to refrain from creating new trouble (risk of innovation). It is fair to say that the SPC actually plays a very important role in defining and clarifying the new legal issues in a transitional society like China. But the means are not by judicial precedent, but by brief reply to lower courts in specific cases or by issuing judicial opinions in the form of comprehensive regulations. Both types of SPC opinions are public and binding.

VII. Proportionality between case and procedure

20. It is widely accepted in China that cases should be disposed of by different procedures in accordance with their natures and value orientation/precedence, or «to afford as much attention to the cases as they deserve it». Under this concept, there are two types of procedures provided by CPL 1991, namely the «ordinary procedure» and the «summary/simple procedure'. However, the said procedures have been criticized as «the formalized one not formal enough, while the simplified one not simple enough».

21. To illustrate on the said criticism, in some basic courts with heavy caseload, «fast track» pilot schemes make the litigation process more efficient and flexible than the «summary/simple procedure», and bring about a higher rate of mediation; while in some advanced intermediate and high courts, complex cases or cases of great social importance are processed in ways more specialized and formalized than the «ordinary procedure». The aforesaid mechanisms (albeit operating in different directions) are warranted given the diverse needs of civil justice, and they are promoted by the official press of the SPC.

22. In the draft version of the revised CPL 1991, a separate small claim procedure is suggested which deals with monetary or other property claims of less than RMB 6,000 or 10,000 in value. Nevertheless, this suggested procedure is still hotly debated[1].

23. The ordinary procedure operated by a collegial panel (as opposed to a single judge) are, as highlighted in the above, formalized and specialized, so that cases that are complex, of great social importance, or where the disputed amount is significant, would be given more attention. Nevertheless, parties are often encouraged to waive the ordinary procedure and choose the summary procedure by agreement.

VIII. Multi-party litigation

24. The aforesaid principles of civil justice are equally applicable in resolving simple bi-party matters, and complex multi-party matters. The multi-party procedure is devised to consolidate cases with similar disputes and resolve them simultaneously so as to avoid conflicting judgments, and at the same time maintain social order, enhance judicial efficiency, and level the playing field between parties of different bargaining powers so as to achieve greater fairness. Notwithstanding to the above, in practice, judges are reluctant to process multi-party cases and even refuse to take on class actions because of their complexity, unmanageability, and unpredictability. These actions also entail greater political interference due to the high level of social attention they may attract. For those class actions, which are accepted by the courts, they are mainly resolved by judicial mediation or withdrawn after settlement. This fortifies the notion that the goal of dispute resolution is comparatively more important than the protection of rights.

IX. Equitable results v. Strict formalism

25. In the Chinese legal culture and judicial custom, achieving an equitable result and substantive justice has always been the priority, and less emphasis is placed on strict compliance of formalism or entrenchment of the principle of legality. In the 1990s, some

[1] Fu Yulin, *Small Claims v. Procedures Classification/Systematization*, *Tsinghua Law Review* 3/2011.

judicial reformers and researchers advocated a new concept that the goal of civil justice and the correct legal solution could be achieved by strict application of the law; this new concept gave rise to the judicial principle of «take facts as the basis and laws as the criterion» being officially recognised. However, before this concept and judicial principle were widely adopted by judges «to find the correct legal solution by application of law» (even not «strict»), an antithetical concept of «active justice» is implemented in recent years. It aims at rectifying situations where the application and interpretation of laws which are out of context so much so that substantive justice is impaired. This may be seen as a regression since the concept of «active justice» resembles the said cultural preference for equitable results, and adhere to the political pursuit of «unification of legal effect and social effect» in civil justice. Nevertheless, most scholars and some elite judges insist that the application of «active justice» should not overstep the judicial functions set out in the statute; otherwise civil justice will be nothing more than a mere political tool.

X. Problem solving v. Case processing

26. In China, answers to this question are both complicated and self-contradictory. On the one hand, time limitations to close a case within 3 to 6 months under the CPL and judicial performance statistical evaluation strongly compel the courts and judges to focus on case-processing; on the other hand, political requirements and judicial policy from the central authorities are based on a problem-solving philosophy (An Jie Shi Liao, or «to end the problem while closing the case»), which require judges to find adequate resolution of the dispute. However, the concept of «adequacy» in Chinese legal culture does not mean «legally adequate» (as appraised by the law) or «legitimate» (as appraised by natural law or common sense of the public), but denotes «acceptable» (as appraised by the parties). Based on this philosophy, if a party is dissatisfied with the judgement, even though it is final and effective, the parties may still petition to various authorities, including courts, procuratorates, the ombudsman («letter visit /complaint/petition»), offices in the Congress, the government, or the politics and law committee of the Party, etc. A record of such complaints may shed a negative light on the judge in relation to his/her evaluation, regardless of the fact that only less than 1% of these petitioned cases may be retried by a procedure called «judicial supervision».

27. In the light of the above, the goal of Chinese civil justice is to give consideration to both problem-solving and case-processing. Ironically, neither objective is fulfilled. The dominant view of scholars is that the Chinese civil justice system needs to approach cases with a view to find adequate resolution of the underlying problems. Unless «adequate resolution» is recognized as «legally adequate», justice distinguished from political petition, and case-processing is reasonably decelerated, the goal of civil justice remains unattainable.

XI. Freely available public service v. quasi-commercial source of revenue for the public budget

28. There is no constitutional right like «access to justice» or «due process».[1] In the 1980s and early 1990s, the courts operated like commercial institutions where incomes

[1] Instead, citizens are entitled to the basic right to complain against officials and/or government branches under Article 32 of the Constitution of the PRC; and this so-called «right of complaint» is ridiculously read as

were generated from litigations in local courts to cover budgetary deficiencies. Since the early 1990s, financial reform has become an important part of judicial reform, with the financial budget being separated from the courts' income derived from legal fees. Nevertheless, at the present, majority of the local governments still make budget plans for their courts based on or pegged with the amount of the courts' «contribution» towards the local treasury. Given such background, the Chinese civil justice remains a quasi-commercial source of revenue for the public budget and has led to some unreasonable charges beyond regulations imposed by the Supreme Court[1]. To redress this problem, the State Council has issued a new regulation drafted by the Treasury Department in 2006.

29. Impervious to criticisms against the regulation of litigation fees and coupled with the custom that the courts draw money from local governments, judicial independence is hanging by the thread. There are scholars who support the view that civil justice should be regarded as freely available public service. The rationale behind it is that when civil proceedings are used only by a fraction of taxpayers (as a public service which has been financed by all taxpayers) to solve their private disputes and protect their own interests, it would only make sense if the litigants share the costs to a higher degree. Moreover, civil procedure is regarded as a mean to balance procedural rights and obligations between the parties through the allotment of litigation costs[2]. Since the regulation of litigation fees in 2006, by cutting down some fees and/or rate of some fees, noticeably contributed to the increase of caseload and frivolous litigations, the predominant view is to enact new rules to rectify the same[3].

XII. User orientation?

30. The lawmaker's (the Congress's) original intention was that the civil justice system should be to cater for the needs of the users. But several factors have undermined such intention. The first factor is that the participants of the legislative process are mainly senior judges and top-notched professors, procuratorate, and only a small number of lawyers. Since lawyers are inferior to the courts in terms of status and bargaining powers, the original intention of the Congress might be diluted albeit scholars amongst the group usually fight for the rights of the litigants. Secondly, the current CPL is so arduous and outdated that the judiciary in practice place heavy reliance on «judicial interpretations' issued by the Supreme People's Court, which naturally embeds its egocentric goals, not of those whose rights are at stake.

31. From users' perspective, the goal of civil justice established by CPL, in particular the protection of private rights, is neither sufficient nor entrenched; the aim to provide efficient dispute resolution is negated by the notable defects in judicial process and the courts' refusal to accept some complex/social-sensitive cases; the goal of maintaining social order and educating people is almost non-existed because of the easy and frequent challenges

the constitutional source of right of petition against effective judgements with probable «errors».

[1] Liao Yongan, *Researches on Legal Fees, in the Perspective of Protection of Access to Justice*, Beijing, Press of China University of Political Science and Law, 2006.

[2] Fu Yulin, *Nature and Bear of Legal Costs*, *Peking University Law Review*, 2001, vol. 1/4.

[3] Wang Yaxin, *Court Fees and Judicial Reform, a Interim Observation after Implement of the New Regulation* （王亚新：诉讼费用与司法改革 —《诉讼费用交纳办法》施行后的一个»中期»考察), http://www.110.com/ziliao/article-149671.html; Su Li, *Professionalism of Justice and Social Demand/Want for Justice*（苏力：司法职业化与司法的社会需求）, http://www.douban.com/group/topic/8920891. Time of visit: 29/8/2011.

of effective judgements. In the revision of CPL 1991, the drafters from the Congress are paying more attention to the neutral suggestions of scholars, who embraced an orientation towards the users whose interests are at stake.

David Chan and Peter C.H. Chan[1]

HONG KONG SPECIAL ADMINITRATIVE REGION (CHINA) NATIONAL REPORT

I. Introduction

1. The present report provides responses to the questionnaire for national reporters formulated by Professor A. Uzelac (**Questionnaire**) for his general report on the Goals of Civil Justice to the International Association of Procedural Law in Moscow, Russian Federation (September 2012). The present report was finalized in October 2011 and focuses solely on the Hong Kong Special Administrative Region of the People's Republic of China.

II. Prevailing opinions on goals of civil justice

2. The prevailing opinions on the goals of civil justice surround the recent civil justice reform in Hong Kong (**CJR**). Since the implementation of the CJR in 2009, the court is guided by the underlying objectives set out in the amended Rules of the High Court (Cap 4A) (**RHC**)[2]. The parties to any proceedings and their legal representatives must assist the court to further the underlying objectives[3]. Realizing the underlying objectives has become the core goal of civil justice in Hong Kong.

3. The CJR targeted the excesses of the adversarial system (such as undue delay and excessive complexities within the system) and sought to improve the cost-effectiveness of Hong Kong's civil procedure[4]. The reform was subject to the fundamental requirements of procedural and substantive justice[5]. As a result of the CJR, there has been a qualitative shift in the Hong Kong civil justice system from the predominant emphasis on «justice on

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[2] RHC O.1A, r.1 reads:

«The underlying objectives of these rules are –

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;

(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

(d) to ensure fairness between the parties;

(e) to facilitate the settlement of disputes; and

(f) to ensure that the resources of the Court are distributed fairly.»

[3] RHC O.1A, r.3.

[4] The Chief Justice's Working Party on Civil Justice Reform (Working Party), *Civil Justice Reform: Final Report*, Hong Kong, 3 March 2004, p. 10 (para. 31).

[5] Ibidem.

the merits» (or substantive justice) to a «three-dimensional concept of justice» under which procedural efficiency is just as important as the correctness of the judgment[1]. The goal of civil justice has transcended the search for pure substantive justice and embraced a multi-faceted agenda to (among others) promote efficiency and reasonable proportionality, as well as to encourage settlement. To achieve this agenda, extensive case management powers were conferred to the judge[2]. The judge may exercise these powers on application or of its own motion[3]. The new judicial case management regime encompasses both procedural powers[4] and substantive powers[5] of case management[6].

4. The CJR is by no means a complete shift to an inquisitorial approach. Parties are still actively involved in an ordinary civil lawsuit. The principle of party-presentation is deeply entrenched. What the CJR has done is to curtail the excesses of the adversarial system and concurrently retain the best features of the adversarial system[7]. An example of this philosophy at work is discovery[8].

5. A civil justice system is more than just a forum for dispute settlement. The civil court performs the important public service of law enforcement. Disputants resort to the court to enforce their legitimate claims and rights[9]. It is unrealistic to devote every possible resource to a particular case regardless of its importance. To effectively discharge its public function, the court must distribute resources fairly and appropriately. The system must reduce the overall cost and time of litigation by encouraging ADR, active judicial case management and a continued effort to streamline procedures. The saved cost and time can be devoted to the improvement of the overall quality of adjudication. Zuckerman observed that a public service is considered adequate if it is «effective, efficient and fair», which he described as the three imperatives of any public service[10]. Hong Kong civil justice aspires to strike a delicate balance in judicial case management to achieve these imperatives.

6. The extent to which the underlying objectives could be enforced depends largely on the court's exercise of its discretion[11]. The court must be bold and principle-centered in

[1] A. Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, *City University of Hong Kong Law Review*, 2009, vol. 1(1), p. 49–71, at p. 49.

[2] RHC O.1B, r.1.

[3] RHC O.1B, r.2.

[4] For instance, the power to adjourn or bring forward a hearing: RHC O.1B, r.1(2)(b).

[5] For instance, the power to exclude an issue from consideration: RHC O.1B, r.1(2)(j).

[6] Despite the express conferral of extensive case management powers to the court, the Working Party warned, «It should, however, be made clear that the Working Party is not in favour of unwarranted proactivity by the court. The case management powers are there to curb the excesses of the adversarial system, not to displace that system». See The Chief Justice's Working Party on Civil Justice Reform (Working Party), *Civil Justice Reform: Final Report*, p. 55 (para. 109).

[7] Legislative Council Panel on Administration of Justice and Legal Services, *The First Year's Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2010*, Hong Kong, LC Paper No. CB(2)591/10-11(06), December 2010, p. 1 (para. 3).

[8] As the Final Report recommends (para. 478), a modified regime of discovery should aim at enforcing compliance with the present rules instead of narrowing the scope of discovery: see The Chief Justice's Working Party on Civil Justice Reform (Working Party), *Civil Justice Reform: Final Report*, p. 246.

[9] Zuckerman observed, «[like] its criminal counterpart, the civil court provides a public service that is crucial to the maintenance of a society governed by the rule of law: a law enforcement service». See A. Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, p. 53.

[10] Ibid., p. 54.

[11] Ibid., p. 56.

exercising its case management discretion and enforce procedural deadlines[1]. If the court is not determined enough to enforce deadlines and too readily grant relief from sanctions, the old problem of delay would continue[2]. Courts in Hong Kong are generally determined in enforcing deadlines after the CJR. In *Nanjing Iron & Steel Group International Trade Co Ltd and others v STX Pan Ocean Co Ltd and others*[3], the Court of First Instance **(CFI)** had struck out the plaintiff's claim for inordinate delay on the basis that such a delay was contrary to the underlying objectives.

III. Matters regarded to be within the scope of goals of civil justice: non-contested matters (e.g. ADR, enforcement)

7. The goals of civil justice are not strictly limited to litigation. The Hong Kong courts consider non-contested matters (such as enforcement and ADR) to be of great significance.

8. The civil justice system in Hong Kong encourages ADR[4]. The successful resolution of disputes through ADR saves costs and time. It is also conducive to preserving the future relationship between the parties. Under Practice Direction 31 (PD 31), procedures are in place to encourage parties to settle their disputes through mediation. Settlement negotiation by itself does not amount to ADR and PD 31 applies to mediation only[5]. The court in exercising its discretion as to costs shall take into account the underlying objectives (including the objective to facilitate settlement) as may be appropriate in the circumstances[6]. The court may impose an adverse cost order on the successful party that had unreasonably refused to submit to mediation when requested by the other party[7]. In exercising this discretion, the court is guided by PD 31[8] and case law. The leading case is *Halsey v. Milton Keynes General NHS Trust*[9], in which the Court of Appeal in England held that in deciding whether to deprive a successful party of some or all of his costs on the grounds that he refused to agree to ADR, it had to be borne in mind that such an order was an exception to the general rule that the unsuccessful party will be ordered to pay the costs of the successful party[10], and the burden was on the unsuccessful party to show why the general rule should be departed from. Such departure was not justified unless it was shown that the successful litigant acted unreasonably having regard to all the circumstances of the case[11]. The court is only entitled to consider statements made in the mediation certificate on the question of costs[12].

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[1] A. Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, p. 62–69.

[2] Ibid., p. 70.

[3] HCAJ 177/2006.

[4] RHC O.1A, rr. 1(e), 4(2)(e) and 4(2)(f).

[5] Para. 3 of PD 31.

[6] RHC O.62, r.5(1)(aa).

[7] Para. 4 of PD 31.

[8] Particularly para. 5 of PD 31.

[9] [2004] 1 W.L.R. 3002.

[10] CPR r. 44.3(2).

[11] [2004] 1 W.L.R. 3002, at 3009.

[12] *Bhana, Angela Mary v. Ocean Apex Trading Limited* (1732/2009). By way of background, the court will receive a mediation certificate that provides information on (a) whether or not the plaintiff or defendant was willing to attempt mediation with the view of settlement; and (b) if the plaintiff or defendant was unwilling to attempt mediation, the reasons for not willing to do so.

9. Hong Kong civil procedure takes enforcement seriously. A plethora of enforcement related tools are available in the event that the unsuccessful party refuses to comply with the judgment. The mode of enforcement available to a judgment creditor (in relation to a monetary judgment) will depend on the nature of the judgment obtained. Modes of enforcement are available by reference to the nature of the judgment obtained[1]. The different modes of enforcement are not alternatives but concurrent remedies[2].

IV. Protection of individual rights v. protection of public interest

A. Attention to public interest

10. *Public interest litigation*: Public interest litigation in Hong Kong takes the form of judicial review[3]. The debate focuses on the extent to which the court may adjudicate on matters concerning public interests (such as environmental protection). The grounds of judicial review are clear. The court does not have the constitutional duty to examine the merits of a policy or administrative decision. As such, any judicial scrutiny of public interest related decisions must relate to the legality and procedural propriety of the decisions.

11. *CJR features*: Proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a statement of truth without an honest belief in its truth. The Working Party believed there is an important public interest to prevent a party from knowingly misleading the court and other parties and that contempt proceedings must remain available in support of that public interest[4].

12. *Rights of third persons:* The civil justice system in Hong Kong takes the rights of third parties seriously. An example is the interpleaded relief. A third party may make a claim on property that is taken or intended to be taken by the bailiff in execution of a writ of *fieri facias*. The execution creditor, bailiff and third party (together as **claimants**) will appear before the court. In a straightforward case, the court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just. If there is an issue between the claimants, the matter may be set down for trial[5].

B. To which extent should civil procedures reach results that are in line with certain policies (e.g. professional privileges)?

13. Discovery and inspection of documents[6] are vital to all civil proceedings in Hong Kong[7]. Documents which are relevant to the key issues between the parties should be disclosed[8]. Their production, however, are not without limitations. Legal Professional

[1] M. Wilkinson, E.T.M. Cheung, C.N. Booth (eds.), *A Guide to Civil Procedure in Hong Kong*, 3rd ed., Hong Kong, LexisNexis, 2009, p. 765.

[2] Ibidem.

[3] RHC O.53.

[4] See The Chief Justice's Working Party on Civil Justice Reform (Working Party)*, Civil Justice Reform: Final Report*, p. 125 (para. 258).

[5] See M. Wilkinson, E.T.M. Cheung, C.N. Booth (eds.), *A Guide to Civil Procedure in Hong Kong*, p. 796. Also see RHC O.17, r.5(1)(b) and r.5(2).

[6] RHC O.24, and O.24 of the Rules of the District Court, Cap 366H (RDC).

[7] Purposes of discovery include: (1) to enable other party to know the case it has to answer; (2) to avoid other party being taken by surprise; (3) to encourage settlement, by knowing the strengths and weaknesses of parties' cases.

[8] *Commerciale Du Pacifique v. The Peruvian Guano Co.* (1882) 11 QBD 55.

Privilege (**LPP**) is the cornerstone of Hong Kong's justice system, be it civil or criminal. Their importance has been stone-etched into the guides and codes that regulate the conducts of lawyers in Hong Kong. The policy rationale underlying LPP, as Mr. Justice Bokhary PJ had explained, is that:

«It is obviously conducive to the due administration of justice that clients candidly reveal the unvarnished truth to their lawyers. And of course the law is not so naïve as to imagine that such candour can confidently be expected in practice if disclosure of the contents of client-lawyer communications may be compelled, to a client's prejudice and contrary to his wishes»[1].

14. As to the fundamental nature of LPP, Mr. Justice Bokhary PJ further stated that:

«...the rule constituted by this privilege is a rational and practical one which exists in the public interest and involves an important right belonging to the client. In Hong Kong this right is a constitutional one. It is contained in the confidential legal advice clause of art.35 of the Basic Law. By this clause it is provided that «Hong Kong residents shall have the right to confidential legal advice' – a right which our courts will always be vigilant to accord proper protection»[2].

C. What are the issues that the court should (in the context of goals of civil procedure) determine ex officio?

15. To put into effect the underlying objectives, the courts are vested with the power to make order of its own motion[3].

16. An interesting area which perhaps better illustrates issues that the court should determine *ex officio* can be found under RHC O. 18, r. 19. After the implementation of the CJR, words are added to the effect that gives power to the court on its own motion at any stage of the proceedings, to strike out, order amendment of pleadings or endorsement, order action to be stayed or judgment to be entered.

D. Which other actors or bodies (except the court and the parties) have an obligation to secure the goals of civil justice are being reached; have right to intervene in the judicial process on that account?

17. The Hong Kong Judiciary is independent from the government and legislature. As such, intervening of judicial process is forbidden by constitution[4]. The exception to this, however, can be found where, for example, a company is being wound-up[5]. Involvements, assistances and interventions from the Official Receiver are expected. Official Receivers[6] can be appointed as a liquidator[7] in compulsory winding-up situation. One of the liquidator's rights is to bring or defend proceedings in the company's name[8]. Such right tally with its obligation to realize the assets and eventually distributing dividends to interested parties.

[1] *Solicitor v. Law Society of Hong Kong (2006) 9 HKCFAR 175*, at p. 185 (paras. A–B).

[2] Ibid., at p. 185 (paras. C–F).

[3] RHC O. 1B, r. 2.

[4] Article 85, the Basic Law of the HKSAR. The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference.

[5] Or where a person is being bankrupted.

[6] It is also possible for persons other than Official Receiver being appointed as provisional liquidator and liquidator. However, a company and an undischarged bankrupt cannot be appointed as a liquidator: s. 278 of the Companies Ordinance (Cap 32) (CO).

[7] And also a provisional liquidator before winding up order is made. See ss. 193 and 194 of the CO.

[8] S. 199 of the CO. The liquidator can appoint solicitors to assist in discharging such duty.

As such, liquidator's intervention, for example, in a civil action against the company[1], helps to protect the interest of the company's creditors[2].

V. «Material truth» v. fair trial within a reasonable time // Principle of proportionality or same standards and processes to everyone, irrespective of the importance of the case

18. Questions 4 and 6 of the Questionnaire are considered together in this chapter.

19. Common law courts are concerned with legal truth and not material truth. The principle of party-presentation is deeply entrenched. On this basis, and coupled with the underlying objective of the CJR[3] to ensure that a case is dealt with as expeditiously as is reasonably practicable[4], fact-finding within a reasonable time has become a core goal of civil justice. For example, under the RHC O. 58, r. 1(5), the court should only allow new evidence be adduced for an appeal from Masters[5] on special grounds being shown[6]. Before introduction of this provision, there was no limitation for a party appealing against a Master's decision to adduce new evidence[7]. Such old practice, inevitably, escalated time and expenses incurred by the parties since new round(s) of affirmations would have to be filed, which RHC O. 58, r. 1(5) aims to defeat. The said objective is further enforced by the new RHC O. 24, r. 15A, which allows the court to make an order limiting discovery[8].

20. Notwithstanding the above, the importance of a fair trial is not compromised under the CJR[9]. Fair trial is ensured by front-loading of the facts gathering exercise before the action is commenced[10]. For example, pleadings, witness statements and expert reports are now required to be verified by a statement of truth that the facts contained therein are true (and opinions honestly held in the case of expert report)[11], so that deviation (and consequently amendments of pleadings and filing of supplemental statements and reports) are avoided[12].

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[1] No legal proceedings could be commenced or continued against the company without leave from the court: section 186 of the CO. The liquidator may consent to or oppose application made by the plaintiff of the civil action for leave to continue the same. E.g. *Re B+B Construction Company Ltd* (HCCW 114/2001, 28 June 2001).

[2] The liquidator acts on behalf of all unsecured creditors of the company, not just the petitioner. If the action is successfully contested, more assets will be available for distribution to creditors.

[3] Even before implementation of the CJR, there are mechanisms available for the court to expedite cases. For example, RHC O. 24, r. 4 of RHC allows a court to order that issue or question between parties should be determined first before discovery. However, this rule is rarely applied, even when the discovery fight between the parties had taken 6 years: e.g. *Alexina Investments Ltd & Anor v. Keysberg Ltd & Ors* (HCA 6359/1992, 27 March 2002).

[4] RHC O. 1A, r. 1(b).

[5] *Aggressive Construction Company Limited v. Yick Wai Cheong* (HCA 1889/2008, 29th June 2009).

[6] As set out in *Ladd v. Marshall* [1964] 1 WLR 1489.

[7] Such appeal was therefore, in substance, a rehearing of the same application.

[8] There is no case law that illustrates how this power is exercised at the time of this report.

[9] RHC O.1A, rr.1(c) and 1(d).

[10] RHC O.24, r.7A. Pre-action discovery has been enlarged by the CJR to cover any actions and not merely personal injury actions. See and compare the 1 July 1997 version of s. 41 of the High Court Ordinance, Cap 4 (**HCO**), and the current version.

[11] RHC O. 41A, rr. 2 and 4(1).

[12] E.g. *Tong Kin Hing v. Autron Mauritius Corp*. [2010] 1 HKLRD 77.

The parties will also be tied down to their respective cases at the earliest possible stage of the proceedings, which also serves the purpose of expediting the entire process[1].

21. Further to the above, it is common practice under the CJR[2] for the court to require parties setting out and, if possible, agreeing to the key issues that should be dealt with at trial, so as to save time and costs[3].

22. An underlying objective of civil justice in Hong Kong is that procedure should be proportional[4]. The principle of proportionality carries with it a mixture of user-oriented and institutional objectives. There have been cases (pre-CJR) where the cost of litigation exceeded the value of the claim. Promoting proportionality has an institutional dimension in that resources of the court can be distributed more evenly (and fairly). This has an immense impact on access to justice.

VI. «Hard cases» v. mass-processing of routine matters

23. The goals of civil justice, in the aspect of «hard cases» versus mass-processing of routine matters, are achieved in Hong Kong by channelling. Civil cases are divided amongst the three main levels of first instance courts[5] in accordance with the amount of quantum claimed[6]. In the District Court **(DC)** and the CFI, the workloads are further distributed according to the nature of the claim. For example, Family Court[7] and Companies Court[8] are within the structure of the DC and the CFI respectively. Judges may also be assigned with particular duties, for example, managing the Employees' Compensation List in the DC, and Commercial List, Personal Injuries List, Construction List, Arbitration List, and Admiralty List etc. in the CFI.

24. Whilst judges are primarily tasked with presiding over trials, interlocutory applications[9] are mostly processed by Registrars and Masters[10].

25. Apart from the above, other specialty tribunals are set up in Hong Kong to avoid expense and delay[11]. For example, Labour Tribunal has certain exclusive jurisdiction over

[1] The issues between the parties can be identified at an early stage by reference to their respective pleadings. This, in turn, will assist in limiting the scope of documents to be discovered, i.e. documents relevant to the issues of the case: *Re Estate of Ng Chan Wah* (HCAP 5/2003).

[2] Such practice was available in the District Court even before implementation of the CJR: RDC O. 18, r. 22. However, it is interesting to see that such mechanism was and is not available under the RHC. However, see below.

[3] Practice Direction 5.2, para. 6: parties should focus on relevant issues. Proliferation of efforts on irrelevant factual or legal disputes should be avoided. Listing Questionnaire to be filed before Case Management Conference (CMC) or Pre-trial Review (PTR) (Appendix C to PD 5.2) also requires solicitor or counsel to attach a one-page summary of the issues to be tried.

[4] RHC O.1A, r.1(c).

[5] Namely Small Claims Tribunal (**SCT**), District Court (civil jurisdiction), and the High Court (CFI, civil jurisdiction).

[6] Jurisdiction up to HK$ 50,000 for SCT (Schedule to Small Claims Tribunal Ordinance (Cap 338) (SCTO)); HK$ 1,000,000 for District Court (s. 32, DCO); and unlimited civil jurisdiction for the CFI.

[7] Responsible for matrimonial matters, e.g. custody of children and ancillary relief.

[8] Responsible for companies matters, e.g. winding-up of companies, shareholders disputes.

[9] E.g. discovery, amendments of pleadings, CMC etc. PTR are usually fixed one month before the trial and presided over by the trial judge.

[10] Interlocutory applications that involve complex and complicated issues are often dealt with by judges sitting in chambers.

[11] Legal representation is not allowed in the Labour Tribunal (s. 23 of Labour Tribunal Ordinance, Cap 25) and the SCT (section 19(2) of SCTO). In addition, formal rules of evidence do not apply in the Labour Tribunal (s. 27) and the SCT (s. 23(2)).

employment matters[1], whilst Lands Tribunal has jurisdiction over certain land matters[2]. Nevertheless, mechanisms are available for these tribunals to decline jurisdiction and transfer cases to the CFI and DC, for example, where complex and complicated issues are involved[3].

VII. Bi-party proceedings v. resolution of complex, multi-party matters

26. Most lawsuits in Hong Kong are bi-partisan proceedings. Under RHC O. 16, third parties may be joined by way of third party proceedings where a defendant seeks relief against a third person not a party to the proceedings[4]. The availability of third party proceedings prevents the duplication of proceedings and the same question being tried twice with possibly different results[5].

27. Hong Kong has no class action regime. Currently, the only avenue that deals with multi-party disputes is provided by RHC O. 15, r. 12. The court may appoint a defendant to act as representative of other defendants being sued on the application of the plaintiff. A judgment or order rendered in representative proceedings will be binding on all the parties so represented[6]. However, representative proceedings suffered from the problem of lack of certainty and the absence of detailed rules that govern its operation[7]. Hong Kong is in need of a full-fledged statutory regime for multi-party litigation that encompasses areas like the conduct of proceedings, protecting representative claimants, costs and the disposal of the case[8]. With this goal in mind, the Class Action Subcommittee of the Law Reform Commission of Hong Kong issued the *Consultation Paper on Class Actions (Executive Summary)* on 5 November 2009 to seek stakeholders' views on the subject.

VIII. Equitable results and substantive justice v. strict formalism and principle of legality

28. The tension between substantive justice and legal formalism can be understood on three levels.

29. First, adjudication under the common law system demonstrates unique characteristics. While the court would generally apply the principles in the case law, it is possible for the court to come to a decision divergent from the precedent by distinguishing the case on its facts or on policy considerations. Hence, the nature of common law allows greater leeway on the part of the judge to tailor a solution for a specific problem and produce relative substantive justice[9].

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[1] See Schedule to the Labour Tribunal Ordinance, Cap 25.

[2] See s. 8 of the Lands Tribunal Ordinance, Cap 17.

[3] See s. 10 of Labour Tribunal Ordinance and section 8A of the Lands Tribunal Ordinance.

[4] See M. Wilkinson, E.T.M. Cheung, C.N. Booth (eds.), *A Guide to Civil Procedure in Hong Kong*, p. 237.

[5] Ibidem.

[6] RHC O. 15, r. 12(2); also see Consultation Paper on Class Actions (Executive Summary) 2009, p. 1.

[7] See The Chief Justice's Working Party on Civil Justice Reform (Working Party), *Civil Justice Reform: Final Report*, p. 240 (Recommendation 70).

[8] Class Action Subcommittee of the Law Reform Commission of Hong Kong, Consultation Paper on Class Actions (Executive Summary), Hong Kong, 5 November 2009, p. 2 (para. 6).

[9] Tracing the legal historical development of the common law, the strictness of common law had been alleviated by the introduction of equitable remedies. Unlike its continental European counterpart, the common law judge does not adopt a formalist approach (in the Weberian sense) in adjudication. Rather, adjudication focuses on the concrete facts of the present case and comparing them with similar precedents in the process of declaring and ap-

30. Second, on a procedural level, the tension is between the need to enforce deadlines and the importance of finding a just solution on the basis of merits. Before the CJR, the adherence to the notion of «justice on the merits» (or substantive justice) resulted in the court's indulgence with non-compliance. With the implementation of the CJR, a major challenge is how effectively the court can enforce procedural deadlines without compromising the merits of each party's case[1].

31. Third, on the level of fact-finding, common law courts are concerned with legal truth and not material truth. The principle of party-presentation is deeply entrenched. While judges are conferred substantive case management powers, the judge has no *ex officio* investigatory powers. The court follows the procedural rules of fact-finding strictly[2].

IX. Problem-solving or case-processing?

32. In Hong Kong, it is never the case that the courts are merely performing case-processing functions[3]. In fact, it is very common to have constructive discussions between legal representatives and the presiding Master or Judge during CMC or PTR as to, for example, how to narrow down the issues between parties, whether certain facts can be agreed amongst the parties, whether additional evidence should be obtained, and what further steps should be taken. Useful directions and/or suggestions from the bench are unexceptional. Furthermore, courts are contented to be used as mechanism for resolving impediments amongst parties. For example, lack of mutual trusts between litigants in matrimonial matters is habitual, so much so that disputes as to who[4] should hold, for the time being, proceeds received from the sale of matrimonial properties are almost universal, which in turn hinder progress of the main cause. In these situations, problems are often resolved by having the proceeds paid into court pending distribution[5].

X. Civil justice as freely available public service, or as a quasi-commercial source of revenue for the public budge?

33. Save for minimal fees payable by litigants[6], civil court services in Hong Kong are available to the general public at no expenses. Unsurprisingly, the Hong Kong Judiciary runs at a deficit[7]. The costs for maintaining the courts therefore come primarily from Hong Kong tax-payers through the government. It is unlikely that, in the foreseeable future, such system in Hong Kong will change, since the society as a whole emphasizes on and desires accessibility of justice by the general public. Whilst the common perception is that justice

plying legal principles. In other words, the court adopts inductive reasoning in adjudication. According to Weber›s categorization, common law belongs to the rational-substantive category, and not the rational-formalist category.

[1] A.A.S. Zuckerman, *Enforcing Compliance with Deadlines*, *Civil Justice Quarterly*, 2004, vol. 23(OCT), p. 231.

[2] Even when the court exercises discretion, it is because of case management needs rather than an attempt to turn every stone in the name of substantive justice. Fact-finding remains a party driven exercise conducted on the basis of the court's case management regime.

[3] This is especially true after implementation of the CJR, where judges actively participate in case management.

[4] Including parties' legal representatives.

[5] See for example *CPK v. CY* (FCMC 7599A/2007).

[6] E.g. fees for issuance of writ in the High Court and the District Court are HK$ 1,045 and HK$ 630 respectively, at the time of this report.

[7] Hong Kong Judiciary Annual Reports.

is only reserved for the rich, the Hong Kong government, judiciary and the legal profession have endeavoured to change the same[1]. Nevertheless, limitations in these services are unavoidable and abundant, so much so that an overhaul of the civil justice system was required[2]. A change in the current system will be seen as a regression.

XI. Orientation towards the users or self-centered goals?

34. The goals of Hong Kong civil justice have a strong orientation towards the users. While enhancement of procedural efficiency yields institutional benefits of lowering the caseload of the court system, the CJR was implemented not for pure institutional reasons or to serve self-centered goals. The fundamental objective is to improve access to justice for the user. For instance, an important goal of the CJR is to enhance the cost-effectiveness of civil procedure[3]. The court is obligated to take into account the underlying objectives in exercising its discretion as to costs[4]. This would incentivize the parties to consider the underlying objectives seriously before making any decisions to incur costs. The enhancement of efficiency has the effect of lowering costs.

35. The principle of proportionality carries with it a mixture of user-oriented and institutional objectives (as explained above).

36. The encouragement of settlement (especially via mediation) also has the user in mind[5]. A settlement through mediation usually involves less time and costs, which is directly in line with the interests of the users. Of course, a regime that effectively promotes settlement also has an institutional benefit of lowering the caseload of the court system. Other measures to improve access to justice include measures to assist unrepresented litigants, taking into account their relative disadvantageous position.

Miklós Kengyel[6]

HUNGARIAN NATIONAL REPORT

I. Introduction – Goals of Civil Justice

1. *Prevailing opinions on goals of civil justice.* According to the *dualist conception* encountered frequently in academic legal literature, civil action is aimed at the enforcement of subjective rights and the protection of legal order. In different historical eras one or the other aim may be given more emphasis. In the 19th century the liberal approach to

[1] E.g.: free legal advice from Duty Lawyer Service; Bar Free Legal Service Scheme; pro bono services from law firms; free legal consultations in district and legislative councillors' office; increased upper limit of means test for Legal Aid eligibility.

[2] With the emphasis now placed on mediation amongst litigants, it is hoped that the number of argued cases and therefore the corresponding expenditures of public funds would reduce.

[3] RHC O.1A, r.1(a).

[4] RHC O.62, r.5(1)(aa).

[5] RHC O.1A, r.1(e).

[6] Professor of Andrassy University, Budapest (Hungary).

legal action laid down as the sole requirement that legal action «should lead to the resolution of the legal dispute in the simplest, shortest and most certain way»[1]. Only a few decades later the «preservation of legal peace» and the protection of «the legal order as a whole» were again moved to the foreground in socialist civil action[2]. Socialist procedural law went even further when in the centre of civil action it placed the revelation and assertion of objective truth.[3]

2. *Protection of individual rights v. protection of public interest.* In the academic literature of the 20th century the perception about the purpose of civil action underwent several changes. In the first half of the century – despite the fact that the Civil Code of 1911 did not lay down either the purpose of the Act or the tasks of the court – legal protection of the parties was moved to the foreground. Accordingly, Jancsó, and later Falcsik defined the goal of civil action as the resolution of civil law disputes by «public authority», while Magyary regarded this goal to be, on the one hand, the enforcement of the plaintiff's private law interests and, on the other hand, legal protection for the defendant against an unfounded claim[4].

3. The definition of the goal of civil action was often intertwined with the requirement of the revelation of truth. In Falcsik's view, parties must accept what is laid down in the court judgment as the truth. «This is the truth the recognition of which is due to external factors, the judicial power of the state and the form of judgment: the formal truth. – A court judgment corresponds to the substantive truth only if it fully enforces the idea of law in the specific legal case and as a consequence, fully satisfies one's sense of justice»[5].

4. In 1952 the purpose of the Act was moved to the beginning of the code. The original text of § 1 of the Code of Civil Procedure provides: «The aim of the present act is to ensure the resolution in court procedures of legal disputes arising in connection with the rights attached to the person and property of the citizens of the state, the state and other legal persons on the basis of material truth.» Névai laid down the enforcement of socialist legality as the general goal of civil proceeding and the resolution of the given legal dispute as its specific goal[6].

5. The amendment of 1957 of the Code of Civil Procedure modified the terms contained in §1: citizen of the state was replaced by citizen, while material truth was changed to truth without any attribute. Following this the text of the Act remained unchanged for more than forty years. Instead of the «misinterpreted» material truth, academic legal literature started using the term of objective truth. In accordance with the purpose of the Act as well as § 3 thereof the court was to establish the objective truth that reflected objective reality even if the party did not comply with his obligation of proof.

6. In socialist *academic literature,* apart from Névai, it was Farkas who dealt with the purpose of civil action in more detail and who again placed emphasis on the protection of subjective rights – in contradistinction to the dominant perception: «The goal of civil action is to provide legal protection with regard to the injured or endangered right or legal

[1] Hans Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, Archiv für die Zivilistische Praxis, 1968, p. 36.

[2] Franz Klein, Friedrich Engel, *Der Zivilprozeß Österreichs,* Mannheim, 1927, p. 188.

[3] Miklós Kengyel, *Changes in the Model of Hungarian Civil Procedural Law*, in András Jakab, Péter Takács, F. Allan Tatham (eds.), *The Transformation of the Hungarian Legal order 1985–2005,* New York, Kluwer, p. 353–354.

[4] György Jancsó, *Magyar polgári törvénykezési jog.,* Kolozsvár, 1908. p. 3.; Dezső Falcsik, *A polgári perjog tankönyve,* Budapest, 1910. p. 12; Géza Magyary, *Magyar polgári perjog,* Budapest, 1924, p. 1–2.

[5] Jancsó, op. cit., p. 12.

[6] László Névai, *A magyar polgári perjog alapelvei*, in *A magyar polgári perjog főbb kérdései,* Budapest, 1953, p. 25.

relation». One of the primary and most important basic conditions of this is that the court must reveal the facts of the case in accordance with the truth[1].

7. After the democratic political transition almost a whole decade had to pass before the basic principles and some legal institutions of the Code of Civil Procedure were changed in compliance with the requirements of the era. The process of transformation was rendered even more difficult by the fact that – despite the expectations – no new Act was passed. This caused the situation that the two main principles of the Code of Civil Procedure, the principle of party control and the principle of oral hearing, appeared with a renewed content in the amendment of 1995 already, while the purpose of the Act was reformulated only in 1999.

8. In accordance with the amended § 1: «The purpose of the present Act is to ensure the impartial resolution by court proceedings of legal disputes arising in connection with the property and personal rights of natural and other persons while enforcing the basic principles defined in the present chapter».

9. Forty-seven years after the entry into force of the Code of Civil Procedure the legislator gave up the goal of ensuring the resolution of civil law disputes based on the truth. At the same time it relieved the court of its obligation contained in § 3 (1) that during the civil action it shall endeavour to find out the truth. The legislator explained these essential changes by the fact that the content and meaning of the «requirement of justice» expected of the court and the Code of Civil Procedure itself had become obsolete in several respects, the earlier formulation defining the goal and intended purpose of the Act was considered outdated. The Constitutional Court declared as early as the beginning of the 1990s that there was no constitutional guarantee relating to the revelation of the material truth[2]. The new goal that has replaced the just resolution of legal disputes – in accordance with the requirement of fair process contained in Article 6 of the European Convention on Human Rights – *is to ensure the impartial resolution of legal disputes.* This is guaranteed by the requirement that the court shall proceed in accordance with the reformulated principles of the Civil Code of Procedure.

10. According to the new perception, instead of the revelation of truth, the Code of Civil Procedure is to guarantee the «justness of the process itself». The most important content elements of procedural justice include: regulation in accordance with the principle of legal security, an independent (impartial) judicial proceeding, respect for the principle of party control and the fair (equitable) division of advantages and disadvantages between the participants of the proceeding based on mutuality»[3].

11. The reinterpretation of the purpose of civil action *did not meet with complete success* either in theory or practice. On the other hand, the ten years that have passed since the amendment have revealed the problems defined by Professor Uzelac in the questionnaire (4–11).

II. «Material truth» v. fair trial within a reasonable time

12. Academic legal literature has been concerned with the question in the form of «Fixigkeit vor Richtigkeit» (speed above correctness) for centuries[4]. As a matter of fact this question cannot be given an answer that would be applicable to all times and situations.

[1] József Farkas, *Bizonyítás a polgári perben*, Budapest, 1956, p. 23–27.

[2] Dec. 9/1992 (I. 30.) Constitutional Court.

[3] Gábor Gadó, *Az eljárási igazságosság a polgári perben*, *Magyar Jog,* 2000, p. 18–19.

[4] Miklós Kengyel, *Magyar polgári eljárásjog*, Budapest, Osiris, 2010, p. 78–79.

Depending on the era or the country, one or the other aspect has been or could be given greater emphasis. In Hungary – as a result of the bad experiences of past decades – the endeavour to a trial within a reasonable time has become more intensified. Despite the fact that 70% of civil cases and 50% of criminal cases are resolved within *half a year*[1], both types of proceedings are considered unacceptably long by the media and public opinion. The contradiction between the facts and the subjective evaluation may be explained by the fact that numerous proceedings attracting public attention are protracted as a matter of fact, which leads the public to negative conclusions about all proceedings. Every year legislature – yielding to pressure from public opinion – takes newer and newer measures with a view to accelerating proceedings, which measures do not always achieve their goal and cannot in any case replace a comprehensive reform of civil proceedings.

13. At present the creation of a new civil code of procedure to replace the Act of 1952 is not on the agenda, but academic legal literature has already formulated requirements relating to it[2]. One cannot exclude a future return to the notion of truth either, which may repeatedly bring up the debate surrounding the question of «Fixigkeit vor Richtigkeit»[3].

14. As for ourselves, we do not oppose the declarative re-appearance of the concept of truth in civil procedure and so it is expected by the majority of the judiciary and by the public seeking justice. We share the view of the great Austrian jurist, *Franz Klein* that legal action without truth is a «rattling mill running with no loads». However, we consider it more important that a future new Code of Civil Procedure should define the aim of proof more specifically than the present one. On the basis of the present terminology of the Code, proof is nothing else but an activity directed at the clarification of the facts of the case and establishing the facts which are needed to decide the action. In view of its content, it is less by far than the concept of proof applied by József Farkas, which is also authoritative at present[4]. Our *de lega ferenda* suggestion is that the legislature should state, concerning proof, that the court – unless the law provides otherwise – shall make sure through its discretion whether the facts necessary to decide the action are true or untrue. Besides the philosophical concept of truth, it would be worth considering – at least at the level of legal literature – a return to the concept of material and formal truth which was banished from socialist civil procedure as early as the 1950s. Civil procedure cannot lack the latter one either, since judicial decisions based on the rules of the burden of proof are essentially founded upon formal truth. If the court establishes the truth or untruth of facts, it makes a decision in accordance with the material truth.

III. «Hard cases» v. mass-processing of routine matters

15. The Code of Civil Procedure of 1952 – as opposed to Hungarian civil procedural conventions – did not contain *special procedural rules* relating to claims of lesser value (small claims proceedings). The dogma of general first instance proceedings, which laid down

[1] Altogether 10% of civil cases and 20% of criminal cases last longer than a year.

[2] András Osztovits, *Az új magyar Polgári perrendtartás szükségességéről*, *Magyar Jog,* 2010. p. 158–163; Miklós Kengyel, Lajos Cserba, Gábor Gadó, Gábor Kiss, *Kell-e új Polgári perrendtartás?*, in *Huszonkilencedik Jogász Vándorgyűlés,* Budapest, 2010, p. 135–158.

[3] Tamás Földesi, *A jogban alkalmazott igazság terminusról és annak háttérbe szorulásáról a magyar polgári eljárásjog újabb fejlődésében*, *Magyar Jog,* 2003, p. 467–473.

[4] József Farkas, Miklós Kengyel, *Bizonyítás a polgári perben*, Budapest, KJK, 2005, p. 32.

the application of the same procedural rules with regard to all cases except for so-called extraordinary actions[1], was broken through only in 2009, when the legislator prescribed the application of simplified procedural rules during the adjudication of claims with a value of less than one million forints (approx. 3,700 Euros)[2]. The aim of the amendment was to formalize and accelerate procedures based on Council Regulation (EC) 861/2007 establishing a European Small Claims Procedure. **Two years later claims with a value exceeding 400 million forints (approx. 1.5 million Euros) were classified as** *high-profile cases* **and again rules differing from the general ones were laid down for them with the aim of accelerating the procedure** (§ 24 of Act LXXXIX of 2011). Both amendments support the propositions contained in point 4 as well, namely that there is an intensified endeavour on the part of the legislator to give priority, over the revelation of truth, to the resolution of legal disputes within a reasonable time, be it a small claim or a high-profile («hard») case.

IV. Principle of proportionality or same standards for all?

16. In Hungary the most important screen is the order for payment procedure, which is *obligatory* in the case of claims with a value not exceeding one million forints (approx. 3,700 Euros). The value limit is rather high – even in a European comparison – compared especially to the value limit of 2,000 Euros contained in the Regulation relating to the European small claims procedure. Proceedings must be filed with the notary, who, in case the conditions are met, issues the order for payment, which comes before the court only if a statement of defence is submitted against it. The order for payment procedure that has been transformed into a lawsuit is conducted by the court in accordance with the simplified rules relating to small claims mentioned in the previous point, during which one of the most important aspects is quickness. In the case of small claims possibilities of appeal are also limited.

V. Equitable results and substantive justice v. strict formalism and principle of legality

17. This question is basically answered in point 3. The objective of the Hungarian Civil Code of Procedure declared in § 1 and § 3 of the Act was changed in 1999 and the revelation of truth as an objective was replaced by the impartial resolution of the legal dispute. The change did not lead to the prevalence of strict formalism, this has never been a characteristic of modern Hungarian civil procedure, but the requirement of legality has increased, which has been given expression primarily in the reformulated principles of the Code of Civil Procedure.

VI. Problem solving or case processing?

18. Problem-solving or case-processing? It is not possible to provide a straightforward answer to the question: while litigants expect the resolution of their dispute from civil proceedings, judicial government demands efficiency from courts. At the time of economic

[1] The Hungarian Code of Civil Procedure regulates among special lawsuits actions relating to civil status as well as administrative, employment, enforcement and patent actions.

[2] The rules relating to small claims are applicable to claims falling within the jurisdiction of local courts and enforceable exclusively by way of an order for payment.

crisis, the pressure on courts increases, in Hungary several legislative packages have been born recently aimed at increasing the efficiency of criminal and civil proceedings. They are directed – especially with regard to small claims – at solutions requiring the least efforts and expenses. However, only the spread of electronic proceedings can mean a satisfactory solution in Hungary. Besides small claims, in so-called high-profile cases as well (see: point 4), special rules were born with the purpose of increasing the efficiency of case resolution. In this latter case, however, the aim is to reduce not the expenses but the length of lawsuits, because these types of lawsuits are generally considered to be rather protracted.

VII. Freely available public service v. Quasi-commercial source of revenue for the public budget

19. From socialism Hungary inherited a generous legal aid system, which practically granted exemption from costs in litigation relating to certain groups of cases (maintenance, guardianship, employment disputes etc.) After the democratic transformation of the political system the significant increase in lawyers' and experts' fees led to a rise in the costs of litigation as well. The earlier situation where the majority of costs reductions were connected with the subject-matter of the lawsuit and not the income of the grantee *became untenable*.

20. The setting up of a state legal aid system functioning at an appropriate level was laid down as an indispensable condition for Hungary's accession to the European Union[1]. Act LXXX of 2003 on Legal Aid (hereinafter referred to as the Legal Aid Act) changed existing regulation fundamentally. The institutional system built up gradually since 2004 renders it possible to provide support in a wider circle and in a more differentiating way, which is also adjusted to Community regulation[2].

21. The new legal aid system is aimed at covering the costs of legal protection to the extent of neediness. At the same time, it should be noted that the high costs are not caused by court fees but lawyers' fees and other ancillary expenses, which – as a result of the uncertain outcome of lawsuits – also mean a burden for those otherwise granted cost reduction. (In case the party who has been granted exemption from costs loses the lawsuit, he shall bear the costs awarded to the opposing party (§ 86, HCCP).

VIII. Orientation towards the users or self-centred goals?

22. The Hungarian Code of Civil Procedure does not define the *goal* of civil action but that *of the Act* (see: point 3). This objective is also applicable to the civil justice system itself, and, out of the participants of proceedings, mainly to the court, whose task is to ensure the impartial resolution of legal disputes. This formulation, which has been contained in the text of the Act since 2000, promises less to litigants than the earlier regulation, which – as it has been mentioned above – lay down as the aim of legal action the resolution of legal disputes based on the truth, since the new regulation guarantees merely procedural justice.

[1] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. *Official Journal L* 026, 31/01/2003, p. 0041–0047.

[2] Miklós Kengyel, Viktória Harsági, *Civil Justice in Hungary,* Tokyo, Jigakusha Publishing Corporation, 2010, p. 135–140.

Elisabetta Silvestri[1]

ITALIAN NATIONAL REPORT

I. Introduction

1. To describe the goals assigned to civil justice in the Italian legal system of 2011 is not an easy task. Truth be told, the topic does not seem to stir much interest either in scholarly debate or among the citizens at large. As far as the courts are concerned, only the Constitutional Court occasionally elaborates on the proper role of jurisdiction, in general by way of *obiter dicta*. All the actors involved in the performance of civil justice (users, lawyers, and judges) appear to be concerned with the more mundane task of handling a system that has reached an unbearable level of inefficiency and slowness: when the situation is dramatically serious – as it is in Italy – it does not seem useful to waste time in theoretical speculations, and there is a sort of natural tendency to look for practical solutions. Unfortunately, though, practical solutions may work, at best, only in the short run; to reverse the ill fate of Italian civil justice would require radical reforms, and no radical reforms can be devised unless they are prepared by a thorough process aimed at identifying which goals must or can be reached by the courts as the main providers of civil justice.

2. With few exceptions[2], scholars have an exegetic approach to the law in force, and do not embark upon passing judgment on the quality of the rules or the soundness of their rationale. Obviously, every manual and treatise on civil procedure defines the goals of civil justice, but such definitions either have a touch of repetitiveness or, when they try to be original, call upon complex notions borrowed from jurisprudence and general theory of law. Therefore (and offering no more than a few examples), adjudication is described as the institutional method of dispute resolution[3], or the method by which rights are made effective via resorting to the courts[4]: more sophisticated analyses shift the focus from adjudication to jurisdiction, advancing different definitions of it, but arriving at a sort of tautological conclusion, and stating that jurisdiction is the function of the State performed by the judges.[5] Definitions aside, some hints of the different scholarly opinions about the goals of civil justice can be read between the lines of a lively debate that has animated the Italian academia during the last years, that is, the debate revolving around the question whether the Code of Civil Procedure – adopted in 1940, entered into force in 1942 and still governing the pace of most civil and commercial proceedings – was a «fascist» code, meaning an authoritarian code, providing for a pattern of civil justice centered on the strong and broad powers bestowed on the judge, with consequential limitations in the leeway for maneuvering left to the parties[6]. Whatever the original intent

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[2] See in particular M. Taruffo, *Cultura e processo*, *Rivista trimestrale di diritto e procedura civile*, 2009, 63.

[3] L.P. Comoglio, C. Ferri, M. Taruffo, *Lezioni sul processo civile*, I, *Il procedimento ordinario di cognizione*, 5th ed., Bologna, Il Mulino, 2011, 15.

[4] F.P. Luiso, *Diritto processuale civile*, I, *Principi generali*, 5th ed., Milano, Giuffrè Editore, 2009, 3.

[5] G. Verde, *Diritto processuale civile*, *1. Parte Generale*, 2nd ed., Bologna, Zanichelli, 2010, 27.

[6] Foreign readers may be immune from the spell of such an all-Italian debate. In any event, for the benefit of those who would like to know more about it, here is a capsule bibliography: F. Cipriani, *Il processo civile tra vecchie ideologie e nuovi slogan*, *Rivista di diritto processuale*, 2003, 455; Idem., *Il processo civile italiano tra revi-*

of the Code's drafters was, one must keep in mind that the Code has gone through so many reforms that to investigate whether it had a fascist «soul» seems a futile exercise; besides, a vast number of the diverse special proceedings conventionally covered by the umbrella-term «civil justice» are more recent than the Code and do not reflect the values embedded in it. Last but not least, the advent of the Republican Constitution in 1948 has had a strong impact on the Code, either because some of its rules have been repealed by the Constitutional Court, or because the same Court requires every legal rule (whether substantive or procedural), when applied by a judge, to be given an interpretation that is «constitutionally oriented».

3. The constitutional dimension of jurisdiction has changed the meaning of the goals assigned to civil justice. Several constitutional guarantees affect civil justice directly. The main one is contained in Article 24, which provides as follows: «1. Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. 2. Defense is an inviolable right at every stage and instance of legal proceedings. 3. The poor are entitled by law to proper means for action or defense in all courts»[1]. Read in conjunction with another fundamental guarantee, that is, the principle of equality, according to which «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions» (Article 3, sec. 1), to the extent that «It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country» (Article 3, sec. 2), what Italian scholars call the right of action and defence has become the pillar of access to justice and the basis on which the guarantee of due process has been built, even before a constitutional amendment enacted a rule specifically devoted to such a guarantee[2].

4. It is said that the Constitution has advanced the «socialisation» of civil justice[3], removing adjudication from the realm of technical matters and bringing it closer to the needs of the society at large. The idea of adjudication as an instrument to promote social justice had its heyday in the 1970s and in the early 1980s, when civil courts were more and more entrusted with the task of enforcing the diverse rights constituting what has been forcefully defined as «the new property»[4]. The essence of civil justice was not only the resolution of disputes between two individuals allegedly on equal footing, but also the settlement of social

sionisti e negazionisti, *Giurisprudenza italiana*, 2002, 425; Idem., *Ideologie e modelli del processo civile,* Saggi, Napoli, ESI-Edizioni Scientifiche Italiane, 1997, 3, 103, 121, 157; G. Monteleone, *Principi e ideologie del processo civile: impressioni di un «revisionista»*, *Rivista trimestrale di diritto e procedura civile*, 2003, 575; G. Verde, *Le ideologie del processo in un recente saggio*, *Rivista di diritto processuale*, 2002, 676.

[1] The English translation of the Italian Constitution quoted in the text is the official one available on the Italian Senate's website, at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[2] Reference is made to Article 111, according to which «1. Jurisdiction is implemented through due process regulated by law. 2. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials'. The text in force dates back to 1998.

[3] See L.P. Comoglio, *La garanzia costituzionale dell'azione e il processo civile*, Padova, Cedam, 1970, 131; I. Andolina, G. Vignera, *I fondamenti costituzionali della giustizia civile. Il modello costituzionale del processo civile italiano*, 2nd ed., Torino, Giappichelli Editore, 1997, 7.

[4] See C.A. Reich, *The New Property*, 73 *Yale Law Journal*, 1964, 733.

tensions and conflicts[1]: courts were expected to be proactive and to exercise an array of new powers with the view to making sure that both parties to a case shared an actual equality of arms, so that the weaker party (for instance, the employee who had been unfairly dismissed, the worker whose rights as a member of a union had been infringed, or the victim of gender discrimination) would suffer no disadvantages in the conduct of adjudications.

5. Nowadays, to talk about the social function of civil justice has a retro flavour. The changes that took place in Italy in the political, economic, social, and cultural landscape are too complex to be analysed in this report: undeniably, they have all affected the way the goals of civil justice are perceived, even though – as noted at the very beginning of this report – it is hard to speculate exactly which ones are deemed to be desirable or attainable. One may object that more important than the goals theoretically and ideally ascribed to civil justice are the goals the system seems to pursue through the law governing civil justice. But these very goals are difficult to decipher. The most recent reforms in the field of civil procedure could persuade one to venture a guess, and say that they show a return on a grand scale of an old-style liberal concept of civil justice, that is, the concept according to which the parties are the absolute masters of adjudication, and the court is supposed to play a passive role, unless the parties request its intervention[2]. In reality, though, a more accurate analysis of the constant amendments to the rules governing adjudications show that the lawmaker deliberately refrains from enforcing a specific concept of the goals civil justice is expected to attain. Does this mean that the lawmaker has yet to devise his own vision of civil justice? Maybe it is so, but another possible explanation is that the constant state of emergency in which Italian civil justice is struggling[3] brings about the necessity of moving from one «quick fix» to the next one, without reflecting on the big picture. Maybe, in a distant future – if ever – the goals civil justice should fulfil will be identified, and the law of civil procedure will be changed accordingly: as of now, the only goal that matters is to reduce the caseload of the courts, hoping that will be enough to shorten the length of proceedings.

II. Matters within the scope of civil justice

6. Traditionally, Italian civil justice covers not only litigation, that is, the resolution of disputes arising out of civil and commercial matters, but also a vast array of proceedings dealing with non-contested matters. Whether such proceedings are consistent with the proper goals of civil justice is questionable: the fact is that the Code of Civil Procedure includes an entire book regulating many «special proceedings» in non-contested matters. Similar proceedings of the same nature are governed also by several special statutes: the result is a multifaceted puzzle that Italian scholars call «*giurisdizione volontaria*», an expression underscoring the absence of a dispute between parties.

7. As regards certain non-contested matters, courts are called upon to perform a role that borders on activities that are more administrative than judicial. It is said that the involve-

[1] Among the scholars who supported vigorously the cause of civil justice as a powerful instrument for the achievement of social justice, see in particular V. Denti, *Processo civile e giustizia sociale*, Milano, Edizioni di Comunità, 1970, 56, 74.

[2] That was the concept underlying the first Code of Civil Procedure enacted by the unified Kingdom of Italy in 1865; see M. Taruffo, *La giustizia civile in Italia dal '700 a oggi*, Bologna, Il Mulino, 1980, 107.

[3] See E. Silvestri, *The Never-Ending Reforms of Italian Civil Justice* (August 2, 2011), available at SSRN: http://ssrn.com/abstract=1903863.

ment of the courts in such matters is justified because they all touch upon public interest, even though to different extents: that probably explains why the so-called «*giurisdizione volontaria*» includes proceedings such as the ones having to do with family relationships, the status of individuals who are mentally incompetent, the management of decedents' estates, and the like. For other proceedings, the same rationale does not hold true, since the concept of public interest is sensitive to changes in the political and societal perception of what amounts to «public interest». In spite of that, Italian civil justice nowadays encompasses a wide variety of proceedings (even related to contested matters) molded on the pattern of the «proceeding in chambers» that the Code designs as the default procedure in non-contested matters[1], since it is simpler, faster and less formal than the ordinary procedure. One may say this is another example of the choices made by the lawmaker for practical reasons only, and dispensing with any attempts to verify whether to expand the involvement of the courts beyond the borders of their traditional decision-making role falls within the objectives civil justice is supposed to serve.

III. Protection of individual rights v. protection of the public interest

8. If one accepts the idea that courts are the enforcers of individual rights, insofar as these rights are infringed or even only threatened, one must also assume that the rights whose protection is the purpose of access to justice have been granted by substantive law in the process of implementing specific policies. Therefore, dispute resolution and policy implementation often intertwine, even though sometimes the policy implemented is difficult to identify. Equally difficult is to evaluate whether certain policies are truly consistent with what is conventionally deemed to be «public interest», or whether they reflect the ideologies and the values of the ruling class: for instance, one may wonder whether «public interest» has something to do with the fact that in Italy divorce can be petitioned only if three years have elapsed since the spouses' will of dissolving their marriage has been legally acknowledged in a court judgment rendered at the end of a separation proceeding, or in a court order ratifying a separation agreement.

9. In some recent cases the problem of policy implementation has taken an interesting turns when courts have opposed the very policy they were expected to implement. That has happened in the field of life-prolonging medical treatments applied to individuals in a permanent vegetative state, a field in which some courts have refused to abide by the governmental policy in favour of such treatments because of ethical reasons (allegedly the same reasons preventing the Parliament from passing any reasonable bills on living wills and advance directives concerning end-of-life care)[2]. Similarly, courts have refused to

[1] The rules governing the «proceeding in chambers» are laid down by Articles 737–742*bis* of the Code of Civil Procedure. These articles are part of Book Four of the Code, in which the Code's drafters piled up a panoply of miscellaneous proceedings: besides the ones mentioned in the text, Book Four is the home of provisional remedies, summary proceedings, eviction proceedings, proceedings for the protection of property and possession, and arbitration. A very famous Italian scholar described Book Four as a true department store, where one can find, more or less, whatever «item' one may fancy: see V. Andrioli, *Diritto processuale civile*, I, Napoli, Casa Ed. Jovene, 1979, 52.

[2] The case of Eluana Englaro, a young woman who had been injured in a car accident and had gone into a permanent vegetative state in 1992, forced not only politicians, but also the Italian society at large to take a stand

implement the policy underlying the regulations on the expulsion of illegal aliens in cases concerning minors or individuals suffering from medical conditions. And, in light of the current debate on same-sex marriage, one can anticipate that the issue sooner or later will end up again before the courts[1], with the aim of challenging the policy supported by the Government, which strongly opposes same-sex marriages.

10. In the Italian system of civil justice, public interest has its own institutional spokesperson, that is, the public prosecutor (*Pubblico Ministero*, hereafter PM). The Code of Civil Procedure provides for a limited number of hypotheses in which the PM has standing to sue or must intervene in the procedure (e.g. proceedings concerning the status of individuals, matrimonial cases, annulment of marriage on particular grounds); as a general rule, the PM is free to take part in any actions affecting public interest[2]. More noteworthy is a peculiar power the PM at the level of the Italian Supreme Court (*Corte di cassazione*) is entitled to exercise: the PM can bring a final appeal against judgments that the parties have not appealed against or that are not subject to any appeals, for the sole purpose of empowering the Supreme Court to state the correct «law of the case», on the assumption that the lower court did not address the questions of law raised by the case in the correct way[3]. This special final appeal brought «in the interest of the law» does not affect the parties to the judgment at stake, but finds its justification in the peculiar role played by the *Corte di cassazione* as the judicial body in charge of watching over the proper and consistent interpretation of the law in force. Within this framework, the final appeal brought by the PM can be seen as an initiative expressing the public interest in triggering a mechanism that allows the Supreme Court to perform its institutional role.

11. In spite of the popular idea according to which Italy, with a legal system belonging to the Civil Law tradition, adopts an inquisitorial model of adjudication, the principles of party presentation and party prosecution of a case are observed as general rules. Parties have full control over their case as far as its beginning, its development and its end as well are concerned. Furthermore, it is in the exclusive power of the parties to shape their case, whose scope is determined by the plaintiff's claim and the defendant's answer and defences.

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on a very controversial issue. Eluana's father petitoned several courts in order to be authorized to disconnect the medical equipment keeping his daughter alive; his applications were constantly rejected. Finally, toward the end of 2008, the Court of cassation and the Milan Court of appeal on remand granted Mr. Englaro the right to discontinue the procedures by which Eluana was fed and kept alive: for an account of the case, see S. Moratti, *The Englaro Case: Withdrawal of Treatment from a Patient in a Permanent Vegetative State in Italy*, 19 *Cambridge Quarterly of Healthcare Ethics*, 2010, 372; K.L. Cerminara, F.G. Pizzetti, W. Photangtham, *Schiavo Revisited? The Struggle for Autonomy at the End of Life in Italy* (Sept. 24, 2009), *Marquette University Law School's Elder's Advisor* (forthcoming), available at SSRN: http://ssrn.com/abstract=1477957.

[1] The issue has been already addressed by the Constitutional Court, which upheld a few regulations of the Civil Code concerning the marriage and, by a convoluted argument, passed the «hot potato' on to the Parliament, stating that it is the duty of the lawmaker to decide which kind of legal status is suitable for same-sex relationships: the Court's judgment (no. 138 of 15 April 2010) can be read (in Italian) on the Court's website, at http://www.cortecostituzionale.it.

[2] The powers of the PM in civil cases are governed by Articles 69–73 of the Code. The author has chosen to translate the Italian expression «Pubblico Ministero' into the English «public prosecutor', since this judicial body is more active in criminal cases. In fact, the PM has the monopoly of criminal prosecutions: see Article 112 of the Italian Constitution, according to which «The public prosecutor has the obligation to institute criminal proceedings'.

[3] On this special final appeal, provided for by Article 363 of the Code, see E. Silvestri, *Commento all'art. 363 c.p.c.*, in F. Carpi, M. Taruffo (a cura di), *Commentario breve al codice di procedura civile*, 6th ed., Padova, CEDAM, 2009, 1240.

The possibility for the judge to determine *ex officio* issues that the parties have failed to raise is quite limited (e.g. issues concerning lack of jurisdiction or lack of standing to sue), and even when the law entrusts the judge with such a power, in practice the judge is more or less bound to relying on the parties' initiatives.

12. Italian scholars elucidate these rules making reference to the so-called «*principio dispositivo*» (principle of party disposition), one of the fundamental tenets of Italian civil justice. The substantive side of the principle is expressed by the rules governing the respective powers of the parties and the judge as to the shaping of the case[1]; the procedural prong of the principle implies, on the one hand, that only the parties can offer the evidence necessary to prove the facts they have stated in their pleadings and, on the other hand, that the judge is bound to relying only on this very evidence, except when a positive rule entrusts him or her with the power to call for evidence *ex officio*[2].

IV. Establishing the facts of the case correctly v. the need to provide effective protection of rights within an appropriate amount of time

13. A naïve bystander could be inclined to infer that the notorious length of Italian civil proceedings shows how diligently the goal of determining the factual issues to every case brought before the courts in the utmost accurate way is pursued. Unfortunately, the reasons causing Italian civil justice to be unbearably slow having nothing to do with the aspiration of granting correct results to truth discovery in adjudication. In other words, accuracy in fact-finding is not the saving grace of Italian civil justice: on the contrary, the way in which the proof-taking stage of ordinary proceedings is structured, that is, as a non-concentrated sequence of fragmented hearings, spanning an indefinite period of time, does not advance the cause of accuracy in adjudicative fact-finding. The reasons are intuitive: time may affect the recollection of witnesses; documents may deteriorate, get misplaced or lost; and so on.

14. Only in the field of provisional measures are the scales tipped in favour of a swift response to situations in which a right is exposed to the risk of suffering an irrecoverable harm, while the need to reach an accurate result as to the factual issues at stake is postponed. If certain requirements are met, the provisional remedy is granted, in general *ex parte*, but its effects are temporary, and conditional upon the fact that they are upheld by the outcome of a subsequent ordinary proceeding.[3]

V. Developing new case law v. mass-processing of routine matters

15. At present, Italian civil justice is more about processing a huge amount of ordinary cases than handling «hard cases». Cases of such a kind, raising new and often controversial issues, do occasionally end up before civil courts, but they are the exception, and not the rule.

[1] See Article 2907, sec. 1 of the Civil Code and Articles 99 and 112 of the Code of Civil Procedure.

[2] See Article 115, sec. 1 of the Code of Civil Procedure.

[3] For an effective account of Italian provisional measures, see M. De Cristofaro, *Provisional Remedies*, in M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy*, Tokyo, Jigakusha Publishing Corp., 2010, 278.

16. Even though one of the most quoted sayings about «hard cases» goes «Hard cases make bad law», for Italy the reversed version of the same saying, that is, «Bad law makes hard cases», is more suitable. «Bad law» refers to statutes whose wording is so poor as to make their meanings difficult to interpret, but most of all to statues implementing policies that sectors of the Italian society perceive as undue government interference in the private lives of citizens: recent statutes dealing with issues touching upon bioethics have brought about «hard cases»[1], as have also old statutes providing that in certain public buildings the crucifix must or can be displayed[2]. These cases do create a stir, but their importance tends to be overshadowed by a widespread dissatisfaction with the way courts cope with their everyday caseloads.

VI. Principle of proportionality

17. The principle of proportionality is unknown to Italian civil justice, unless one is inclined to think that the rules of the Code of Civil Procedure providing for an allegedly simplified treatment of certain cases falling within a loose notion of «small claims' show a certain degree of attention paid by the system to a use of judicial resources that is proportional to the amount at stake or the complexity of the issues raised by the case. The justices

[1] An example is the very restrictive and controversial statute on medically assisted procreation passed in 2004 (Law no. 40 of 19 February 2004). A brief sketch of the main contents of the statute can be found in N. Doe, J. Oliva, C. Cianitto, *Medically Assisted Procreation in Italy: The Referendum and the Roman Catholic Church*, available at http://www.ccels.cardiff.ac.uk/archives/issues/2005/doeolivacianitto.pdf.

[2] The case of the crucifix displayed in Italian schools has caused quite a stir within Europe. The issue, debated in several cases at the domestic level, eventually reached the European Court of Human Rights. The Second Section of the Court, with a judgment issued in November 2009 (*Lautsi v. Italy*, Application no. 30814/06, 3 November 2011), ruled – *inter alia* – that there is «an obligation on the State's part to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable. The schooling of children is a particularly sensitive area in which the compelling power of the State is imposed on minds which still lack (depending on the child's level of maturity) the critical capacity which would enable them to keep their distance from the message derived from a preference manifested by the State in religious matters»(§ 48). Furthermore, the judgment stated that «The Court considers that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education» (§ 57). In March 2011, on appeal brought by the Italian Government, the Grand Chamber of the Court reversed the 2009 ruling (Grand Chamber, *Lautsi v. Italy*, Application no. 30814/06, 18 March 2011). According to the Grand Chamber, «There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed. However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1 (§ 66). The Court went on, saying that «in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions» (§ 76). In spite of the Grand Chamber's ruling, in Italy the issue is far from settled: many Italians (whether Catholic or followers of other religions) believe in the secularisation of the State, and think that the display of the crucifix, as well as of any religious symbols, in public buildings runs against at least two constitutional guarantees, that is, the principle of equality (Article 3 of the Constitution) and the right of religious freedom (Article 97 of the Constitution).

of the peace are the lay judges (or honorary judges, as they are called in Italy) handling «small claims'. Actually, the jurisdiction of the justices of the peace shows that the claims they deal with are not necessarily so «small': for instance, their jurisdiction based upon the value of the claim is up to € 5,000, but it jumps up to € 20,000 for cases in which the recovery of damages caused by car accidents is sought, not to mention the significant amount of subject-matter jurisdiction justices of the peace are granted[1].

18. As far as the procedure followed in front of the justices of the peace is concerned, a closer look shows that the «simplified» procedure is just a rough copy of the procedure followed in «proper court cases», meaning the ones falling within the jurisdiction of the ordinary courts of first instance, that is, the *tribunali*. Just to offer an example, before the justices of the peace parties must be assisted by lawyers, unless the amount at stake is below the risible threshold of € 500.

19. In 2009, a new kind of summary procedure was made available for cases falling within the jurisdiction of the *tribunali*[2]. If the plaintiff chooses to submit a claim according to the forms of this new procedure, the court, either requested by the defendant or even *ex officio*, can order the case to be continued according to the ordinary procedure *if* the issues raised by the parties are deemed unsuitable for summary adjudication. Could one say that a «filtering mechanism» is at work here, allowing the court to apply a principle of proportionality as to deciding which cases deserve a full-fledged adjudication or may be dealt with in a more streamlined way? An affirmative answer to this question probably would imply ignoring that the establishment of the new summary procedure has been yet another attempt at speeding up the pace of litigation. Besides, one must keep in mind that the power allowing the court to order a procedural switch works only one-way: in other words, if a claim has been submitted in the form of an ordinary proceeding, it is impossible for the court to issue an order requiring the case to be disposed of through the new summary procedure, whatever the court's evaluation of the complexity of the case is.

20. If courts have no discretion as to decide which procedure is most suitable for the cases they process, even more so is it inconceivable that courts refuse to take into consideration cases deemed trivial or inappropriate: frivolous and groundless claims will end up being rejected, but not to entertain them would amount to a denial of the fundamental right of access to justice, and to a violation of the principle of equality.

VII. Multi-party litigation

21. The responsiveness of Italian civil justice to the contemporary problems of aggregate litigation is far from stellar. Collective actions for injunctive relief have been adopted from the 1990s on, under the pressure of EU law, but they have never been very popular. Only in 2009 was a «class action» for damages available to consumers and users[3], but – at least so

[1] On the justices of the peace, see Articles 7, 311–322 of the Code of Civil Procedure: F. Rota, *Giudice di pace (diritto processuale civile)*, *Enciclopedia del Diritto*, *Annali*, II, 1, Milano, Giuffrè Editore, 2008, 291.

[2] The new «*procedimento sommario di cognizione*' is regulated by Articles 702*bis*–702*quater* of the Code of Civil Procedure: see M.A. Lupoi, *Recent Developments in Italian Civil Procedure*, available at http://unibo.academia.edu/MicheleAngeloLupoi/Papers/665628/Recent_developments_in_Italian_civil_procedure.

[3] The Italian «class action» (which happens to be anything but a class action American-style) is provided for by Article 140*bis* of the Consumer Code. An English version of this article, together with a commentary on

far – it has not taken off. As a matter of fact, as of June 2011 only seven class actions have been commenced, and one only has been declared admissible (i.e. certified to proceed as a class action): as far as the outcome of the case is concerned, it is impossible to advance any predictions, even though one may be inclined to think that the parties will work toward a collective settlement in order to avoid the risk of proceedings that could take years to be defined by a judgment.

22. Most scholars share with the Italian society at large the view that collective redress should be one of the goals of modern civil justice. Unfortunately, the law in force does not meet the expectations for a workable and effective protection of multy-party rights.

VIII. Equitable results v. Strict formalism

23. In principle, courts must decide cases by applying the law in force: this rule, laid down by Article 113, sec. 1 of the Code of Civil Procedure, is known as the principle of legality of court judgments. This principle is linked to the constitutional provision according to which «Judges are subject only to the law»[1]. Against this background, the problem of how courts interpret the law arises, but it is settled that the principle of legality, by itself, does not have any direct bearings on the methods of statutory interpretation that courts might resort to, neither does it nullify a certain measure of judicial discretion in the interpretative process.

24. Whether that means the Italian system of civil justice is more geared to strict formalism than to the attainment of equitable results is hard to say: certainly, the idea of courts as problem-solvers is met with a good measure of skepticism in light of the very poor performance of the justice system.

IX. Freely available public service v. quasi-commercial source of revenue for the public budget

25. Civil justice is not for free. Leaving aside the attorney's fee, the filing of a case requires the payment of a lump sum («*contributo unificato*») into the public purse: the amount of the payment varies according to the value of the claim and the type of proceeding that is initiated (e.g. an ordinary proceeding before a court of first instance, an enforcement proceeding, a matrimonial proceeding, and so on). The trend toward the increase of such a tax burden has been confirmed by a statute passed in July (Law n. 111 of 15 July 2011); numerous exemptions from payment have been repealed, too, even as regards cases in which the exemption had a social significance, such as labor cases, as well as separation and divorce procedures.

26. The rationale behind the new arrangement of court fees is only in part the need to grant the State the cash flow necessary to meet the expenses required by the operation of the justice system: most of all, it is another step in the strategy aimed at reducing the caseload of the courts. And raising the costs of justice can be a very effective strategy in a country in

its main contents can be read in N. Calcagno, *«Italian Class Action»: The Beginning*, available at SSRN: http://ssrn.com/abstract=1875424.

[1] Article 101, sec. 2 of the Italian Constitution.

which those who are unable to afford access to the courts cannot – unfortunately – count on a modern and adequately funded system of legal aid[1].

X. User orientation?

27. Italy is a very litigious society, but there is no disagreement at all as far as the evaluation of the civil justice system is concerned: it does not work, and – which is probably even worse – nobody seems to know how to make it work. Users are unhappy, but the «professional actors» are unhappy, too, and in this climate of general dissatisfaction the system stands still, «*En attendant Godot*». Let us all hope that sooner rather than later Mr. Godot shows up and works some magic.

C.H. (Remco) van Rhee[2]

DUTCH NATIONAL REPORT
with some additional information on Belgium and France

I. Introduction

1.The present report provides answers to questions formulated by Professor A. Uzelac for his general report on the Goals of Civil Justice to the International Association of Procedural Law in Moscow, Russian Federation (September 2012). The present report was finalised in September 2011 and focuses on the Netherlands[3]. It provides some additional information in the footnotes on Belgium and France. This information has kindly been provided by Professor Benoît Allemeersch (Catholic University of Leuven) and Professor Frédérique Ferrand (Université Jean Moulin – Lyon 3).

II. Goals of Civil Justice

2. There is no general consensus on the goals of civil justice in the Netherlands. Within the circles of lawyers and legal scholars, however, usually at least three goals are distinguished:

a. The authoritative determination of rights recognised by private law and the provision of enforceable titles (judgments) (i.e. «deciding disputes»);

b. Demonstrating the effectiveness of private law[4];

[1] See F. Carpi, *Legal Aid in Italy and Europe*, in F. Carpi, M.A. Lupoi (a cura di), *Essays on Transnational and Comparative Civil Procedure*, Torino, Giappichelli Editore, 2001, 3.

[2] Professor of Maastricht University (Netherlands).

[3] The author would like to thank Dr. F. Fernhout for his comments on an earlier version of this report, and Mr R. Davidson for the English language revision.

[4] According to Benoît Allemeersch, in Belgium not only the effectiveness of private law is at stake here, but also the effectiveness of the court system as a whole. In each individual case, Belgian judges are at least implicitly trying to demonstrate that in the long run the system is an effective system. This also means that the length

c. The development of private law and guaranteeing its uniform application[1,2].

3. The authoritative determination of rights and the provision of an enforceable title where the opposing party is not willing to act in accordance with its obligations resulting from these rights voluntarily (1), is the obvious aim of a civil action and usually the reason why litigation is commenced in the Netherlands (as elsewhere). According to the Dutch government[3], it is the primary aim of civil litigation. In its opinion, civil litigation should be regarded as *ultimum remedium*, only to be commenced when all other means of obtaining what one is entitled to have been exhausted. According to lawyers and legal scholars[4], this is however too narrow a view since, in their opinion, the other two aims mentioned above is as important. Since litigation is conducted in public, these lawyers and scholars claim it serves an important goal (2) in demonstrating the consequences of not acting in conformity with one's obligations under private law (an issue in which the litigants involved in the lawsuit may not be interested; in that sense this goal may be considered a so-called positive externality according to economic theory)[5]. When these consequences are the enforcement of the rights in dispute, this may serve as a strong impetus for the public at large to behave in the required manner, without the need for litigation, since it demonstrates the effectiveness of the law also for similar cases. Additionally, it may prevent parties from taking the law into their own hands, something which may occur in societies where it is not so clear that private rights can be adequately enforced. As a result, it is claimed that the individual lawsuit has a wider significance than only being a means to obtain a decision in individual cases.

4. The wider significance of civil lawsuits is also demonstrated by the third goal of civil justice that is distinguished in the Netherlands, (3) the development of the law and guaranteeing its uniform application. Again, this may not be in the interest of the litigants involved in the particular lawsuit (it is also a positive externality, although this is different in test cases, e.g. cases brought by insurance companies), but this does not prevent Dutch scholars from defining it as an important goal. The existence of a large volume of periodicals and (more recently) internet sources aimed at publishing relevant case law and commenting on it is proof that this goal is

of the proceedings is not an issue to be determined by the parties. The judge may even disallow delays that are mutually requested by both of the parties.

[1] W.D.H. Asser, H.A. Groen, J.B.M. Vranken (in cooperation with I.N. Tzankova), *Een nieuwe balans. Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, BJu, 2003, p. 33–46. See also Idem, *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, BJu, 2006, p. 27–32 (also available at http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2006/02/01/uitgebalanceerd-eindrapport-fundamentele-herbezinning-nederlands-burgerlijk-procesrecht.html; last consulted in September 2011).

[2] According to Frédérique Ferrand, the following goals of civil justice are usually distinguished in France within the circles of legal scholars: (1) the determination and enforcement of rights recognised by substantive private law and (2) demonstrating the effectiveness of private law and the realisation of «social peace'. The development and uniform application of private law are not officially mentioned as goals of French civil justice. However, in practice, these goals are recognised where the *Cour de cassation* is concerned.

[3] Contourennota 1998, p. 2 and p. 15 ff.; *Visie op het civiele proces: reactie fundamentele herbezinning burgerlijk procesrecht*, p. 8, available at http://www.rijksoverheid.nl./documenten-en-publicaties/kamerstukken/2007/02/05/reactie-fundamentele-herbezinning-burgerlijk-procesrecht-7026.html (last consulted in September 2011).

[4] See, for example, W.D.H. Asser, H.A. Groen, J.B.M. Vranken (in cooperation with I.N. Tzankova), *Een nieuwe balans. Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*.

[5] On externalities and civil procedural law, see, e.g., the contribution of Louis Visscher titled: «A Law and Economics View on Harmonisation of Procedural Law', in a volume edited by X. Kramer and C.H. van Rhee, *Globalisation of Civil Procedural Law*, to be published by Springer at the end of 2011.

taken seriously in the Netherlands[1]. This particular goal may also prevent further litigation since many of the issues regarding the interpretation of the Civil Code and related statutes may be answered on the basis of previous case law without the need of bringing a new case.

5. Unfortunately, outside the circles of lawyers and legal scholars, notably within government circles, views seem to be different (for the view of the government, see above). This appeared clearly when a group of three university professors presented their ideas on the future of the civil justice system in the Netherlands in their interim report in 2003[2]. They stated that civil litigation should not be seen as *ultimum remedium*, namely, as something one should only resort to if all other means of dealing with the dispute (including mediation and other means of ADR) have failed. After all, these other means do not generate what I have qualified as positive externalities here, that is, externalities by which the goals of the civil justice system under (2) and (3) are realised. Mediation, for example, cannot demonstrate the effectiveness of private law in situations where a party is unwilling to live up to its obligations (in that case usually an action needs to be brought at a state court in order to obtain an enforceable title, unless the mediation agreement itself has been sanctioned by the court), nor does it function as a vehicle for the development of that law and its uniform application since it is, by its very nature, conducted outside the public domain. Of course, this is less problematic if a representative sample of cases fail in mediation, allowing the state courts to deal with such matters (after failed mediation the state courts should always be available), but whether this will occur in practice is questionable. From the perspective of the second and third goals of civil justice distinguished in the Netherlands, therefore, looking at civil litigation as *ultimum remedium* is unjustified. Nevertheless, the Minister of Justice in his reaction to the 2006 final report of the three university professors[3] did adhere to the *ultimum remedium* view, most likely because mediation and other means of ADR are not paid from the public purse or at least are less costly for the government than litigation before a court of law.[4]

6. A recent example of a clash between the government on one side and lawyers and legal scholars on the other as regards the goals of civil justice appeared in the discussion on proposed legislation aimed at a substantial increase in court fees in the Netherlands[5] (the total revenues should double) in order to make sure that from 2013 the civil justice system would be paid for by its users[6] (although the government seems to claim that the

[1] The major collection of case law is the *Nederlandse Jurisprudentie* («Dutch Case Law'), which also contains influential case annotations by leading lawyers.

[2] See W.D.H. Asser, H.A. Groen, J.B.M. Vranken (in cooperation with I.N. Tzankova), *Een nieuwe balans. Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*.

[3] *Visie op het civiele proces: reactie fundamentele herbezinning burgerlijk procesrecht*, p. 8, available at http://www.rijksoverheid.nl./documenten-en-publicaties/kamerstukken/2007/02/05/reactie-fundamentele-herbezinning-burgerlijk-procesrecht-7026.html (last consulted in September 2011).

[4] According to Frédérique Ferrand, civil litigation is not seen as *ultimum remedium* in France. Even though ADR mechanisms (so-called *Modes alternatifs de règlement des litiges* or MARC) are being promoted by the State, mandatory preliminary mediation is only prescribed in rare cases (the latter is, as a matter of fact, also true in the Netherlands). For a proposal of mandatory preliminary mediation in family matters where a court order has been made with regard to the exercise of parental responsibilities, see *Rapport Guinchard. L'ambition raisonnée d'une justice apaisée*, Paris, Doc. française, 2008, p. 24.

[5] Available at http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/wetsvoorstel-invoering-van-kostendekkende-griffierechten.html (last consulted in September 2011).

[6] Both plaintiffs and defendants traditionally pay court fees in the Netherlands. The defendant in small claims cases («cantonal' cases up to € 25,000) is exempt from this. Court fees can be recovered by the winning party from the losing party.

increase in fees would mean that 100 per cent of the costs of the civil justice system would be covered by court fees, in actual practice the suggested changes would result in roughly a 64 per cent coverage)[1]. In the explanatory memorandum[2], the government justifies the sometimes dramatic increases in fees (occasionally, the increase could amount to a staggering 52 times the current fee)[3] by advancing (1) that litigation should be regarded as the personal responsibility of the parties involved (in other words as a kind of commodity), pointing out that only 5 per cent of all possible conflicts reach a court of law, meaning that 95 per cent of cases are handled in a different manner. When reading the explanatory memorandum, one gets the impression that the government feels that those who are «stubborn' enough to bring their case before a court of law should pay for this. This should not, in the government's opinion, be the public in general, as it holds that they do not benefit from litigation. Of course, in this approach the government completely disregards the positive externalities generated by civil litigation (often being of a much higher economic value than the actual value of the particular lawsuit for the litigants) which may be considered as a justification for the public purse paying a considerable share of the costs of the civil justice system. The other two reasons advanced for the increase of court fees are that (2) the increase fits well into the government's programme of improving the justice system (although it is hard to understand how this should be achieved since the operation only results in transferring costs from the public purse to the litigants; courts do not obtain a larger budget as a result of the operation)[4] and that (3) higher fees are mandatory given the need for cuts in the state budget.

7. Various bodies and organisations have been asked to comment on the draft. From these reactions, including those of the Dutch Council for the Judiciary[5] and the President and Procurator General at the Supreme Court of Cassation in the Netherlands (*Hoge Raad*)[6], it becomes clear that there is considerable opposition against the proposed legislation, especially because it is felt that in many cases access to justice is severely threatened; large numbers of cases will no longer be brought before a court of law by economically

[1] See http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/wetsvoorstel-invoering-van-kostendekkende-griffierechten.html. The Dutch government is following the example of England & Wales, Scotland and Northern Ireland, where court fees are also set at a level to cover the costs of the civil justice system. The Dutch proposal is of course opposite to the approach of France and some other European countries (ironically usually countries in considerable financial difficulties as a result of the financial crisis) that have elevated the free administration of justice to a principle of civil procedure. It should be noted that in the Dutch proposal the costs of the administration of justice will not necessarily be covered completely at the level of individual cases but at a more general level since otherwise particular types of litigation would become too costly.

[2] See p. 1–2; available at http://www.rijksoverheid.nl/documenten-en-publicaties/regelingen/2011/04/04/memorie-van-toelichting-invoering-van-kostendekkende-griffierechten.html (last consulted in September 2011).

[3] See Council for the Judiciary (*Raad voor de Rechtspraak*) in its advisory opinion to the Minister of Safety and Justice, *Advies wetsvoorstel kostendekkende griffierechten* (21 June 2011), p. 7, available at http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadvisering/Adviezen%202011/Advies-wetsvoorstel-kostendekkende-griffierechten-21-6-2011.pdf (last consulted in September 2011).

[4] The government states that higher court fees stimulate «innovation' since they will result in the parties' finding ways to solve a larger number of disputes outside the court. The higher fees mean, in its opinion, also that litigants will have higher expectations of the administration of justice, which in the government's view will stimulate the courts to innovate, a somewhat curious line of reasoning indeed.

[5] See Council for the Judiciary (*Raad voor de Rechtspraak*) in its advisory opinion to the Minister of Safety and Justice, *Advies wetsvoorstel kostendekkende griffierechten*.

[6] Available at http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/Griffierechten.pdf (last consulted in September 2011).

calculating litigants or by litigants who do not have the means to pay the increased fees (this may occur even though according to the explanatory memorandum about 60 per cent of the population would be entitled to a reduced fee rate, since even so the fees to be paid increase dramatically also for this group). As a result, positive externalities such as the demonstration of the effectiveness of the law in these cases will be at risk, in the end resulting in high costs for society at large (calculating debtors of smaller claims, for example, may not be willing to pay voluntarily under the new system since the message imparted by it would no longer be that it is effective in these cases, but on the contrary that it is ineffective since creditors who have some doubts about whether they will be awarded costs or whether their opponent will be able to pay these costs will not go to court due to the high costs involved in litigation). In the end, therefore, it may be claimed that if the proposed legislation were to become law, a comparatively small savings in the budget for the justice system (ca. € 240 million per year; the Netherlands has a population of 16,692,382 as of 1 September 2011) would hurt the Dutch economy for an amount that is probably many times higher due to the disappearance of at least the positive externality mentioned under (2) above, but also since international businesses may find the Dutch civil justice system less attractive as a result of it[1].

III. Matters within the scope of civil justice

8. Matters within the scope of civil justice do not only encompass contested matters. This is reflected by the existence in the Netherlands of two ways of bringing a case to the notice of the court which – but this issue will not be explored here – also affect the type of procedure that will be followed afterwards. Originally, the ordinary civil action was to be initiated by a writ of summons (*dagvaarding*) served on the opposing party by a bailiff (*deurwaarder*; in French *huissier de justice*). Non-adversarial matters, on the contrary, were originally brought to the notice of the court by way of a petition (*verzoekschrift*). Although this strict division of starting litigation has become somewhat diluted, in the sense that currently also certain contested matters are initiated by way of a petition[2], the origin of the distinction between the two ways of bringing cases to the attention of the court lies in the recognition of the fact that courts also deal with uncontested subject matter (i.e. «voluntary jurisdiction» or jurisdiction *ex parte*; in French, *juridiction gracieuse*)[3].

9. Uncontested matters brought before the Dutch civil courts are very diverse, but they have in common that they are more or less administrative in nature and that the measure that the petitioner wants to obtain can only be granted by a court of law since issues of public order are at stake: examples are adoption, the appointment of a guardian, making a person a ward and the emancipation of a minor[4].

10. The «administrative' tasks of the courts mentioned above are rather limited when compared to the administrative tasks of courts in some other jurisdictions. Dutch courts are usually not involved in enforcement proceedings (unless legal questions arise as

[1] According to Benoît Allemeersch, in Belgium court fees only cover 10 percent of the costs of the court system. An increase of court fees is not on the agenda and it is politically not acceptable.

[2] Examples are contested divorce proceedings and the contested dissolution of a labour contract.

[3] Hugenholtz/Heemskerk, No. 34.

[4] Arts. 1:227, 1:295, 1:378 and 1:235 Dutch Civil Code, respectively.

a result of it and in a limited number of other instances)[1] or in the holding of land or company registers[2]. Also, the existence of the Latin notaries in the Netherlands means that various other administrative tasks are performed by specialised and well-trained state-appointed officials outside the court. This means that in the definition of the goals of civil justice, the more administrative matters do not play such a preponderant role as in some other jurisdictions[3, 4].

IV. Protection of individual rights v. Protection of the public interest

11. Apart from matters of a more administrative nature, where considerations of public order or public interest lie at the basis of entrusting the courts with these matters (see the examples given above; often the interests of a third party such as a minor are involved), it cannot be said that the Dutch system of civil justice puts a very strong emphasis on furthering matters of public interest or public policy by way of the civil justice system. The Dutch system does not, for example, know punitive damages or a comparable institute[5]. Of course, there are several issues which the court has to take into consideration *ex officio* when administering justice (e.g. the applicable law including foreign law: *ius curia novit*)[6, 7], whereas the court also has certain powers to guarantee the proper and efficient administra-

[1] Enforcement is the domain of specialised enforcement officers who are appointed by the State and who function outside the court; they are known as *deurwaarders* (court bailiffs) and share their origin with the French *huissiers de justice*.

[2] The holding of such registers is the task of specialised agencies; the land or, more in general, real rights (real property) register is held by the Kadaster (see http://www.kadaster.nl/; last consulted in September 2011), whereas the companies register is held by the Chambers of Commerce.

[3] According to Benoît Allemeersch, the administrative tasks of the courts in Belgium are comparable to those in the Netherlands. Different from the Netherlands, the Belgian judiciary is also involved in the supervision of the parliamentary elections.

[4] As in the Netherlands, the scope of civil justice in France does not only encompass contested matters (*juridiction contentieuse*). According to Frédérique Ferrand, non-contested matters (*matière gracieuse*) also belong to the jurisdiction of the French civil courts (see Art. 25 Code de procédure civile). Uncontested matters (such as adoption, emancipation of a minor and appointment of a guardian) are initiated by way of a petition (*requête*), while contested matters are usually initiated by *assignation* (writ of summons). It has been suggested to transfer some uncontested matters to other officials than the judge, for example to the clerk of the court (e.g. orders for payment). The aim of this suggestion is to allow the judge to concentrate on contested matters and to increase the efficiency of the courts. See especially *Rapport Guinchard. L'ambition raisonnée d'une justice apaisée*, Paris, Doc. française, 2008, p. 21 and 22.

[5] France knows neither punitive damages nor a comparable institute. Frédérique Ferrand states, however, that a recent decision of the *Cour de cassation* determines that punitive damages ordered by a foreign court are not automatically contrary to the French *ordre public* (Cass. Civ. I, 1.12.2010, n°09-13303, *BICC* n°739 of 1.4.2011). Such punitive damages only violate this *ordre public* when the amount is disproportionate to the real damages and in violation of the contractual obligations of the party that has been ordered to pay these damages.

[6] Art. 25 Dutch Code of Civil Procedure.

[7] Frédérique Ferrand states that with regard to the application of legal rules *ex officio*, Art. 12(1) and (2) Code de procédure civile contains important powers and duties for the judge: Art. 12(1) «The judge decides the case in accordance with the rules of law applicable thereto». Art. 12(2) «He must give or restore the proper legal definition to the disputed facts and deeds notwithstanding the definitions provided by the parties». These provisions may be interpreted as encompassing the formulas «Iura novit curia» and «Da mihi factum, dabo tibi ius». However, in a recent decision (Cass. ass. plénière, 21.12.2007, n°06-11343), the Plenary Assembly of the *Cour de cassation* provided a restrictive interpretation of them which has been criticised strongly by a majority of scholars

tion of justice[1], but outside these domains courts do not normally have the explicit task of furthering other societal or external goals.

12. In reaching the goals of civil justice, courts may be assisted by members of the Public Ministry, who function as part of the Executive. The Public Ministry may not only initiate proceedings in which an element of public order is at stake (e.g. asking the court to declare a marriage null and void, or requesting the dissolution of a legal person whose aims or activities are in contravention to public order), but may also render advice to the court known as the *conclusion* of the Public Ministry[2]. This is especially important at the Dutch Supreme Court of Cassation. There, the conclusions are, however, not taken by members of the Public Ministry but by the Procurator General and the Advocates General at the Supreme Court, who since 1999 officially function independently from the Executive[3]. These conclusions are often very influential and are published in collections of case law[4].

V. Establishing the facts of the case correctly v. the need to provide effective protection of rights within an appropriate amount of time

13. Establishing the material or substantive truth is not necessarily the task of the Dutch civil judge; facts that are advanced by one party and that are not contested or not sufficiently contested by the other party do not have to be proven and may form the basis of the judge's decision. The judge does not have the powers to investigate these facts him or herself[5]. Facts that are contested, however, may *ex officio* be subject to his or her scrutiny by way of, for example, a judicial viewing (such as the on-site inspection by the judge of premises which are the subject of a dispute), and the hearing of experts or by way of an interrogation of the parties[6]. In addition, in its Article 21 the Dutch Code of Civil Procedure states that the parties have the duty to submit all facts that are relevant for their case in a truthful manner. If this duty is not complied with, the judge is allowed to draw the necessary inferences from this[7, 8].

[1] Art. 20 Dutch Code of Civil Procedure.

[2] Arts. 42–44 Dutch Code of Civil Procedure.

[3] Arts. 111 ff. Dutch Code of Judicial Organisation.

[4] According to Frédérqiue Ferrand, the French Public Ministry may initiate proceedings in which an element of public order is at stake. It can e.g. ask the court to declare a foreign adoption based on a contract with a surrogate mother null and void; the same applies to a marriage contracted only to obtain French citizenship. In such cases, the Public Ministry is a full party to the proceedings – *partie principale*). In other cases, the Public Ministry may act as *partie jointe* to the proceedings, which means that it can defend public interest. At the French *Cour de cassation*, there is a strong body of *avocats généraux* (unlike in the Netherlands, they are members of the Public Ministry), whose head is the *procureur général près la Cour de cassation*. In each civil case at the cassation court, the Public Ministry advises the court and suggests a solution by way of its conclusion. As in the Netherlands, the *procureur général près la Cour de cassation* can also bring an application in the interest of the law (*pourvoi dans l'intérêt de la loi*). In such cases, the sanction is only «Platonic» and does not affect the original parties to the action.

[5] Art. 149 Dutch Code of Civil Procedure.

[6] Hugenholtz/Heemskerk, No. 78.

[7] According to Benoît Allemeersch, Belgian litigants are also subject to a duty to be truthful and exhaustive in their presentation of the case. If the litigants do not live up to this duty, the judge may draw the necessary inferences from this, just as his or her Dutch counterpart.

[8] According to Frédérique Ferrand, in France parties have control over the «litigious matter' (*matière litigieuse*) and can even «pursuant to an express agreement and in the exercise of rights that they may freely alienate,

This division of powers between the judge and the parties may be an indication that the Dutch civil justice system tries to seek a certain balance between a decision based on a sound factual basis, on the one hand, and speed and efficiency in reaching this decision, on the other.

VI. Developing new case law v. mass-processing of routine matters

14. Just as the Dutch courts of first instance, the Supreme Court of Cassation in the Netherlands (which is the main source of case law) has no mechanism available to select cases, for example cases which it finds relevant for the development of new case law[1]. There is no system of permission to bring a case before the Supreme Court[2], [3]. Ordinary appeals before the ordinary appellate courts, however, can only be brought if the value of the claim on which the court of first instance has ruled exceeds € 1,750[4]. Obviously, this hardly functions as a serious selection mechanism.[5]

15. Currently, cassation proceedings are under review. A Government Commission of Inquiry has drafted a report (2008)[6] in which it is indicated that a considerable number of cases that reach the cassation court do not pose questions that are significant from the perspective of safeguarding the unity of the law, the development of the law or the legal protection of individual citizens. In the report, various options are considered to strengthen the role of the cassation court, allowing it to be involved only in cases that are relevant from the above perspectives. One option is allowing the court to declare cases that are not relevant inadmissible. At the same time, alternative ways for bringing relevant cases before the cassation court are being investigated, such as strengthening the procedure of cassation in the interest of the law, which allows the Procurator General at the court to start cassation proceedings even if the parties in the case do not choose to do so (consequently, the ruling of the cassation court will not influence the legal position of these parties, but will only be

bind the judge as to the legal definitions and legal arguments to which they intend to restrict the action' (Art. 12(3) Code de procédure civile). This shows that establishing the substantive truth is not necessarily the task of the civil judge. In France, the parties are not required to submit all facts in a truthful manner (unlike in Germany or in the Netherlands); they are responsible for the allegation and proof of the facts on which their claims or defences are based (Arts. 6 and 9 Code de procédure civile). They are, however, required to cooperate in good faith in all investigation measures the judge may order (Art. 11 Code de procédure civile). The judge has extended powers to order any legally admissible investigation measure (*mesure d'instruction*, Art. 10 Code de procédure civile) *ex officio*.

[1] The grounds for appeal in cassation are to be found in Art. 79 Dutch Code of Judicial Organisation.

[2] In order to allow the cassation court to concentrate on relevant matters, it can currently only make use of the procedure of Art. 81 of the Dutch Code of Judicial Organisation, which allows the court to give abbreviated reasons for its decision where the case can clearly not result in a ruling quashing the decision of the lower court.

[3] According to Benoît Allemeersch, civil cases that reach the Belgian cassation court are informally filtered by the 20 specialised cassation attorneys in the country who have the monopoly on representing clients at this court. These lawyers see it as part of their deontology to determine whether cases are suitable for cassation proceedings. As a result, one out of two cassation proceedings in civil cases in Belgium is successful.

[4] Art. 332 Dutch Code of Civil Procedure.

[5] In France ordinary appeals may only be brought if the value of the claim exceeds €4,000. Frédérique Ferrand states that further appellate review is possible and widely available at the *Cour de cassation* (there is no direct selection mechanism as in Germany). However, at the Cour de cassation a «procédure de non admission' was created in 2001 (Law of 25 June 2001): a *pourvoi en cassation* can receive a preliminary refusal (déclaré non admis) if it is not based on a serious cassation ground.

[6] *Versterking van de Cassatierechtspraak. Rapport van de Commissie normstellende rol Hoge Raad*, available at http://internetconsultatie.nl/versterking_cassatierechtspraak/document/145 (last consulted in September 2011).

significant for the legal community at large)[1], and the possibility of allowing lower courts in civil cases to submit preliminary questions to the court of cassation in mass litigation. New legislation is currently pending before the Lower House[2]. The proposed legislation allows the cassation court to declare the appeal in cassation inadmissible if on the basis of the statement of case containing the complaints of the claimant, and the statement of case containing the reply of the defendant, it comes to the conclusion that the complaint does not justify proceedings in cassation, either because the claimant does not have a reasonable interest in bringing cassation proceedings or because the complaint cannot result in the decision of the lower court being quashed. According to one author, the proposed legislation does not result in selection at the entrance of the court, but only just after the entrance has been passed[3]. However, indirectly it may allow the cassation court to select relevant cases from the above-mentioned perspectives. Additionally, legislation is pending which under certain circumstances allows lower courts to submit preliminary questions to the cassation court[4, 5].

VII. Proportionality between case and procedure[6]

16. The Netherlands does not know many specialised courts in civil matters – although there are various specialised divisions within the ordinary courts[7] – and only a few specialised procedures (such as the so-called *Kort Geding* (in French: *référé*), a quick and informal procedure to obtain provisional measures in urgent cases)[8]. There is one standard model of procedure for adversarial litigation (the summons procedure)[9], which may be applied with a certain degree of flexibility by the judge based on the specific features of the case[10]. Conse-

[1] See the still relevant PhD thesis of W.H.B. den Hartog Jager, *Cassatie in het belang der wet. Een buitengewoon rechtsmiddel*, Arnhem, Gouda Quint bv, 1994.

[2] *Wijziging van de Advocatenwet, de Wet op de rechterlijke organisatie en enige andere wetten ter versterking van de cassatierechtspraak (versterking cassatierechtspraak)*, Kamerstukken II 2010/11, 32 576; available at http://www.tweedekamer.nl/images/32576%20bij_tcm118-215850.doc (last consulted in September 2011).

[3] H.J. Snijders, *Verandering van cassatierechtspraak*, *Tijdschrift voor Civiele Rechtspleging* 2011/3, p. 81–88, at p. 82.

[4] *Wet prejudiciële vragen aan de Hoge Raad*, Kamerstukken II 2010/11, 32612; available at http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vimkmhu8npzv?ctx=vimkm1d6cwx1 (last consulted in September 2011).

[5] According to Frédérique Ferrand, in France during the course of civil proceedings the first instance or appellate court may suspend the hearing in order to ask the *Cour de cassation* a legal question. This is often done when a new law which has not yet been interpreted by the *Cour de cassation* has to be applied. This mechanism is called *saisine pour avis de la Cour de cassation*. The cassation court only gives an «avis» which does not bind the lower court. However, this court usually follows the «avis».

[6] I will not discuss the output related manner of funding the Dutch court system here. This manner of funding is meant to be an incentive for courts and judges to deal with cases efficiently.

[7] Belgium also knows specialised divisions in the courts, although in that country there are various specialised courts, too.

[8] Arts. 254–259 Dutch Code of Civil Procedure.

[9] I will not discuss the procedure initiated by petition which is sometimes also applicable in adversarial cases – see above.

[10] According to Benoît Allemeersch, Belgium knows two procedural tracks in civil cases, the long track (ordinary track) and the fast track (*korte debatten*). In both tracks, a court hearing is scheduled immediately after the writ of summons has been served. At this hearing, parties may plead orally if they wish to do so and the judge may give a final judgment immediately afterwards. When subsequent procedural acts are necessary, which happens in the long track, the judge is in charge of fixing the time limits. As is widely known, France also knows various procedural tracks.

quently, there is no specific small claims procedure in domestic cases[1]. Claims of € 25,000 or less and some specific subject matter belong to the domain of the cantonal section of the Court of First Instance (the cantonal section was created when the former Lower First Instance Court – the *Kantongerecht* – was merged with the general Court of First Instance), where parties may litigate in person without the assistance of an advocate (also there, the uniform, flexible procedural standard model is followed). Higher value claims must be brought before the ordinary civil section of the general Court of First Instance, where the assistance of a lawyer is mandatory. There are no filtering mechanisms as regards the importance and relevance of the case, as long as the claimant brings an action concerning his own private rights and duties and not a case in the general interest (in the latter case, his claim will be declared inadmissible)[2]. As stated above, currently a discussion is going on in the Netherlands concerning the introduction of filtering mechanisms at the Supreme Court of Cassation.

17. Proportionality between case and procedure may also be reached by an early settlement of the case. The ordinary first instance procedure in the Netherlands aims at such a settlement of the case. To this end, courts have the duty – unless the judge is of the opinion that this will be futile in the case at hand – to order a court appearance of the parties at an early moment in the litigation[3]. Additionally, in order to enable parties to settle their case at an early stage with minimal involvement of the judiciary, a special procedure (*deelgeschillenprocedure*) has been introduced by law (17 December 2009)[4] as regards claims for damages as a result of physical injury or death[5]. One or both of the parties in such cases may ask the judge, either before or during the proceedings in court, to decide about a sub-issue that is either directly relevant or related to part of the matter that is keeping the parties divided, but only if such a decision may contribute to the parties' settling their case out of court by way of a settlement agreement (*vaststellingsovereenkomst*).

VIII. Multi-party litigation

18. Multi-party litigation is still in its infancy in the Netherlands. There are limited possibilities to bring such litigation before Dutch courts, although these cannot be equalled to class or group actions as they are known in other jurisdictions[6,7]. The Dutch alternatives are discussed below.

19. The Dutch Civil Code contains a set of articles on organisations litigating in the interest of their members or in the general interest. Originally, claims brought by such organisations would be declared inadmissible; since the rule is that a claim can only be brought when the claimant litigates in his own personal interest[8]. Later, such claims were

[1] At the EU level there is of course the small claims procedure (Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European small claims procedure) which is, however, only applicable in case of cross-border litigation.

[2] Art. 3:303 Dutch Civil Code.

[3] Art. 131 Dutch Code of Civil Procedure. See also Arts. 87 and 88 of the same Code.

[4] Official Journal (Stbl.) 2010, 221; in force since 1 July 2010.

[5] Articles 1019w-1019cc Dutch Code of Civil Procedure.

[6] Belgium does not know class actions or similar types of litigation either.

[7] In France there are no general provisions on group litigation. Frédérique Ferrand states that only an *action en représentation conjointe* by consumer associations is possible, which is designed as an opt-in procedure.

[8] Art. 3:303 Dutch Civil Code.

sometimes allowed by the courts. In 1994, the Civil Code was modified with the introduction of Articles 3:305a and 3:305b, and in 2001 with the addition of Article 3:305c. In these articles, the right of foundations, associations with full legal personality, and other legal persons to bring an action in the interest of a collectivee is, under certain conditions, recognised. Conditions are that the interests of those for whom the action is brought must be similar in nature and that the aim of representing their interests is expressed in the documents by which the legal person was created (*statuten*). Damages *cannot* be claimed in actions brought in this way[1].

20. In 2005, Articles 7:907–910 were introduced in the Dutch Civil Code, and Articles 1013–1018 in the Code of Civil Procedure. These articles govern situations in which a large number of individuals suffer harm due to an act or related acts of one or more natural or legal persons (e.g. a tobacco company). The articles open the possibility for the natural or legal persons having caused the harm and a foundation or association representing the interests of those who have suffered harm to reach an agreement which can be submitted to the Court of Appeal in Amsterdam in order to have it sanctioned as an agreement applicable to all who have suffered harm in the context of the agreement. The decision is binding for everyone involved in the dispute, except for those who decide to opt out.

IX. Equitable results v. Strict formalism

21. For a few decades now (especially since the 1970s), the keyword in Dutch civil procedure has been «deformalisation», that is to say, the elimination of unnecessary formalism. The litigants should not be able to use the rules of civil procedure to win their case, but the action should concern the specific problem that keeps the parties divided. Furthermore, the infringement of procedural rules should only result in sanctions if the interest protected by the infringed norm has actually been harmed[2].

22. Recent examples of «deformalisation» are that the initiation of a particular action in the wrong manner, namely, by way of a petition where a summons is prescribed or *vice versa*, does not result in the inadmissibility of the claim but in an order to correct the wrong initiation of the action; and the date of commencement of the action will remain the original date of commencement, even though it was commenced in the wrong manner[3]. Another example is that litigants who introduce an action themselves where legal representation is required will be given the opportunity by the court to correct their omission without the action being discontinued.[4] Also, all kinds of irregularities in the writ of summons will only result in the summons being declared void if it can

[1] According to Benoît Allemeersch, in Belgium the «Eikendael doctrine' teaches that legal persons *cannot* represent the interests of others; they may only bring an action in their own interest. Currently, there is some debate about this issue, but it is unlikely that changes will be introduced in Belgian law in the near future. There are a few exceptions to the «Eikendael doctrine', e.g. where it concerns civil litigation as regards racism or environmental issues.

[2] *Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg* (effective from 2002), Explanatory memorandum, Kamerstukken II 1999/2000, 26 855, Nr. 3, p. 5, available at https://zoek.officielebekendmakingen.nl/dossier/26855/kst-26855-3?resultIndex=33&sorttype=1&sortorder=4 (last consulted in September 2011).

[3] Art. 69 Dutch Code of Civil Procedure; e.g. relevant in the light of the statute of limitations.

[4] Art. 123 Dutch Code of Civil Procedure.

be assumed that the interests of the addressee of the summons have been harmed in an unreasonable manner[1].

X. Problem solving v. case processing

23. Problem solving is not, according to the majority of Dutch authors,[2] a primary goal of the civil justice system, although it may be a by-product of it (in civil proceedings, Dutch courts will explore whether a friendly settlement of the case is possible). The primary goal of the civil justice system is to produce authoritative, enforceable decisions (judgments) within a reasonable amount of time. This is, according to the same authors, the main difference with, for example, mediation. Mediation is of a completely different nature than the administration of justice in a court of law since mediation is aimed at allowing the parties to find a solution to their conflict that is acceptable to both of them.

XI. Freely available public service v. quasi-commercial source of revenue for the public budget

24. The Netherlands does not recognise the principle of the administration of civil justice free of charge. For various reasons, this is not an acceptable principle. Court fees make the parties think about the necessity of bringing an action more than in a system in which court fees are not levied, whereas it may also be claimed that these fees are justified since it is in the end the parties that (also) profit from a court decision in their case. However, due to the positive externalities of civil litigation for society at large (see above), there are good reasons not to introduce a system of court fees that covers all the costs of the civil justice system; part of these costs should be borne by the public purse since society at large also profits from civil litigation. As stated above, the current government has proposed legislation aiming at introducing a system of court fees that covers the costs of the justice system to a larger extent than at present. The new system would mean that approximately 64 per cent of the costs are covered, partly due to the higher court fees and partly due to a lower number of cases. Even the new system would not, however, mean that the civil justice system in the Netherlands can be viewed as a «quasi-commercial source of revenue for the public budget'; in the end, even under the proposed system the State would bear part of the costs of the administration of civil justice.

XII. User orientation?

25. During the last decade, the Dutch legislature and legal authors have started to view the civil justice system also from the perspective of its users[3]. User satisfaction surveys are

[1] Art. 66 Dutch Code of Civil Procedure.

[2] E.g. W.D.H. Asser, H.A. Groen, J.B.M. Vranken (in cooperation with I.N. Tzankova), *Een nieuwe balans. Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, BJu, 2003, p. 35 ff. and Chapter 5.

[3] The same applies to France. The report of the Guinchard Commission, published in 2008, is especially important (*Rapport Guinchard. L'ambition raisonnée d'une justice apaisée*, Paris, Doc. française, 2008). The Commission had to think about a new «répartition des contentieux,' i.e. a new distribution of cases over courts and other judicial bodies. The Guinchard Commission promoted different reforms aiming at placing the *justiciables*

being conducted on a regular basis and have been since the start of the new millennium, but only a limited number of courts of first instance have participated. In 2011, for the first time a nationwide survey was organised in which not only a selection of courts of first instance were involved, but all courts of first instance and all courts of appeal, including some special administrative tribunals. The results of the survey will be published at the end of 2011[1].

26. At the moment, the latest available results are those which were published in 2006 (data October–December 2005)[2]. These results show that professional court users (advocates, court experts, etc.) are of the opinion that the courts of first instance are better organised than in 2001, and they are also more satisfied with the professional behaviour of the judges (ca. 84 per cent of the respondents are generally satisfied). They share their opinion about the professional conduct of the judges with the litigants (litigants are satisfied with the way in which the judge listens to their respective positions (85 per cent of the respondents are satisfied), with the room offered by the judge for the litigants to tell their story (86 per cent satisfied) and with the judge's expertise and his or her impartiality (79 per cent satisfied); fewer litigants are satisfied with the amount of empathy displayed by the judge (69 per cent satisfied)). Professional court users are *not* so satisfied with the manner in which grounds are expressed in the judgment: the current manner of expressing grounds sometimes makes it hard for them to establish whether similar cases are decided in a similar manner. Litigants are *not* so satisfied with the length of proceedings[3], with the availability of information about the manner in which their case will be handled in court and with the facilities at the court buildings (availability of food too limited, separate rooms to discuss cases in private with their lawyer not available, etc.).

XIII. Conclusion

27. From the above report it appears that – albeit after a long period of gestation – the Netherlands has introduced fundamental reforms in the civil justice system. These reforms are successful, at least from the perspective of court users such as advocates and litigants. The present financial crisis may, however, endanger the successes that have been achieved. Plans to increase court fees to such an extent that the court system as a whole can be financed from these fees may prove to be detrimental to access to justice and are not justified given the various positive externalities that litigation by private litigants creates for society at large. Hopefully, the current plans will be modified before they reach the statute book.

(i.e. those searching for the administration of justice) in the centre of the judicial system. This requires clearer, easier and more foreseeable access to justice (*accès plus facile, plus aisé et assurant une plus grande prévisibilité*). The Report has already been implemented on several issues. A new law will be enacted at the end of 2011 in order to implement other proposals formulated by the Report.

[1] For information, see http://www.synovate.nl/content.asp?targetid=672 (last consulted in September 2011).

[2] See *De zaken meer op orde. Klantwaarderingsonderzoek in tien rechtbanken*, Prisma, May 2006, available at http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/rapporten-en-artikelen/Documents/dezakenmeeroporde.pdf (last consulted in September 2011).

[3] Although, the record is not bad. Just before the survey was conducted in 2005, the median case processing time in defended cases for the courts of first instance in the Netherlands had dropped by 20 per cent, from 525 days in 1996 to 413 days in 2003. In the same period, the percentage of cases terminated within one year rose from 34 per cent to 49 per cent.

Inge Lorange Backer[1]

NORWEGIAN NATIONAL REPORT

I. Prevailing opinions on goals of civil justice

1. Civil justice in Norway covers disputes between private parties as well as conflicts between a private party and the public administration. Norway has a unitary court system with courts of general jurisdiction, no separate administrative courts[2] and very few specialised courts. The ordinary courts exercise constitutional control of legislation in so far as relevant in the cases brought before them.

2. In the past 15 years, Norwegian civil justice has been subject to a range of various reforms. The new and complete Dispute Act was adopted in 2005[3] and took effect on 1 January 2008, replacing the former Act on Civil Procedure from 1915[4]. The goals of civil justice were examined in the legislative preparations and set out in the introductory section on the purpose of the Act. The Dispute Act, section 1-1 first subsection, reads:

«This Act shall provide a basis for hearing civil disputes in a fair, sound, swift, efficient and confidence inspiring manner through public proceedings before independent and impartial courts. The Act shall safeguard the needs of individuals to enforce their rights and resolve their disputes, and the needs of society for respect and clarification of legal rules».

3. How the different goals should be balanced, and which goal should be given priority in case of conflict, is scarcely discussed in the preparatory works to the Dispute Act.[5] In procedural theory, the goals of civil justice are summarised in three points: (i) to resolve civil disputes between citizens and between citizens and public authorities, (ii) to implement and enforce substantive law, in particular parliamentary and subordinate legislation, and (iii) to clarify and develop the law[6]. Sometimes a fourth point is added: (iv) to control the constitutionality of statutes and the legal authority of subordinate legislation. With reference to conflicts between a citizen and a public authority, this goal may be seen as a necessary complement to the second goal (the implementation and

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[2] In this respect there is a profound difference between the Eastern Nordic countries (Sweden and Finland) and the Western Nordic Countries (Denmark, Iceland and Norway).

[3] Act of 17 June 2005 no. 90.

[4] For a survey of the reforms, see Inge Lorange Backer, *The Norwegian Reform of Civil Procedure*, 51 *Scandinavian Studies in Law* (Stockholm 2007), p. 41–75. See also the same author in Volker Lipp and Halvard Haukeland Fredriksen (eds.), *Reforms of Civil Procedure in Germany and Norway* (2011).

[5] See Magne Strandberg, *Fordeler og ulemper ved partsprosessen, særlig med tanke på rollefordelingen mellom dommer og part* [Advantages and Disadvantages with Civil Procedure between Parties, Particularly Regarding the Roles of the Judge and the Parties], 46 *Jussens Venner* (2011), p. 165 et seq., at 171–172.

[6] Jens Edvin A. Skoghøy, *Tvisteløsning* [Dispute Resolution], Oslo, 2010, p. 3–4. Admittedly, Norwegian procedural theory tends to discuss only briefly the goals of civil justice and some authors address the question in terms of the functions or tasks of civil justice. Jo Hov, *Rettergang* [Court Procedure] I, Oslo, 2010, p. 138–139 asks what demands court procedure should fulfil: in particular producing judgements that are correct in substance and confidence-inspiring proceedings that also are swift and cheap. In Scandinavian procedural theory, the goals and functions of civil justice are much more extensively discussed by Swedish scholars, recently by, for example, Per Henrik Lindblom and Torbjörn Andersson. The goal of reaching correct decisions may appear to have stronger support in Norway than in Sweden.

enforcement of substantive law), but it can also be regarded as included in the first goal (resolution of civil disputes).

4. The resolution of a dispute by civil justice is brought about by reaching a settlement between the parties after mediation, or by a final judgment delivered by the court. The Dispute Act places greater emphasis on alternative dispute resolution and court mediation than its predecessor did and thus underlines the goal of conflict resolution. Dispute resolution by the courts need not, however, lead to a result which satisfies both parties even if they abide by the judgment. It has therefore been suggested that «conflict treatment» would be a more appropriate description than dispute resolution[1].

5. It has also been suggested that the abovementioned goals reflect and specify a superior goal – the protection of legal rights and positions[2]. In this context, it may be added that civil justice – together with criminal justice – serves to monopolies the use of coercion in the society.

6. As the courts have no legislative authority the third goal (clarification and development of the law) has a limited bearing. In Norwegian jurisprudence and legal theory, it has long been accepted and approved that courts should take an active attitude towards filling in gaps and lacunae in existing legislation and provide the necessary clarification of unclear law. In recent years, the courts may appear more frequently to strike down, or refrain from applying, statutory provisions by virtue of constitutional and human rights provisions, even where opinions on the content of the latter provisions may be diverse. A statement by the Government and the parliamentary committee in the preparatory works of the Dispute Act, to the effect that development of the law is a task for the courts only to some extent and in an interplay with the legislature, must be seen against this background.

7. The different goals play different roles at the various court tiers. It is generally agreed, and in accordance with the preparatory works of the Dispute Act, that the chief task of the first instance – the district courts – is to provide swift and efficient dispute resolution, the prime task of the courts of appeal is to correct erroneous judgments rendered by the district courts, while the Supreme Court has a particular responsibility to ensure the uniformity, clarification and necessary development of the law[3].

II. Matters regarded to be within the scope of goals of civil justice

8. By tradition, a number of other tasks than adjudication proper have been vested in Norwegian courts, mainly the courts of first instance. They kept the land register and several other registers including the company and shipping registers. They dealt with matrimonial cases, administered matrimonial estates after divorce and estates of deceased persons (unless handled by the parties themselves) as well as bankruptcy estates, and, in a special procedure, decided upon compensation to be paid to landowners in the event of compulsory purchase.

[1] Anne Robberstad, *Sivilprosess* [Civil Procedure], Oslo, 2009, p. 3–4.

[2] Ibid., p. 2–3. She adds that from the users' perspective, civil justice may regarded as providing a forum for dialogue which the contesting parties are obliged to attend (p. 4).

[3] The role of the second tier – the court of appeal – was discussed at the 39th Conference of Nordic Lawyers in Stockholm August 2011 following a report by the Icelandic professor Sigurður Tómas Magnússon. On the role of Nordic Supreme Courts, see Per Henrik Lindblom, *The Role of the Supreme Courts in Scandinavia*, 39 *Scandinavian Studies in Law,* Stockholm, 2000, p. 324–366. Since then, the Norwegian Supreme Court has further developed into a precedential court.

9. During the last 30 years, however, the trend has been to concentrate the tasks of the courts to adjudication of contested claims. This trend appears to have been favoured by legislators and judges alike, without being opposed by the public. The present situation can be described as follows:

a) An enforcement title is required for the *collection of non-contested debt*. The Enforcement of Claims Act 1992 enumerates various kinds of enforcement titles, but for ordinary claims a judgement will be required. Such a judgement is commonly granted by the conciliation boards, a body composed of three lay judges elected by the municipal council, frequently in default proceedings on the basis of a complaint made by the creditor which has then been served on the debtor. Dating from 1795, the conciliation boards have a long-standing tradition in Norwegian civil justice, but after the Dispute Act reform they are formally regarded by the law as a body with certain adjudicating powers and no longer included among the ordinary courts of law.

b) The *enforcement of claims* is generally administered by the bailiffs, who may be organised as a separate body or linked to the local police. The rules on enforcement are laid down in the Enforcement of Claims Act 1992. An appeal against the bailiff's decision lies with the district court which must also decide on interim relief and certain other issues regarding enforcement.

c) The *keeping of registers* has been transferred from the district courts to administrative bodies. The company register, the register of mortgaged movable property and the marriage settlement register were transferred from the courts to the Brønnøysund Registers (which also handles numerous other registers) about 30 years ago. The ship registers are organised as a separate administrative body. The land register was computerised and centralised to the Norwegian Mapping Authority in the last decade. The transfer has deprived some small district courts of an important part of their tasks and may thus serve to cause a merger of some local courts. The transfer of the land register, in particular, may also deprive the court of relevant information about the local community and reduce the courts' importance as a service centre for the public. Taken together, the transfer of civil registers may on the one hand reduce the role of the courts in the civil society and thus increase their relative function in criminal justice, but may on the other hand leave more time for civil adjudication.

d) The *administration of bankruptcy estates* continues with the district courts. The administration of estates of deceased persons is normally avoided by the court appointing a trustee. The courts are rarely – if ever – called upon to administer the matrimonial estate after a marriage breakdown unless the division of the estate is heavily contested between the spouses.

e) The courts are given the task of *regulating the future relationship between the parties* in a limited number of cases only. Claims for separation, divorce or alimony are decided by an administrative body – the county governor – unless there is also a dispute on custody. Adoption decrees are made by the county governor. It is for the courts to issue a decree stating that a disappeared person is presumed to be deceased or to declare somebody incapable of managing his own affairs. Other examples are: The court may make a decree for the dissolution of a company in special circumstances and for the annulment of a negotiable instrument. In hydropower projects involving the regulation of watercourses, the courts have, in the special procedure of judicial assessment, limited powers to prescribe certain future obligations of the power company towards landowners and the local community.

f) The role of the courts in deciding by judicial assessment the compensation for compulsory purchase persists, but has become less apparent as friendly settlements are strongly encouraged by the law. The task now includes the assessment of compensation for nature conservation areas where such compensation is provided by statute.

10. It is fair to say the abovementioned procedures or cases play a limited part or none at all in determining the goals of civil justice generally. It can be noted, however, that efficiency is an important consideration behind the rules on collection of uncontested debts as well as enforcement of claims, although with regard to the latter upholding the rule of law is as important. In the management of estates, conflict resolution is a major aim.

III. Protection of individual rights v. protection of public interest

11. The prevailing opinion is probably that in civil justice a balance must be struck between the protection of individual rights and the protection of public interest[1]. It varies, of course, depending upon the particular case, to what extent the public interest may be affected. Generally, the public interest is more at stake in disputes between private parties and public authorities than in disputes between private parties only.

12. When interpreting and applying existing law, the courts will pay regard to common societal values and goals and to the public interest as set out in the relevant statutory provisions (including the provision stating the purpose of the act in question) and its preparatory works. This is regarded as a matter of substantive law rather than procedural law. A court of law is obliged to apply current law on its own motion (within the framework established by the claims and factual grounds invoked by the parties).

13. Some examples will illustrate that the balance between individual rights and the public interest varies. In a long series of judgements the Supreme Court has held that the regulation of private property – typically for purposes of area planning or nature conservation – will, in the absence of statutory provision, only give rise to a right to compensation for landowners in very exceptional circumstances. On the other hand, the Supreme Court has strengthened the authorities' duty to give convincing reasons for administrative decisions that *prima facie* appear to be unreasonable. In recent years there has been an increased willingness to modify or strike down statutory provisions on a constitutional or human rights basis without clear precedents.

14. In their application of procedural law, the overriding aim of the courts appears to be to achieve fairness to both parties. In 1983, a person who challenged the lawfulness of telephone tapping by the police was refused access to the court warrant for reasons of national security (NRt.[2] 1983 p. 1438); today, the courts are more likely to exercise an independent control in this respect.

15. The views of ruling elites or classes are clearly irrelevant for the application of the law and the courts will take account of government programmes only to the extent they are supported by or implemented through statutory legislation. Government White Papers and parliamentary debates may, however, highlight common societal values and goals that will

[1] The question has, particularly in recent years, given rise to a debate on whether the courts – especially the Supreme Court – tend to favour the State rather than the individual. For a contribution in English, see Gunnar Grendstad, William R. Shaffer and Eric M. Waltenburg, *Revealed Preferences of Norwegian Supreme Court Justices*, 123 *Tidsskrift for Rettsvitenskap* (2010), p. 73–101, whose assessments and conclusions I can in no way support.

[2] NRt.= Norsk Retstidende (Norwegian Law Gazette).

be relevant legal arguments. Professional privileges will not as such be given priority by the courts. In a leading case from 1977 (NRt. 1977 p. 1035), the Supreme Court ruled that a patient is entitled to see his case record without the doctor's or hospital's consent; on the other hand, lawyers' confidentiality has been upheld on various occasions.

16. Even if Norwegian civil procedure at the outset is based on the contentions by the parties, the court is entitled to determine a number of issues on its own motion. *First,* it follows from above that the court determines the law regardless of, but assisted by, the parties' submissions. *Second,* in cases where the right of disposition of the parties is limited, the court is free to call additional evidence and obliged to ensure that the evidence presented provides a sound and sufficient factual basis for its ruling, and the court may base its judgment on factual grounds that are not invoked by the parties. This applies to cases on personal status and legal capacity, custody cases, and other cases where public policy limits the parties' right of disposition[1]. The court may, however, only rule on the claims made by the parties to the case. 67. *Third,* a number of procedural issues are to be decided by the court regardless of the contentions and submissions of the parties. This includes questions of jurisdiction (except local venue), standing, *res judicata* and certain time limits for bringing a case.

17. Other actors or bodies than the parties have no general or statutory obligation to secure that the goals of civil justice will be reached in a particular case (except to abstain from interfering with the independence and impartiality of the court). Third parties with a real interest in the outcome of the case may intervene in a civil case for the benefit of a party. Moreover, associations and foundations as well as public bodies charged with promoting specific interests may intervene in cases falling within the purpose and normal scope of activity of the organisation. Such organisations may also offer written submissions on matters of public interest. There is no such institution in Norwegian procedural law as the *ministère public* and a right of intervention in order to secure the ordinary goals of civil justice is not foreseen for anyone. In cases before the Supreme Court which raise the question of setting aside statutory rules for constitutional reasons or because of binding international obligations, the State – represented by the Ministry of Justice – is always entitled to appear in order to safeguard the State's interests with regard to the potential conflict of rules.

IV. «Material truth» v. fair trial within a reasonable time

18. Again, a fair balance must be struck between the goals of reaching the material truth and providing fair trial within a reasonable time[2]. The Norwegian attitude to this must also be regarded in the light of Question 6 (below). Over the years, greater emphasis has been laid on a fair trial within a reasonable time[3]. In the Dispute Act 2005 it is demonstrated by the introductory section as well as by various procedural remedies, such as time limits for the main hearing and for rendering judgement and instruments to allow the judge to

[1] Admittedly, the scope of the latter concept, which is enacted in sec. 11–4 of the Dispute Act, is rather unclear.

[2] In procedural doctrine, Hov, op.cit., p. 138 appears to give a certain priority to the material truth.

[3] In 2010, the average handling time for a case in the district courts was 5 months, in the courts of appeal 5,9 months, and in the Supreme Court 5,8 months.

concentrate and speed up proceedings. Rules requiring leave to appeal can also be seen in this light as they contribute to arriving at a final judgement at an earlier stage.

19. In cases where the right of disposition of the parties is limited, the court shall see to it that the case is sufficiently clarified with a view to reaching the material truth. In all cases, the court has a duty to give procedural guidance to the parties and may encourage a party to offer evidence and to take a position on relevant factual and legal issues, but must do so in a manner which does not preclude the impartiality of the court. Such guidance is particularly important with respect to a party who appears without counsel and serves to avoid a miscarriage of justice due to inadequate procedure on behalf of a party.

V. «Hard cases» v. mass-processing of routine matters

20. In this respect, the goals of civil justice vary with the court tiers. For the district courts (courts of first instance) the emphasis is on securing efficient handling of a considerable number of cases. To some extent, the same applies to the courts of appeal. In the Supreme Court, however, the main goal is to resolve new questions of law which have not hitherto been addressed by it and where the answer may be doubtful.

VI. Principle of proportionality (de minimis non curat praetor) or same standards and processes to everyone, irrespective of the importance of the case

21. The principle of proportionality is one of the main principles underlying the Dispute Act 2005. It represents a true reform even if the principle was not unknown under the previous rules. The introductory section of the Dispute Act states in its second subsection that one of the means to achieve the purposes set out in the first subsection is that «the procedure and the costs involved shall be reasonably proportionate to the importance of the case».

22. The principle is implemented in a number of provisions of the Dispute Act. The right of the parties to present evidence is limited to evidence on facts which may be of importance to the ruling to be made and the scale and scope of evidence must be reasonably proportionate to the importance of the case. If it is not, the presentation of evidence may be limited by the court provided it is in keeping with the general purpose of the Act. An award of compensation for costs is limited to necessary costs, having regard to whether it was reasonable to incur them in view of the importance of the case. At the request of a party, the court may dispose of unsustainable claims at the preparatory stage, without a main hearing, and the same applies if all objections made against a claim are unsustainable. An appeal against a judgement by the district court on an asset claim requires leave if the amount contested in the appeal is less than NOK 125 000 (currently ? € 17 000). For an appeal to the Supreme Court, leave is always required, but the main criterion is the significance of the legal issue raised with a view to its value as a future precedent, not the amount contested[1].

23. Small claims (generally cases where the disputed claim does not exceed NOK 125 000) are handled according to a special and simplified procedure. The judge has greater powers to administer the case and to provide guidance to the parties. It is thus hoped that

[1] There are examples where the monetary claim decided by the Supreme court did not exceed € 50, see NRt. 2006 p. 179 concerning a consumer's remedies against a faulty pair of boots.

litigation costs will be reduced because the parties do not need to be represented by counsel. Compensation for costs is limited to NOK 15 000 ~ € 2000 and cannot include costs for presentation of unnecessary or disproportionate evidence. The oral hearing may be held in the form of a distance meeting by aid of audiovisual media, and, with the consent of both parties, the court may dispense with it in order to reduce litigation costs. Written submissions may be used as a basis for the judgement and evidence shall be presented to the court only in so far as required on a balance of considerations to proper and cost-effective proceedings. Judgement shall be rendered within three months from the submission of the writ of summons and its reasons may be more brief than for ordinary judgements.

VII. Bi-party proceedings v. resolution of complex, multi-party matters

24. At the outset, Norwegian civil procedure is designed for simple, traditional disputes between two parties. Rules of joinder of claims and parties, and third party intervention, allow for complex, multi-party disputes. Typical examples are compensation cases after extensive disasters and real property cases involving joint ownership or commons with numerous rightholders. The courts have a long-standing tradition for dealing with the assessment of compensation for compulsory purchase involving a large number of properties, which is handled according the special procedure of judicial assessment. Efficiency of justice is usually prompted by consolidating for joint hearing cases raising similar issues. The general goals of civil justice apply to complex and multi-party proceedings.

25. Judgements may, by way of the doctrine of precedent, affect the legal position of many individuals or large groups of the society. Courts will take account of such wide-reaching effects when stating the law. Social regulation, however, is a matter for the legislature; the basic role of the courts is to decide legal conflicts between individual parties.

25. Certain procedural devices help the courts manage complex cases. The court may decide to split the proceedings and adjudication of separate claims if the proceedings will then be more efficient. Separate rulings may be given on certain topics, such as the grounds for a claim for damages as distinct from the assessment of the sum to be awarded, or grounds that do not necessarily lead to the determination of a claim, e.g. an objection on the basis of prescription, or the choice of law in private international law. In multi-party cases, evidence presented by one party applies in respect of all parties. In cases of judicial assessment involving compulsory purchase, the purchaser's obligation to pay for landowners' legal costs may be restricted at the purchaser's request by requiring landowners who do not have conflicting interests, to engage one lawyer jointly instead of separate lawyers individually, thus reducing the total costs and generally promoting the efficiency of the proceedings.

26. Class actions were introduced in the Dispute Act for dealing with a large number of claims or obligations that are substantially similar[1]. As distinct from a joinder, the individual rightholders or debtors need not appear as parties to the case but their interests will be defended by a class representative appointed by the court. As a main rule, the judgement will only be binding on individuals registered as class members («opt in»), but the court may accept that it shall be binding on all individuals having a claim within the scope of the

[1] Class actions have also been introduced in other Nordic countries, first in Sweden, strongly advocated by the Swedish professor Per Henrik Lindblom. See Lindblom, *Group Litigation in Scandinavia*, *Zeitschrift für Zivilprozess International* 13 (2008), p. 85–114 for an account with an emphasis on the Swedish experience.

class action unless they have withdrawn from the action («opt out»). The latter procedure can be used where the individual claims are so small that separate lawsuits would not be economically feasible. A class action may be brought by anyone qualifying as member of the class in question or by an association or public body set up to promote specific interests, provided the action falls within the purpose and normal scope of the organisation. In any case, it is for the court to approve whether litigation should take place in the form of a class action or follow the ordinary rules including the possibility of joiner. So far, there is limited practical experience with class actions in Norwegian law.

VIII. Equitable results and substantive justice v. strict formulation and principle of legality

27. In Norwegian law, there is a strong tradition for seeking equitable results and substantive justice instead of formal justice. This is deeply rooted in legal reasoning which allows for considerations of reasonableness within the boundaries set by the law. The story goes that a Supreme Court justice towards the end of the 19th century expressed the view that «never has the Supreme Court felt compelled to render a judgement which in its opinion would be unjust». Later observers – judges as well as academics – hold that some qualification is needed and, indeed, it occurs that the Supreme Court sticks to a legal solution that the court may find unsatisfactory in real terms, thus leaving it to the legislature to change the law. The attitude to this question probably differs between the judges and where judicial restraint is preferred, it is chiefly out of respect for the legislature or because it may be unclear or left to a political assessment what the desirable rule should be. Inadvertent mistakes in the legislative process, however, tend to be corrected by the courts if at all possible.

IX. Problem-solving or case-processing

28. Even here the prevailing view is likely to be that both goals deserve to be pursued. The introduction and increased use of court mediation may be regarded as a means to obtain effective problem-solving between the parties as well as to promote court efficiency. The trend in recent years, however, seems to be more bent on case-processing than problem-solving. There is a stronger emphasis in the efficient management of cases which shows in the Dispute Act itself, court budgets and their statistical goals for case management, and continuing education of judges. On the other hand, there is also an awareness that efficient case-processing must not go too far at the expense of actual problem-solving. In certain cases or types of cases, lack of problem-solving can easily give rise to renewed or repetitive litigation which is not barred by the doctrine of *res judicata* if a different claim can be raised.

X. Civil justice as freely available public service or as a quasi-commercial source of revenue for the public budget

29. Although subject to court fees, civil justice was originally largely perceived as a freely available public service, but the lawyer's salary had to be borne by the party. Nowadays, court fees as well as lawyer's salaries have risen to such an extent as to make civil litigation an expensive exercise for the ordinary citizen. Businesses, however, are entitled to detract

legal costs from their taxable income. The less well-to-do may be covered by legal aid schemes and ordinary citizens to some extent by insurance policy clauses.

Court fees are calculated according to a specific Act on the basis of a court fee unit (termed R, which currently amounts to NOK 860 ~ € 110). The court fee for an ordinary case in the district courts amounts to 5 R if the main hearing lasts one day, with an addition of 3 R for each additional day of the main hearing and 4 R per day exceeding five days. The court fee for an appeal case amounts to 24 R (NOK 20 640 ~ € 3000) with a similar additional fee if the main hearing lasts more than one day. The court fee for a claim handled by the district court according to the special small claims procedure is 3,5 R (NOK 30 100 ~ € 4000).

30. The total amount of court fees nonetheless only covers about 10% of the courts' budgets. In 2009, the total expenses for the district courts, courts of appeal and the Supreme Court were about 1650 mill NOK (~ € 220 mill.) and the court fees collected amounted to 167 mill. NOK.

XI. Orientation towards the users, or self-centered goals?

31. It is probably not unfair to say that the goals of civil justice used to be somewhat self-centred within the judiciary and the legal profession at large and you can still meet the attitude that they should be no concern for the legislature or political authorities. The prevailing view is surely that it is also a matter for them, but there are proponents who hold that in order to secure the independence of the courts from the executive branch, the goals of civil justice are basically a matter for the Parliament.

68. Even when the goals of civil justice were perceived as a matter for the courts themselves, the needs of citizen users have never been entirely left out of account. It is only in recent years, however, that the question of establishing their needs and wishes independently of judges and lawyers has arisen. As a part of the evaluation of the Dispute Act that is about to take place, surveys and interviews with citizens parties to civil cases will also be used[1].

Dmitry Nokhrin[2]

RUSSIAN NATIONAL REPORT

I. Prevailing opinions on goals of civil justice

1. The concept of civil justice for the purposes of both law application and doctrinal development has been formulated by the Constitutional Court of the Russian Federation in the Decision of 1/25/2001 N 1-P. In this decision the Constitutional Court pointed out, among other, the following: «Administration of justice is a special kind of realization of

[1] Demands and expectations to the modern judge were discussed at the 39th Conference of Nordic Lawyers in Stockholm August 2011 on the basis of a report by the Swedish Chancellor of Justice Anna Skarhed. One of the theses in her report is that an outside view on the judge and court activities is important but citizens' expectations can only be fulfilled within the rule of law and the justice system as adopted by democratic bodies.

[2] Advisor of the Constitutional Court of the Russian Federation (Russia).

the state power. Carrying out justice, court applies general legal instruction (norm of the law) to concrete circumstances of the case. <...> Justice realization should be understood not as a whole of legal proceedings, but as a part of it, which consists in passing of acts of judicial authority concerning the resolution of issues subordinated to court, i.e. judicial acts resolving the case in essence. <...> [In these acts] court defines actual legal status of the parties, i.e. applies norms of law to the circumstances of the concrete legal dispute. Exactly by resolving the case in essence (articles 126, 127, 128 of the Constitution of Russian Federation) and ruling the decision according to the law (Article 120 of the Constitution), court carries out «justice» in its due meaning, which is the goal of civil proceedings, and through this implements the rights and freedoms as directly in force (Article 18 of the Constitution). Legal acts, though carried out by courts, that do not determine the legal status of the parties and are not aimed at resolution of the case in essence, aren't covered by concept of «justice realization»...; these acts solve mainly procedural questions arising during the trial: from the application acceptance to the execution of the court decision».

2. The activity connected with consideration and a resolution of disputes, elimination of legal uncertainty in relations of the parties, traditionally is a basic element to fill the concept of «Justice». It is also necessary to mention that Russian courts carry out rather various activities and a part of their powers isn't connected with consideration of civil disputes and acceptance of obligatory acts for the parties. Powers of court in questions of legislation inspection, special and mandative process in this meaning don't concern justice (in «narrow» meaning, however make «a civil jurisdiction» part in a broad meaning)[1].

3. The goals of civil proceedings are defined in legislation. The federal legislator is frequently insufficiently consecutive, naming the goals of civil justice sometimes as «aims of civil justice» and sometimes as «procedural tasks». Contemporary, it is widely appreciated, that term «procedural aim» should be understood as fixed in norms of both civil and arbitration procedural law socially necessary and desirable result of procedural activity (as a whole or at its separate stages) of court and other subjects; and by «procedural task» we should understand the particular intermediate aim which is representing itself as an implementer of more remote and overall aims of remedial activity of court and other subjects of process[2].

4. To such treatment of aims and tasks of civil proceedings there corresponds the Article 2 of the Civil Process Code of the Russian Federation. It names the following aims of civil proceedings:

1) protection of the infringed or challenged rights, freedoms and legitimate interests of citizens, organizations, protection of rights and interests of the Russian Federation, subjects of the Russian Federation, municipal bodies and other actors, who participate in civil, labor or other legal relations;

[1] This view is shared by A.T. Bonner (*Боннер А.Т.* Некоторые проблемы социалистического правосудия // Труды ВЮЗИ. 1971. Т. 17. С. 194), N.A. Gromoshina (*Громошина Н.А.* К вопросу о видах гражданского судопроизводства // Защита прав и законных интересов граждан и организаций: Матер. Междунар. науч.-практ. конф. Сочи, 2002. Ч. 2. С. 26–27), N.A. Chudinovskaya (*Чудиновская Н.А.* Установление юридических фактов в гражданском и арбитражном процессе. М., 2008). The opposite view is taken by G.A. Zhilin (*Жилин Г.А.* Правосудие по гражданским делам: актуальные вопросы: Монография. М., 2010).

[2] For more detailed information on differentiation of concepts of «purpose (aim)» and «problem (task)» of civil legal proceedings, see: *Жилин Г.А.* Правосудие по гражданским делам: актуальные вопросы: Монография (§ 1 гл. II «Понятие целевых установок судопроизводства по гражданским делам». Цит. по: СПС «КонсультантПлюс»).

2) strengthening of the Legality and of Law and Order;

3) prevention of infringement of the law (i.e. providing the Legality for future);

4) Formation of a valid (respectful) relation to law and court (it is so-called «educational» or «upbringing» purpose of civil legal proceedings).

5. Achievement of these objectives is ensured by one legislatively allocated task - correct and timely consideration and resolution of civil cases.

6. Due to the Article 2 of the Code of Arbitration Procedure of the Russian Federation state commercial (arbitrational) courts of Russia seek the following goals:

1) protection of infringed or challenged rights and legitimate interests of persons, who are carrying out enterprise and other economic activities, and also protection of rights and legitimate interests of the Russian Federation, subjects of the Russian Federation, municipal unions in the sphere of enterprise and other economic activities, of public authorities of the Russian Federation, public authorities of subjects of the Russian Federation, local governments, other bodies and officials in the specified sphere;

2) maintenance of availability of justice in the sphere of enterprise and other economic activity;

3) fair public proceeding in reasonable time by independent and impartial court;

4) strengthening of legality and prevention of law infringement in the sphere of enterprise and other economic activities;

5) formation of a valid (respectful) relation to the law and court;

6) assistance to formation and development of partner business relations, to strengthening of ethics and customs of business.

7. It is obvious that term «goal» in the present construction of the cited norm embraces the categories, which have different hierarchical allocation. Summarizing existing views on goals of civil legal proceedings, it is possible to offer the following hierarchy of theirs.

8. **The basic ultimate goal (aim)** of legal proceedings on civil cases consists in protection of infringed or wrongfully challenged rights, freedoms and legitimate interests of persons, whose dispute is subject to the court resolution. It is exactly what the main social mission of court as justice body is; that has found reflection in the state Organic law as a duty of the State to provide protection of rights and freedoms of a person and a citizen by means of all its authorities, including judicial, and is directly fixed in the Constitution (Articles 2, 17, 18, 45, 46).

9. This goal is achieved by accomplishment of **basic task**, arising before the court, that is correct and in proper time resolution of the case. This basic task falls into few **particular tasks**, which are solved by court on certain stages of the proceedings. Among them, we can mark out the above mentioned task of maintenance of availability of justice, which is realized mainly on the stage of process initiation, and task of fair public proceeding, carried out on the stage of hearing case in essence. Except tasks the specified separate stages of process have as well their aims, we can name them the **particular aims**. According to this approach, the «aim» of a separate stage of the proceedings will be realization of a concrete procedural right (or their set), and a «task» – consecutive and correct application of the procedural means established by the law with the view of realization of the relevant «aim» («particular aim») of a stage.

10. So, the aim of the stage of process initiation in a court of the first instance is realization of the right for remedy at law, which is reached by performance of tasks of bringing the matter before the court and of providing its acceptance by the court, and lastly by fulfilling

of the more general task, which is maintenance of the availability of justice (Zhilin). The aim of the preparatory stage of proceedings consists in ensuring of correct and timely consideration and resolution of a case; tasks of this stage are formulated in Article 148 of the Civil Process Code and in Article 133 (point 3) of the Code of Arbitration Procedure. Speaking of the stage of hearing case in essence, as of ultimate and definitive stage of civil proceedings, our researchers conclude, that its particular aim and task coincide with the basic aim and task of the proceedings in the court of the first instance in general. Tasks of the procedures devoted to check and revision of judicial acts are both correct and timely legal investigation and elimination of a judicial error. Aims of these procedures coincide with the general (ultimate) aim of civil process[1].

11. Particular aims and tasks of certain stages of civil procedure often draw researchers' attention. So, observing the stage of supervision, K.I. Komissarov attributed correction of miscarriages of justice and maintenance, in such a way, of legality in justice to the aim of a court of supervising instance; check of legality and validity of judicial decisions was referred by him to the direct task of the mentioned procedure, and a management of practice of inferior courts for the purpose of legality maintenance – to its derivative task.[2]

12. **The auxiliary aims** of civil procedure, in realization of which the court participates along with other public authorities, are realized through consideration of all set of civil cases by all the courts of the country: strengthening of the legality and of law and order; prevention of infringement of rights; inculcation of the respect for the law and court[3].

13. We should not, as well, ignore the philosophical doctrine in the sphere of law which is contemporary definitive, when talking on the subject of procedural goals. Whether such doctrine is libertarian, so it adheres to the concept of a primacy of the rights of the separate person, or it is, for example, solidarist, appreciating the concept of mutual balance of the rights and interests of the claimant, the respondent, a society as a whole.

14. In general, Russian scientists share an idea, that basic aim of civil process – protection of an infringed or challenged right and, through this, search for the legal truth (equity) – is a part of a an even more broad aim of social harmonization and search for the social truth. Search for the truth and equity demands finding the right balance between contrary interests of the parties on the one hand and public interest of the State in establishing of Law and Order on the other hand, where the stability of social relations itself is a legal value[4]. On the other part, goal of civil justice can be defined as socially necessary and desirable result of remedial activity of a court and other subjects of a case consideration on every its stage.

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[1] This scheme of aims and tasks of civil process was first proposed by G.A. Zhilin in his monograph «Goals of civil procedure and their realization in the court of the first instance» (*Жилин Г.А.* Цели гражданского судопроизводства и их реализация в суде первой инстанции. М., 2000).

[2] *Комиссаров К.И.* Задачи судебного надзора в сфере гражданского судопроизводства. Свердловск, 1971. С. 7.

[3] *Боннер А.Т.* Принцип законности в советском гражданском процессе. М., 1989. С. 14–15; *Зайцев И.М.* Целевые установки гражданского судопроизводства // Проблемы реформы гражданского процессуального права и практики его применения. Свердловск, 1990. С. 15; *Жилин Г.А.* Цели гражданского судопроизводства и их реализация в суде первой инстанции. М., 2000. С. 16–24, 59–60; *Чечина Н.А.* Воспитательная функция советского гражданского процессуального права. Л., 1972. С. 53–57.

[4] *Даньков А.А.* Баланс частного и публичного интересов и его значение в правоприменительной деятельности // http://www.samoupravlenie.ru/16-05.htm

II. Value of a category «goal» for the needs of the theory and practice

a. For the purpose of studying the stages of civil procedure.

15. The phased movement of civil process allows scholars to focus on studying goals (tasks, aims) of every stage of it, moreover, in the soviet science of civil process law term «stage» itself was traditionally connected with the category of «nearest procedural aim». It is commonly construed that «stage of the civil process» correspond to the totality of procedural actions, of the court and persons involved, connected by the common nearest procedural aim»[1].

16. Within the limits of the approach traditional to our national doctrine of civil procedural law the following stages are marked out: 1) initiation of the proceedings; 2) preparation before the hearing, which task is to provide timely and correct consideration of a case, possibly in a single session; 3) court examination of the case; in this stage case is heard in essence, that usually ends by ruling a decision; 4) appellation on decisions that have not yet become final (here we should also mention cassation, which status differs dependently on the court branch: in common courts it is similar to appellation, whereas in arbitrational (state economic) courts it tends to be closer to supervision); 5) revision of final court decisions through the procedure of supervision, thus connected with the breach of «res judicata»; 6) revision of final judicial acts due to new (newly discovered) facts that have crucial meaning for the correct resolution of the case; 7) stage of compulsory execution of court decisions[2]. (We should remark that the latter stage is not commonly regarded as a part of civil procedure, because an activity on execution of judicial acts is carried out not by court, but by the Service of enforcement, which is the part of the system of bodies of the Ministry of Justice of the Russian Federation, and is organizationally independent from court. However it is directly connected with justice: non-fulfillment of the judicial acts makes legal proceedings inefficient, even in situation of correct and timely consideration and resolution of legal dispute, as the ultimate goals of justice remain non-realized in this case).

17. The other popular point of view (suggested by Ju.K. Osipov) presumes that single civil or economic process consists of procedural cycles of law-application, which find their names in the norms of procedural law as appropriate procedures: procedure of case consideration in the court of the first instance; appellation procedure; cassation procedure; procedure in the court of supervising instance; procedure on revision of judicial acts due to newly discovered facts. These cycles, in their turn, are composed of stages closely associated with each other (initiation of the procedure; preparation for consideration; consideration and resolution of the appropriate matter in essence), which correspond with system of consistently performed procedural actions united through independent and final, within the given stage of proceedings, remedial goal[3].

18. Original view on the system of civil process was proposed by V.M. Sherstyuk. On the first, highest, level of the system of procedural relations, he discerns two major stages (sets of interconnected actions): proceeding in the court of the first instance; proceeding

[1] Курс советского гражданского процессуального права: В 2 т. М., 1981. Т. 1. С. 120.

[2] Гражданский процесс: Учеб. / Под ред. М.К. Треушникова. М., 2007.

[3] *Осипов Ю.К.* Элементы и стадии применения норм советского гражданского процессуального права // Проблемы применения норм гражданского процессуального права. Свердловск, 1976. С. 30, 43–44; *Жилин Г.А.* Правосудие по гражданским делам: актуальные вопросы: Монография. М.: Проспект, 2010.

on revision of judicial acts. The criterion for distinguishing them is procedural aim: resolution of the case in essence for the first stage or removal of assumed judicial mistake for the second one[1].

b. For studying of types of legal procedures.

19. P.F. Eliseikin defined the category of «type of civil procedure» as «the procedural order of consideration of a separate category of civil cases; in the basis of such order lie both special aim and a method of performance of tasks on protection of the subjective rights and lawful interests conditioned by a subject of judicial activity and at the same time subordinated to the general rules of civil legal proceedings»[2]. Thus, according to P.F.Eliseikin, the aims of a procedural norms and ways of their achievement should lie at the basis of allocation of types of civil proceedings.

20. However, most authors support common and carefully argued opinion that it is nevertheless necessary to consider «specific features of material legal relations subjected to court» observation and conditioned by them procedural peculiarities of judicial consideration of these cases» (A.A. Melnikov) as a sign for differentiation of procedure types[3]. All types of legal proceedings, both action (adversary), and non-action (inadversary), are directed to achievement of the uniform goal of protection of the right, which has universal value[4].

c. For purposes of studying procedural functions of civil process participants.

21. Participants of civil procedure follow their particular interests which are, as a rule, contradictory. Whole totality of procedural actions, undertaken by certain actor of case consideration in order to achieve his specific interest-conditioned goal, V.N. Scheglov named «procedural function»[5].

22. Developing Scheglov's ideas in the spirit of solidarism, G.A. Zhilin soundly specifies that subjective goals of the participant of disputable material relations should coincide with socially significant aims and tasks, reflected in the norms of a civil procedural law. He understands procedural function of the concrete actor as his activity, which is directed on achievement of aims and purposes of civil legal proceedings and is carried out according to the rights and duties established for the given subject of process by the norms of the civil procedural law[6].

23. The construct of «goal» also matters when we concern expediency of certain procedural actions: whether they really correspond the goal sought. In practical activities of courts, the criterion of expediency frequently has crucial importance at fulfillment of such procedural actions as conjugation and separation of cases, resolution of questions on indemnification of costs on the court representative (because it is necessary to establish, not only a sum rationality, but, whether really the work volume on the case, executed by the

[1] *Шерстюк В.М.* Система советского гражданского процессуального права (вопросы теории). М., 1989. С. 25–27.

[2] *Елисейкин П.Ф.* Судебное установление фактов, имеющих юридическое значение. М., 1973. С. 34.

[3] *Мельников А.А.* Особое производство в советском гражданском процессе. М., 1964. С. 6.

[4] *Жилин Г.А.* Правосудие по гражданским делам: актуальные вопросы: Монография. М.: Проспект, 2010 (§ 3 «Противоречия при отражении целей судопроизводства в современной процессуальной литературе»).

[5] *Щеглов В.Н.* Субъекты судебного гражданского процесса. Томск, 1979. С. 5–17.

[6] *Жилин Г.А.* Цели гражданского судопроизводства и их реализация в суде первой инстанции. М., 2000. С. 55–58.

representative, was necessary, taking into account complexity of process and the remedial result reached by the party).

III. Protection of individual rights and public interest: problem of balance

24. According to the Article 18 of the Constitution of the Russian Federation rights and freedoms of a person and citizen are directly operating. They define sense, maintenance and application of laws, activity of legislative and executive powers, of local government, and are provided with justice. At the same time frequently there are situations when absolutization of an individual right would lead to negative consequences for large groups of citizens. According to the part 3 of the Article 55 of the Constitution, rights and freedoms of a person and a citizen can be limited only by a federal law and only in measure necessary for protection of bases of the constitutional system, morals, health, rights and legitimate interests of other persons, maintenance of defense of the country and safety of the State. Providing balance of private and public rights and interests through laws is an objective for national legislator. However, when a law gets to the sphere of judicial application in connection with concrete matter – the question of true balance in concrete legal situation is transferred to the sphere of civil process. It is interesting to observe certain examples of attempts of finding such balance.

a. Protection of proprietary interests of the State

25. Owing to point 4 of article 93.4 of the Budgetary Code of the Russian Federation, the limitation of actions, established by the civil legislation of the Russian Federation, doesn't extend on the actions of the Russian Federation which arise in connection with granting of budgetary money resources on returnable and compensative basis, including claims on payment of percent and (or) other payments provided by the contract, including claims on superficial enrichment and indemnification. The Article 5 (part 6) of the Federal law from April, 26th, 2007 № 63-FZ establishes, that point 4 of Article 93.4 of the Budgetary Code is applied also to the relations which arose till January, 1st, 2008.

26. Considering a dispute from a long-term leasing contract, which had been concluded between JSC «Rosagrosnab» (the agent of the Government of the Russian Federation in particular questions of agricultural development) and the Voronezh regional association of country (farmer) households «Niva» long before the mentioned provisions were enacted, state arbitration courts of Russia specified that it is not possible to apply the disputed norms to the legal relations that had already been protected by limitation of actions before that provision came into force. They also considered, that the given norms extend only on the budgetary relations, which are not by the nature civil, and don't cover contracts, concerning the budgetary funds, concluded between commercial organizations. Later the Supreme Arbitrational Court initiated a constitutional procedure on these provisions, the decision of the Constitutional Court on the subject is yet to be ruled.

b. Protection of the public morals

27. This issue can be vividly described relying on the meaningful decision of the European Court of Human Rights ruled in the case of *Alekseyev v. Russia* (Judgment of 21.X.2010). Mr. Alekseyev, together with other individuals, was an organizer for a number of marches to draw public attention to discrimination against the gay and lesbian minority in Russia. The decisions of Moscow officials contained refusals to hold these marches on the grounds of protection of public order, health, morals and the rights and freedoms

of others, and of preventing riots. Common courts of Russian Federation, being guided by corresponding positions of the Law on processions and meetings, as well as reasons of morals and public safety, refused to repeal the challenged decisions.

28. Evaluating these considerations, the European Court pointed out that the mere risk of a demonstration creating a disturbance was not sufficient to justify its ban. If every probability of tension and heated exchanges between opposing groups during a demonstration resulted in the demonstration's prohibition, society would be deprived of hearing differing views on questions which offended the sensitivity of the majority opinion, and that ran contrary to the Convention principles. The Russian Government had stated in their submissions to the Court that such events had to be banned as a matter of principle because gay propaganda was incompatible with religious doctrines and public morals, and could harm children and adults who were exposed to it.

29. Estimating how good were the reasons of domestic courts, of Tverskoy district court of Moscow in particular, as well as of other officials in the case of Mr. Alekseyev, we have to admit that the official bodies followed traditional for Russia and Russian doctrinal system ideas on correlation of law and morals. They recognized in particular that homosexuals in Russia aren't exposed to any real discrimination, because Russian legislation does not recognize sexual orientation as a circumstance in any way significant, which might have legal consequences, leaving it completely out of legal sphere, in space of a free choice of an individual. It was also taken into account, that institution of marriage, inaccessibility of which the applicants considered a major discrimination, doesn't lead to such specific legal consequences which cannot be reached by other legal means[1]: gay partners can settle their mutual proprietary rights through a standard civil contract, they can inherit each other's property by means of a last will and testament, they can even adopt children, because according to the Russian law single person is allowed to be foster parent. It was appreciated that legislation provides full set of remedial features accessible for gays so no special changes were required and no real discrimination was confirmed to exist. That is why the demand for carrying out gay parade had been regarded not as struggle against discrimination, but as an attempt to propagandize homosexuality (besides, it is commonly believed, that sufficient social inquiries were made to show that only for a small percent of homosexuals homosexuality is determined by genetic and other medical factors; many choose such orientation because of its socializing effect – under influence of gays in their milieu and of specific subculture[2], and if it is so, it may be subject of propaganda). At the same time such propaganda would enter into contradiction with the moral guidelines existing in a society increasing the threat of public disturbance and acts of violence.

30. As to civil process, Russian legal scholars traditionally, continuing Kant tradition, postulated that law as itself (if it is not substituted for positive law – legislation, which sometimes may not correspond with natural law) is in deep unity with morals, inherently representing justice fixed in the norms of regulatory acts[3]. In this sense all standard positions

[1] For sophisticated arguments on why marriage should only be understood as the conjugal union of husband and wife, in many aspects similar to considerations common for Russian authorities, please see: Sherif Girgis, Robert George, Ryan T. Anderson. *What is Marriage?*, *Harvard Journal of Law and Public Policy*, Vol. 34, No. 1, 2010, p. 245–287.

[2] K. Plummer, *Sexual stigma: an interactive account*, London, 1975.

[3] *Алексеев С.С.* Теория права. М., 1993. С. 70–71.

of a civil procedural law, and not just «axiomatic norms», should embody moral principles, establishing rules of fair legal proceedings. Only under such condition legal proceedings on civil cases can be called «justice» in the original meaning of this concept.

31. N.A. Chechina, allocating «norms-axioms» (or «axiomatic norms») as specific independent group of procedural norms, recognized that they fix estimated formulas of behavior of process subjects from positions of «good and evil», from the point of view of the concept of truth accepted by a society which «as though highlight links between a civil procedural law and morals». Thus, she did a conclusion that «civil procedural axioms are in essence the remedial rules of law directly expressing the substance of morals»[1].

c. Institutional mechanism of public interests protection

32. According to Article 46 of the Russian Constitution, everyone is entitled to apply for judicial protection of his rights and legal interests. An institution traditionally designated for protection of public interests, including those of the State and of «undetermined broad circle of persons», is Public prosecutor's office.

33. Article 45 of the Code of Civil Procedure regulates participation of the public prosecutor in civil cases. The public prosecutor has the right to address court with an action for the purpose of protection of the rights, freedoms and legitimate interests of citizens, an uncertain circle of persons or interests of the Russian Federation, subjects of the Russian Federation, municipal unions. The action stipulating for protection of the rights, freedoms and legitimate interests of the concrete citizen can be brought by the public prosecutor only in cases, when the citizen, because of a poor state of health, age, incapacity and other good reasons, can't address the court by himself. Article 52 of the Code of Arbitration Procedure contains similar provisions, except for possibility of bringing a suit for protecting rights of the certain person.

34. In civil process, unlike state arbitration procedure, the prosecutor, seeking the goal of strengthening obedience before the Law, also participates in cases concerning eviction, restoration at work (in labor relations), compensation of the harm caused to life or health, where he makes an official procedural statement (conclusion), whether the legal acts subjected to court investigation were undertaken by the respondent officials in strict correspondence with legislation.

35. These are two separate procedural forms of prosecutor participation in civil case, however certain problems occur when prosecutor, for example, initiates process on eviction in favor of the municipal union and at the same time participates in the case as «unbiased» provider of the legality, giving the conclusion. In this example two contrary procedural functions coincide and the function of actual procedural plaintiff combines with the function of impartial evaluator of legality, which leads to the breach of the right to fair trial and, in particular, infringes the balance of the procedural rights of the parties. However, the Constitutional Court has done much to deal with the problem, and nowadays that kind of practice is almost eliminated[2]. It is considered that the right of individual occupation, according to Russian housing law, solely does not affect the es-

[1] *Чечина Н.А.* Основные направления развития науки советского гражданского процессуального права. Л., 1987. С. 89–91.

[2] Decisions of the Constitutional Court of the Russian Federation of 20.06.2006 N 165-O and of 20.06.2006 N 176-O (Cases of Ms. Frenkel, evicted as a result of process initiated by the Solntsevsky interdistrict public prosecutor, and of Ms. Abdurakhmanova, legal action on her eviction was brought by the same official).

sence of public right of possession to the extent making prosecutor›s initiative necessary; and public bodies, executing powers in the sphere of public property, should initiate this kind of proceedings, in particular on eviction, by themselves, enabling the prosecutor to perform its primordial task of providing legality.

IV. «Material truth» v. fair trial within a reasonable time

36. In the Soviet system of civil process the principle of material truth was considered an important part of the principle of legality. The construct of «material truth' was fixed in the Article 14 of the Code of Civil procedure of the year 1964, which ran as follows: «The court is obliged, without being limited to the presented materials and explanations, to take all measures provided by the law for all-round, full and objective investigation of the real circumstances of cases and of the rights and duties of the parties». In theory the noted principle was understood as a requirement addressed to courts (in wide – to all of the law practitioners), that their decisions strictly and fully correspond to the objective reality[1]. This legal approach was based on philosophical doctrine of dialectical materialism, which recognized the objective cognoscibility of the events of the past. Most scholars of that time (S.V. Kurylev, M.A. Gurvich, O.V. Ivanov, M.K. Treushnikov), considered the finding of «material truth» main goal of court, stating that it should be found even if it is contradictory to the interests of the parties. The public character of soviet civil process expressed itself in such way and the state of «socialistic legality» was reached. Upon discovering unlawfulness of parties' actions, the court had wide powers for struggle against deviations from legality: special court rulings (imposing on subjects the duty to eliminate certain departures from the provisions of law), rulings obliging the prosecutor to initiate criminal investigation when the court during the trial considers it evident that criminal offence took place, and even the possibility of initiating the criminal procedure by the court itself in cases of impending urgency. Search for the «material truth» was an argument to justify the application of supervisory reports by the highest court' and Prosecutor Office' officials. Subsequently this changed correspondingly to the changes in the policies of the State as well as to the changes of scientific paradigm.

37. Many contemporary jurists appreciate the concept of «formal truth»[2] (Yarkov, Reshetnikova, Murad'yan) understanding the process of judicial cognition as the process of infinite approaching to the truth, the absolute of which is objective but can hardly be reached with usage of limited measures that are at court's disposal. Besides, the concept of «material truth» does not correspond well to the competitive and dispositive nature of modern process. The rule of «reasonable doubt» is fully integrated in law and decisions are considered just if they are substantiated by the existing evidence provided by parties. The limitation of court powers on investigation allows certain procedural economy, shortens the terms of proceedings and is focused on providing effective protection of rights in an appropriate time.

[1] *Алексеев С.С.* Общая теория права. Т. II. М., 1982. С. 321; *Треушников М.К.* Судебные доказательства. М., 1998. С. 9–12.

[2] *Бернам У., Решетникова И.В., Ярков В.В.* Судебная реформа: проблемы гражданской юрисдикции. Екатеринбург, 1996. С. 26.

Richard Marcus[1]

AMERICAN NATIONAL REPORT

I. Introduction

1. Identifying the goals of procedure may be more challenging in some ways in the common law world than in the civil law world because, as is true in many ways, the procedure of the common law world (like its substantive law) evolved organically and without any «founding principles». That does not mean that procedure is less valued in the common law world. To the contrary, for the U.S. «due process» – the ultimate measure of procedure – is enshrined in two places in our Constitution[2].

2. As we shall see, particularly in the American setting, procedure also is measured importantly as it overlaps with or furthers the goals of substantive law; in this sense, one may speak of the overall purpose of civil justice as depending on the effectiveness of compensation and the other features of any civil justice system.

3. As we shall also see, it is possible that widely-recognized purposes of procedure actually conflict with each other in important ways. For example, concerns about efficiency and accuracy may conflict if more costly procedure produces more accuracy. Similarly, to the extent one wants to use procedure to ensure law enforcement, one may downplay the goal of conflict resolution; conflicts may be regarded as desirable opportunities to enforce and articulate the law rather than unfortunate disruptions of social tranquility that should be soothed over.

4. For the common law world, and for the U.S. in particular, there is no simple report on the goals of procedure. Instead, it is necessary to offer a complicated and ambiguous one.

II. The Historical Emergence of the Notion of Purposes of Procedure

5. Although the concept of due process can be found as long ago as Magna Carta (1215), the concept that procedure must be explained or justified in terms of its purposes is of fairly recent origin in the Anglo/American world. Indeed, at first in England, it is said, there was only procedure; in the words of the Englishman Maine, «substantive law has at first the look of being gradually secreted in the interstices of procedure»[3].

6. At first, then, procedure was the dominant feature of the common law. In the words of the American scholar Millar: «Ever do we see that procedure has been the major element, substantive law the minor in the growth of the legal order, and that procedure has been signally procreative of the substantive rule»[4]. But as Millar further explains, over time this relationship changes; «the trend of development diminishes the place of procedure and enlarges that of the substantive law»[5].

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[1] Professor of University of California (USA).

[2] U.S. Const., Amend. V; Amend XIV.

[3] H. Maine, *Early Law and Custom*, London, 1907, at 389.

[4] R. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, New York, 1951, at 4.

[5] Ibidem.

7. In England, this development was markedly furthered by Jeremy Bentham, who applied utilitarianism to procedure (which he called «adjective law») and rejected the notion that it had any inherent value: «the whole of the adjective branch taken together may be said to have two specific ends: the one *positive*, maximizing the execution and effect given to the substantive branch; the other *negative*, minimizing the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end»[1]. This view has been carried forward into the current times in the economic analysis of law by Posner – asserting that ‹objective of a procedural system› is to minimize the sum of the cost of erroneous judicial decisions and the cost of operating the procedural system[2]. The U.S. Supreme Court has adopted a variant of this approach for the constitutional due process requirement[3].

III. Choosing basic goals – conflict resolution v. policy implementation

8. Assuming one has recognized procedure as «adjective law», which seeks to implement something else (substantive law), one is left to focus on whether it does that job effectively. But it turns out there is considerable room to debate what should be the goal of private civil adjudication, and that the resolution of this question is central to our inquiry. Prof. Damaska introduced that notion a generation ago by positing a difference between what he called the «reactive state» and the «activist state»[4].

9. The easy first answer is the goal of civil adjudication is conflict resolution – the focus of the «reactive state». At a very basic level, the State seeks to provide an alternative to self help, both to maintain the peace and because the State›s alternative implements the substantive legal principles the State has adopted. So unduly high costs of using formal procedure would deter people from using the courts, perhaps sufficiently so that they would turn to self help instead, for self help is not subject to the limitations of due process[5].

10. But this conclusion has been challenged, particularly regarding alternative dispute resolution. Most famously, in «Against Settlement» Prof. Fiss objected that «[t]he dispute-resolution story makes settlement appear as a perfect substitute for judgment ... by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes»[6].

11. Judge Edwards (a former law school professor) reacted to this debate by emphasizing that ‹[a]n oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values,› adding that ‹there are some disputes that cannot be resolved simply by mutual agreement and good faith. It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to «understand» each other. Indeed, many

[1] J. Bentham, *Principles of Judicial Procedure*, London, 1843, at 8.

[2] See R. Posner, *Economic Analysis of Law*, 3d ed., Boston, 1986, at § 21.1.

[3] See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[4] M. Damaska, *The Faces of Justice and State Authority*, New Haven & London, 1986, chp. III.

[5] See, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), holding that no due process protections applied to restrict sale of former tenant's possessions for failure to pay storage fees even though the possessions had been taken by the City Marshall in an eviction because the action of the storage company was not «state action.»

[6] O. Fiss, *Against Settlement*, *Yale Law Journal*, 1984, vol. 93, at 1073, 1085. For a critique of Fiss's argument, see S. Issacharoff & R. Klonoff, *The Public Value of Settlement*, *Fordham Law Review*, 2009, vol. 78, at 1177.

disputants understand their opponents all too well. ... One essential function of law is to reflect the public resolution of such irreconcilable differences›[1].

12. Similarly, Professor Brunet observed: ‹The output of conventional litigation should be viewed as a public good – society gains more from litigation than would be produced were litigation left in the private market. ... Litigation guides third parties. Litigation results in written opinions that apply necessarily vague positive law to concrete fact situations. Those opinions are expository – they refine and elaborate ambiguous norms›[2]. This view is particularly applicable, of course, to a common law system in which court decisions are ‹the law› to a degree that is not usually true in a civil law system.

13. The same dividing line that influences enthusiasm for alternative dispute resolution also affects the content of procedural rules. In the 1970s, Prof. Scott explored these notions in his essay *Two Models of the Civil Process*[3]. He posited a «conflict resolution model» and a «behavior modification model.» The former would be concerned only with providing an alternative to retaliation or forcible self-help, and therefore would be strongly inclined to leave unremedied ‹wrongs› that would not excite retaliation. The latter, on the other hand, would expect civil litigation to serve as a way of altering behavior by imposing the costs of harmful activity on the wrongdoer. That orientation might focus most forcefully on the very instances in which the injured parties would be least likely to take action because their injury is trifling and the cost of taking action is large in comparison.

14. That division could affect the design of the class action, for example, as Prof. Scott illustrated[4]. One who favored the conflict resolution model would shy away from the consumer class action, for that would stir up litigation where none would occur. That seemed to be the attitude of the U.S. Supreme Court in holding that in class actions all class members must be individually identified and provided a chance to opt out even though each one would have little at stake, and that an aggregate recovery for the harm done would not be allowed[5]. But under the behavior modification view, one should favor creative use of the class action, as the California Supreme Court did in upholding its use for unidentifiable taxicab customers who were overcharged, permitting the court to order the taxi company to charge unduly low prices to future customers to take away its illegal profits from prior victims[6]. Those examples show that, even in the U.S., different choices about basic orientation can be made. They thus mirror debates now ongoing in Europe about how to handle representative litigation in those countries.[7]

IV. The American exceptionalism addition – private enforcement of public norms

15. The basic question about general orientation toward conflict resolution or behavior modification relates to a different question about procedural design – who does the enforcing?

[1] H. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, *Harvard Law Review*, 1986, vol. 99, at 668, 676–677.

[2] E. Brunet, *Questioning the Quality of Alternative Dispute Resolution*, *Tulane Law Review*, 1987, vol. 62, a 1, 19–20.

[3] K. Scott, *Two Models of the Civil Process, Stanford Law Review*, 1975, vol. 27, at 937.

[4] Ibid., at 940–945.

[5] See ibid., at 942–944, discussing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

[6] See ibid., at 940–942, discussing *Daar v. Yellow Cab Co*., 433 P.2d 732 (Cal. 1967).

[7] See generally C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford and Portland, Ore., 2008.

16. As Prof. Scott also observed, one oriented toward the behavior modification model had to decide who should initiate the process: «The creation of an administrative agency charged with the duty of enforcing the legal rules in these situations is one solution that has been tried. But a statutory instruction is not the same as an incentive for efficient enforcement»[1].

17. For most of the rest of the world, we Americans are informed, the administrative enforcement model is the favored method of achieving policy enforcement or behavior modification, and conflict resolution is the goal of private civil litigation. Of course, administrative enforcement is possible in the American legal system; as the Supreme Court recognized long ago in holding that a private employment discrimination class action could not go forward, the federal Equal Employment Opportunity Commission (EEOC) does not have to satisfy the same requirements to obtain classwide relief as a private plaintiff seeking certification of a class action[2]. The reality seems to have been, however, that such governmental enforcement has often not been sufficient to do the job. One looking for evidence of that shortfall of enforcement need only consider the multitude of reports that enforcement of securities laws in the period leading up to the 2008 financial crash was unduly lax, and the more recent reports that the federal Securities and Exchange Commission and other enforcement agencies are not funded sufficiently to do the job.

18. As Prof. Kagan has noted, this administrative shortfall responds to an American suspicion of intrusive government[3]. He explains that people in the U.S., as in other post-industrial states, want aggressive protection from government, but they do not want the sort of big or intrusive government that would be necessary to provide that enforcement administratively. In these circumstances, the American reliance on private litigation can serve as a good substitute for having government seek to enforce the law, including even those protections included only in administrative regulations and not in statutes.

19. On occasion, Congress may explicitly authorize such suits. The Clayton Act, for example, explicitly authorizes those harmed by violation of the federal antitrust laws to sue for ‹treble damages› – three times their actual losses, and also guarantees that they can recover their attorneys› fees if successful[4]. But it is surely not necessary for the legislature to authorize such private enforcement to permit it in the American scheme. The very heart of the common law system contemplates that the courts themselves will develop and enforce – via private litigation – the sorts of legal protections that are ordinarily adopted by legislative or administrative action in other legal systems. In the U.S., for example, the development of product liability law after World War II was almost entirely done by courts, and those product liability suits were intended to exert a decisive influence on industry. We are certainly told that they have; it is accepted Chamber of Commerce dogma that the risk of product liability suits weighs heavily on manufacturers.

20. Even when there has been legislative or administrative action, it may be the courts that take the step and authorize private enforcement that the legislature did not enact. The most famous American example is probably securities fraud suit, which is not based

[1] Scott, *Two Models of the Civil Process,* at 939.

[2] *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). The case held that plaintiff could not justify a class action under Fed. R. Civ. P. 23. The Court contrasted the situation of a private plaintiff with that of the EEOC, which has general enforcement power and 'may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23.'

[3] See R. Kagan, *Adversarial Legalism: The American Way of Law*, Cambridge, Mass., and London, 2001.

[4] 15 U.S.C. §15.

on any Congressional authorization of private suits. To the contrary, Congress created the Securities and Exchange Commission, which in turn promulgated Rule 10b-5 forbidding fraud in connection with securities suits. The SEC was authorized to enforce that antifraud provision, but after a time the courts concluded that it was not doing a vigorous enough job. In 1947 a district court therefore accepted a plaintiff›s invitation to ‹imply› a private cause of action for securities fraud in violation of Rule 10b-5, and in 1964 the Supreme Court endorsed this judicial invention[1].

21. Not until 1995 did Congress implicitly endorse this judicial invention, and then it did so in a backhanded way by adopting the Private Securities Litigation Reform Act, which was designed to curb these suits, in part by imposing stringent pleading requirements and forbidding discovery pending denial of a motion to dismiss for failure to satisfy the pleading requirements. Yet when the Supreme Court first interpreted these new pleading requirements, the first line of its opinion said: ‹This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission›[2]. So even Congress›s efforts to curtail private securities fraud suits would be interpreted in a way designed to further the Court›s – not Congress›s – determination that these private enforcement actions are necessary.

22. Congress does take the lead on this point fairly often, however. As noted above, a century ago it authorized a private suit to enforce the antitrust laws. More recently, it has become much more active in authorizing similar regimes to enforce a variety of new enactments. The model for most of those was Title VII of the Civil Rights Act of 1964, the federal statute forbidding discrimination in employment. As extensively chronicled in Prof. Fahrang›s 2010 book *The Litigation State*[3], there was a vigorous dispute in the U.S. Senate about how enforcement of these antidiscrimination provisions should be handled. The ‹liberal› proponents of broad enforcement favored giving the main enforcement authority to the EEOC. But they did not have enough votes to pass the measure, and needed to compromise with the Senate Republicans, who were responsive to business concerns that the EEOC would be full of zealots who would enforce the Act too vigorously. At the Republicans› insistence, therefore, primary enforcement authority relies on those who claim to be victims of discrimination; they can sue, and recover attorneys› fees if they prevail.

23. As Prof. Fahrang points out on the first sentences of his book, private enforcement has flourished: ‹Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts. Over the past decade or so, the annual number of such lawsuits averaged about 20,000. Two percent of these job discrimination suits were prosecuted by the federal government, while 98 percent were litigated by private parties'[4]. Meanwhile, Congress repeatedly used the Title VII model during the quarter century after 1964 to create similar private enforcement regimes in a wide variety of other antidiscrimination, consumer protection, and other measures[5].

[1] See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[2] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

[3] S. Farhang, *The Litigation State,* Princeton and Oxford, 2010.

[4] Ibid., at 3.

[5] See ibid., ch. 5.

24. Like most civil law systems, most common law systems do not subscribe to this exceptional American arrangement. In the next section, I will address the procedural ramifications of this American choice, but I pause to note that other common law countries, particularly England, do not have a separation of powers arrangement and do rely much more heavily on governmental actors to enforce legislation. But this may be changing in the EC. Prof. Keleman argues in his 2011 book *Eurolegalism* that for a variety of reasons the EC is gradually gravitating toward a variant of the adversarial legalism identified as American by Prof. Kagan[1]. Although the EC now relies on national judiciaries for enforcement, further integration along with this trend toward adversarial legalism may produce pressure to adapt procedure to effectuate enforcement through private litigation.

V. The implications of embracing private enforcement – implementing American exceptionalism

25. The more one conceives of private litigation as furthering a public enforcement purpose, the more one may be tempted to provide incentives to pursue it, and the more one may be inclined to equip those who do pursue litigation with the tools they will need to succeed. Thus, the goals of civil litigation largely explain American exceptionalism. If the final comment in the previous section is justified, moreover, it may predict ways in which pressures in the EC could emerge to promote similar provisions there in order to achieve similar objectives[2].

26. One major feature of American litigation is that the stakes are higher. In part, that is due to the reliance (at least in theory) on juries – the ultimate private enforcement device, in a way. In another way, it is due to the prospect of large recoveries in many cases for pain and suffering and perhaps also for punitive damages. In yet another way, it is due to the American Rule that each side must bear its attorneys› fees, win or lose. That rule – which some in this country call the «only in America» rule – flows from the goal of facilitating private enforcement by protecting those who file lawsuits against ruinous liability if they lose.

27. But for our purposes, the more salient aspect is the magnetic force of private enforcement on relaxing burdens on plaintiffs. The relaxed «notice pleading» requirements seemed designed to facilitate the commencement of suits. Although the American system expected that those who sue would first investigate and sue only if they had a legitimate basis[3], the American version is notably less exacting than that used in the rest of the world[4]. Indeed, at least until recently the American formulation seemed almost to forbid dismissal on the pleadings.

[1] R.D. Keleman, *Eurolegalism*, Cambridge, Mass., and London, 2011, ch. 1.

[2] For an argument along these lines, see K-C Huang, *Introducing Discovery into Civil Law*, Durham, 2003. Huang argues that civil law systems should adopt American-style discovery and a preponderance-of-evidence burden of proof like the American one in order to foster law-enforcement by litigation.

[3] See Fed. R. Civ. P. 11(b)(3) (requiring that factual contentions have evidentiary support, or be likely to have such support after discovery).

[4] Compare Rule 12, of the proposed Transnational Rules of Civil Procedure, ALI/UNIDROIT, Principles of Transnational Civil Procedure (Cambridge, New York, Madrid, Cape Town, Singapore, São Paolo, 2006) at 111, requiring that plaintiff state the facts and describe the evidence supporting the claim. Surely the actual pleading requirements vary from country to country, but the Principles› adamant rejection of ‹notice pleading› strongly shows that there is a stark division between the U.S. model and the approach of the rest of the world.

27. More strikingly from the perspective of the rest of the world, the U.S. permits plaintiffs (and defendants) strikingly broad discovery. As Prof. Hazard has observed, in the U.S., ‹[b]road discovery is thus not a mere procedural rule. Rather it has become, at least in our era, a procedural institution perhaps of virtually constitutional foundation›[1]. As Dean Carrington has explained, this attitude connects directly to the American election to rely on private enforcement: ‹We should keep clearly in mind that discovery is the American alternative to the administrative state. ... Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy›[2]. In order to enable them to do that work, discovery is broad gauged. ‹Unless corresponding new powers are conferred on public officers›, Carrington adds, in America ‹constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct›[3].

28. The constitutional status of the right to jury trial also fits into this picture. Adjudicating cases using ‹reasonableness› standards depends not on a professional judiciary, but instead on a lay jury. And because there is a right to a jury trial, the judge cannot ‹take the case from the jury› except in extraordinary circumstances.

29. None of these aspects of American procedure is intrinsically a feature of common law, as opposed to civil law, systems. In England, for example, Prof. Zuckerman explains that ‹[j]ury trial declined [in the 19th century] because it was not being asked for›[4]. The American political commitment to the jury trial remains vibrant, even though the civil jury trial is becoming increasingly rare. More generally, as we can see, American exceptionalism depends largely on its embrace of the private enforcement goal.

VI. «Easy» problems contrasted – other issues that preoccupy proceduralists

30. Much therefore flows from the choice of goals for a civil justice system, as already shown. But for many other things, there is no need to tarry long in terms of procedural design. For example, cost and delay are perennial concerns of proceduralists. But nobody is in favor of magnifying either as a matter of procedural design. Similarly, everyone is in favor of accuracy and efficiency, but these concepts need to be measured against one another. Recently in the common law world the notion of «proportionality» has gained a considerable following. It makes abundant sense – the expenditure on litigation should be reasonable in light of the stakes. That notion was installed in the American discovery rules more than 25 years ago[5]. Prof. Andrews tells us that Lord Woolf›s reforms made proportionality a ‹pillar› of modern English procedure[6]. And Prof. Piche has recently explored the vigorous adoption of proportionality in Quebec[7]. But the much higher stakes of American litigation make much higher costs ‹proportional› in that litigation.

[1] G. Hazard, *From Whom No Secrets Are Kept*, *Texas Law Review*, 1998, vol. 76, at 1665, 1694.

[2] P. Carrington, *Renovating Discovery*, *Alabama Law Review*, 1997, vol. 49, at 51, 54.

[3] Ibidem.

[4] A. Zuckerman, *Civil Procedure*, London, 2003, at 357 n.15.

[5] See, e.g., Fed. R. Civ. P. 26(b)(2)(C) (directing the court to curtail disproportional discovery).

[6] N. Andrews, *English Civil Procedure*, Oxford and New York, 2003, at §§ 2.25–2.39.

[7] See C. Piche, *Figures, Spaces and Procedural Proportionality, paper for XIV Congress*, *Intern. Ass'n on Proc. Law*, Heidelberg, Germany, July 28, 2011.

32. The challenge with these ‹easy› principles is not so much one of determining whether they fit in with the goals of civil justice as with determining how given principles apply to specific cases. In the background lies the specter that haunts the American system – that the financial cost and other burdens of civil litigation will subvert the rights of the parties. This concern is raised most often from the defense side, relying on assertions that the cost of broad American discovery forces defendants to settle meritless cases because settling is cheaper than litigating successfully. Many suggest that a loser pays rule would go far toward rectifying this situation, but that cuts against the American reliance on private enforcement; the fact that a plaintiff does not ordinarily risk paying for defendant›s lawyer makes the American contingency fee system work. But is important to appreciate that frustrating the merits due to cost afflicts prospective plaintiffs also, for the American Rule means they have to find a lawyer who will take their case for a share of the (contingent) recovery; regularly today we are told that it is too costly to litigate a claim for less than $ 100,000 in the American federal courts. For *all* categories of litigants, there is an argument that the procedures justified by the private-enforcement goal must be tempered to avoid defeating that goal.

VII. Concluding observations

33. It turns out that much flows from the choice of goals of civil litigation, but that at least the American litigation system does not consistently exhibit the features one might expect from its reliance on private enforcement. As section III above shows, American courts do not always fashion their procedural rules – such as the handling of the class action – in a way that reflects the system's seeming choice about the purposes of procedure. Perhaps that is because, as section II points out, thinking about goals arose long after the procedures involved – and the general concept of 'due process' – were adopted. Sometimes, then, goals may be more an afterthought and rationalization than a motive force.

34. But for the future, it is likely that goals will loom large in fashioning procedural rules. And the basic choice between 'private' dispute resolution and 'public' law enforcement seems central to that process. The American rhetoric and reality still favor the law-enforcement orientation. But that seems not to be inherently a common law or civil law feature, and not to be similarly true of other countries on either side of the divide. Perhaps the most interesting prospect, therefore, is the one suggested at the end of section IV – that the EC may adopt a private enforcement orientation also.

SESSION 3. CIVIL PROCEDURAL SYSTEMS: PRO AND CONTRA

General Reporter –
Prof. **Dmitry Maleshin**, IAPL Council member, Moscow State Lomonosov University Law Faculty, Russia.

What kind of civil procedural systems exist in the contemporary world? Is it still important and does it makes any sense to distinguish opposite procedural systems? Could we propose any other classification than civil law vs. common law? Do we have any new criteria? What is the role of legal culture in the contemporary civil procedure?

National Reporters:
- Australian National Report: Prof. **David Bamford**, Flinders University, Australia
- Brazilian National Report: Prof. **Teresa Arruda Alvim Wambier**, Catholic University of São Paolo, Brazilia
- Chinese National Report: Prof. **Margaret Woo**, Northeastern University School of Law, USA
- Italian Report: Prof. **Chiara Besso**, University of Turin, Italy
- Hungarian National Report: Prof. **Viktoria Harsagi**, Pazmany Peter Catholic University, Hungary
- Romanian National Report: Dr. **Serban Vacarelu**, Maastricht University, Romania
- South African National Report: Prof. **Daniel van Loggerenberg**, Prof. **Andre Boraine**, University of Pretoria, South Africa
- Turkish National Report: Dr. **Murat Ozsunay**, Ozsunay law office, Turkey
- American National Report: Prof. **Jeffrey Thomas**, University of Missouri – Kansas City School of Law, USA

Dmitry Maleshin[1]

GENERAL REPORT

1. Introduction
2. Classifications overview
3. Culture as the main criteria for classification of procedural systems

[1] Associate Professor of Moscow State Lomonosov University Law Faculty (Russia).

4. National Examples (Reports illustrations)[1]
5. Classification: collectivistic and individualistic civil procedural systems

1. Introduction

Classification of civil procedural systems is like the question, «To be or not to be?» This subject has been one of the crucial questions of civil procedural doctrine in the 19th and 20th centuries. Is it as crucial in 21st century as it was before?

Several events have occurred at the turn of the century, that have affected legislation as well as doctrine. They have occurred not only in the field of law, but also in other spheres: economics and culture, in the context of integration and globalization. This process affected different legal branches aside from civil procedural law: first, it affected legislation, the English Woolf reform serving as a good example; and second, it affected doctrine, as seen by the European soft slide towards several common law constructions. Dramatic legal changes in post-Soviet countries are good illustrations of this process as well.

We can ascertain many facts and find proof that legal systems are beginning to become closer to each other. Common law is more attractive for business, while civil law is more practiced in international relations. In this situation many scholars state that currently previous procedural diversity no longer exists. They argue that we can find more similarities than differences.

At the same time I would like to prove that cultural diversity is continuing to be one of the most crucial factors that differentiates one procedural system from another. There are still some differences between them. They are not the same that they were in the 19th century, but they still exist. What are they? My main idea is that presently the frontier is lying not in the field of legislation or doctrine but instead mainly in the area of practice and legal culture and what we call the spirit of law.

Therefore we should remember how systems are usually sorted, what their main features are, and how culture affects them. I propose that the National reporters should reveal their national systems and answer the following questions:

– How systems could be sorted in the contemporary world, and what is the criteria for their classification? Could legal culture be one of them?

– What system is your national civil procedure related to and why?

– What are the main features of your national civil procedure? Do you have any unique features that don't exist in neither civil nor common law, but just in your country alone?

– Does culture influence civil procedure in your country? How does it reflect in the legislation?

[1] Based upon the following National reports, for which the author is grateful:
- Australia: Prof. David Bamford, Flinders University, Australia
- Brazil: Prof. Teresa Arruda Alvim Wambier, Pontifícia Universidade Católica de São Paulo, Brazil
- China: Prof. Margaret Woo, Northeastern University, USA
- Hungary: Prof. Viktoria Harsagi, Pazmany Peter Catholic University, Hungary.
- Italy: Prof. Chiara Besso, University of Torino, Italy.
- Romania: Dr. Serban Vacarelu, Romania
- South Africa: Prof. Andre Boraine, Prof. Daniel Van Loggerenberg, University of Pretoria, South Africa
- Turkey: Dr. Murat R. Ozsunay, Oszunay law office, Turkey
- USA: Prof. Jeffrey Thomas, University of Missouri – Kansas City School of Law, USA

2. Classifications overview

The classical point of view proposes two different systems: civil law and common law[1]. Some decades ago we could distinguish socialist law[2], but in its pure sense it doesn't exist anymore. Moreover there is a notion that it never existed as a separate legal system and has always been a member of a civil law family[3]. Some authors add Islamic[4] customary, religious and other legal system. In 1929 a map of the world's law with sixteen different legal systems was proposed![5]

We accept the notion that all legal systems are derived from common law or civil law.[6] There are also mixed jurisdiction. They have some characteristics. First, they should be built upon dual foundations of common-law and civil-law materials. Second, a mixture should rely on most of the basic elements. An occasional transplant from another tradition will not create a mixed jurisdiction. Third, the structure of a mixture has a specificity: private law is created on the basis of civil law and tradition and public law – on common law tradition[7].

Civil law refers to legal systems whose development was influenced by Roman law. They are codified systems. By contrast, common law is based on case law, which relies on precedents. They differ from each other by concepts, substance, structure, vocabulary, methods of legal reasoning, legal education, etc.

The area of civil procedure has also traditionally been divided into civil and common law procedural systems[8]. While the distinction between the two systems is not as strong today as in previous centuries[9], it still exists along with the controversial features that are associated with each other. Under the first system the two adversaries take charge of most procedural action; under the second, officials perform most activities[10].

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[1] J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1985), p. 1; E. Washburn, *The Relation of the Civil to the Common Law*, *The American Law Register*, 1873, vol. 21, no. 11, p. 673–681; R.W. Lee, *The Civil Law and the Common Law: A World Survey*, *Michigan Law Review Association*, 1915, vol. 14, no. 2, P. 89–101; P.J. Hamilton, *The Civil Law and the Common Law*, *Harvard Law Review*, 1922, vol. 36, no. 2, p. 180–192.

[2] A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three leading Systems of the World, Three Kinds of Legal Thought,* in C. Varga (ed.), *Comparative Legal Cultures,* New York, 1992, p. 83–97.

[3] J. Quigley, *Socialist Law and the Civil Law Tradition*, 37 *American Journal of Comparative Law* (1989), p. 781–808.

[4] S. Vago, *Law and Society*, New Jersey, 2003, p. 12–18.

[5] J.H. Wigmore, *A Map of the World's Law*, 19 *Geographical Review*, 1929, no. 1, p. 114; F.P.W., *The Legal Systems of the World,* 13 *Journal of Comparative Legislation and International Law* (1931), no. 4, p. 311.

[6] See, e.g., A.T. Von Mehren, J.R. Gordley, *The Civil Law System. An Introduction to the Comparative Study of Law,* Boston, Toronto, 1977, p. 3.

[7] V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family*, Cambridge, (2001), P. 7–10.

[8] See, e.g. O.G. Chase, H. Hershkoff (eds.), *Civil Litigation in Comparative Context* (2007), p. 3.

[9] H. Jacob, *Courts, Law and Politics in Comparative Perspective* (1996), p. 4.

[10] See, e.g., O.G. Chase, *American «Exceptionalism» and Comparative Procedure*, 50 *American Journal of Comparative Law* (2002), p. 281–282; The New Encyclopaedia Britannica, 15th ed., vol. 7, Chicago, 1994, p. 921; G.C. Hazard, *From Whom No Secrets Are Hid*, 76 *Texas Law Review* (1998), p. 1672–1674; J.I.H. Jacob, *The Fabric of English Civil Justice,* London, 1987, p. 7; J.I.H. Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure,* London, 1982, p. 24; D. Epstein (ed.), J.L. Snyder, C.S. Baldwin, *International Litigation: A Guide to Jurisdiction, Practice and Strategy,* 2002, p. 3/6–3/8; J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems,* The Hague, London, Boston, 1998, p. 2.

The main attributes of the classic common law procedural system are: 1) civil juries; 2) pre-trial conferences; 3) party-controlled, pre-trial investigations; 4) trials designed as «concentrated courtroom dramas that provide a continuous show»; 5) passive judges; 6) class actions; and 7) party-selected and paid experts.[1]

On the other hand, the main attributes of the civil law procedural system are: 1) the absence of civil juries; 2) a lack of distinction between the pre-trial and trial phases; 3) active judges; 4) judicial proof-taking and fact-gathering; 5) judicial examination of witnesses; and 6) court-selected experts.[2]

There are also some mixed jurisdictions in the area of civil procedure, including, for example, the Japanese'[3], Chinese'[4], and Philipino[5] systems.

Presently, I think that such classifications are not sufficient because they use legislation as the main criteria.

3. Culture as the main criterion for classification of procedural systems

Most of you, I think, could accept my view that civil procedural legislation in different countries begins to be very similar. That's why I think it is not a good criteria for classification anymore. Good examples are Japan as well as some other countries in East Asia. Legislation there takes its roots in the German Code of Civil Procedure of 1877. But if we are considering practice in Germany and Japan, we should also state that there are two different systems. We can't even compare them even though legislation is very similar.

What is the reason? From my point of view, the main reason is the legal culture. It differs in Germany and Japan. That's why practice is different too. Culture influences the process of law enforcement, and as a result we have different civil procedural systems. At the same time, in most classical works Japan belongs to the civil law system, but as we have ascertained the differences in legal culture, and it is not correct.

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[1] See, e.g., G.C. Hazard, M. Taruffo, *American Civil Procedure. An Introduction* (1993), p. 5, 19–22, 86–104; F. James, G.C. Hazard, J. Leubsdorf, *Civil Procedure* (1992), p. 4–10; J.A. Jolowicz, *On Civil Procedure* (2000), p. 175–182; G. Watson, *From an Adversarial to a Managed System of Litigation: A Comparative Critique of Lord Woolf's Interim Report,* in R. Smith (ed.), *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (1996), p. 65.

[2] See, e.g., J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1985), p. 111–123; J. Langbein, *The German Advantage in Civil Procedure*, 52 *University of Chicago Law Review* (1985), P. 824, 826, 835; H. Kotz, *Civil Justice Systems in Europe and the United States*, 13:61 *Duke Journal of Comparative and International Law* (2003), p. 66, 68; C. Elliott, C. Vernon, *French Legal System* (2000), p. 129.

[3] See Y. Taniguchi, *The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?,* 45 *The American Journal of Comparative Law* (1997), p. 767–791; H. Matsumoto, *The Reception and Transmission of the Law of Civil Procedure in Japan – The Experience in Japan,* in M. Deguchi, M. Storme (eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society. Legislative and Legal Educational Assistance to Other Countries in Procedural Law,* Antwerpen, 2008, p. 142–143.

[4] M.Y.K. Woo, Y. Wang, *Civil Justice in China: An Emperical Study of Courts in Three Provinces*, 53 *The American Journal of Comparative Law* (2005), p. 911.

[5] E.A. Tan, *Special Features of Comparative Procedural Law in the Philippines*, 3 *Zeitschrift fur Zivilprozeb International* (1998), p. 424–425.

The link between culture and civil procedure is the following: culture – legal culture – practice – civil procedural system. Law is a form of social control[1], but it is not the only one. There are some other nonlegal and informal mechanisms of social control. There is a widespread notion that the law is more effective in the societies with complex social structure. Following this point of view, we can make the interference that law is only ineffective in the «non-civilized» societies. In reality in some societies, law is not as effective as other mechanism of social control. Some mechanisms of social control, such as shaming or open disapproval, could be more effective. For example, in Japan and other countries of Asia, law is less effective in social regulation than nonlegal mechanisms. Nevertheless these countries can't be treated as «non-civilized», they are ones of the world's most industrialized nations. Their systems of nonlegal social control discourage antisocial conduct more effectively than any legal system. Sometimes the legal conquest was the best way to destroy the power of the previous elites[2].

The problem is that some societies are more adapted for legal regulation than others. From my point of view, contemporary law as a form of social control has been created in the political, economical and social circumstances of European culture. Due to the historical expansion of Western civilization (based on the technological advantages) it was widespread all over the world. It is necessary to note that the reception of law as a form of social control wasn't voluntary in most cases. It was enacted with external force like in most cases of common law reception[3] or with internal adaption by the «civilized» governor of continental law.

In such societies legal regulation is treated by the majority of their members as an alien element of social control[4]. The majority of the members tend merely to acknowledge the existence of legal regulation, trying as long as possible to avoid any contact with the legal system. It is better for them not to be involved at all in the legal process whether one is guilty or innocent. It implies the degree of fear and even lack of confidence which these people have for legal regulation.

It is obvious in these circumstances that law as a form of social control is more effective in the societies where it was created than in those where it was implanted as an alien element. Nevertheless, in the modern period, law is widespread all over the world as the main mechanism of social control. In some countries it is effective, in others – not. Law should reflect the social, economic, and political climate of the society. Law of one society differs from that of another by legal culture[5].

In Western societies it is assumed that legal behavior is the measure of moral behavior. The subject is different in collectivistic societies. There is a very big gap between the law and reality in many collectivistic societies. Japan is a good example of a collectivistic society. The Japanese tradition of emphasizing the ascendency of the group interest over the individual interests of its members takes its root from the

[1] R. Pound, *An Introduction to the Philosophy of Law*, New Haven, 1925; S. Vago*, Law and Society,* New Jersey, 2003, p. 4, 19; H. Cairns, *The Theory of Legal Science*, New York, 1941, p. 22.

[2] L.M. Friedman, *Legal Culture and Social Development*, 4 *Law and Society Review* (1969), p. 43.

[3] See, e.g., J.M. Purdy, *Common Law and Colonized Peoples*, Aldershot, 1997.

[4] See O. Oloruntimehin, *The Status of Informal Social Control and Dispute Resolution – An Analysis of African Societies,* in L. Sebba (ed.), *Social Control and Justice,* Jerusalem, 1996, p. 332–342.

[5] S. Vago, *Law and Society*, New Jersey, 2003, p. 3.

Confucian thought. The primacy of group interests is one of the most important pillars of Japanese society[1].

Dispute resolution is a reflection of the culture in which it is embedded[2]; it reflects and expresses its metaphysics, values[3], psychological imperatives, histories, economics, and political and social organization[4]. Western society is litigation-oriented. In contrast, traditional and collectivistic societies don't use formal dispute resolution. They prefer conciliation or mediation by moral or divine authority.

In Japan, the rates of litigation and adjudication are extremely low. The main reason for this is the desire to minimize the use of law[5]. The total number of judges has not increased since 1890, so that now there is only one judge for every 60,000 persons, compared to one for every 22,000 in 1890. Disputes are generally settled out of courts. Japanese prefer conciliation and mediation, which agree with Confucian thought. Reputation is one of the mechanisms of social control. To lose face in Japan is to lose trust and cooperation and to invite ostracism – a personal and social disaster comparable to imprisonment in Western societies[6]. Litigation divides the parties definitively into winner and loser; in contrast, conciliation teaches both parties their duties in order to restore harmony between them. For these reasons, litigation is not popular in Japan.

4. National Examples (Reports illustrations)

Japan and Germany are just two of the examples. There are many others that also demonstrate the role of legal culture. Most of the national reports of our session give us concrete facts and examples.

Similar to Japan is the situation in China. Three philosophical traditions affect the legal regulation in China: the Confucian, the Legalist, and the Buddhist[7]. According to Confucian ethics, disputes should be settled privately, involving third parties. If the disputants do bring their problem to court, the assumption is that both of them are being stubborn, uncompromising people who are unable to sacrifice their personal interests for the peace of the community. Therefore judicial proceedings are unpleasant for most people, and they try to avoid them[8]. Moreover in China until the end of the nineteenth century, the term «rule of law» had a negative connotation[9].

Prof. Woo from Boston University (USA) in her report concerning the Chinese perspective writes that recent governmental reforms have the goal to stabilize society and are

[1] C. Kim, C.M. Lawson, *The Law of the Subtle Mind: the Traditional Japanese Conception of Law,* in C. Varga (ed.), *Comparative Legal Cultures*, New York, 1992, p. 282.

[2] O.G. Chase, *Law, Culture, and Ritual. Disputing Systems in Cross-Cultural Context*, New York, 2005, p. 2.

[3] O.G. Chase, *American «Exceptionalism» and Comparative Procedure*, 50 *American Journal of Comparative Law* (2002), p. 278.

[4] W.L.F. Felstiner*, Influences of Social Organization on Dispute Processing*, 9 *Law and Society Review* (1974), p. 63.

[5] C. Kim, C.M. Lawson, *The Law of the Subtle Mind: the Traditional Japanese Conception of Law,* in C. Varga (ed.), *Comparative Legal Cultures*, New York, 1992, p. 275, 290–294.

[6] D. Black, *Sociological Justice*, New York, Oxford, 1989, p. 85.

[7] L.T. Lee, W.W. Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, in C. Varga (ed.), *Comperative Legal Cultures,* New York, 1992, p. 225–247.

[8] D.H. Bracey, *Exploring Law and Culture*, Long Grove, 2006, p. 35.

[9] Ibidem.

based on the ideas of «using mediation whenever possible, using adjudication whenever appropriate, [and] combining mediation with adjudication,» because the courts are unable to constrain social discord[1].

In African societies 60% of all disputes are settled through informal means such as third party mediation by members of the family, friends, neighbors, ward heads, chiefs, etc.[2] There are different reasons for this. First, they are scared of the legal process and try to avoid it. Second, the legal process is too time-consuming. Third, they have no confidence in the legal system. In some counties dualistic system exists. Native ethnic groups settle disputes through the use of customs, which differ from the law applied at the center[3].

Prof. Loggerenberg and Prof. Boraine from the University of Pretoria (South Africa) state in their National Report that South African civil procedure is mainly of common law origin. At the same time, there is an influence of the culture, which is reflected in the constant pressure to change in order to meet the changing needs of society[4].

Culture plays a crucial role not only in Asia and Africa, but also in other parts of the world. Eastern Europe, for example.

Dr. Harsagi from Pazmany Peter Catholic University (Hungary), in her National report, states that Hungarian civil procedure has to do with a strange multi-layer culture and, through it legal culture, which is born on the border of legal cultures; is based on the civil law system, and more specifically, on German-Austrian civil procedural law, which still bears on it some marks of the socialist heritage[5].

Dr. Vacarelu from Romania writes in his National Report that there is little doubt that Romania belongs to the civil law system, and it developed its body of laws primarily by French import[6]. As for the culture, he thinks that the connection between the cultural values of a society and its law is most evident in the field of procedural law and show us several examples of how legal culture influences litigation[7].

In Turkey, according to Dr. Murat Oszunay National Report, following the establishment of the Republic, all remaining religious sources and practices of law were abolished within a few years, many Ottoman legal traditions rapidly disappeared with the newly adopted Western procedures, mainly French and Swiss origin.

Even in Western Europe, legal culture is an important aspect of the civil procedural system. Prof. Besso from University of Torino (Italy), in her National report, points that culture and civil procedure affect each other in different ways, and illustrates this view by using several Italian examples concerning adaptation of the mechanism of class actions and mediation[8].

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[1] M. Woo, *Proposed 2011 Amendments to Chinese Civil Procedure. National Report for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

[2] O. Oloruntimehin, *The Status of Informal Social Control and Dispute Resolution – An analysis of African Societies,* in L. Sebba (ed.), *Social Control and Justice*, Jerusalem, 1996, p. 338.

[3] L.M. Friedman, *Legal Culture and Social Development*, 4 *Law and Society Review* (1969), p. 31.

[4] D. Loggerenberg, A. Boraine, *National Report of Republic of South Africa for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

[5] V. Harsagi, *«Downstream or Up the Stream». Influence of Different Legal Cultures on Hungarian Civil Procedural Law. National Report of Hungary for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

[6] S. Vacarelu, *Legal Culture and Civil Procedure. Romania's place among Civil Procedural Systems. National Report of Romania for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

[7] Ibid., at p. 17–20.

[8] C. Besso, *The Italian Litigation system: a civil law system with a touch of common law. National Report of Italy for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

Good example of cultural influence on civil procedure is the USA. Prof. Jeffrey Thomas from University of Missouri – Kansas City School of Law writes, that the uniqueness of some exceptional US procedural features raises the question of whether culture might be the explanation. And he has an answer: «It is because of the deep cultural suspicion that Americans have for the government, the jury system was a mechanism to counterbalance the power of the British government»[1].

Russian illustration

The most significant example of how culture could affect civil procedure is the Russian legal system. Russian civil procedure is not simply a continental or Anglo-Saxon system possessing only classical civil and common law features, but a unique system possessing exceptional features that do not exist in either of these traditional approaches[2].

There were different periods in Russia's history when lawmakers introduced continental or Anglo-Saxon features of civil procedure. For example, the 1864 Imperial Code introduced the common law passivity of the court in the process of proof-taking. The Soviet civil procedure should be viewed as a radical solution to the continental model. In 1995, the common law passivity of the court was re-introduced, but only remained in effect until 2002.

Disrespect of the rule of law in Russia has been noted by many scholars[3]. However, I believe the reason for it is not unwillingness of Russian citizens to obey rules of law, but the conflict between the legislation and the social relations of the society. The law can›t be simply exported and imported. It is always necessary to take into account cultural specificity of a society. Yet Montesquieu noted, that «laws should be in such compliance with features of nation, for which they are made, that only in very rare cases laws of one nation might become applicable for another»[4]. It is noted by many researchers that there is a strong connection between culture and law[5], especially civil procedural law[6]. In the modern environment, in the epoch of globalization and creation of the multi-polar culture, this method becomes especially important.

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[1] J. Thomas, *National Report of the USA for the IAPL Moscow Conference*, Moscow, September 18–21, 2012.

[2] See D. Maleshin, *The Russian Style of Civil Procedure*, *Emory International Law Review,* vol. 21, no. 2 (2007), p. 543–562.

[3] See C. Hendley, *Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law*, *East European Constitutional Review*, vol. 8 (1999), p. 94; C. Hendley, «*Demand» for the Law in Russia – A Mixed Picture*, 10 *East European Constitutional Review* (2001), p. 72–77; V.A. Tumanov, *О правовом нигилизме* [On the legal nigilisme], *Советское государство и право* [Soviet State and Law], No.10 (1989), p. 21.

[4] Montesquieu, *De l'esprit des loix, ou du rapport que les loix doivent avoir avec la Constitution de chaque Gouvernement, les Meurs, le Climat, la Religion, le Commerce, &c. A quoi l'Auteur a ajoute des recherches nouvelles sur les Loix Romaines touchant les successions, sur les Loix Francoises & sur les Loix Feodales*, M.DCC.XLIX.

[5] See, e.g., R.C. Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, *Harvard Law Review*, vol. 117. (2003), p. 52–56; 80–86; D. Nelken, J. Feest (eds.), *Adapting Legal Cultures* (2001), p. 4.

[6] Works reflecting this approach include: O.G. Chase, *Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context* (2005); O.G. Chase, *Culture and Disputing*, 7 *Tulane Journal of International and Comparative Law* (1999), p. 81–90; Idem, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 *American Journal of Comparative Law*, vol. 4 (1997), p. 861–870; M. Taruffo, *Transcultural Dimensions of Civil Justice*, 23 *Comparative Law Review* (2000); S.N. Subrin, *Discovery in Global Perspective: Are We Nuts*, 52 *DePaul Law Review* (2002), p. 312; T.O. Main, *Global Issues in Civil Procedure* (2006), p. 5. The importance of this issue was also emphasized on different conferences. See, e.g., XII Word Congress on Procedural Law, Mexico, September 2003; Colloquium of the International Association of Procedural Law, Tulane University, October 1998; Colloquium of the European University Institute, Badia Fiesolana, May 1977 (see M. Cappelletti (ed.), *New Perspectives or a Common Law of Europe* (1978)).

The tasks of the modern Russian legislator are to conduct detailed research about the moral ideas of the Russian citizens and to create rules of law which reflect the demands of both the society as a whole and its individual members. The Russian law should take into account both individualistic and collectivistic traditions, as well as ideas and moral views that exist in the Russian society[1]. This means that in the process of legal regulation, a «golden mean» between two moral traditions should be found.

This principle should also be taken into account in civil procedural lawmaking. The norms that are successful for Europe do not work properly in Russia[2]. The 1864 Code was one of the best European codes, but it was unsuccessful in Russia[3]. In twenty years after its adoption, a special drafting committee was established to prepare a new code.

The Soviet civil procedure was continental in its radical sense, but the laws worked primarily on paper. One of the reasons for this failure was the general Soviet approach to the law, where non-legal regulation was overwhelming[4].

As for the 1990's common law initiatives, it is necessary to say that most of the 1995 amendments to the Code of Civil Procedure (hereafter referred as «CCP») did not work well enough[5]. In Russia, the court could not be passive because of the widespread collective views in the society. Therefore, the common law model regarding the role of the judge is unworkable in Russia and the judge's role has been changed in the 2002 CCP.

Pure civil law or common law procedural constructions do not work properly in Russia. One of the reason is the unique elements of Russian culture. For this reason, Russian civil procedure consists of both continental and Anglo-Saxon features of civil procedure. They are further explained when one looks at the history of Russian civil procedure and the varying degrees of success different approaches obtained. Additionally, Russian civil procedure contains specific exceptional features which are not found in civil law or common law procedural models. Therefore, I would like to conclude that Russian civil procedure does not relate to the civil law or common law procedural systems, but should instead be viewed as a specific, exceptional procedural system.

It should be noted that similar civil procedural outlines exist in most former USSR countries. The civil procedural law in these countries has similar historical and cultural backgrounds. Moreover, I would bet that a similar cultural framework exists in other countries of middle Eurasia as well as some of Latin America, where pure civil and common law procedural constructions are unsuccessful. Therefore, I think that in today's world, it is better to distinguish not only civil law and common law procedural systems, but also other exceptional models. The recent evaluation of two classical types of civil procedure supports this contention. It is obvious that these models do not exist today, at least not in their classical sense[6]. The many changes to the basic principles of each combined with the blending of their characteristics has led to this. An excellent example of this is the recent evaluation of the role of the judge in both systems.

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[1] See D. Maleshin, *Some Cultural Characteristics of the New Russian Code of Civil Procedure of 2002,* 10 *Zeitschrift für Zivilprozess International* (2005), p. 385–389 (in English); D. Maleshin, *La reforme de la Procedure Civile Russe*, *Revue Internationale de Droit Compare* No. 3 (2007), p. 673–683 (in French); D. Maleshin, *O Novo Codigo De Processo Civil Russo de 2002,* 121 *Revista De Processo* (2005), p. 159–165 (in Portuguese).

[2] See, e.g., H. Berman, *Justice in the U.S.S.R. An Interpretation of Soviet Law* (1963), p. 216.

[3] See M. Cappelletti, *Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe*, 5 *Michigan Law Review*, vol. 69 (1971), p. 875.

[4] C. Sypnowich, *The Concept of Socialist Law* (1990), p. 155.

[5] See Treushnikov, *Grajdaski process [The Civil Procedure]* (2006), p. 15.

[6] H. Jacob et al., *Courts, Law and Politics in Comparative Perspective* (1996), p. 4.

The Russian example is not the only one of the cultural influence on the civil process. There are several ways in which culture affects law and civil procedural law. First of all, not all societies use a western style of the formal legal system. Traditional societies rely mostly on custom. Second, law is inseparable from the interests and goals of concrete peoples. Therefore the respect of the law by members of the society should be based on a clear understanding of the nature of the legal practice.

5. Classification: collectivistic and individualistic civil procedural systems

National reports on multiple civil procedural systems and my analysis of the situation in Russia and some other countries demonstrate that culture is one the most important factors that determines the specifics of civil procedure. It affects practice and forms a national character of civil procedure. That's why legal culture is the most important criteria at present for classification.

Using these criteria, we should sort two systems: individualistic and collectivistic. They correlate with two widespread cultural models. The first one is based on individualism; the other on collectivism[1]. On the one hand, collectivism is defined as a moral principle that asserts the priority of the group over that of the individual or as a social organization in which the individual is seen as being subordinate to a social collectivity such as state or nation[2]. On the other hand individualism is defined as a moral principle that stresses the self-directed, self-contained, and comparatively unrestrained individual or social organization, which exists in large measure to serve and protect individual[3]. Society in such case becomes the background to the interests of individuals[4]. In collectivism, the law aims to protect the interests of society as a whole and to achieve common goals, while in individualism the law primarily protects the interests of individual members of society. It is focused on reaching individual goals[5]. This problem was a moot point one century ago[6] and became important presently due to the process of globalization.

In collectivistic societies, only active judges could be effective. Of course, there are cases when there are passive judges, but as a rule they are not effective. Group actions are also not very practical in collectivistic societies because they need very high self motivation. Individualistic systems are the best place for the judicial «show court hearings» with active parties and advocates.

Conclusion

In conclusion, I would like to say that even in the contemporary active process of integration and globalization we still have differences in civil procedure; we still have national character and specificity.

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[1] See, e.g., D.G. Myers, *Social Psychology* (2001); M. Calenkamp, *Individualism verus Collectivism* (1993); M.H. Thompson, *Individualistic and Collectivistic Liberty*, 37 *Journal of Philosophy* No.14 (1940), p. 382–386.

[2] See Graig Calhoun (ed.), *Dictionary of the Social Science* (2000), p. 78; *The Encyclopaedia Americana. International edition*, vol. 7 (1997), p. 239; *The New Encyclopaedia Britannica,* vol. 3 (2002), p. 453.

[3] See Graig Calhoun (ed.), *Dictionary of the Social Science* (2000), p. 228; *The Encyclopaedia Americana. International edition*, vol. 15 (1997), p. 69; *The New Encyclopaedia Britannica*, vol. 6 (2002), p. 295.

[4] See J. Crittenden, *Beyond Individualism. Reconstructing the Liberal Self* (1992), p. 77.

[5] See, e.g., P. Sandevoir, *Introduction au droit* (1991); J.-L. Bergel, *Theorie generale du droit* (1985).

[6] See, e.g., F. Cosentini, *La societe future, individualisme ou collectivisme?* (1905).

David Bamford[1]

AUSTRALIAN NATIONAL REPORT

CONVERGING PROCEDURAL SYSTEMS? AUSTRALIAN CIVIL JUSTICE IN THE 21ST CENTURY

Every Australian law student learns from almost their first day at Law School that Australia's legal system is part of the great common law tradition inherited from England. Yet the last forty years has seen great change in both and content and structure of Australian law. The contribution of common law to the Australian legal system is diminishing. Every year new legislation increasingly erodes or replaces substantive common law principles in different areas of law – including torts, contract, criminal law, administrative law, or evidence. In legal education, law schools are under increasing pressure to move away from its traditional focus on teaching case analysis – how to establish the *ratio decidendi* as opposed to *obiter dicta*. Instead admission authorities and senior judges are urging more attention to knowledge and skills in statutory interpretation[2].

This is also true for civil procedure. Many of the underlying common law principles inherited from England in the 18th and 19th centuries are under increasing challenge. Two of the most significant reforms over the last forty years in civil procedure have been the diminution of adjudication and the expansion of court control of litigation process. Adjudication has been diminished by diverting as many disputes as possible from courts and by incorporating and providing increasing emphasis to non-adjudicatory dispute resolution for those cases remaining within courts. Court control of litigation has been expanded through introduction of case management regimes by which courts seek to ensure that cases proceeding through the litigation process expeditiously and efficiently.

It is this second reform that this national report focuses on. Case management challenges some of the fundamental values of the common law adversarial system. The traditional understanding of common law litigation had the judge uninvolved in the development of the case participating only at the culmination of the process, the continuous trial. The judge would have little to no knowledge of the case before the trial commenced. During their trial their role was to ensure that procedural and evidentiary rules were observed and at the end of the trial (if no jury was involved) decide the case on the evidence adduced by the parties at the trial.

With the introduction of case management, judicial officers are involved from when the case is filed, setting timetables or ensuring procedural steps are completed within reasonable times, encouraging the parties to identify and focus on the live issues in the case. It has been argued that this change in roles brings the common law judge closer to his civil law counterparts[3].

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[1] Professor and Dean of Flinders Law School, Adelaide (Australia).

[2] Lord Steyn, *The Intractable Problem of the Interpretation of Legal Texts* (2002), 25 *Sydney Law Review* 5, 5: «...the academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law in our time». See also J Spigelman, *The Poet's Rich Resource: Issues in Statutory Interpretation* (2001), 21 *Australia Bar Review* 224; Paul Finn, *Statutes and the Common Law: The Continuing Story* in Suzanne Corcocan, Stephen Bottomley (eds.), *Interpreting Statutes* (2005).

[3] See Thomas Rowe Jr, *Authorised Managerialism under the Federal Rules – And the Extent of Convergence with Civil-Law Judging* (2007), 36 *Southwestern University Law Review* 191. Also see Linda Mullenix, *Lessons from Abroad: Complexity and Convergence* (2001), 46 *Villanova Law Review* 1.

This is simply the next step in the changing role of common law judges. In Australia where civil juries are a rarity, judges have already taken over the fact finding role. However the court's role in fact gathering has been regarded by some as a point of major distinction between the common law adversarial litigation and civil law inquisitorial litigation[1].

In reality the attempt to categorize civil procedural systems as adversarial as opposed to inquisitorial is of diminishing value. The variety of procedural systems within both legal families has become very large and the commonalities between the systems better understood.

Rather than attempting to contrast procedural developments against some idealized model of inquisitorial civil procedure, this paper focuses on major changes to the judicial role. It argues that in two ways judicial roles are extending beyond traditional common law procedure – the first is an increased role in and control of fact finding; and the second is the extension of case management beyond the pre-trial phase to trials themselves.

Changing role in fact gathering

The principle of party autonomy has meant Australian courts have generally regarded identification of the issues in dispute and the fact gathering needed to succeed on those issues as matters controlled by the parties. However there have always been some Australian courts where this was not the case. The remnants of chancery practice[2] were also imported to Australia, but court control of the issues and fact gathering has for the most part, been restricted to coroners courts[3]. In the Australian context, a coroner has always been engaged in a search for the truth. The coroner is not deciding between competing versions advanced by parties but is most commonly investigating the circumstances surrounding the death of an individual and where appropriate making recommendations which may avoid or minimize such circumstances in the future. Assisting the coroner is a «Counsel Assisting» who is charged with marshaling the evidence and presenting it to the court along with lawyers representing any interested parties[4].

Within the Australian civil courts, there has been some erosion of party control of fact gathering. The most extreme example is the transformation of procedure in the Family Court of Australia for custody cases. The Family Court of Australia is a national court exercising jurisdiction in matters relating to marriage and divorce. In 2002 the then Chief Justice Alistair Nicholson advocated for a new approach to custody of children cases. Between 2003 and 2004 members of the court visited Europe to examine alternatives and in 2004 a pilot project – the Children's Cases Project saw the trial of new procedural process that more closely resembles procedural regimes found in Germany and France[5]. In 2006 the pilot was adopted following legislative amendment to applied across the Family Court of Australia.

Known as the Less Adversarial Trial (LAT) it puts the judge at the centre of the trial process with the judge determining the issues that need to be determined, the evidence

[1] See for example Charles Koch Jr, *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems* (2004), 11 *Indiana Journal of Global Legal Studies* 139.

[2] See Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process and the Search for an Alternative to the Adversarial* (2004), 90 *Cornell Law Review* 1181.

[3] See Ian Freckleton, *Opening a New Page* (2010), 83 *Law Institute Journal* 29.

[4] Hugh Dillon, *The Roles of Counsel in the Coronial Jurisdiction* (2010), 33 *Australian Bar Review* 293.

[5] Gaylke Meredith, *The Children's Cases Project: Was it a Success and is it the Way of the Future?* (2005), 18 *Australian Family Lawyer* 11.

needed and the use of court experts[1]. As the Full Court of the Family Court held in a challenge to the use of the LAT process:

The Family Court has recognised for some time that the traditional adversarial model of litigation is not well-suited to assisting families to resolve their disputes, especially those involving children. The statutory obligation to regard the welfare of children as the paramount consideration has always been understood to require a judge to take a more active role in Family Court proceedings than would be appropriate in other areas of litigation. The changes brought about by the LAT process not only authorise but positively encourage judges to depart further still from the adversarial model[2].

As the Full Court went on to point out, the trial begins on Day 1 when the matter is commenced and a conference is held with the judge where the judge is to assist the parties to define the issues in dispute. It is a discontinuous trial with the judge determining the order in which issues will be addressed or determined and the evidence required to determine the issues. The judge will appoint a «family consultant» to act as an expert adviser to the court and the parties. In part this dramatic departure from the common law adversarial approach is based on the special nature of children's custody cases along with the statutory command that in determining the case the paramount consideration is the «best interests of the child».

The courts exercising general jurisdiction have not moved so far but they too have made major changes increasing the role of the court in the fact gathering process. This is in the area of expert evidence. There have been major intrusions into the traditional relationship between parties and expert witnesses. In some jurisdictions there has been increasing use of court appointed experts[3]. Even where parties can chose their own experts, their use is closely controlled by the court who can determine the number of expert witnesses a party will be allowed, the sorts of issues that they may give evidence on, and the manner in which they will give evidence.

The Victorian case *Thomas v. Powercorp*[4] serves as an illustration of the degree to which this aspect of fact gathering has changed. This was a representative proceeding in which victims of a bushfire were seeking damages from a power company whose electrical lines and poles were alleged to have been the cause of the bushfire. While the parties were allowed to choose their expert witnesses, the trial judge made extensive orders controlling what they were to give evidence on and how they were to do it. Before giving evidence the experts for all parties were to meet together in the absence of their instructing lawyers and provide a report on those matters they were in agreement on and those matters on which there was disagreement. The judge also required the experts to give concurrent evidence – the experts were to be sworn in as a panel and then questioned in the presence of each other and with the opportunity for the experts to comment on each other's evidence. Known colloquially as «hot-tubbing' this process is increasingly used in Australian courts.

As further evidence of the change in judicial role in fact gathering the concurrent expert evidence session begins the judge questioning the experts to ascertain the extent of agreement and disagreement between them. The judge identified eight issues on which they were

[1] John Faulks, *Natural Selection – The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia* (2010), 35 *University of Western Australia Law Review* 185.

[2] *Truman v. Truman* (2008) 216 FLR 365, 370.

[3] In South Australia, for example, the Magistrates Court uses court appointed experts in a range of cases. See Courts Administration Authority, *Annual Report* 2010–2011, 28.

[4] (2010) VSC 489; (2011) VSC 502.

to give evidence. Following that the parties take it in turn to examine and cross-examine the witnesses. At the end of that process, each of the witnesses is given the opportunity to canvass any matters not covered.

In *Thomas v. Powercorp* the trial judge also quarantined the expert witnesses ordering that they not confer with their instructing solicitors.

I made such an order on the basis that the expert witnesses should be able to discuss amongst themselves the relevant issues during the course of the session. This, I thought, may encourage agreement on issues and more importantly, would militate against partisan encouragement or schooling of the witnesses by the parties' legal advisors during the course of the session. I made such an order on the basis that the expert witnesses should be able to discuss amongst themselves the relevant issues during the course of the session. This, I thought, may encourage agreement on issues and more importantly, would militate against partisan encouragement or schooling of the witnesses by the parties' legal advisors during the course of the session[1].

This change in control of fact gathering and presentation is only part of a broader change in judicial role and that is the extension of case management from pre-trial to the trial phase in litigation.

Trial management – changing role for judges

Traditionally common law procedure has drawn a sharp distinction between pretrial and trial stages. The emphasis given to the continuous trial as the ultimate cataclysmic event in the litigation process, it was easy to draw a distinction between what happened before trial and what happened at trial. As we have seen, the judge's role was to preside over the trial ensuring that evidence was properly adduced and the jury properly instructed on the law and on how to approach that evidence.

The introduction of case management in the 1980s was not a result of attempts to learn from or adopt European civil procedural principles but some commentators have described case management as «... the mostly widely noted example of convergence....»[2] between common law and civil law procedural systems. Very early in the evolution of case management Von Mehren noted it was a development occurring in both German and US civil procedure systems.

The efforts of these two systems to deal with delay and related problems are causing them to converge in a curious and interesting fashion. In the first place, for both systems the distinction between trial and pretrial phases is becoming less important; secondly, judges are more and more being called upon to play directive and managerial roles; lastly, these developments raise for each system somewhat comparable questions respecting the proper balance between efficiency and justice.[3]

There is absolutely no doubt judges have always had the power to manage trials but that was largely around the ordering of the trial. Judges, for example, have long had the power to separate issues for separate trial; they could consolidate matters; and they could decide

[1] (2011) VSC 502, [15].

[2] Scott Dodson, James Klebba, *Global Civil Procedure Trends in the Twntry-first Century* (2011), 34 *Boston College International and Comparative Law Review*, 1, 14.

[3] Arthur Von Mehren, *Some Comparative Reflections on First Instance Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules* (1988), 63 *Notre Dame Law Review* 609, 623.

to determine preliminary issues where such resolution might lead to finalization of the matter. In the last twenty years a number of other management powers were added in some Australian jurisdictions – power to make orders as the form in which evidence would be taken (written as opposed oral testimony) and as we have seen, relating to expert evidence.

Over the last ten years there has been a significant growth to the provisions in court rules relating to trial management. While most of the matters could have been supported by resort to general provisions relating to court powers to control litigation or a court's inherent jurisdiction, these amendments to court rules make more explicit the range of matters affecting trials judges are able to make orders about.

Illustrating this are some recent examples.

South Australia

In South Australia, the 1986 Rules reflected the prevailing approach to trial management with very limited provision for trial management.

Rule 75. 02 (SA) provided :

Subject to the preceding subrules, the Court may at any time or from time to time in any proceeding, order:

Separate trials of questions of fact

(a) that different questions of fact arising therein be tried by different modes of trial;

Trial of preliminary question of fact

(b) that one or more questions of fact be tried before the others;

Points of law to be heard before a trial on the facts

(c) that any point or points of law arising on the pleadings be disposed of before proceeding to trial of the facts; and may appoint the place or places of such trials.

In addition to these very general provisions, Rule 55.12 provided that the court could limit the number of expert witnesses or the issues they would be allowed to give evidence about.

Following a major rewrite, completely new code of civil procedure rules were introduced in 2006. By contrast the 2006 Rules contain greatly expanded provisions relating to trial management. R117 .02 provides:

(f) require the parties to state issues in a particular way;

Example –

In cases where there may be numerous issues for determination by the Court, the Court may require preparation of a schedule, in tabular form, listing each item for determination by the Court and the contentions of the plaintiff and the defendant relation to each item (for example, the so-called Scott schedule used in cases of building disputes).

(g) require the parties to prepare a joint or separate statement of the issues in contention between them for the Court's use;

(h) require each party to file in the Court affidavits sworn by the witnesses the party proposes to call at the trial setting out the substance of the evidence the party proposes to adduce from each witness;

(i) require the parties to file in the Court statements of the documents they propose to tender at the trial;

(j) deal with the form in which evidence is to be taken at the trial;

(k) dispense with compliance with the rules of evidence in relation to a particular issue or range of issues;

(l) fix the time and place of trial.

Further more Rule 209 titled «Court's power to control trial» contains detailed trial management provisions

(1) The Court may give directions about –

the issues on which it requires evidence; and

(b) the nature of the evidence it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the Court; and

(d) limiting the number of witnesses or the amount of evidence that a party may call or introduce on a particular issue.

(2) The Court may, at any time –

(a) limit the time to be taken by a trial or any part or aspect of a trial; or

(b) amend any such limitation.

Examples –

1 The Court might limit the time to be taken in examining, cross-examining or re-examining a witness.

2 The Court might limit the time to be taken by a party in presenting its case or making a particular oral submission.

(3) In deciding whether and, if so, how to exercise its powers under this rule, the Court –

(a) must have regard to–

(i) the need to ensure that justice is administered expeditiously and

economically; and

(ii) the need to ensure that each party is allowed an adequate opportunity to present its case; and

(iii) the need to prevent abuse of the judicial system for the purpose of delay or other ulterior purposes;

(b) may have regard to other relevant considerations.

(4) The Court may use its power under this rule to exclude evidence that would otherwise be admissible.

Victoria

Victorian has recently enacted a new Civil Procedure Act and Rules following an extensive inquiry by the Victorian Law Reform Commission. Part4.2 of the *Civil Procedure Act 2010* (Vic) has similar provisions relating to trial management as are now found in South Australia.

S 49 Court's power to order and direct trial procedures and conduct of hearing

(1) In addition to any other power a court may have, a court may give any direction or make any order it considers appropriate to further the overarching

purpose in relation to the conduct of the hearing in a civil proceeding.

(2) A direction or an order under subsection (1) may be given or made by the court at any time –

(a) before a hearing commences; or

(b) during a hearing.

(3) Without limiting subsection (1), a court may give any direction or make any order it considers appropriate with respect to –

(a) the order in which evidence is to be given and addresses made;

(b) the order in which questions of fact are to be tried;

(c) limiting the time to be taken by a trial, including the time a party may take to present the party's case;

(d) witnesses, including –

(i) limiting the time to be taken in examining, cross-examining or reexamining witnesses;

(ii) not allowing cross-examination of particular witnesses;

(iii) limiting the number of witnesses, including expert witnesses, that a party may call;

(e) limiting the issues or matters that may be the subject of examination or cross-examination;

(f) limiting the length or duration of written and oral submissions;

(g) limiting the numbers of documents to be prepared or that a party may tender in evidence;

(h) the preparation by the parties of an agreed bundle of documents for use in the proceeding or a schedule summarizing business records or other documents;

(i) the place, time and mode of trial;

(j) evidence, including, but not limited to whether evidence in chief should be given orally, by affidavit or by witness statement;

(k) costs, including the proportions in which the parties are to bear any costs;

(l) any other matter specified in rules of court

The Federal Court

In August 2011 the new Rules of the Federal Court of Australia came into operation. Reflecting the 2009 amendments to the Federal Court of Australia Act 1976 which emphasized the courts case management powers, Order 5.04 brings together in a more systematic way the various matters a court make orders about at a directions hearing. It includes provisions for trial management:

20. The giving of evidence at the hearing, including whether the evidence in chief of witnesses is to be given orally or by affidavit or both.

21. The filing and exchange of signed statements of evidence and outlines of evidence of intended witnesses and their use in evidence at the hearing.

22. The number of witnesses to be called.

23. The evidence of a particular fact or facts being given at the hearing:

(a) by statement on oath on information and belief; or

(b) by production of documents or entries in books; or

(c) by copies of documents or entries; or

(d) otherwise.

24. The manner in which documentary evidence is to be presented at the hearing.

25. The number of documents to be tendered.

Looking at the newer provisions in the these three jurisdictions, what appears to be made more explicit for the is the power to determine the number of witnesses, the time allowed for giving evidence, the manner in which documentary evidence and the number of the documents to be tendered. This is not to suggest the Court did not have these powers previously but the fact that the Rules now make explicit provision suggest the court itself is more consciously considering trial management. The move is away from what I call ordering powers – the powers to determine the order in which issues will be dealt with; dealing with preliminary questions first etc. – to include the quantity of evidence that will be allowed and the nature of the evidence that the court will allow – documentary and testimonial.

The increased emphasis on trial management powers is symptomatic of the increasing responsibility given to judges in Australian civil litigation. The fact that the powers exist

does not necessarily mean that judges will exercise them. Many courts have provisions in rules that are little used. While there has been no systematic research to ascertain the degrees to which trial management powers are used, the ideology supporting this changed role for judges can be discerned in cases.

Heydon J, perhaps one of the most «conservative» of the current judges on the High Court of Australia referred in 2001 to the new approach to trial management:

A reading of the whole transcript reveals that the trial judge was not at any stage going to conduct the trial merely by sitting back and letting the parties conduct the case without any intervention or restraint at all. Her technique is a common modern technique, and a not unacceptable one, particularly in a busy trial court under pressure from crowded lists[1].

Examples can also be found in lower courts of the new approach to trial management.

In *Tovey v. Rezek (No 3)* the solicitor for applicant father in a bitter child custody case wanted to call a large number of witnesses. The magistrate refused the application in no uncertain terms.

11. Having regard to modern case-management, such a submission and such a course for a trial of, effectively, the unbridled calling of witnesses, was untenable. Indeed, given the experience of Mr Tobey's solicitors in family law litigation, it was an astonishing submission. It defied (a) the objects and practices of this court as set out in the Federal Magistrates Act 1999 (Cth), (b) the objects and practices of this court as set out in the Federal Magistrates Court Rules 2001[7], and (c) among multiple cases, the recent High Court decision in *AON Risk Services Australia Ltd v. Australian National University* where the court made plain the importance of, among other things, recognising that the services provided by a court are a public resource, which must be used in the most efficient manner possible.

12. To stress the matter further, standard «practice texts», and innumerable cases confirm that the submission by Mr Tobey's [then] solicitor was completely unsustainable, the complete antithesis of modern case management, and totally discordant with the day to day practices of this court. As it was, the parties had an almost luxurious amount of time, by the usual standards of trial length in this court. Their evidence alone occupied the better part of five days, with the total trial time occupying seven (7) days[2].

Giving impetus to this have been some long and complex cases that have taken up disproportionate amounts of the time and resources. This mega litigation has led to calls for increased judicial management of trials. In the *C7* case[3], one of the largest media cases in Australia involving TV rights for sporting rights, an estimated $ 200 million in legal costs were incurred after litigation that included 120 hearing days in the Federal Court of Australia. Despite a strong judge in Justice Sackville and a well-entrenched case management system in the Federal Court, the judge's frustrations with his ability to manage the trial are very clear. His judgement describes how over half million pages of documents discovered, over 1000 pages of pleadings. Closing submissions amounted to over 5000 pages.

Justice Sackville subsequently pointed out that in reality courts require the co-operation of parties if effective management is to occur. When this is not present or the parties are unwilling to co-operate with each other, the courts may need to look to more interventionist approaches to hearing and deciding cases. In a speech he said:

[1] *Budd v. Kambah Tea Tree Plantations Pty Ltd* [2001] NSWCA 180, [103].

[2] [2011] FMCAFAM 1336.

[3] *Seven Network Ltd v. News Ltd* (2007) FCA 1062.

If the courts are to acquire and exercise the capacity to curtail the impact of mega-litigation on the judicial system, the role of the judiciary will need to change further. Specifically, the courts will have to adopt even more rigorous and interventionist pre-trial case management strategies. They will also have to demonstrate a greater willingness to exercise stringent control over the parties and their legal representatives in the conduct of the trial itself...

Despite this ringing endorsement of a rule of stringency, the fact is that if the courts are to exercise more effective control over mega-litigation it will be necessary to loosen some of the conventional constraints. In addition, the courts will need to have available a greater panoply of case management tools and to demonstrate a greater willingness to use them[1].

Conclusion

This paper has argued that Australian civil procedure is continuing to depart from its common law traditions. Two recent examples of this are the changes to role of courts in fact gathering and the growing emphasis on judicial management of trials. In so doing it, it could be said to be converging with procedural principles found in non-common law jurisdictions. The heightened role of the judge said to be a feature of civil law procedural systems is at the core of these Australian developments. What is yet to be explored in the Australian context is the question of whether we have the appropriate safeguards and accountability mechanisms in place for these new measures. Procedural systems where judges have long played roles in fact gathering and trial management may provide useful guidance in this context.

Teresa Arruda Alvim Wambier[2]

BRAZILIAN NATIONAL REPORT

BRAZILIAN CIVIL PROCEDURE: BETWEEN COMMON LAW AND CIVIL LAW?

I. Introduction of the National civil procedure with historical background

Legal history in Brazil is divided in two phases: before and after independence. Brazil was a colony of Portugal. In the beginning, there were three *Ordenações statues*, which were law in Brazil, but in fact they were Portuguese law: the *Ordenações Afonsinas* (from 1446), at the time of Brazil´s discovery; *Ordenações Manuelinas* (1521) and Filipinas (1603). The first *Ordenações* were effectively divided into five books. The third was composed of 128

[1] Ronald Sackville, *Mega-litigation: Towards a New Approach*, Speech to Supreme Court of New South Wales Judges Conference, August 2007, (http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_sackvillej1.html).

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provisions and entirely dedicated to civil procedural law. The *Ordenações Afonsinas* were in effect up to 1521 when they were replaced by the *Ordenações Manuelinas*, not very different form the others, maybe making this latter the king stronger and corresponding in more closely to the interests of royalty. Then, there came the *Ordenações Filipinas*, which brought novelties in the field of civil procedure, such as for example having introduced written procedural acts and created privileged acts[1].

After the independence of Brazil, in 1822, the Constitution of 1824 was enacted and the separation of powers was not clear in it: there was confusion among judicial, administrative, tax and military roles. In 1832, we had a code of criminal civil procedure containing provisory provisions on civil procedure.

In 1850 two Codes were enacted: the commercial Code and the 737 regulation, this last one being very important until our Civil Procedural Code of 1939.

Under the Constitution of 1891, each Brazilian State was enabled to have a Civil Procedural Code and some of them became very important.

However, the Constitution of 1934 established that only the central power could enact statutes on civil procedural law. That created the need for a new national civil procedural code and the Government appointed groups of scholars whose task would be to write a draft of a bill for this new Code[2]. This new code has effectively a brand new part but also had an excessive bonds/attachment to the old Lusitanian law, considered undesirable[3].

Later, another group of jurists[4] led by Alfredo Buzaid prepared another draft for the second Brazilian Civil Procedural National Code, which became our CPC of 1973.

New devices were introduced[5] and the essence of Enrico Tullio Liebman's thought became the basis of our civil procedural law: Civil procedure must not be too formal. Formalities must not be more than an expression of the due process of law, so they should be taken seriously[6].

Since then many very important additions have appeared. These additions and alterations were obtained in a very democratic way (were suggested by a commission composed of lawyers, jurists, prosecutors and practitioners). The main goal of these amendments and additions were (and are) to make civil procedure faster and more effective.

As you must know, civil law procedure, not only in Brazil, but also in Germany or in Italy, in Portugal or in Spain, is still a rigid and formalistic system.

II. Concept of civil procedural systems

Our codes and statutory law are created under the presupposition that it is possible for them to be exhaustive and absolutely coherent. Court decisions are made with strict reference to rules and principles and they are always reasoned. And this is of course a typical characteristic of civil law jurisdictions.

[1] Humberto Theodoro Jr, *Curso de Direito Processual Civil*, Rio de Janeiro, Forense, 2003, vol. I, p. 15.

[2] Ada Pellegrini Grinover et al., *Teoria Geral do Processo*, 19ª ed., São Paulo, Malheiros, 2003, p. 107.

[3] Humberto Theodoro Jr, op. cit., p. 17.

[4] José Frederico Marques, Luiz Machado Guimarães e Luís Antônio de Andrade.

[5] On this topic see: http://www.abdpc.org.br/abdpc/imortal.asp?id=10 Access: 21/07/2011.

[6] Cândido Rangel Dinamarco, *Liebman e a cultura processual brasileira*, in *Estudos em homenagem à Professora Ada Pellegrini Grinover*, São Paulo, DPJ, 2005.

However, in a globalized world, this purity and many others in several fields tend to disappear. I would really say that this classification of the existent legal system in *civil law* and *common law* still plays a significant role in what concerns the existence of binding precedents. But as far as civil procedure is concerned, maybe this classification is nowadays almost meaningless[1].

That means that the Brazilian procedural system has today some characteristics which could be, to a certain extent, considered typical of the procedural system of *common law* jurisdictions. On the other hand, we still conserve some other features which could be considered typical of civil law procedures.

We will say something about this specific topic covering question n. 4.

But we really cannot say that we have a «unique» system. No. I would say that we have a procedural system inspired by many others, mainly Italian, German and North American.

There has nevertheless been a visible trend in Brazilian civil procedure in the last 15 years in the sense of conferring the judges and Courts a new active role, in contrast with civil law tradition.

III. Main features of the National civil procedure

3.1) Typical characteristics of common law jurisdictions

1) The *amicus curiae*[2] *also* known as Brandies-Brief, in the sense that it is a third party that can intervene in certain proceedings and at a certain time established by statutory law, to provide a Court with important data concerning the case at hand or the relevant dispute, is being increasingly admitted.

This third can be e.g. a Professional Association (of Doctors) which would intervene in a case in which the patent of a medicine is discussed. The IATA could also intervene as an *amicus curiae* in proceedings which revolve around the amount awarded for moral damages for loss of luggage; the Administrative Council for Economic Defence (CADE), which has the power to oversee and rule in cases of abuse of economic power, intervenes in all lawsuits revolving around this matters.

For the time being, statutory law caters for the intervention of the *amicus curiae* in very special and predetermined situations, such as in appeals to the STF (*Supremo Tribunal Federal*).

The kind of interest which justifies the intervention of the «amicus curiae» is different from the one of the parties' or from a «normal» third party, whose interests could be indirectly affected by the judgment (and this is the reason why he can intervene in a lawsuit where he is neither plaintiff nor defendant).

It could be said that it is an institutional interest, relevant from a legal point of view[3]. The *amicus curiae* does not want to obtain something from the judgment (for him, her or

[1] Christpoh Kern, Rolf Stürner, *Comparative Civil Procedure: Fundamental and Recent Trends*, in *Melanges en l'honneur de Halûk Konuralp*, Anraka, Turquia, 2009, p. 997–1029.

[2] On the subject: Cassio Scarpinella Bueno, *Amicus Curiae no processo civil*, *Um terceiro enigmático*, São Paulo, Saraiva, 2006.

[3] Eduardo Cambi, Kleber Ricardo Damasceno, *Amicus curiae e o processo coletivo uma proposta democrática*, in *Revista de Processo,* vol. 192, São Paulo, Revista dos Tribunais, feb/2011, p. 19.

itself) but conversely he, she or it takes contributes, taking data or showing different points of view on the dispute, which can help a judge to solve the controversy.

In Brazilian law, the intervention of the *amicus curiae* takes place when one or both of the parties ask or when the judge finds it necessary[1]. The judge's decision is not appealable because of the public interest underpinning the question[2].

The *amicus curiae* represents society to a certain extent or at least one or some social groups or lawyers, and his, her or its manifestation can show a judge a different angle of the dispute, which renders the award/judgment more democratic[3]. Nevertheless, he does not have the right to appeal[4].

Nevertheless, in the Bill for a new civil procedural code (Bill 166/2010) has a broader provision allowing a judge to accept or to «invoke» the presence of the *amicus curiae*, even *ex officio* in any phase of the proceedings and in any kind of proceedings.

2) A clear trend to give more importance to case law has been noted.

Codes and statutory law cannot, as traditionally conceived, cover all possible matters, every possible situation that takes place in real life. There are, in civil law jurisdictions of law, different techniques whose role is to adapt statutory law where changes are needed and even to lead to decisions on situations not expressly mentioned by statutory law or Codes. These techniques are the use of vague or cloudy concepts, general clauses and the inclusion of legal principles in legal reasoning.

a) Legal Principles

Presently, in civil law countries, it is generally admitted that legal principles are norms, in the broadest sense of the word, as a normative species, even if they are not necessarily part of statutory law. In other words, they are part of the system, just as statutory law itself, legal literature and case law.

They are verbally formulated in an intentionally vague fashion and necessarily connected to the axiological dimension. In other words – principles could be considered as the legal translation of social values.

In the past, legal principles were almost entirely ignored. I dare to generalize and suggest that some decades ago principles were often mentioned by jurists but not taken very seriously.

In fact, it seems to me that the complexity and the lack of stability of modern societies (which exist in different degrees in different countries) have shown that positive law (statutory or case law) has, more often than not, demonstrated its inability to solve problems.

This is one of the main reasons why jurists, principally in civil law countries, have turned their attention to some elements, as legal principles, and have included them, perhaps, forever, as an essential part of legal reasoning.

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[1] Carlos Gustavo Rodrigues Del Prá, *Amicus Curiae: Instrumento de participação democrática e de aperfeiçoamento da prestação jurisdictional*, Curitiba, Editora Juruá, 2007, p. 136.

[2] Ibid., p. 148.

[3] Gustavo Binenbojm, *A dimensão do amicus curiae no processo constitucional brasileiro: requisites, poderes processuais e aplicabilidade no ambito estadual*, in *Revista Eletronica de Direito do Estado* n. 1 (jan/fev/mar 2005), Salvador, Bahia, p. 10 (http://www.direitodoestado.com/revista/REDE-1-JANEIRO-2005-GUSTAVO%20BINENBOJM.pdf Acesso em: 05/07/2011).

[4] ADI 2.591-ED/DF, Rel. Min. Eros Grau. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=435156.

It is fruitless to discuss the origin of these norms. They can nevertheless be considered as cultural «products». Even in civil law countries, it is considered unnecessary for a legal principle to be written in a Code or Act – although, nowadays, most of them are like that.

At any rate, they are intentionally vague norms, sometimes providing guidance to interpretation and other times being applied by them, mainly when the situation at hand is not expressly referred by statutes.

Some authors write, regarding decision-making based on legal principles, that: «Where the judicial constructions operates by way of working out the underlying principles and giving them concrete effect in a series of landmark decisions, it seems almost artificial or even fictional to draw a line between interpretative and law-making precedents»[1].

An example: Brazilian statutory law, directly controls the visiting rights of separated parents for their children, but does not mention those of grandparents visiting grandchildren of divorced parents. However, courts have already decided that a grandmother could not be prohibited, by her son or daughter-in-law, from visiting her grandchild, unless for serious reasons. Any opposition to this right would be an abuse of *patrio poder* (parental rights)[2].

b) Vague Concepts

A vague concept is considered, in itself, nowadays a very workable technique, mainly because it enables judges to adopt statutory law to concrete factual circumstances and extends the life of statutory law. «During the twentieth century it became acceptable, even fashionable, for the legislature to enact open textured provisions which required discretionary application by the courts (or arbitrators) even within the hallowed zone of contract law»[3].

That means that a legal text which contains a vague concept can legitimately generate different decisions throughout time, because, e. g. a «*bonus pater familiae*' means something today, yet had quite a different meaning a hundred years ago.

Of course, judges' personal opinions could influence their decisions. It is nevertheless expected that the decision's reasoning would neutralize this subjectivity.

A good example is the concept of an abusive clause. Courts consider that a contractual clause in a health plan, which limits the duration of hospitalization - as abusive[4].

Another example: if a health plan covers a certain disease, a clause limiting the kind of treatment appropriate to this very disease is considered abusive. So, if the contract covers cancer, all kinds of treatments must be considered as covered too; thus any clause which states that chemotherapy, for example, is not covered, is null or void[5].

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[1] Zenon Bamkowski, Neil MacCormick, Lech Morawski, Alfonso Ruiz Miguel, *Rationales for Precedent*, in Neil MacCormick, Robert S. Summers (eds.), *Interpreting Precedents, A Comparative Study*, Dartmouth Publishing Company Lta, Ashgate Publishing limited, Gover House, Croft Road, Aldershot, Hants, GU113H3, England, p. 485.

[2] RT 205/528.

[3] Neil Andrews, *Judicial Discretion in Common Law Jurisdictions, England, Australia, Canada and the USA*, in Marcel Storme and Burkhard Hess (eds.), *Discretionary Power of the Judge: Limits and Control*, Mechelen, Belgium, Kluwer Academic Publishers, 2003, p. 188.

[4] REsp. 158.728 – RJ (97/90585-3) – (4.765), rel. Min. Carlos Alberto Menezes Direito, DJ 17/may/1999. Available at: http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?tipo_visualizacao=null&processo=158728+&b=ACOR.

[5] REsp. 668.216 – SP (2004-0099909-0), rel. Min. Carlos Alberto Menezes Direito, j. 15/março/2007. Available at: https://ww2.stj.jus.br/revistaeletronica/ita.asp?registro=200400999090&dt_publicacao=02/04/2007.

c) General Clauses

A general clause[1] is a much more complex phenomenon than a mere vague concept, although both belong to the same family. It is an expression which contains vague concepts – but also more. A useful example to explain this «*plus*» would be the «social function of property» (Article 1228, § 1 of the Brazilian Civil Code).

This article purports that property is no longer considered an absolute right. This right has to be exercised for the general good of society.

It is a meaningful expression formed by vague concepts which incorporates legal principles, providing guidance for the interpretation of other provisions.

It is to this extent (or in this sense) more important than other legal provisions, although it is not formally stated as such.

There is no hierarchical rule which declares that a general clause is more relevant than any other provision – but in fact it is.

A general clause is the formulation of a very general legal thought that furthers the unity of the system and can be applied to different factual circumstances, (the terms are intentionally vague) and also to the future.

These general clauses must be substantiated by judicial decisions. In this sense and to some extent judges make law, even in civil law jurisdiction[2]. This would in fact make judge-made law, for the rule to resolve that specific case exists – only after the decision. This is not often expressly admitted by Brazilian legal writers or judges.

Only from a formal point of view, in these cases it could be said that this is statute law «interpreted» by judges.

Close attention should be paid to precedents derived from «vague' statutory provisions.

It can then be noted that there is a certain convergence between civil and common law jurisdictions. These general clauses increase or render more important the role of case law in civil law jurisdiction[3].

In this sense, we could also surmise that in these cases we would have precedent-based law which will be the base for future cases[4].

«The role of the judges and the legislators are complementary - the legislator sets out (in some cases, I would add) general rules and the judges render principles concrete»[5].

To this end, the following quotation is very interesting: «In over 70% of cases the discussion of «fairness» occurred as part of the application of general clauses in the codes or statute. The concept provides a bridge between ideas expressed in rules and the broader sense of justice within the community. Such an approach moves away from classical legal positivism and requires more justification – Accountability is mediated through doctrinal

[1] On this subject see: Alberto Gosson Jorge Jr, *Clausulas Gerais no novo Código Civil* (LGL\2002\400), São Paulo, Saraiva, 2004; Ruy Alves Henriques Filho, *As clausulas gerais no processo civil*, *RePro* n. 155, São Paulo, Ed. RT, 2008; Fabiano Menke, *A interpretação das clausulas gerais: a subsunção e a concreção dos conceitos, Revista da Ajuris* n. 103, Porto Alegre, Ajuris, 2006, p. 79.

[2] Fredie Didier Jr, *Cláusulas Gerais Processuais*, in *Revista de Processo,* vol. 187, São Paulo, Revista dos Tribunais, Sep/2010, p. 70.

[3] Ibid., p. 71.

[4] Judith Martins-Costa, *O direito privado como um «sistema em construção». As cláusulas gerais no projeto do Código Civil (LGL\2002\400) brasileiro*, *Revista de Informação Legislativa*, n. 139, Brasília, Senado, 1998, p. 10–11.

[5] John Bell, *Judiciaries within Europe, Cambridge Studies*, in *International and Comparative Law*, CSICL, New York, Cambridge University Press, 2006, p. 145.

legal commentators who will publish criticism of decisions. Through their comments, there will be a wider dissemination into the legal community as a whole»[1].

In a very interesting decision, the STJ (Superior Tribunal de Justiça) considered that no indemnity was due as a result of the expropriation of a plot of land, where the owner had planted psychotropic plants. It was held that this plot of land did NOT fulfill its social function (Social function of property)[2].

Naturally, decisions based on these flexible standards can be different from each other, because they rely on personal interpretations.

Thus, just because of that, respect for precedents would be important specifically in this field to create predictability and uniformity.

Therefore, case law dealing with these vague standards has to be standardized to not compromise the rule of law. Hence, not necessarily just one (and the first) precedent becomes binding, but a clear line of precedents of our higher Tribunals must at least orientate the other organs of the Judiciary.

We are all conscious of the fact that if this does not happen, uniformity, predictability, consistency, stability, equality can be profoundly, deeply, heavily compromised.

d) That is why statutory law nowadays contains provisions which can effectively put pressure on judges to respect precedents.

There is also the *súmula vinculante*, since the 45th Amendment to the Federal Constitution (2004).

The *sumula vinculante* is not properly a precedent. It is, in fact, a verbal formulation of a *quaestio juris* (and its solution) issued after a clear line of precedents have already been issued in the same sense. After that, a *súmula vinculante* can be issued by the *Supremo Tribunal Federal*, a) on constitutional matters; b) if previously there have been several decisions by the STF on this matter; c) if there are controversies among the various organs of the Judiciary; d) if this matter raises a proliferation of claims.

These four conditions having been satisfied, meeting some requirements, the STF can formulate a *súmula vinculante*, which can be revised by the same court. One of the main goals of this device is to create uniformity, for cases should be solved according to their context[3]. I do hope it takes a considerable time until this takes place, because it would really compromise stability profoundly and it is binding to the whole Judiciary and to the Executive. The STF, respecting some requirements, is allowed by statutory law to overrule it. There are, till the present moment, 31 *sumulas vinculantes*.

3) Our *class actions*[4] are a rather well developed field of our civil procedural law.

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[1] John Bell, *Judiciaries within Europe, Cambridge Studies*, in *International and Comparative Law*, CSICL, New York, Cambridge University Press, 2006, p. 143.

[2] REsp. 498.742 – PE (2003/0017278-8), rel. Min. José Delgado, j. 16/setembro/2003.

[3] Elizabeth Cristina Campos Martins Freitas, *A aplicação restrita da súmula vinculante em prol da efetividade do direito,* in *Revista de Processo*, vol. 116, São Paulo, Revista dos Tribunais, jul/2004, p. 181.

[4] On the subject: Antonio Gidi, *Coisa julgada e litispendência em ações coletivas*, São Paulo: Saraiva, 1995; Idem, *A Representação Adequada nas Ações Coletivas Brasileiras: uma proposta*, *Revista de Processo,* n. 108, São Paulo, Revista dos Tribunais, 2002; José Carlos Barbosa Moreira, *Ações Coletivas na Constituição Federal de 1988*, *Revista de Processo,* n. 61, São Paulo, Revista dos Tribunais, jan-mar/1991; Ada Pellegrini Grinover, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto,* 8. ed., Rio de Janeiro, Forense Universitária, 2005; Idem., *Ações Coletivas ibero-americanas: novas questões sobre a legitimação e a coisa julgada*, *Revista Forense* n. 361, São Paulo, Forense, 2002; Idem., *Ações Coletivas para a Tutela do Meio Ambiente e dos Consumidores – a Lei 7.347, de 24.7.85*, *Revista de Processo,* n. 44, ano 11, São Paulo, Revista dos Tribunais,

Today we have a sophisticated system of class actions.

Our legislation is very detailed in what concerns the kinds of rights which are protected, *res judicata*[1], *lis pendens*[2], and other important aspects are expressly dealt with.

Class actions can be considered a powerful device to improve access to justice and to balance a lack of power over companies and government. Class actions are a device to solve disputes over rights or duties found in society to which no one is specially or specifically entitled, and sometimes claims of various plaintiffs revolving around some legal issue[3].

Which point or points actually make class actions different from individual ones?

Mainly two points: standing and *res judicata*.

Rules of standing and *res judicata* are two sides of the same coin.

A class action is brought by a representative claimant (collective standing) without the express consent of all the represented persons. And the outcome of the action shall bind the group as a whole.

In Brazil, class actions can only be brought by those identified by the statute: social unions, associations, prosecutors of the Office of the Attorney General (Ministère Public) and so on.

Judges cannot evaluate the adequacy of representation on a case-by-case basis, as in the USA.

In the *res judicata* regime there is something special: specific rules of *res judicata* in Brazilian Class actions do not bind absentees if the judgment in not favorable to their interests.

And, furthermore, there shall be no *res judicata* at all if there is a defeat due to insufficient evidence. The same class action can be brought again if new evidence is found and presented.

We talk about a) diffuse rights, b) collective rights and c) homogeneous individual rights.

These three types of rights correspond to three kinds of class actions, each with a slightly different procedure and scope of judgment.

a) A diffuse right[4] belongs to a universe of indeterminate people, not previously connected and linked only by factual circumstances.

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out-dez/1986; Luis Manoel Gomes Jr, *Curso de Direito Processual Civil Coletivo,* 2. ed., São Paulo, SRS Editora, 2008; Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses,* 24ª ed., São Paulo, Saraiva, 2011.

[1] Latin for «the thing has been judged» meaning the issue before the court has already been decided by another court, between the same parties. Therefore, the court will dismiss the case before it as being useless. Example: an Ohio court determines that John is the father of Betty›s child. John cannot raise the issue again in another state. Sometimes called «res adjudicate». Available at http://dictionary.law.com/Default.aspx?selected=1825 access 04/07/2011.

[2] Latin for «a suit pending,» a written notice that a lawsuit has been filed which concerns the title to real property or some interest in that real property. Available at http://dictionary.law.com/Default.aspx?selected=1172 access 04/07/2011.

[3] Eduardo Cambi, Kleber Damasceno, op. cit., p. 24.

[4] Pedro da Silva Dinamarco, *Ação civil pública*, São Paulo, Saraiva, 2001, p. 51, nota 163; Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses,* 24ª ed., São Paulo, Saraiva, 2011; Pericles Prade, *Conceito de interesses difusos*, 2. ed., São Paulo, RT, 1987, p. 57–58, Rodolfo de Camargo Mancuso, *O município enquanto co-legitimado para a tutela de interesses difusos, RePro* n. 48 São Paulo, RT, out-dez 1987, p. 49; Lúcia Valle Figueiredo, *Direitos difusos na Constituição de 1988*, *Revista de Direito Público* n. 88, São Paulo, RT, out-dez 1988, p. 105; Ada Pellegrini Grinover,

e.g. We all have the right to breathe clean air or live in an ecologically balanced environment[1].

b) A collective right[2] belongs to a specific group, where persons are linked to each other by a legal relationship, preexistent to the lawsuit[3].

e.g. Rights which belong to a specific professional category, such as lawyers[4] or fishermen.

c) The homogeneous individual rights[5] are the «old» rights (as the *droit subjectif* of the French Law) which can be the object of a collective treatment, if they have a common origin[6].

An example of these rights emerges from the situation of clients of a bank from whom excessive fees have been charged; or that of a consumer enticed by false advertising, for example, to acquire beverages that contain prizes in the bottle tops but that, due to printing errors, nullify the right to the prize; and also those consumers who purchase vehicles produced with factory defects; or people who take out loans that contravene national legislation or omit essential information[7].

Those who can take the initiative of filing claims against (or suing) the State Companies etc... «representing» a group of persons, the community or the whole society are specifically mentioned or named by statutory law. In Brazil, we did not adopt the system of adequate legitimacy or standing.

The effects of the final decision on the case affect all those who are «represented» unless the decision is based on a lack of evidence. In this case, the claim can be presented again.

The inversion of the burden of the proof is also possible, that is, it is possible for a judge to decide not to apply the rule, according to which, each of the parties has to produce evidence of the allegations of fact that he or she made.

These proceedings are normally used (employed) in environmental matters, consumer law, and in general questions or problems related to Financial Institutions.

A problemática dos interesses difusos, in *A tutela dos interesses difusos*, São Paulo, Max Limonad, 1984, p. 30–31; Celso Ribeiro Bastos, *A tutela dos interesses difusos no direito constitucional brasileiro, RePro* n. 23, São Paulo, RT, 1981, p. 40; João Carlos de Carvalho Rocha, *Notas sobre a composição do dano ambiental no Brasil e nos Estados Unidos da América*, *Revista da Procuradoria-Geral da República* n. 1, São Paulo, RT out-dez 1992, p. 174–175; Herman Benjamim, *A insurreição da aldeia global contra o processo civil clássico. Apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor,* in Edis Milaré (Coord.), *Ação civil pública lei 7.347/85 – Reminiscências e reflexões após dez anos de aplicação*, São Paulo, RT, 1995, p. 93.

[1] Nesse sentido REsp 28222 / SP 1992/0026117-5 rel. Mina. Nancy Andrighi. Available at: https://ww2.stj.jus.br/revistaeletronica/ita.asp?registro=199200261175&dt_publicacao=15/10/2001.

[2] On this subject, see: Luiza Dias Cassales, *Ação Civil Pública,* in *Revista da Ajufe* n. 48, São Paulo, jan-fev 1996; Herman Benjamim, *A insurreição da aldeia global contra o processo civil clássico. Apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor,* in Edis Milaré (Coord.), *Ação civil pública lei 7.347/85 – Reminiscências e reflexões após dez anos de aplicação*, São Paulo, RT, 1995, p. 94; Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses*, 24ª ed., São Paulo, Saraiva, 2011.

[3] Kazuo Watanabe, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto*, 8. ed., Rio de Janeiro, Forense Universitária, 2005, p. 803.

[4] REsp 331403 / RJ – Rel. Ministro João Otávio de Noronha, DJ 29/05/2006. Lawyers could only claim for something related to their professional group.

[5] Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses*, 24ª ed., São Paulo, Saraiva, 2011.

[6] Pedro da Silva Dinamarco, *Ação civil pública*, São Paulo, Saraiva, 2001, p. 60.

[7] TRF 2ª Região. Agravo em Ação Civil Pública 2006.02.01.004411-3, rel. Desembargador Federal Frederico Gueiros. DJ. 13/06/2007.

3.2) Typical characteristics of civil law jurisdictions

1) In Brazil, a judge or a Court can only give decisions based on **statutory law**. That does not obviously mean that uniformity is granted, because words, even the words of statutory law, can be understood in various different ways.

That is why, as I explained before, we are beginning in Brazil to give more importance to case law, stimulating the Judiciary to pay respect to precedent of our highest Courts (STJ and STF).

Or the other hand, these courts should also be encouraged to create stability in their case law. There is a Bill for a new Brazilian procedural Code and in this Bill there are several principles to provide guidance to the Courts, telling them e.g., not to overrule without seriously taking into consideration the need for stability and predictability.

2) A Brazilian judge **controls the proceedings**[1] but this kind of control that we have is different from the management powers of the English Civil procedural code. This difference stems mainly from the fact that this control depends entirely on statutory law.

3) Role of the parties. If, in common law jurisdictions, it is the responsibility of the parties to decide on which facts evidence is to be taken and to determine which means of evidence they want to use, in Brazil as in other civil law jurisdictions, it is not like that.

In Brazil – as in other civil law countries – a judge is directly involved in the taking of evidence: from the framing of the facts on which evidence is to be taken to the identification of the means of proof. A judge will not investigate the facts by himself, but based on the parties' description of the facts, he or she will decide on which of the means of proof chosen by the parties will effectively be produced.

Witnesses are heard when they answer questions posed by a judge and not directly by the lawyers of the parties.

Witnesses are neutral persons, even if they have been appointed by the claimant or the defendant[2].

There can then be three (or more) expert witnesses[3]: the one appointed by the judge and two party appointed experts. They can all work together or separately.

The Court can call the parties at any time to ask them questions[4] and can appoint an expert witness, if necessary, to act with those appointed by each of the parties.

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[1] Luiz Rodrigues Wambier, Eduardo Talamini, *Curso Avançado de Processo Civil*, 11. ed., São Paulo, RT, 2010, vol. 1; Arruda Alvim, *Manual de Direito Processual civil,* 11. ed., São Paulo, RT, 2007, vol. II; Alexandre de Freitas Camara, *Lições de Direito processual civil*, 16. ed., Rio de Janeiro, Lumen Iuris, 2007, vol. I; José Frederico Marques, *Manual de direito processual civil*, 9. ed. atual Ovício Rocha Barros Sandoval, Campinas, Millennium, 2003, vol. II.

[2] Arruda Alvim, *Curso de Direito Processual Civil*, vol. II, Ed. Revista dos Tribunais, 1972; Luiz Rodrigues Wambier, Eduardo Talamini, *Curso Avançado de Processo Civil*, 11. ed., São Paulo, RT, 2010, vol. 1.

[3] Humberto Theodoro Jr, Curso de Direito Processual Civil, Rio de Janeiro, Forense, 2003, vol. I, p. 191; José Manuel de Arruda Alvim*, Curso de direito processual civil*, São Paulo, RT, 1972, vol. II; Luiz Rodrigues Wambier, Eduardo Talamini, *Curso Avançado de Processo Civil,* 11. ed., São Paulo, RT, 2010, vol. 1.

[4] About this subject Arruda Alvim highlights that: «O art. 342 confere ao Juiz, como se disse, um poder-dever, no sentido de que deverá ser usado quando o Juiz se encontrar num estado de dúvida, insuscetível de ser esclarecida por outro modo, que não o interrogatório, ou pelo menos, que entenda ser o interrogatório meio manifestamente adequado para tais esclarecimentos. [...] Afigura-se-nos, ainda, que do interrogatório livre, tal como previsto no art. 342, dever-se-á lavrar um termo, de tal forma que fique documentado nos autos o que a parte, ou as partes, tenham dito ao Magistrado. Ainda, parece-nos ser direito dos advogados o de assistirem ao referido interrogatório, menos para nele intervirem, senão para fiscalizar a atividade do Juiz, no sentido de evitar que saia ela, eventualmente, de sua imparcialidade. Aplica-se o disposto no art. 342 a quaisquer tipos de pro-

4) There is no jury in the first instance. There are usually several hearings before a judge, who can decide either at the end of the last one, or afterwards when the parties are not present.

5) Traditionally in common law systems like the U.S. it was the task of the parties to present the applicable law to the judge. Conversely, civil law countries, among them Brazil, expect their judges to know the law.

The Roman principle *damihi fact dabo tibi jus* is still in effect in Brazil and generally speaking in civil law jurisdictions[1].

That means that a judge is not bound/restricted by the legal arguments or grounds alleged by the parties in the claim form or in the defence or even during proceedings.

He or she is, however, limited by the facts described by the parties and clearly only by those which were properly demonstrated by the evidence.

Consequently, the judge can pick from statutory law, the right article or rule and the legal theory applied to solve the case.

6) The pieces of evidence are produced before the judge during the several hearings which may take place. The parties' activities in this field are never directed at each other, i.e. the claimant does not exhibit documents to the defendant. Instead, they both show the evidence to a judge who is the only one who is expected to evaluate it[2].

7) There is no witness preparation. Witnesses are seen in Brazil, as it normally happens in civil law jurisdictions, as neutral persons, even if they have been nominated by one of the parties. That is why witnesses in Brazil are never coached. On the contrary, the credibility of the witnesses can be affected if the parties have contact with them before the hearing.

8) When a claim is brought before a Brazilian Court, some of its elements are fixed until the end of the proceedings, and these phenomena are known as the *perpetuatio legitimationis*[3], *perpetuatio jurisdictionis* and *perpetuatio libelli*. Specifically the *perpetuatio libelli* means that the cause of action and the *petitum* made or formulated by the plaintiff cannot be changed until the end of proceedings. Even the plaintiff himself or herself is tied to his or her version of the facts.

Instead, the rule *damihi facta dabo tibi jus* exists concerning the law. That means that a judge can chose the legal basis of his or her decision independently of what the parties have alleged.

9) In Brazilian law, parties have the *right to appeal*.[4] They can attack interlocutory decisions and final awards or sentences. The appeals in themselves have their own requirements, expressly mentioned by statutory law as for instance, the deadline.

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cessos, inclusive, senão especialmente, aos casos de segredo de justiça, hipótese em que também têm os advogados o direito de ao mesmo estarem presentes. Ainda, não deverá uma parte ouvir o interrogatório da outra, mercê da aplicação analógica da lei (art. 413)» (Arruda Alvim, *Manual de Direito Processual Civil*, vol. II, São Paulo, RT, 1978, pp. 298–300).

[1] José Manuel de Arruda Alvim, *Curso de direito processual civil,* São Paulo, RT, 1972, vol. II; José Joaquim Calmon de Passos, *Comentários ao Código de Processo Civil*, 8. ed., Rio de Janeiro, Forense, 1998, vol. III.

[2] Luiz Rodrigues Wambier, Eduardo Talamini, *Curso Avançado de Processo Civil*, 11. ed., São Paulo, RT, 2010, vol. 1; Luiz Guilherme Marinoni, Sérgio Cruz Arenhart, *Manual do Processo de Conhecimento: A tutela jurisdicional através do processo de conhecimento*, 2001.

[3] Helder Martinez Dal Col, *Modificações da Competência*, in *Revista dos Tribunais*, vol. 802, São Paulo, RT, 2002, p. 105; José Manuel de Arruda Alvim, *Manual de direito processual civil*, 13. ed., São Paulo, Ed. RT, 2010.

[4] Nelson Nery Jr, *Aspectos da Teoria Geral dos Recursos no Processo Civil*, in *Revista de Processo* n. 51, São Paulo, RT, 1988; Idem, *Princípios fundamentais – Teoria geral dos recursos*, 4. ed., São Paulo, Ed. RT, 1997,

But there is no discretionary power to accept an appeal.

There is only one exception: an appeal to the Supreme Court can be refused since 2004, when the 45th Amendment to the Federal Constitution took place and took effect.

Appeals to the *Supremo Tribunal Federal* are accepted under one special condition (besides all the others whose existence is verified with discretionary powers): the *quaestio juris* involved has to be important for the whole society transcending the sphere of the parties. This phenomenon is called *repercussão geral* [1] and is very similar the *Grundsätzlichebedeutung* of the German law.

It is interesting to mention that Ministro Marco Aurelio, in his opinion in RE 577494/PR (rel. Min. Ricardo Lewandowski – j. 17.04.2008 – DJe 09.05.2008) said that the «repercussão geral» aims to avoid a significant amount of cases, rationalizing the activities of the Judiciary, therefore the criteria for identifying it must be flexible and not restricted.

It is of course a vague concept (because it's applied every time that the situation has political, social, economic or juridical relevance) that implies a certain level of subjectivity, but case law tends to be uniform and stable in this specific situation. Good examples can be given.

The STF heard an appeal on a case involving the applicability of an amendment to the Health Insurance Contract law. The question was to know whether this change would apply only to the new contracts or also to the ones which existed already. It was rightly considered that the legal problem which had to be solved was of public interest (= important from economic and social points of view)[2].

The STF heard an appeal on the question of whether a statute establishing a special tax for the use of the airspace, by «electricity poles» would be compatible with the Federal Constitution. Again «repercussão geral» was recognized in this case.[3]

An interesting example deserves to be referred to: a supporter of a football team from the state of Bahia demonstrated that there had been corruption in a league, asked for moral damages and won the suit. However, his appeal before the STF was not heard, for despite everything, it was considered that this specific case presented no «repercussão geral».

As one can see, Brazil has strong characteristics of what can be considered to be typical civil law jurisdiction as well as some characteristics of the common law jurisdiction. For this reason, it can be said that the current Brazilian procedural system is not pure in essence, but a combination of these two great legal systems.

IV. Culture and civil procedure

Of course, our culture does influence civil procedural law in my country. But, in general, Brazilians are very open to comparative law and important statutes are written with the help of jurists (scholars, law professors), who are aware of what is happening around the

p. 44; Oreste Nestor de Souza Laspro, *Garantia constitucional do processo civil*, São Paulo: Ed. RT, 1999, p. 192.

[1] José Miguel Garcia Medina, *Prequestionamento e repercussão geral e outras questões relativas aos recursos especial e extraordinário,* 5.ed., São Paulo, RT, 2009; Bruno Dantas, *Repercussão Geral. Perspectivas histórica, dogmática e de direito comparado e questões processuais,* 2.ed., São Paulo, RT, 2009; Nelson Nery Jr, *Princípios fundamentais – Teoria geral dos recursos*, 4. ed., São Paulo, Ed. RT, 1997.

[2] RESP 578.801-6/RJ – Rel. Min. Carmen Lúcia. Tribunal Pleno. DJ 16/10/2008

[3] RE n. 494.163/RO, rel. Min. Eros Grau. Tribunal Pleno.

world, and seek to know where new devices are producing good results. So, as was said in answer to the question above, our procedural system is effectively a mixture of elements of various systems, although still in my opinion with stronger or more visible features of civil law countries, mainly as far as necessary respect of precedent is concerned. This is a clear trend in Brazilian law, but it is not mandatory.

Margaret Woo[1]

CHINESE NATIONAL REPORT:

Proposed 2011 Amendments to Chinese Civil Procedure

The Chinese Civil Procedure Code was first promulgated in 1982 for trial implementation, formally enacted in 1991, and amended in 2007. The 2007 amendments focused primarily on tightening the trial supervision provisions and enforcement of judgments. Since 2007, the ever increasing number of civil lawsuits and the over-burdened workload of Chinese trial courts have led to discussions of yet another round of changes to the civil procedure code. In June, 10, 2011, the central committee legislative affairs bureau announced plans to revise both the civil and criminal procedure codes. This report documents the proposed amendments as of December 2011.

The proposed changes to the civil procedure code came on the tail of the growing social instability and public dissatisfaction with the work of the Chinese courts. As the economic boom in China also resulted in greater disparity in power and income, there is growing social unrest, an increase in letters of complaint, as well as rising numbers of petitions (a method seeking reviews of cases after final appeals) to governmental entities and courts. In 2005, President Hu Jintao called for the construction of a «harmonious society» in an effort to stem this tide of social unrest[2]. In response, the Supreme People's Court acknowledged in 2006 a retreat from a decade long path of civil justice reform towards adjudication and a return to mediation, with an endorsement of enhanced mediation for cases of «great social concern»[3]. The call is for preserving a «harmonious society,» and the goal is to stabilize society with the principle of «[u]sing mediation whenever possible, using adjudication whenever appropriate, combining mediation with adjudication, concluding the case and having the dispute resolved»[4]. Concerned that the courts are unable to constrain social discord, the Chinese govern-

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[2] *Building Harmonious Society CPC's Top Task, China Daily*, Feb. 20, 2005, available at http://www.ChinaDaily.com.cn/english/doc/2005-02/20/content_417718.htm.

[3] *Si fa bu biao zhang min tiao gong zuo «shuang xian»* (司法部表彰民调工作»双先») [Ministry of Justice Commends the «Two Advances' in People's Mediation Work] (Mar. 1, 2005), http://www.legalinfo.gov.cn/moj/jcgzzds/2005-05/17/content_133971.htm (reemphasizing the importance of mediation in serving the interests of building a «harmonious society»).

[4] Ibidem.

ment has equated improved legal work with greater consideration of the social and political context of cases[1].

In sum, any proposed revisions to the Chinese civil procedure code must be understood with the stated government goals of protecting litigant's rights, easing the court's workload, and maintaining social stability. The proposed amendments to the Chinese civil procedure addressed some of the country's concerns with social instability, the increased workload of Chinese judges, and the external pressures of WTO treaty regime that urges greater access to justice and greater transparency of the courts. The areas for major reforms include: filing procedures, pretrial procedure, mediation, evidence, public interest litigation, small claims, and trial supervision.

1. First and foremost, the draft clarifies the relationship between extra judicial mediation and adjudication in the courts.

a. The revision adds new article that emphasizes mediation as an effective mechanism for resolving disputes, and states that suitable cases should first be mediated. (New Art. 121).

b. New subsection 6 also provides for enforcement of extra-judicial mediated agreements by the courts, provided that the agreement is filed with the courts within 30 days of the agreement. The civil court after investigation may enforce the agreement or may require the parties to mediate again, if it finds the agreement unlawful. (New Arts. 192 & 193). The enforcement provision protects the integrity of the mediated agreement.

2. Increasing the litigant's right to file a complaint with the courts.

a. In response to problems of courts refusing to accept complaints, Art. 111 is revised as new Art. 122 with a clause emphasizing the importance of protecting a litigant's right to file a complaint. It provides that a court must accept a case that is filed and that meets the requirements of Art. 118. The court must decide to accept or not accept the case within 7 days and notify the litigants. The litigants have a right to appeal. (New Art. 122).

b. Proposed articles also outline a multi-tracked civil litigation system. In the early stages of the litigation, the people's court must assess and decide to track the case either to 1) an expedited procedures (du cu) translated loosely as «supervised procedure» if the case, such as a debt case, has little or no factual disputes; 2) mediation if the litigants' disputes are more substantial; 3) simplified procedure or ordinary procedure, according to the needs of the case; and 4) procedure for litigants to exchange evidence to clarify the point of disputes for cases that will require a trial. (Newly added Art. 132).

c. Quite importantly, the revisions recognize the need to expand standing for public Interest cases beyond those who have sustained a direct injury. In environmental and consumer protection cases, proposed Art. 55 provide that relevant governmental organs and civil society organizations may have standing to file suit on behalf of the public interest. (Newly added Art. 55).

d. The new provisions also provide general authority to courts to order or prohibit actions to maintain status quo until the court can make final determinations. This is particularly necessary in intellectual property disputes, trademark infringement, and copyright violation disputes. The court can order parties to cease and decease from certain conducts as well as

[1] See *China to Launch Education of «Socialist Concept of Rule of Law»*, available at http://english.peopledaily.com.cn/200604/14/eng20060414_258297.html (stating socialist rule of law is the building of a socialist harmonious society).

freeze assets to ensure that execution of judgment is later possible. The court has power to do this even if there were no request from the litigants. (New Art. 99).

e. To increase judicial decision transparency. Amended provisions now emphasize that all judgments and judicial orders must explain the basis for the decision in writing. The judicial decision must state the basis for the law suit, the decision and reasoning for the decision, the costs, and appeals period. (New Arts. 151 & 153) More importantly, a newly added article specifies that all judgments and decisions are available to the public with the exception of cases involving trade secrets, national security or the privacy of individuals. (New Art. 155).

3. To complete a litigant's right to present evidence, these articles specify the timing for exchange of evidence and procedure. The focus point is the pretrial conference, which will enable parties to focus on the major points in dispute, the evidence, and simplify trial and eliminate disputes in the litigation process.

a. When parties present evidence to the court, the court must accept the evidence and document the type of evidence, the pages, the amount and the time of receipt, with the court seal. (Newly added Arts. 66).

b. To avoid delays in the case, a new article is added to require the timely presentation of evidence. If the party is untimely in presenting the evidence, the people's court may fine the party, impose costs due to delays in litigation, and even reject the evidence. (New Arts. 65).

c. New articles provide that for questions requiring an expert's opinion, the litigant can petition to the court for an expert evaluation. The court will assign an evaluator or the parties, by agreement, can agree to one. The evaluator must testify before the court if the parties disagree with the evaluator's opinion or if the court thinks it is necessary for the evaluator to testify. If, after the court notices the evaluator, the evaluator fails to appear, then the evaluation will not be admitted into the facts nor will it serve as the basis for any factual determination. (New Arts. 76, 77, & 78).

4. Completing simplified procedures. For many civil cases in which the facts are relatively clear and the disputes are not large, simplified procedures will be utilized.

a. A new article provides that simple cases below 5,000 RMB will have one trial only. (New Art. 161).

b. A revised article also expands the simplified procedure's parameters. In addition to requiring some simple cases to use simplified procedure, parties can agree to the use of simplified procedures. (New Art. 156).

c. A revised article also added the requirement that cases from the basic people's court and those send out from the trial courts can use more convenient methods to summon litigants, deliver documents and try cases, but should in all cases protect the litigant's rights and opinion. (New Art. 158).

5. Procurators in China have the unique authority to supervise judicial work. The following changes strengthen the procurator's role in judicial supervision

a. Increase the manner of supervision. The former civil procedure code previously provided for one form supervision method - kansu, that of an upper level procurator filing a protest with a court at a lower level seeking retrial of a legally effective judgment or with an upper level court for review if the judgment is not yet legally effective. According to the drafters, experiments in area courts suggest expanding the procurator's right to supervise the trial procedure. The amended provision now provides that Chinese procurators can

also propose (jianyi) to a court at the same level for a retrial for cases with legally effective judgments, mediated agreements, or arbitration decisions, if there is newly discovered mistake (or conditions under Art. 198) or if the mediated agreement harms the public good. In the alternative, the procurator can also ask the procurator at an upper level to file a kansu. (New Art. 206).

b. Increase the parameters of supervision. The former civil procedure code did not clearly specify whether execution of judgments and mediation activities by the court can be subject to procurator's supervision. This is to address the problem of collusion between litigants and mediation authorities. This new provision will allow procurators to protest (kansu) or to petition for retrial in any executions of judgments and also exercise supervision over mediated outcomes that may harm the public good. (New Art. 206).

c. Increase the authority of procurators to investigate to determine whether a protest (kansu) with the court at the next higher level or a proposal (jianyi) to the court at the same level that a retrial is necessary. Procurator can review the court records, question the litigants or investigate beyond the case. (New Art. 209).

6. Completing the trial supervision procedure.

a. At present, if the litigants believe there is some error in the decision, they can petition a higher level court for a retrial. The amended article now allow litigants in cases involving private citizens to petition the original trial court for retrial under specified circumstances. (New Art. 197). These circumstances include new evidence warranting the overturn of the judgment, lack of evidence, fake evidence, unauthenticated evidence, cases requiring court investigation and court failed to investigate, correct error of law, the judge failed to recluse when appropriate, absence of necessary parties, illegal stripping of litigants' right of defense, default judgment when party failed to receive summons, judicial decision went beyond or failed to address the litigation, judicial corruption. (New Art. 198).

b. Litigants often petition both the procurator and the people's courts for trial supervision simultaneously. New articles are added to clarify the circumstances under which litigants may petition the procurator to file a protest (kangsu) or suggestion (jianyi) for a retrial. Three circumstances allow litigants to petition the procurator for supervision: 1) when the people's court has declined the litigant's petition for retrial; 2) when the people's court failed to act on the retrial petition for a long time; and 3) if the case upon retrial contains clear error. (New Art. 207). Finally, to address the problem of repeated petitions for retrial, new Article 208 specify that parties may not petition the procurator again to file a protest if the party has already filed one petition to the procurator and the case has been retried by people's court. (New Arts. 208).

7. Addressing residual problems with execution of judgments, amended provisions both empower the court with direct action to execute as well as the power to punish violators.

a. To prevent the problem of parties hiding or moving assets, this revision will allow the execution personnel to take direct measures to execute on assets after notice to the defendant. (New Art. 237).

b. The people's courts are authorized to fine, arrest, or investigate as a criminal case, those people evading execution of judgments. (New Arts. 111 & 112).

c. For parties in cases of extreme conduct, the fine is raised from «not to exceed 10,000» to «not to exceed 100,000» RMB; for institutional defendants, the fine is raised from «between 10,000 and 300,000» to between «500,000 to 1 million» RMB. (New Art. 114).

Chiara Besso[1]

ITALIAN NATIONAL REPORT

THE ITALIAN LITIGATION SYSTEM: A CIVIL LAW SYSTEM WITH A TOUCH OF COMMON LAW

1. Introduction to Italian civil procedure with historical background

The current Italian system of civil procedure belongs to the civil law tradition, heir to the so-called Romano-canonical procedure, the procedure developed in the 12th century and based on Roman law (as embodied in the Iustinianus Corpus Iuris Civilis), Canon law (the Gratian's *Decretum* and papal decretals), and the law of northern Italian cities.

If Italian procedural culture played a creative and dominant role in Europe during the Middle Age, it entered in crisis in the period from the XVI to the XVIII centuries. There was no central power and no central court able to exercise a unified influence on the praxis of the courts[2]. Civil litigation was still modeled, in its substance, on the Romano-canonical procedure: the proceeding was written, with a limitless exchange of briefs, in front of a passive judge[3].

The beginning of the XIX century was characterized by the influence of the Napoleonic *Code de procédure civile*, which strongly conditioned the Sardinian Codes of 1854 and 1859, the antecedents of the first Italian Code of 1865.

The 1865 Code, enacted at the time of Italian political unification, designed a proceeding subject to close party control and governed by formalistic rules, and it was replaced by the current Code of Civil Procedure, that entered into force in 1942.

The new Code moved away from the principle of party control over proceedings and introduced a stronger role of the judge in controlling the course of the proceedings. The so-called 1950 «Counter Reform», driven by the bar, introduced changes, increasing again party control over litigation. Parties were allowed to introduce new facts and new evidence during the whole course of the proceedings, with the consequence of an overlap of introductory and evidence stages of the proceedings.

Between the 70's and the 80's of last century intense debates had been going about the need of a new code of civil procedure – with the proposal of various projects and bills, – but it is only at the beginning of the 90's that we had a significant reform.

As it is very well known, the most important problem of Italian civil justice is delay[4]. With the main objective of reducing the length of civil proceedings, in the last

[1] Professor of University of Turin (Italy).

[2] See Van Caenegem, *History of European Civil Procedure*, in Cappelletti (ed.), *International Encyclopedia of Comparative Law*, vol. XVI, Tübigen, 1973, 69 ff.

[3] Taruffo, *La giustizia civile in Italia dal '700 ad oggi*, Bologna, 1980, 9 ff.

[4] The average length of an ordinary proceeding is 977 days in front of the «tribunale» (the court of first instance) and 1,549 days in front of the court of appeal. On the problem see Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, in Trocker-Varano (ed.), *The Reforms of Civil Procedure in Comparative Perspective*, Torino, 2005, 217 ff.

twenty years several reforms have been tempted, reforms sometimes mutually contradictory:

I. A first period of reform has taken place over the years 1990–1998, with the result of a partial rewriting of the code of civil procedure. The Law n. 353/1990 introduced «emergency measures for civil procedure», with the main aim to concentrate the preparation phase in a preliminary hearing, making use of a system of deadlines mostly fixed by the legislator[1]. After a negative reaction by the bar, the rules were modified in 1995 with at least three hearings dedicated to the preparation of the case. The Law n. 374/1991 introduced the new figure of the justice of the peace («giudice di pace»), intended to reduce the workload of the ordinary courts of first instance as to small claims (objective that has been over the years largely achieved). Aiming at a better use of the judicial personnel, the Legislative Decree n. 51/1998 set the principle that the «tribunale» (the court of first instance) sits normally as a single judge courts.

II. Undoubtedly, the 1990–1998's reforms, even if they had few positive effects, failed to achieve the most important purpose of reducing the length of civil proceedings. The innumerable judgments against the Italian government by the European Court of Human Rights – with the warnings by the European Counsel to solve the problem of delay – led to the Law n. 89/2001. In order to prevent the resort to the European Court of Human Rights, the so-called «legge Pinto» required the parties to ask first to the Italian courts (the Courts of Appeal) the compensation for damages suffered because of the delays in the administration of justice[2].

III. In 2003 a group of procedural provisions was included in the reform of corporate law (Legislative Decree n. 5/2003). The new procedure was intended as a sort of experiment of a future, general reform of the Code of Civil Procedure. The main aspect of the proceeding – contrary to the rules of the existing code – was the «privatization» of the preparatory phase, taken away from the judge and exclusively entrusted to the parties' lawyers. Briefly, the proceeding was divided in two phases. The first phase started with the claim served to the defendant without submitting it to the court, and ended when one of the parties asked the judge to fix a hearing in front of the court. The second phase consisted of one or more hearings to discuss the case and to take the evidence, and of the judgment. The idea was that entrusting the lawyers, instead of the judge, of the management of the case would have speeded up litigation.

Corporate proceeding was strongly criticized by some scholars[3], who stressed it contrasts with the reforms recently enacted in several systems, of civil law and common law, where judges have been invested with broader and more effective powers of management of the case (first of all England, but also Germany and France).

Anyway, the experiment gave disappointing results: corporate proceedings were even longer than ordinary proceedings and the procedure was almost totally abrogated in 2009 and 2010.

[1] Law 353/1990 ruled other aspects: a simplified and unified regulation of provisional remedies; the possibility to obtain money orders during the proceedings; the enforceability of the first instance judgment.

[2] On the negative impact of the Pinto Law see the analysis of the «Procuratore generale della Corte di cassazione» in his opening speech, delivered in January 2010, concerning the administration of civil justice in 2009 (in www.giustizia.it). Just think that in the month of September 2010 there were 24 Supreme Court decisions in response to appeals against the liquidated damages made by the Courts of Appeal.

[3] See Taruffo, *Recent and current reforms of civil procedure in Italy*, 228 f.

IV. The recent reforms of 2005 (Law n. 80), 2006 (Law n. 51), and 2009 (Law n. 69) changed orientation and, someway, moved in the direction of judges' case management and procedural flexibility and proportionality[1]. I refer to:

• the new articulation of the preparatory stage under the modified articles 183 and 184 CCP;

• the so-called «calendario del processo» (process calendar): the judge, after hearing the parties, organizes the schedule for the unfolding of the proceeding (a figure presents in other European systems, think of France)[2];

• the new «procedimento sommario» (summary proceeding) for non-complex cases, applicable to all disputes under the jurisdiction of the «tribunale» in its one-judge composition (articles 702-bis, 702-ter, and 702-quater CCP)[3].

2. The concept of civil procedural systems

The classical distinction of procedural systems between common law and civil law systems is now perceived as a stereotype or – at most – as an educational tool:

• Firstly, even for the countries that traditionally belong to civil law and common law families (let us think on the one side to England and USA and on the other side to France, Germany, and Italy) it has lost some of its opposition. It is now widely believed that there is an attenuation of differences[4]. If the common law systems are placing more managerial powers to judges and trying to limit the excesses of adversarialism, the civil law systems have someway changed their character and even adopted mechanisms typical of the common law.

• Secondly, there are many countries in the world that cannot be qualified as belonging to the common law or to the civil law families, because they traditionally present mixed aspects of the two (let us think as to Europe to Sweden or Scotland).

• Thirdly, there are countries that undoubtedly present features of common law or civil law systems, but that, nevertheless, have strong unique peculiarities (let us think to the Islamic countries).

New classifications, designed to overcome the Euro-American perspective, have been proposed. We have, for example, the taxonomy by a colleague of mine – Ugo Mattei – that divides all legal systems into three families based, respectively, on the professional law, on the political law, and on the religious law (where the three patterns, obviously, are at play in all systems, and the difference is only in terms of hegemony)[5]. Another recent classification, based this time on legal tradition, has been proposed by Glenn, who separates legal systems as to the tradition they belong to: chthonic legal tradition, Talmudic, civil law, Islamic, common law, Hindu, and Asian legal tradition[6].

I think that culture may undoubtedly be criteria to classify procedural systems. As a matter of fact, a taxonomy – of legal systems in general, but it may be used as well to procedural

[1] Trocker, *Judicial system*, in De Cristoforo-Trocker (ed.), *Civil Justice in Italy*, Tokyo, 2010, 10 f.

[2] Art. 81-bis of the «disposizioni di attuazione» of the CCP.

[3] The reforms of 2005 and 2009 also introduced two new developments relating to the law of evidence, see *infra* par. 4.

[4] Trocker-Varano, *Concluding Remarks*, in *The Reforms of Civil Procedure in Comparative Perspective*, 244 ff.

[5] Mattei, *Three Patterns of Law*, in *American Journal of Comparative Law*, 1997, 5 ff.

[6] H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, 2000.

systems – based on «cultural spheres» has been proposed by Husa[1], who divides the systems into three different types: one called Western, the second one labelled non-Western, and the third – formed by hybrid systems that can be either Western or non-Western – that combines features of legal families into exceptional combinations.

3. What system is related to Italian civil procedure and why?

The Italian civil procedure presents all the typical features of a civil law system[2]:

• the judge has primary responsibility for development of the evidence and articulation of the legal concepts that should govern decision (see articles 175, 188, 202, 209 CCP);

• litigation proceeds through a series of short hearing sessions for preliminary checks on the regularity of the proceedings, the clarification of questions of fact and questions of law, and the reception of evidence, which is then consigned to the case file until an eventual final stage of analysis and decision (see articles 183, 184, 189, 275 CCP);

• the judgment in the court of first instance is subject to reexamination, extended to facts as well as law, in the court of second instance (see articles 352, 356 CCP);

• a judge serves a professional lifetime as judge, usually lacking the experience of having been a lawyer[3].

Italian jurisdiction has been strongly influenced from the French Code of 1806. It has also been strong the inspiration – by scholars as by codes of civil procedure – of the German and Austrian systems by the late XIX century. A prime example is the theory of Giuseppe Chiovenda, the father and main actor of the so-called orality-movement, who partly determined the Code of 1942[4].

It should be noted that in some areas the Italian system still reflects the setting of the nineteenth-century tradition of civil law when, on the contrary, other systems (I think to France and Germany) have moved away.

Take the case of evidence law. The evidence rules dictated by the Code of Civil Procedure and the Code Civil[5] are not very innovative compared with the rules present in other European systems.

Evidence taking proceedings are the same of the 1865 Code of Civil Procedure.

Think of parties' statements. The medieval «decisive» oath, confession, and formal interrogatory are still there as means of legal proof. There is the new informal interrogatory of the party, but it has first of all the aim to clarify the *thema decidendum* and the *thema prubandum,* and just in the second place it is an evidence device (and in any case parties' statements weigh only as «arguments of proof»)[6].

[1] Husa, *Classification of Legal Families Today*, in *Revue Internationale de Droit Comparé*, 2004, 11 ff.

[2] Cf. the *Introduction* to the *Principles of Transnational Civil Procedure*, Cambridge, 2004, 6.

[3] See Trocker, *Judicial System*, 33 ff.

[4] On Chiovenda and his contribution to the Italian jurisprudence see Tarello, *L'opera di Giuseppe Chiovenda nel crepuscolo dello Stato liberale*, in *Materiali per una storia della cultura giuridica*, vol. III, 1, Bologna, 1973.

[5] According to the French model, the law of evidence is divided in two different Codes. In the Code of Civil Procedure we find the evidence taking rules, in the Civil Code we find the admissibility rules.

[6] In France and in Germany, on the contrary, the interrogatory – mean of legal proof, heir of the medieval interrogatory *per positionem* – has been abolished and replaced by the c*omparition personnelle de parties* and the *Parteivermehnung,* where parties' statements are freely evaluated by the court.

The court power to order the other party, or a non-party, the production of relevant, specified documents (article 210 CCP) represents the only significant novelty of the Code of 1940.

Even if the court may call some evidence, as a matter of principle it is up to litigants to call relevant evidence as judicial powers of evidence initiative are used only as means of last resort.

The principle of free evaluation of proof, asserted by the Code of Civil Procedure (article 116 CCP), has several exceptions.

Formalism plays an essential role[1].

The law of evidence provided by the Code of Civil Procedure and by the Civil Code – both code are nearly 70 years old - has had little change, remaining substantially the same, with the exception of the abolition or modification of specific rules by the Constitutional Court.

Yet, several proposals to reform evidence rules have been made in the direction of the full enforcement of the principle of free evaluation of proof and of the simplification of evidence proceedings[2], but they never became law.

In 2002 a project with a different approach was presented. Leaving unchanged the evidence proceedings under articles 191 ff. CCP and the general dispositions on court's powers and evaluation of evidence under articles 115–118 CCP, the project provided for the empowerment of the pre-action evidence proceedings and the introduction of new figures such as the possibility for the attorneys of taking written statements or expert evidence.

The proponents said that the innovations are an answer to praxis present in the Italian system. This is undoubtedly true. Yet, these proposals on the one hand have also to be put in the contest of evolutionary lines present in other European countries and on the other hand present clear analogies with structural features of the Anglo-American proceedings. So, the empowerment of the pre-action evidence proceedings is present also in countries like France and Germany, and written testimonies have been introduced in England, France, and Germany. As to the taking of evidence by attorneys, it is a feature that is present in the Anglo-American world, particularly in the United States, where the discovery pre-trial stage is traditionally conducted by attorneys with just a marginal role of the court.

Recently the project, in relation to evidence, partially became law: in 2005, pre-action evidence proceedings were empowered; in 2009, written testimonies were introduced (cf. the next paragraph).

[1] An example is the obligation (article 244 CCP) to call witnesses by specifying the name of the witness and the facts on which they will be questioned «formulated in distinguished articles».

[2] The project elaborated by the so-called Liebman commission in the 70s of last century proposed to:

- unify all the evidence rules in the Code of Civil Procedure;
- strengthen the court's powers that could order on its own all means of evidence and impose appropriate sanctions to guarantee the cooperation of the parties to the taking of evidence;
- abolish the decisive oath, transform the party confession from a legal to a free evaluated type of evidence. and give a central role to the interrogation of the parties;
- introduce the chief and cross-examination of witnesses by attorneys;
- simplify the proceedings of documents verification.

The project never became law and the same destiny had the less courageous project elaborated in the 90's by the so-called Tarzia commission.

4. What are the main features in Italian civil procedure? Civil law, common law, unique, that don't exist nor in civil or common law, but just in Italy?

The main features of the Italian civil procedure are, undoubtedly, of civil law.

However, as I said in par. 2, the classical distinction between common law and civil law has lost some of its opposition, and Italy takes part in this trend:

I. As a matter of fact, two mechanisms typical of the US litigation have been introduced: class actions and contingency fees.

A) The debate about the introduction of damage group actions to protect consumer rights went on for years[1]. A proposal was finally approved, by a one majority vote, at the end of 2007, but its entry into force was postponed several times. In January 2010, the provision – replaced in its entirety – came into effect (art. 140-bis of the Consumer Code). According to the rule, each consumer who is a member of the proposed class has the right to file. The types of claims that can be brought are limited (contractual rights, product liability, unfair commercial practices and anti-competitive practices,). The Italian class action is based on an opt-in model: the judgment binds the class members only if they have opted-in. A class action involves two main stages: first, an admissibility stage (similar to the US certification stage, but, in addition, with a preliminary inquiry by the court on the merits of the action) and second, a liability and damages stage. Between the first and the second stage, publicity and opt-in take place. Courts have broad case-management powers to structure the proceedings[2].

B) Traditionally, in Italy contingencies fees have been illegal and any such agreement was void. Today it is no longer so. The Law n. 248/2006 – that also abolished the minimum fees for the lawyers' services – removed the prohibition on contingency fees provided by art. 2233, para. 3, of the Civil Code. Therefore, lawyers can make agreements with their clients about fees. The only requirement is that the agreement has to be in writing. No limit is otherwise given about the type of cases where contingencies fees are allowed or about the amount of the fees. This lack of limits has been strongly criticized by commentators and in general there is broad hostility towards the innovation and the *Consiglio nazionale forense* (the national lawyers' board) proposed to restore the old system[3].

II. As I said in par. 3, in 2005 and in 2009 we had in evidence law two novelties that in this area put the Italian system closer to the Anglo-American proceedings: written testi-

[1] Before the introduction of the class action mechanism, forms of collective action already existed as to consumer rights and labor law, but they were limited to injunctive relief (see art. 139 and 140 of the Consumer Code, and art. 28 of Law n. 300/1970). Cf. Giussani, *Complex Litigation*, in De Cristoforo-Trocker (ed.), *Civil Justice in Italy*, 181 ff.

[2] See Nashi, *Italy's Class Action Experiment*, 43 *Cornell Int'l Law Journal*, 2010, 147. Since 1 January 2010, some (even if not so many as one would expect) consumer class actions were filed. The cases spanned issues ranging from banking services to flu vaccines. But all claims were dismissed as inadmissible, with the exception of one case (see Court of Appeal of Torino, 11 September 2011, that reversed the decision of the Court of first instance) in which the class action was qualified admissible. For an overview of the first months of the Italian class experience see Comolli-De Santis-Lo Passo, *Italian Class Actions Eight Months In: The Driving Forces*, in www.nera.com, and Calcagno, *Italian Class Action: The Beginning*, working paper, in http://papers.ssrn.com, with a translation of Article 140-bis.

[3] See Alpa, *Avvocatura*, *Report to the Conference on Etica e responsabilità. Principi fondamentali e società civile in Italia*, Rome, 8 June 2010, in www.consiglionazionaleforense.it.

monies were introduced and the pre-action evidence proceedings were empowered. Here is a short description:

A) Under the new Art. 257-bis CCP, on the consent of the parties, the court may order, taking into consideration the nature of litigation and every other consideration, that the witness makes her declarations in writing[1]. A debate preceded the introduction of the written testimony, where preoccupations about the risk of untrue written declarations by witnesses and of violation of the right to be heard of the parties were expressed. Nonetheless, in the name of saving costs and time, the Italian legislator introduced the mechanism, that presents strong similarities to the German *schriftliche Beantwortungen* to the *Beweisfragen* under § 377 of the *Zivilprozessordnung*. The model of written testimony finally approved, however, is very restricted in its application – in particular, it is conditioned to the consent of all parties – and too many formalities have to be respected. Therefore, it is doubtful that the new form of testimony taking could have a real impact on the administration of evidence.

B) The proceeding of «consulenza tecnica preventiva» (pre-action expert report): a party may, before the action, ask the court having jurisdiction on the merits to appoint an expert who seeks to settle the parties and, if the settlement fails, draws up the report that can be used in the process on the merits. The aim of the pre-action expert report is focused on the settlement of the dispute, and not so much on the preservation of the evidence. The measure, therefore, may be asked «also out of the requirements of the first paragraph of Art. 696»[2], such as out of situations of risk of losing the evidence[3]. The proceeding – ruled in the CCP by Act n. 80/2005 and into force since March 2006 – has strong similarities with the German *schriftliche Begutachtung* (§ 485 of the *Zivilprozessordnung*) and much in common with the French *expertise préventive* (art. 145 of the *nouveau code de procédure civile*).

III. Lastly, I want to mention the Legislative Decree n. 28/2010 on mediation in civil and commercial disputes, aiming - according to the intentions of the legislator – at deflating the workload of courts and so reduce delays of civil litigation.

In recent years, Italy – like most countries in the world – has seen a growing interest in methods of alternative dispute resolutions. In some areas, statutes provide forms of mandatory or voluntary mediation procedures, and the Decree n. 5/2003 on corporate litigation, above mentioned, regulated a system of conciliation bodies controlled by the State through the inclusion in a national register, and provided mechanisms for fostering the parties' conciliation. Despite the several legislative initiatives, the development of ADR, in terms of the number of mediation proceedings, was still limited. The situation is likely to change with the Decree n. 28, which makes mediation mandatory for a considerable number of civil cases.

[1] The declarations must be collected under a form, made and notified to the witness by the party who requested the testimony taking. The witness – who has the same obligations as the witness who testifies in court – must deposit the completed form in the office of the court›s clerk or send it by post.

[2] Art. 696-bis, paragraph 1 CCP.

[3] The applicability of the measure is not general. As a matter of fact, the pre-action expert report procedure applies «in order to investigate and assess the credits coming from contractual obligation or torts» (Art. 696-bis, paragraph 1 CCP). If the parties settle, the record becomes an enforceable order and claim to mortgage (Art. 696-bis, paragraph 3). As economic incentive for settlement, the record is exempted from paying taxes (Art. 696-bis, paragraph 4). It is a pre-action procedure in front of the court: parties must therefore be represented by attorneys – with the exception of small claims pertaining to justices of the peace – and have to pay their fees. The expert is appointed by the court and paid by the parties, who very often appoint, and have therefore to pay, their experts. If the dispute is not settled, the pre-action procedure costs do therefore increase to a certain extent the total costs of litigation.

Summing up, Italy is a civil law procedural system, with some touches of common law. Therefore, based on the taxonomy of Husa, it belongs in full to the Western legal culture.

Italian civil procedural system does not present unique features that are why we do not find mechanisms other than those formed in the tradition of the *ius commune* – which is first of all Italian, but common to the other continental European countries – or those borrowed from other Western traditions. What we obviously find are unique rules of these mechanisms. Let us think to the class action which clearly derives from the US model of class action under Rule 23 of the Federal Rules of Civil Procedure, but which has its rules unique to Italy. As I said, the first stage of admissibility of the action resembles the class certification stage in the United States, but – and this is unique – the court has the added task of making a preliminary inquiry regarding the merits of the case.

I have to say that even if some of the novelties cited above present elements of other jurisdictions, they are – with the exception of the much debated introduction of the class action – more an «echo» of foreign experiences than the direct result of depth comparative law studies. This may seem ad odds with the long and distinguished tradition of Italian comparative studies and the fact that some Italians scholars are leading corporatists (let us think to Mauro Cappelletti and his Florentine scholars, or to Michele Taruffo, co-author with Jeffrey Hazard of the first draft of the Transnational Rules of Civil Procedure), but I have to say that «ignorance of comparative law» is still «a widespread character of the Italian procedural culture, including that of the drafters of the reforms»[1].

5. Does culture influence civil procedure in Italy?

Before to answer the question I think it is necessary to define what we mean by «culture».

Over time, culture has been a highly fluid and vague concept[2], not easily distinguishable from other concepts like «tradition»[3] (as a matter of fact, culture may be defined, from an historical point of view, as joint social heritage or tradition).

Adopting the definition of the Oxford English Dictionary, culture means «the distinctive ideas, customs, social behavior, products, or way of life of a particular society, people, or period». This is the general concept of culture, part of which is legal culture, that is – under the definition of Lawrence Friedman – the «ideas, values, attitudes and opinions people in some society hold, with regard to law and the legal system»[4].

In my opinion culture – generally, and specifically as legal culture – affects civil procedure[5]. The idea is certainly not new. Franz Klein, the Austrian proceduralist, underlined in 1901 that «the squalid, arid, neglected phenomenon of civil procedure is ... strictly con-

[1] Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, 228.

[2] The word has Latin roots – the word originates from cultura, stemming from colere – that are connected with tilling the soil and facilitating growth, but in 1952 Kroeber and Kluckhohn (*Culture: A Critical Review of Concepts and Definitions*, New York, 1952) assembled 156 definitions, that they classified under six headings (descriptive, historical, normative, genetic, structural, and psychological definitions).

[3] On the concept of tradition see the Report by Berizonce and Ferrand, *Model Laws and National Traditions,* XIV IAPL World Congress, Heidelberg, 2011, 5 ff.

[4] L.M. Friedman, *Is There a Modern Legal Culture?*, in *Ratio Juris*, 1994, 117.

[5] The literature on the relationship between culture and civil procedure is conspicuous. See, among many others, Cappelletti, *Social and Political Aspects of Civil procedure*, 69 *Michigan Law Review*, 1971, 847 ff.; O.G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 *The American Journal of Comparative Law*, 1997, 861 ff.

nected with the great intellectual movements of peoples; and that its varied manifestations are among the most important documents of mankind's culture».

But non only dispute resolution procedures «are in part a reflection of the culture in which they are embedded»; more, they importantly «influence a society and its culture»[1]. Therefore, civil procedure both reflects the culture in which it arose and affects in some ways this culture.

The conclusion is true for the Italian system of civil procedure.

An obvious example is given by the differences between the Code of 1865 and the Code of 1942. The first code of civil procedure of unified Italy - centered on control of the parties and governed by formalistic rules – reflected the structure of the society of the 19th century, whereby the code of 1942 – introducing a stronger role of the judge – interpreted the new social demands of the 20th century[2].

An interesting recent example is the debated mechanism of class action. In this case we are confronted with a legal transplant, imported from a legal culture different from the Italian one. The fact that the mechanism is alien to our culture has, on one hand, influenced its regulation (the Italian rules are, in many respects, different from the American ones and aiming at someway limiting its application) and its application by the courts (all cases, except one, have been until now rejected). But the fact that the mechanism has been introduced will undoubtedly influence our legal culture (a first sign of change may perhaps been recognized in the circumstance that the only case where the action was declared admissible is a case where the Court of Appeal reversed the initial decision of inadmissibility by the court of first instance).

Another recent example is the model of mediation introduced last year by the Decree n. 28. The legislator uses the term «mediation» – unfamiliar to Italian legal tradition – and adopts definitions clearly derived from the American ADR experience. Nevertheless, the Italian model of mediation – based on mediation bodies controlled by the State through the inclusion in a national register – is very different from the US one based on professionals whose qualification is not regulated by the State.

Viktória Harsági[3]

HUNGARIAN NATIONAL REPORT

«Downstream or Up the Stream»: Influence of Different Legal Cultures on Hungarian Civil Procedure Law

The roots of the Hungarians can be traced back to Asia, our ancestors used to live in the area of the Ural Mountains. This people of Asian origin found their new home-country in the Carpathian Basin in the 9th century. Our first king St. Stephen made a historic decision

[1] O.G. Chase, *Law, Culture and Ritual*, New York, 2005, 2.

[2] The current Code of Civil Procedure – issued in 1940 and entered into force in 1942 – is a code of the fascist period. Intense has been the debate about the influence of the political ideas of the time on its structure and contents (for all cf. Cipriani, *Piero Calamandrei e la procedura civile*, Napoli, 2007).

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when, receiving the crown from Pope Sylvester II, he decided to adopt Western Christianity. By this he tied the country to the Western-European sphere of culture for the following centuries. In spite of this, Hungarian history and cultural history have always been strongly influenced by the geographical circumstance that Hungary is situated on the border of several major cultures, far from the related peoples speaking related languages, wedged in between peoples speaking Slavic and German. As a result of this peculiar situation, the country has tried to find its own way under pressure from Eastern and Western cultures. It inevitably remind us of a piece of prose by the poet Endre Ady, let me quote it: «Ferry-land, ferry-land, ferry-land: even in its most daring dreams it is only roaming back and fro between two shores: from East to West or, rather, the other way round. Why did they lie that the ferry was – a bridge [...]»[1] – «Bridge». It is not without cause that the poet came to this conclusion, on the border of East and West the country has always had the role of mediating between cultures. In the territory of historic Hungary there lived great numbers of nationalities, by today their numbers have decreased significantly. Numerous religious denominations live in Hungary at present as well, alongside and in interaction with one another. This makes the country culturally diverse. Throughout their cultural history the Hungarian people have derived from numerous sources, often even unintentionally, if they have not been able to avoid the sweeping processes coming from outside, which may be explained mostly by historical causes.

As far as the historical development of Hungarian procedural law is concerned, one cannot speak of organic development similar to that of Western-European legal systems, the line of development has broken at several points; Hungarian civil procedural law has gone through numerous changes in model. The process lacks evenness and continuity. Started processes of development have often been discontinued so as to give way to the influence of another trend[2]. On the whole it may be stated that the foundation was constituted by Western cultural influence, all other influences have become layered on this including, for example, the ideology of the socialist era and the effects of present-day globalisation. Therefore, one has to do with a strange multi-layer culture and, through it, legal culture, which is born on the border of legal cultures. It is a civil procedural system based on the civil law system, and more specifically, on German-Austrian civil procedural law, which still bears on it some marks of the socialist heritage. Since the democratic political transformation, it has repeatedly become characterised by Western orientation; the approximation of the legal system to Western cultures (in a lot of cases to European Community law) began as early as the 1990s.

I. Historical background

In the era of the kings of the Árpád dynasty (1000–1301) contemporary Hungarian civil procedure was characterised by a rather strong *Germanic influence*[3]. In the era of the House of Anjou (1308–1395) one may encounter the traces of a new influence already. Róbert Károly

[1] Original Hungarian version: „Kompország, Kompország, Kompország: legképességesebb álmaiban is csak mászkált két part között: Kelettől Nyugatig, de szívesebben vissza. Miért hazudták, hogy a komp – híd [...]». Resource: Ady Endre, *Ismeretlen Korvin-kódex margójára*.

[2] Géza Magyary, *Magyar perjogi reformmozgalmak*, in *Összegyűjtött dolgozatai*, Budapest, Magyar Tudományos Akadémia, 1942, p. 15.

[3] «Evidence directed at inferences and not directly at facts, the sharp division of the action in two parts by the judgment on evidence, and deciding the case at the evidentiary stage by ordeal, the rigid formalism of action: all this reveals the influence of contemporary Germanic civil procedure» (Magyary, op. cit., p. 12–13).

executed substantial civil procedural reforms; he adopted *Norman institutions of procedural law* into Hungarian law[1]. On these foundations Hungarian civil procedural law *developed further with a rather high degree of independence* for centuries. Maybe, there is no other era in the history of our civil procedure during which our procedural law institutions could develop so independently and without any foreign influence as in the period spanning from the Angevin period to the middle of the 19th century. It was in this period that our civil procedure developed into a legal institution of peculiar character differing in many aspects from foreign laws. According to Géza Magyary's description, «its particular characteristic lies in the fact that it loses more and more its medieval character and approaches more and more the civil procedural system that evolved in Germany in the 14th century as a result of the reception of the civil procedural law of Upper Italy and that is mainly represented by codes of civil procedure prepared for the so-called Kammergericht. However, this happened so unnoticeably and through so many modifications that one cannot speak either of the reception of this or that of church procedural law»[2].

Therefore, Hungarian civil procedural law of the age is not a pure national creation; it developed under the influence of Western institutions, which is but a natural consequence of the fact that Hungary had attached herself to Western culture beginning from the earliest times. On the other hand, our civil procedure is *not a simple reception*. Hungary did not simply adopt foreign civil procedural institutions, but rather received them after substantial modifications suited to her situation[3].

As a result of the establishment of closer relations with Austria during the 19th century, Hungarian civil procedure again became *influenced by* a stronger foreign law, namely *Austrian law and, through it, German law*. After the 1848 revolution and fight for freedom had been put down, the Vienna Court implemented the *Austrian Code of Civil Procedure*, which remained in effect until 1861.

Thus the renewal of feudal Hungarian civil procedure took place after the Compromise of 1867. At the same time, the House of Representatives had to accept that the creation of a modern Act on Civil Procedure would take a long time; therefore, it designed the Act of 1868 on the Code of Civil Justice to be of a *temporary character*[4]. In spite of this, it remained in force until 1915[5]. The Act regulates civil procedure and enforcement. It created two types of civil procedure: one for district courts proceeding in cases of smaller importance,

[1] Imre Hajnik, *A magyar bírósági szervezet és a perjog az Árpád- és vegyesházi királyok alatt*, Budapest, Magyar Tudományos Akadémia, 1899, p. 215–220. The evidentiary procedure known as inquisition, which struck root in our country during the Angevin period, is but the Norman recognition. Both were designed to push formal evidence into the background and allow more space for substantive evidence. Magyary, op. cit., p. 13. There is a view according to which French principles of civil procedural law were transmitted to Hungary by the Kingdom of Naples. István Miskolczy, *Anjou-királyaink reformjai és a nápolyi viszonyok*, Századok, 1932, p. 398–505.

[2] The fact that the last traces of the medieval system of evidence had disappeared from Hungarian civil procedure and the fact that our civil procedure of the 17th century strongly relied on the written form should be attributed to the influence of German Kammergerichts-Ordnungs. Magyary, op. cit., p. 13; Géza Magyary, Endre Nizsalovszky, *Magyar polgári perjog*, Budapest, Franklin Társulat Kiadása, 1942, p. 23.

[3] Magyary, Nizslovszky, op. cit., p. 23; István Novák, *Első magyar polgári eljárásjogunk – Hommage à 1911:I. tc., Bírák Lapja*, 1996/1-2, p. 155.

[4] Tihamér Fabinyi, *A Polgári perrendtartás törvénye és joggyakorlata*, Budapest, Grill Károly Könyvkiadóvállalata, 1931, p. 1.

[5] László Gáspárdy, *Die Grundsätze des ungarischen Zivilverfahrensrechts*, in Nakamura/Fasching/Gaul/Georgiades (eds.), *Festschrift für Kostas E. Beys dem Rechtdenker in attischer Dialektik*, Ant. N. Sakkoulas Verlag, Eunomia Verlag, Athen, 2003, p. 318; Miklós Kengyel, Viktória Harsági, *Civil Justice in Hungary*, Jigakusha, Tokyo, 2010, p. 5–6.

a simpler, less formal, basically oral and accelerated procedure, and the other one, the so-called regular procedure for higher courts of law, which was grounded on strict written form[1]. When drafting the Code of Civil Justice of 1868, legislators relied on Austrian civil procedure. However, the influence of Austrian civil procedural law is primarily restricted to procedure, with regard to our statutes relating to the organization of courts, this influence may be felt to a lesser extent; concerning them the impact of Belgian law may be shown[2].

Act XVIII of 1893 on summary proceedings introduced into (a part of) Hungarian civil procedures the procedural institutions based on oral hearing, immediacy and the free evaluation of evidence. Several people regard its provisions as the «preliminary Act» on the Hungarian Code of Civil Procedure[3].

II. The birth of the modern Hungarian Code of Civil Procedure (1911)

At the beginning of the 20th century there was a turning point in the history of the Hungarian Code of Civil Procedure. The outdated and anachronistic Code of Civil Judicial Procedure of 1868 still based on the written form, the indirect method and a prescribed system of proof was replaced by the *Code of Civil Procedure of 1911.* The preparatory work for codification lasted almost 25 years. The prolonged work resulted in a «Code of Civil Procedure recognized Europe-wide, which, due to Sándor Plósz, combined with a lasting impact the elements of German civil procedure having liberal-capitalist foundations and those of the Austrian civil procedure of 1895 implementing the ideal of social civil action»[4].

The House of Representatives instructed the Minister of Justice of the day as early as 1880 to prepare a new code of civil procedure based on the principles of oral hearing, immediacy and publicity. However, the drafts published in 1885, one of which was prepared by *Kornél Emmer* based on the French example[5], and the other of which was the work of *Sándor Plósz* founded on the German code[6], were not brought before Parliament[7]. Later Sándor Plósz prepared new drafts and in 1902 he put forward the whole bill on civil procedure. This was not to become an Act either. The government again submitted to Parliament the repeatedly revised draft in 1907 and 1910, which was eventually passed and promulgated as Act I of 1911[8].

[1] Jenő Szilbereky, *Bevezető*, in Jenő Szilbereky, László Névai (eds.), *A polgári perrendtartás magyarázata*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1976, p. 17.

[2] Magyary, op. cit., p. 14.

[3] Tamás Gyekiczky, *A magyar polgári perjog története*, in Zsuzsa Wopera (ed.), *Polgári perjog – Általános rész*, Complex, Budapest, 2008, p. 50.

[4] Miklós Kengyel, *A polgári eljárásjog jelene és jövője*, in Győrffy Ilona Benisné (ed.), *Ötödik magyar jogász-gyűlés*, Budapest, Magyar Jogász Egylet, 2000, p. 233.

[5] Pl. az egyes bizonyítási eszközökre vonatkozó rendelkezések kidolgozásakor Emmer a francia mintát követte. Ezek beleolvadtak Plósz tervezetébe. Miklós Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, Budapest, Osiris, 2003, p. 156.

[6] Magyary, Nizsalovszky, op. cit., p. 30.

[7] See István Varga, *Foreign Influences on the Hungarian Civil Procedure Law*, in Masahisa Deguchi, Marcel Storme (eds.), *The Reception and Transmission of Procedural Law in the Global Society*, Antwerpen, Maklu, 2008, p. 277.

[8] Gyula Térfy, *A Polgári Perrendtartás Törvénye és Joggyakorlata*, I. kötet, Budapest, Grill Károly Könyvkiadóvállalata, 1927, p. 2; László Névai, A magyar polgári eljárásjog fejlődése, in Salamon Beck, László Névai (szerk.), *Magyar polgári eljárásjog*, Tankönyvkiadó, Budapest, 1959, p. 53.

The Code of Civil Procedure of 1911 undebatably turned out to be one of the best European products of European legal development in the era. Its creators probably set it as their objective to ensure, through the implementation of modern principles, the possibility of rights enforcement within the framework of an effective and relatively short action, and at the same time, to prevent the protraction of lawsuits by mala fide litigants. For this purpose a concentrated action structure was developed. It gave effect to the *basic principles* that had evolved during legal development in the 19th century (oral hearing, publicity, immediacy, free evaluation of evidence), on the other hand, it established a modern *cooperation between the court and parties*, it respected the parties' right to disposition, but put the management of the lawsuit into the hands of the court, so as to avoid the protraction of proceedings by increasing the activity of the judge. With regard to supplying facts and evidence the adversarial principle prevailed basically, but the Act also allowed a relatively wide possibility for the taking of evidence ex officio. In district court proceedings the Act laid down the court's obligation to brief the party acting without legal representation about the process. This was not required elsewhere since legal representation was compulsory before higher courts of law, regional courts of appeal and the Curia. The essential new rules of the Code of Civil Procedure of 1911 included the obligation of the parties and their representatives to tell the truth, more precisely, the prohibition of claiming untrue facts[1].

The prolonged codification had the advantage that legislators were able to get more acquainted with the main Acts on civil procedure of the last third of the 19th century and even their reception. The work was characterised by the rather *strong influence of German and Austrian civil procedure*[2], but during its creation not only these codes but, apart from them, primarily French and English institutions were also carefully utilized[3]. In the lengthy reasoning relating to the Code of Civil Procedure of 1911, approximately 120 references were made mainly to the German, Austrian, French as well as Italian, Geneva and Belgian civil codes of procedure[4]. The bill was published as the resultant of modern European codes of civil procedure, «which endeavoured to incorporate the most important institutions and most successful solutions»[5].

The codification of Hungarian civil procedure which started in the 1880s was founded on the German Code of Civil Procedure of 1877 and the French Act of 1806 on civil procedure. Sándor Plósz prepared his first draft based on the German Code of Civil Procedure, the influence of Austrian codification, which became accelerated at the beginning of the

[1] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 234.

[2] János Németh, *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf die Rechtsordnungen der osteuropäischen Länder*, in Walther J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Gieseking, Bielefeld, 1991, p. 254–281; Miklós Kengyel, *Der Einfluss der österreichischen Zivilprozessordnung auf die ungarische Kodifikation*, in Bittner, Klicka, Kodek, Oberhammer (eds.), *Festschrift für Walter H. Rechberger zum 60. Geburtstag*, Wien, Springer, p. 246–249; Kengyel, Harsági, *Civil Justice in Hungary*, p. 5.

[3] Magyary, Nizsalovszky, op. cit., p. 23–24.

[4] The frequency of references tells a lot about the intensity of foreign influences: 45 references to the German Code of Civil Procedure of 1877, 40 references to the Austrian Code of Civil Procedure of 1855, 22 references to the French Act on Civil Procedure, 8 references to the Italian Act on Civil Procedure, 4 references to the Code of Civil Procedure of Geneva of 1812, 3 references to the Belgian Act on Civil Procedure of 1876. Source: Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 153; Idem., *Der Einfluss der österreichischen Zivilprozessordnung auf die ungarische Kodifikation*, p. 241.

[5] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 158.

1990s, was first reflected in the reasoning attached to the draft of 1902[1]. Everything that on the application of strong criticism was found the most valuable in the German and Austrian codes of civil procedure was adopted by the legislator. Nevertheless, it would be erroneous to believe that the Act was limited to the simple transposition of the achievements of German and Austrian civil procedures. In many parts it reveals an original conception; it solves a great many questions independently[2]. Keeping a distance from German dogmatic was justified also for the reason that the professional public would have preferred the embodiment of the ideals of French or English civil procedure. The practical implementation of modern civil procedural principles was transmitted to Hungary primarily by the codes of civil procedure of German states realizing French ideals. In spite of the fact that the basic civil procedural principles of the French bourgeois revolution were adopted by Hungarian law through German transmission, it may be stated that they were elaborated by Hungarian law within the framework of an independent system, and the greatly flexible attitude of the Code de procédure civile toward the basic principles had a noticeable impact on Hungarian legal development too. The Austrian Code of Civil Procedure of 1895 exerted a substantial influence on Hungarian codification at the turn of the century and reshaped the original aspects of the bill significantly. Apart from the general effect of the adoption of individual rules and legal institutions (the active role of the judge, the extent of ex officio judicial acts, the obligation to tell the truth etc.), it also projected the social ideal of Austrian civil action on the Hungarian Code of Civil Procedure[3].

III. The influence of the Soviet Code of Civil Procedure in the socialist era

However, the code of civil procedure of German-Austrian roots hallmarked by the name of Sándor Plósz was *replaced in 1952 by an Act of «socialist spirit»* based on the Soviet-Russian Code of Civil Procedure of 1923[4]. The Act was passed following a surprisingly short preparation paradoxically five years before the codification of the substantive law. Act III of 1952 is still effective, although it has gone through 11 greater amendment and more than 60 other modifications in the past almost 60 years.

In Hungary between 1945 and 1949 large-scale organizational changes took place in the fields of economy, politics and justice. Market elements were eliminated from the relations between nationalized companies – «socialist organizations»; disputes between legal persons pursuing economic activity were resolved by arbitration committees proceeding in accordance with special procedural rules, and later by so-called economic arbitration committees[5]. The scope of private law became extremely limited within a few years. On the one hand, due to the elimination of private property and market economy, the number

[1] Miklós Kengyel, *Külföldi hatások a 20. század magyar polgári eljárásjogában*, in Daisy Kiss, István Varga (eds.), *Magister artis et aequi. Studia in honorem Németh János*, Budapest, ELTE Eötvös Kiadó, 2003, p. 419.

[2] Magyary, op. cit., p. 14–15.

[3] Kengyel, *Külföldi hatások a 20. század magyar polgári eljárásjogában*, p. 420–421; Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 157, 164–165; cpr.: Sándor Plósz, *Die Prozeßleitung des Gerichts nach der neuen Zivilprozeßordnung. Recht und Wirtschaft*, 1912, p. 392–398.

[4] See more detailed: Miklós Kengyel, *Die Zukunft des ungarischen Zivilprozeßrechts nach der Zivilverfahrens-Novelle 1999*, *ZZPInt* 5 (2000), p. 361; Kengyel, Harsági, *Civil Justice in Hungary*, p. 7.

[5] Gyekiczky, op. cit., p. 52–53.

of possible private law cases decreased significantly and only disputes between citizens involving a small value remained within the frames of civil law[1]. Administrative justice was eliminated; legal disputes arising within the frames of branches of law relating to labour organizations were channelled outside the courts. It was on this strongly reduced area that still remained for the civil justice that the Code of Civil Procedure was built[2].

Hungarian legislation in the field of civil procedure was saved from the sheer copying of Soviet law by its remarkable legal traditions[3]. Based on several sources of academic literature what happened– by force – in 1952 was but the *drastic shortening, abridgement of the Code of Civil Procedure of 1911,* but the core concept on which it had been built was preserved[4]. As a matter of fact, the new Act excerpted certain parts from the 792 sections of the old Code of Civil Procedure, to which specific parts of the Soviet Code of Civil Procedure of 1923 and the Soviet Act of 1938 on the Courts were added[5]. István Varga describes the situation as follows: «breaking tradition without abandoning it»[6].

The Code of Civil Procedure of 1952 was *linked with many ties to the old Code of Civil Procedure:* it followed the old one to a great extent in its structure and slightly in its contents (e.g. the regulation of the conduct of lawsuits). According to Kengyel, «structural changes executed under the Soviet influence (two-level system of justice, one-level appeal etc.) could be fitted into the old structure». The basic principles were placed at the beginning of the Act. Mainly special procedures fell victim to the «shrinking» of the HCCP of 1911. Despite the structural similarity between the old and the new Acts, *rather essential changes* were made to the structure of civil action. The Act of 1911 divided civil action in two stages: the pre-trial hearing and trial on the merits. As opposed to this, the new HCCP regarded the legal action to constitute an integral process[7].

The *main innovations* of the Act of 1952 may be summed up as follows: the prevalence of substantive truth, the redefinition of the principle of party control, restriction of the activity of attorneys, turning district courts into first instance courts of general jurisdiction, a two-level justice system with one level of appeal, unification of the appeal system by abolishing direct appeal to the Supreme Court against court orders, the elimination of the review system and instead, laying the foundations for protest on legal grounds. The Act created in the era of dictatorship reflects the transformation of the court and prosecution organization based on the Soviet pattern and the elimination of courts of special jurisdiction. The prosecutor's role in civil action increased and a system of lay assessors was introduced.

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[1] Attila Horváth, Csaba Kabódi, Barna Mezey, László Pomogyi, *A perjogok története*, in Barna Mezey (ed.), *Magyar jogtörténet*, Budapest, Osiris, 2003, p. 408.

[2] László Gáspárdy*, Quo vadis Hungarian Civil Procedure Law?* in *Studi di diritto processuale civile in onore di Giuseppe Tarzia,* Milano, Giuffrè Editore, 2005, p. 2671.

[3] Horváth, Kabódi, Mezey, Pomogyi, op. cit., p. 407.

[4] János Németh, *Polgári perjogunk a XX. század végén*, in Gábor Máthé (ed.), *Negyedik magyar jogászgyűlés*, Budapest, 1998, p. 69.

[5] Horváth, Kabódi, Mezey, Pomogyi, op. cit., p. 409.

[6] Varga, op. cit., p. 278.

[7] Miklós Kengyel, *Die Entstehungsgeschichte der fünfzigjährigen ungarischen Zivilprozeßordnung*, in Nakamura, Fasching, Gaul, Georgiades (eds.), *Festschrift für Kostas E. Beys dem Rechtdenker in attischer Dialektik*, Ant. N. Sakkoulas Verlag, Eunomia Verlag, Athen, 2003, p. 715; Miklós Kengyel, *Az ötvenéves Polgári perrendtartás – a törvény keletkezésétől a rendszerváltásig*, in Miklós Kengyel (ed.), *50 éves a Polgári perrendtartás,* Dialóg Campus, Pécs, 2003, p. 100–101; Szilbereky, op. cit., p. 20.

The Soviet influence was most strongly manifested in the *basic principles* of the Act; the legislator adopted the text of the Soviet CCP almost word for word[1]. The approach of Soviet civil procedure was characterised by the «cult of basic principles», therefore, the importance of basic principles increased greatly because they conveyed the dominant ideology of the era. The court's monopoly of justice was implemented paradoxically; the notion of judicial independence was reinterpreted. The court was not bound by the claim submitted by the parties; the predominance of the judge could be seen. The principle of party control was also implemented restrictedly: the court, the prosecution and state authorities had a strong right of initiative, the principle of adversarial hearing was pushed to the background in favour of ex officio proceedings, and the aim of the Soviet action was the revelation of «objective truth». «The typically paternalistic formulation of the Act made it obvious that it was solely the authority of the court to decide about the equitable interests of the parties. [...] they included the social interest (e.g. the protection of collective property) as well»[2]. The regulation required that the court should not be satisfied with the facts and evidence presented by the parties but should take all measures laid down by the Act in order to reveal the true circumstances of the case. Basically, in the HCCP of 1952 one may observe a large increase in the power of the judge at the expense of the parties' right to disposition. The Act divided the right of disposition over the lawsuit between the parties, the court and the prosecutor. As a result of this, the traditional principle of party control became illusory, since all procedural acts of the parties came under the control of the court (and the prosecutor)[3].

The Code of Civil Procedure having functioned for almost four decades prior to the transition to the rule of law has been modified by four amendment acts. The creation of the (first) Amendment Act of 1954 one and a half years after the commencement of the Act was necessitated by the changes in the organization of justice. It amended the rules relating to the prosecutor's participation, spheres of authority and the composition of court panels, the role of the Supreme Court, the scope of authority of its president, and re-regulated legal protest and transformed the appeal procedure completely. The Amendment Act of 1954 also expressed the intention that the Hungarian CCP should resemble the model Soviet Act more closely. This purpose was served by the total transformation of the appeal procedure. Although the change in question was based on the Soviet legal pattern, it constituted an indirect adoption of the Tsarist Russian model and, in the final analysis, of the classical but outdated French model[4].

It is to the merit of the (second) Amendment Act of 1957 that it eliminated the inconsistencies brought about by the first novel. Although it introduced some guarantees, the principle of adversarial hearing became more emphatic, the notion of truth was partly re-evaluated and all this did not result in a decrease of etatism. The greatest achievement of the second novel was the restoration of the earlier appeal system. It is undebatable that out of the four attempts made at renewing the foundations of socialist civil procedure, it is

[1] Kengyel, *Die Entstehungsgeschichte der fünfzigjährigen ungarischen Zivilprozeßordnung*, p. 718.

[2] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 277–278.

[3] Miklós Kengyel, *Changes in the Model of Hugarian Civil Procedure Law*, in András Jakab, Péter Takács, Allan F. Tatham, *The Transformation of ungarian Legal Order 1985–2005*, Alphen aan den Rijn, Kluwer, 2007, p. 353–354.

[4] For more detail, see: László Gáspárdy, *Ötvenéves a Polgári perrendtartás*, in Zsuzsa Wopera (ed.), *50 éves a Polgári perrendtartás*, Miskolc, Novotni Alapítvány, 2003, p. 10–11.

the achievement of the third Amendment Act (1972) that stands out[1], which was aimed at simplifying procedure, laid down trial by a sole judge as the general rule, and modified the rules relating to the legal status of the prosecutor. It introduced labour and economic jurisdiction. The novel also affected relations between the courts and the parties; however, it did not make a decisive change to the preponderance of the judge. Later amendments of the socialist era were not able to repeat the success of this novel[2].

IV. Democratic political transformation, facing the challenges of globalization

Market economy and the rule of law building up continuously beginning from the 1990s meant for the legislator and applier of law challenges that had previously been unknown to them both from the aspect of quality and quantity. Within a short period of time, the number of litigious and non-litigious cases became multiplied. New types of lawsuits came into being or little-known case types acquired special significance, (e.g. company law actions, administrative actions). The organizational system of courts was also radically transformed, after a long period of gestation the four-level court system was set up: courts of appeal deeply rooted in legal history started functioning[3]. In the 1990s the legislator made an attempt at renewing the Code of Civil Procedure of 1952 – through repeated amendments – in accordance with new objectives and principles[4]. It is still raised as an unanswered question whether by this method (in other words, by «filling the old bag with new wine») one succeeded or could possibly succeed in adjusting to the frames of the rule of law a code of civil procedure, the original conception and text of which (although modified several times) had been formulated within the frames of a dictatorial system and in accordance with the ideology of that system. The codification of a new code of civil procedure is still to be waited for.

1. Modifications made following the decisions of the Constitutional Court

«In the stormily changing legal environment, the courts themselves as underground streams have shaped the contents of civil procedural rules significantly through permanent work»[5]. Apart from this, mention should also be made of the Constitutional Court, which has taken a great number of important decisions essentially affecting civil procedure. Out of them, the most important ones will be mentioned.

Under the influence of Decision № 32/1990 (XII. 22.) AB of the Constitutional Court, the Act on the extension of the judicial review of administrative decisions was created in 1991. Decision № *9/1992. (I.30.) AB of the Constitutional Court* declared protest on legal grounds to be unconstitutional. The institution of review was introduced in 1993 instead of the protest on legal grounds annulled by the above-mentioned decision of the Constitutional Court. The first breach in the socialist principle of disposition over the lawsuit was

[1] Gáspárdy, *Quo vadis Hungarian Civil Procedure Law?*, p. 2671–2672.

[2] Kengyel, *Changes in the Model of Hugarian Civil Procedure Law*, p. 354–355.

[3] Imre Szabó, *Előszó*, in Imre Szabó (ed.), *A Polgári perrendtartásról szóló 1952. évi III. törvény magyarázata*, I. kötet, Budapest, Magyar Hivatalos Közlönykiadó, 2006, p. 5.

[4] Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 20.

[5] Szabó, op. cit., p. 6–7.

made by the Constitutional Court. *Decision № 1/1994. (I.7.) AB of the Constitutional Court* sharply delimited the parties' right to disposition and confined the role of the prosecutor within frames corresponding to the rule of law. The Constitutional Court stated that in civil procedure the prosecutor's general right to institute proceedings, intervene, appeal and motion for the review of final judgments is unconstitutional.

2. The reinterpretation of basic principles

By the modification of the principle of party control and the principle of adversarial hearing, the sixth Amendment Act (1995) *changed the relationship between the court and the parties* essentially. In accordance with Decision № 1/1994 (I.7.) AB of the Constitutional Court, it has become a general principle that the court is bound by the petitions and statements presented by the parties; deviation from them is permitted only in cases defined by the Act. Besides the change in the purpose of civil action, «the dimming of the judge's role» was considered by academic literature as the other essential element of the change in model between 1995 and 2000. One of the main achievements of the reform of 1995 was constituted by the reformulation of the principle of party control[1]. The Act also provided the obligation to supply facts and evidence with a new basis. It restricted the possibility to take evidence ex officio to the narrow range defined by the Act. By this it endeavoured to ensure the full implementation of the principle of adversarial hearing, which did not constitute a return to the regulation followed by the HCCP of 1911, but to the model followed by the liberal codes of civil procedure of the 19th century, defines it as the exclusive task of the parties to prove the facts required for deciding the lawsuit. However, the legislator made no modification to the regulation relating to the purpose of the lawsuit, therefore, the obligation of the court to endeavour to reveal the truth remained. This task cannot be carried out without the possibility of ordering the taking of evidence ex officio. This conflict was eventually resolved by the legislator as a result of the re-regulation of the purpose of the lawsuit in 1999. Following the modification of § 1 of the HCCP, the purpose of the lawsuit is no longer to reveal the truth but to ensure the impartial resolution of legal disputes in court proceedings (basically in accordance with the requirement of due process laid down by Article 6 of the European Convention on Human Rights).

3. The main changes stemming from international agreements

«Reasonable time» as a professional term in civil procedure was introduced into the text of the Hungarian Code of Civil Procedure in 1993. During the specification of the court's tasks, § 2 (1) emphasises *fair trial* and the *resolution of the lawsuit within a reasonable time*. Both principles can be traced back to the same international document, to Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,* which declares the «right to due process». The European Court of Human Rights has held in several cases that the case of the applicant was not adjudicated by the Hungarian Courts within a reasonable period of time.

The Hungarian legislator has made several attempts at increasing the efficiency of lawsuits in the past twenty years. Out of them mention should be made of the Amendment Act of 1999, which laid down numerous time limits binding on courts. It was also during this period that the provision was made that enables parties to claim compensation from the

[1] Kengyel, *Changes in the Model of Hugarian Civil Procedure Law*, p. 358–360.

court if their right to the fair conduct of the lawsuit and its resolution within a reasonable time has been violated, provided that this injury cannot be remedied within the framework of the appeal procedure. Act XIX of 2006 has introduced a new legal institution: the exception against the delaying of court proceedings. During the elaboration of the Hungarian regulation mainly the Austrian solution served as the model.

4. The impact of European Union law on Hungarian civil procedural law

Last but not least, civil procedure was also greatly influenced by Hungary's accession to the European Union. In all probability, this will not lead to another change in model with regard to Hungarian civil procedure, but since the democratic political transformation it has exerted a significant influence on the changes in civil procedural rules – similarly to other branches of law – and it requires both the legislator and the applier of law to adopt an approach essentially differing from the earlier ones[1]. With regard to Regulations, Member States have merely legislative tasks of deregulatory or executive character due to the direct effect of these norms.

An important amendment aimed at the harmonisation of laws is constituted by the legal regulation of *electronic documents,* which was carried out in two steps. Although the regulation had already been born before Hungary's accession to the European Union, Community law had an obvious inspiring effect on development in this field. In summer 2001 the Hungarian Parliament passed the Bill on electronic signatures presented to it. The Act[2] follows Directive 1999/93/EC[3] in its regulation, which has led to a comprehensive modification of the chapter of the Code of Civil Procedure on documents. The second step in this development was constituted by the establishment of the legal frames for electronic legal documents, which, as a matter of fact, had been made necessary by the reregulation of company registration procedures. The Directive 68/151/EEC[4] and the modifying Directive 2003/58/EC[5] provided the questions of company records with a new basis. Act LXXXI of 2003 on Online Company Registration and on Reviewing Company Documents in Electronic Format, which transposed the provisions of the Directive into Hungarian law, laid the foundations for the creation of electronic public documents through the modification of several Acts[6]. Few years later the legislator took new impetus and, by Act LII of 2009 on Electronic Service of Documents, created the legal background for the general applicability of *electronic service of documents* in the administration of justice. At the same time, a new

[1] Zsuzsa Wopera, *Effect of the European Community Law on the Hungarian Civil Procedure*, in András Jakab, Péter Takács, Allan F. Tatham, *The Transformation of ungarian Legal Order 1985–2005*, Alphen an den Rijn, Kluwer, 2007, p. 365.

[2] Act XXXV. of 2001 on electronic signature.

[3] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures *Official Journal* L 013, 19/01/2000 p. 12–20.

[4] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community *OJ L* 65 14.3.1968, p. 8–12.

[5] Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies. *OJ L* 221 4.9.2003, p. 13–16.

[6] See Viktória Harsági, *Elektronische Urkunden als Beweismittel im ungarischen Zivilprozeß. Die Regelung der elektronischen Signatur in Ungarn im Spiegel der Signaturrichtlinie und im Vergleich zur deutschen Lösung*, *WGO – Monatshefte für osteuropäisches Recht*, 2003/4, p. 274–289; Kengyel, Harsági, *Civil Justice in Hungary*, p. 154–160.

chapter was inserted into the Code of Civil Procedure on electronic communication. The rules were to enter into force at different times. In 2010 a substantial part of the original dates of commencement was postponed.

With a view to the future accession, the purpose of facilitating the application of European Community law was served by Act CX of 2000, which approximated Hungarian rules of jurisdiction to the Brussels and Lugano Conventions. It applies to this Act as well as to later legislation that they have been included mainly in Law-Decree № 13 of 1979 on Private International Law or some separate Act regulating non-litigious procedures. Only a small fraction of amendments had to be carried out through the Code of Civil Procedure. Thus, for example, Act XLI of 2005 adjusted certain rules of Act on Enforcement to the regulations existing in this field in order to facilitate the enforcement of court judgments[1]. Out of the legislative acts amending the text of the Code of Civil Procedure – with regard to Community law – it is worth mentioning Act XXX of 2003, which is aimed at facilitating the applicability of the preliminary ruling procedure[2]. Act XXXVI of 2005 amended the rules relating to the legal consequences of the omissions of parties in connection with the Regulation on the service of documents, which was repeatedly altered in 2008 with regard to the new Regulation on service. Act LXXX of 2003 on Legal Aid was designed to introduce essential changes in available cost reductions, especially with regard to our obligations of legal harmonisation. It was under the influence of Community law that rules relating to the service of process agent were inserted as new rules in the Hungarian Code of Civil Procedure, and simultaneously with this. Having regard to the Regulation on the European order for payment procedure, in 2010 new rules were incorporated into the Hungarian CCP.

V. Conclusion

The examination of events taking place in Central-Eastern Europe may throw light on the fact that the problems presenting themselves to former socialist countries during the codification following the democratic political transition were similar to those experienced in Western Europe. During the «demolition» of judicial power the desired state of equilibrium could not be achieved everywhere, over-exaggerated liberalization went as far as the idea of the passive «contemplative judge». It may raise several doubts: on the one hand, it has no tradition in our region; on the other hand, these products of codification do not fit into the international trends[3]. In Hungary the image of judge that developed during socialism has been pushed to the background since 2000, but public opinion is dissatisfied with the role of the judge confined to passivity. The theory of procedural justice has basically failed, since right-seekers would expect judges to reveal the truth. Although the reform that began in 2000 has, to some extent, approximated also Hungarian regulation to the common law system, it would be an exaggeration to claim that as a result of this Hungarian civil procedure has become enriched with common law features. «Central elements of

[1] See Viktória Harsági, Miklós Kengyel, *Der Einfluss des Europäischen Zivilverfahrensrechts auf das ungarische Verfahrensrecht*, in Miklós Kengyel, Viktória Harsági (eds.), *Der Einfluss des Europäischen Zivilverfahrensrechts auf die nationalen Rechtsordnungen*, Baden-Baden, Nomos, 2009, p. 111–131; Viktória Harsági, Miklós Kengyel, *Anwendungsprobleme des Europäischen Zivilverfahrensrechts in Mittel- und Osteuropa*, IPRax, 2009, p. 533–539.

[2] See Wopera, *Effect of the European Community Law on the Hungarian Civil Procedure*, p. 367–369

[3] Cmp. Kengyel, *A bírói hatalom és a felek rendelkezési joga a polgári perben*, p. 315–316.

common law civil procedure haven't found their way into the Hungarian system and they seem to be of no mentionable influence on present day litigation»[1]. The Hungarian civil procedure law belongs to the civil law tradition, and within it, primarily the influence of German-Austrian law, and to a lesser extent, that of French law (mainly through German, and later Soviet-Russian transmission) may be felt.

Then on this foundation were layered changes inspired by Soviet civil procedure conveying socialist ideology. This latter determined the development of Hungarian civil procedural law right until the democratic political transformation, moreover, the effect of this socialist heritage can be felt even today. Some remnants of the civil procedural law of the socialist era can be considered peculiarities that cannot be classified either with the civil law or the common law system. However, very few of these features can be found today, they have gradually disappeared from the Hungarian Code of Civil Procedure since the democratic political transformation. Such may include the repeated attempts of past years to separate economic lawsuits, or the reinstitution of obligatory negotiation, as in them one may recognize the solutions of the former Chapter V of the Hungarian Code of Civil Procedure relating to «lawsuits between socialist organizations». It does not have civil law features insomuch as what is outlined here is not commercial jurisdiction (Handelsgerichtsbarkeit) but post-Soviet «arbitrage» (арбитраж), which is the legal successor of economic arbitration. With regard to ordering enforcement, the difference of enforcement order and the certificate of enforcement can be mentioned as being left over from the socialist period[2]. This distinction was taken over by Hungary from Soviet law in the 50s and we have not been able to get rid of it even since the political transformation[3].

The Hungarian Code of Civil Procedure, which has been modified many times since its entry into force, does not follow a uniform concept. After the political transformation, the Hungarian Code of Civil Procedure struggled with the problem of «belonging» and «finding its proper place». In this period of its development one may experience some kind of return to German-Austrian roots as well as some independence. One part of the modifications was triggered off by international conventions and European Union law.

One may regard as a unique feature of Hungarian law the institution of summons to an attempt at settlement, which is a rather exceptional solution, although this does not mean that one could not find any analogy in the common law or civil law systems. Following the political transformation, adherence to traditions led to the restoration of courts of appeal after the millennium. In accordance with international trends – through Anglo-Saxon transmission – the mediation procedure has been introduced in Hungary too. The relatively low level of receptiveness concerning mediation is a Hungarian peculiarity, which obstructs its spread in practice significantly.

In the present-day Hungarian Code of Civil Procedure only traces of the influence of the common law system can be revealed. The common law system may have inspired the Hungarian legislator during the elaboration of witnesses' obligation to disclose documents

[1] Varga, op. cit., p. 285.

[2] Based on its own decision or approved settlement, the court issues an enforcement order. The court affixes a certificate of enforcement for example to notarial documents. Kengyel, Harsági, *Civil Justice in Hungary*, p. 185–186.

[3] István Vida, *A végrehajtás elrendelésével kapcsolatos jogorvoslatok*, in János Németh, Daisy Kiss (eds.), *A bírósági végrehajtás magyarázata*, KJK, 2004, p. 213.

in their possession[1]. The disclosure obligation of third persons not concerned in the lawsuit used to form an organic part of witness obligations in the Code of Civil Procedure of 1911 as well. As a matter of fact, this institution was introduced by the Act on summary proceedings in 1893. Its roots are to be looked for outside the continent of Europe, Magyary emphasizes English influence, tracing back the Hungarian solution to the classical legal institution called «subpoena duces tecum»[2].

For one and a half centuries Hungarian civil procedure has basically been following German-Austrian legal culture and its changes. To a lesser degree the influence of the French legal system can also be shown. Among others, this may be traced back to German and French erudition received by legislators at the end of the 19th century and the beginning of the 20th century, which had a strong impact on the choice of model. Other cultural influences also presented themselves with varying degrees of intensity in the different historical eras, thus, for example, the influence of Soviet law, and to a small degree, that of the common law system. However, they were able to gain ground in Hungarian civil procedure only temporarily, afterwards they usually «failed».

Serban S. Vacarelu[3]

ROMANIAN NATIONAL REPORT

Legal Culture and Civil Procedure Romania's place among Civil Procedural Systems

I. Historical background of Romanian Civil Procedure

The modern Romanian civil procedure finds its roots in the code of civil procedure of 1865, developed after the union of the Principates of Moldova and Valachia in 1864. The code of civil procedure was enacted on 9 December 1965 and entered into force on 1 December 1865. It was largely a product of French inspiration, being based on the French Code of Civil Procedure of 1842, the French procedural law of 1855[4] and the Code of civil procedure of the Geneva canton of 1819 (itself a version of the French Code of Civil Procedure of 1806)[5]. Consistent with the liberal spirit of the French Code of Civil Procedure, the Romanian code of 1865 envisioned a relatively passive role for the judge, leaving the parties much autonomy and control over the litigation. The role of the judge was primarily devoted to presiding over the debates in a non interventionist manner[6]. Nonetheless, the judge was allowed to ask for clarification of arguments and factual points raised by the parties, and could ask for additional

[1] See Viktória Harsági, *Okirati bizonyítás a modern polgári perben*, Budapest, HVG-Orac, 2005, p. 58–60; Kengyel, Harsági, *Civil Justice in Hungary*, p. 150.

[2] Magyary, Nizsalovszky, op. cit., p. 417.

[3] Professor of ***Maastricht University, the Netherlands (Romania).***

[4] C.E. Alexe, *Judecatorul in procesul civil, intre rol activ si arbitrar*, Editura C.H. Beck, Bucuresti, 2008, at 393

[5] See I. Les, *Tratat de drept procesual civil*, 5th ed., C.H. Beck, Bucuresti, 2010, at 22.

[6] Alexe at 394.

evidence if it considered necessary to ascertain the truth[1]. Although in theory the judge could order the administration of additional evidence, ask for clarification from the parties, witnesses and experts and could also raised certain exceptions of public order[2], contemporary assessments of the practice indicate that judges have rarely made use of such powers[3].

The procedure in the Old Kingdom[4] under the 1865 code was in stark contrast with the procedure used in Transylvania and Bucovina, two provinces that were part of Austro-Hungary at the time. In these territories, the procedure was governed by the Austrian Code of Civil Procedure of 1895, which provided for an exaggerated active role of the judge[5]. This type of procedure continued to be enforced until 1938, even after these territories were united with the Old Kingdom in 1918[6]. In Basarabia[7], procedure was governed by the Russian code of civil procedure from 1864 until 1928.

On the same time, in the Old Kingdom several legislative amendments have gradually expanded the role of the judge toward a moderately active role in litigation. A procedural law reform of 1900 provided for an increase in the judge's involvement in the litigation and provided for the ability to raise *ex officio* certain exceptions and matters of public order, being however obligated to put them for discussion before the parties[8]. The judge could not raise *ex officio* affirmative defenses that were considered to protect private interests (i.e. prescription, *res judicata*) than be in the interest of the administration of justice[9]. However, these limitations were subsequently eliminated by a law of 1908 which provided for the judge's **duty** to raise *ex officio* any affirmative defense deemed necessary for the efficient administration of justice and to put them for discussion before the parties[10].

Several laws on the acceleration of justice (most notably in 1925, 1929 and 1943) further expanded the active role of the judge in litigation, by taking away from the parties the control over the pace of litigation and presentation of evidence. These changes were justified in the name of efficiency and greater need for expediency in litigation:

«In truth, [the previous] procedure left to the parties a too great liberty in the presentation of evidence and obtaining the means or acts to administer such proofs. Such liberty not only prolonged litigation in an unjustified manner, but also busied the judge with minor and unimportant incidental matters, repeatedly exhausting time the judge could have put to better use in solving the substance of the dispute»[11].

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[1] Alexe at 394.

[2] Ibid., at 395.

[3] G.G. Mironescu, *Revizuirea Codului de Procedura Civila*, Tipograffia Gutemberg, Bucuresti, 1901, at 11.

[4] Starting with 1866, the new political entity of the United Principates of Moldova and Valachia becomes a monarchy and will be hereinafter referred to as the «Old Kingdom.»

[5] On the role of the judge under the Austrian Code of Civil Procedure of 1895 and the procedural philosophy envisioned by Franz Klein see R.R. Verkerk, *Fact Finding in Civil Litigation. A Comparative Perspective*, Intersentia, 2010, Chapter VII, at 240–258. See also C.H. van Rhee, *Introduction,* in Uzelac & van Rhee (eds.), *European Traditions in Civil Procedure,* Antwerp, Intersertia, 2005, at 11–14.

[6] See generally Alexe at 396.

[7] Basarabia is the eastern part of historical province of Moldova. Nowadays, the main part of Basarabia is organized as an independent state, the Republic of Moldova, and while another part belongs to Ukraine together with Bucovina (northern part of historical Moldova).

[8] Alexe at 399.

[9] Mironescu at 12, Alexe at 399.

[10] Alexe at 401.

[11] Expose des Motifs to the Law on acceleration of justice of 1925. Translation is approximate.

The Communist power (1945–1989) brought a reform on the organization of judiciary[1] and some significant changes in the field of the civil procedure. Thus, the appeal procedure and the courts of appeal were abolished altogether[2]; the review by cassation procedure (*casare cu trimitere*) was supplemented with the review by revision procedure (*casare cu retinere*)[3], whereby the reviewing court would keep the case and issue a modified judgment on the merits by itself, rather than quash the judgment and send it back to the lower court for reconsideration; the public prosecutor received powers of intervention and in some cases of mandatory participation in the civil proceedings, being also able to seek supervisory review of judgments[4]; the General Prosecutor was given powers of supervision over the courts and control of any case of record, being able to initiate a special type of «extraordinary» review, initially named «review in surveillance» and later «review in annulment»[5], which could be exercised even against otherwise final and definitive judgments; the High Court of Cassation and Justice became known as the Supreme Court (1948–1952) and later as the Supreme Tribunal (1952–1991). It should be noted that apart from a few other relatively minor changes, the previous code of civil procedure of 1865 (as subsequently amended) was retained by-in-large in its original form[6].

During the communism, the active role of the judge was strengthened and received new ideological justifications. Significant in this regard are provisions referring to the right of the president of the panel «to ask questions to the parties or debate any issue of fact or law that may lead to a solution of the case, even if they were not provided in the petition or answer. He could order [any] evidence he deems necessary, even if the parties would oppose it»[7]. Moreover, «[j]udges have the duty to insist by all available legal means to discover the truth and to prevent any mistake in the ascertainment of the facts; they will give the parties an active support in the protection of their rights and interests. They will decide only as to the issues that form the object of the litigation»[8]. Legal commentators at that times regarded the active role of the judge as an «innovation» and «a new principle of the socialist procedural law» aimed at «bringing the justice close to the people»[9] and a guarantee of the due process. In line with the soviet doctrine, the commentators were keen to emphasize the duty of the judge to ascertain the «objective» truth, as opposed to the «formal» truth[10]. The latter was being regarded as a characteristic of the civil procedure of the bourgeoisie, whereby the judge was not sufficiently active to be able to ascertain the facts of the case and consequently, it resulted in the judge having no choice but to enter a decision which was often contrary to his own beliefs[11]. By contrast, the virtues of the objective truth were heralded as the only way to achieve social justice taking into account the supremacy of the public interest in litigation.

[1] Initiated by Law 341 of 1947.

[2] Law 5 of 1952.

[3] Decree 471 of 1957.

[4] Decree 38 of 1959.

[5] See i.e. Decree 470 of 1958. See also S. Spinei, *The Romanian Legal Profession,* in Uzelac & van Rhee (eds.), *The Landscape of the Legal Professions in Europe and the USA: Continuity and Change*, Antwerp, Intersentia, 2011, at 42.

[6] The Code was subject to a formal renumbering under the Law 18 of 1948. By contrast, the Code of Criminal Procedure also adopted in mid 19th century was abrogated and replaced in 1968 by an entirely new code.

[7] Art. 129.

[8] Excerpts from art. 130.

[9] See G. Porumb, *Codul de Procedura civila comentat si adnotat*, Bucuresti, 1960, at 9, cited by Alexe at 411.

[10] See Alexe at 414 et seq. and authorities cited therein.

[11] Ibidem.

After the fall of the communism, Romanian civil procedure and the court system were reformed again, with various amendments adopted almost every year. Arguably, the tendency was to revert back to the procedure in place before 1948. The courts of appeal and the appeal procedure were reintroduced, the review in annulment procedure was eventually repealed, and the highest court was renamed as the Supreme Court of Justice under the new 1991 Constitution and following a 2003 constitutional amendment it was re-designated as the High Court of Cassation and Justice as it was originally known under the empire of the 1865 Code of Civil Procedure. The active role of the judge was maintained, although it varied in the degree of application at times. In this regard, an interesting debate arose immediately after the 1989 Revolution on whether the principle of the active role of the judge should be maintained. Some legal commentators regarded the active role as a communist principle and advocated in favor of a retreat from its application. However, these views were quickly dismissed by the more established academics, who pointed out the tendency in other countries toward an enlargement of the role of the judge in civil litigation[1]. The active role of the judge was described as a guarantee of an effective right of defense and justified by reasons of efficiency, speed and the «suppleness»(!) of judicial intervention[2]. One influential academic explained, in pertinent part:

«In the western doctrine there is a tendency toward the justice as a dialog, which is specific for these times... [...] Therefore, the judge-as-an-arbiter is replaced by the judge-as-a-coach, an active judge, who cannot leave the course of the litigation to the whim of the parties. Of course, such an evolution may be criticized, but it has imposed itself and it appears to me to be justified, since the active role of the judge tends to attenuate the social and economical differences between the parties and to ensure procedural equality, and consequently [to ensure] the principle of legality.

Of course, we are not talking about transforming the judge in the advocate for one of the parties, but we cannot leave him in the position of a sphinx who helplessly witnesses a slaughter and not a judicial duel»[3].

At present, Romania is on the verge of a new major procedural reform. The project of a New Code of Civil Procedure (hereinafter «NCPC») has been adopted by the Government in February 2009 and by the Parliament in July 2010[4]. However, it has yet to be decided when it would enter into force[5]. For these reasons, the instant paper makes references to the law in force prior to September 1, 2011 and provides only guidelines on the important expected changes under the NCPC.

II. An overview of the current Romanian civil procedure

a. The Court system

The current court structure in Romania is provided by Law No. 304 of 2004 and its subsequent amendments. Romanian courts are organized into a strict four level hierarchy. It is composed of local courts (*judecătorii*), district courts or tribunals (*tribunale*), courts of

[1] See V.M. Ciobanu, *Tratat Teoretic si Practic de Procedura Civila*, Editura National, Bucuresti, 1997, at 132.

[2] Ibid., at 128, 132.

[3] See Ciobanu at 132. Translation is approximate.

[4] Law 134 of 2010.

[5] The parliament is scheduled to debate the implementation of the NCPC sometimes in the fall of 2011. At the time of this writing, the status of the NCPC remained unclear.

appeal (*curţi de apel*) and a High Court of Cassation and Justice (*Înalta Curte de Casaţie şi Justiţie*). All courts are courts of general jurisdiction and operate under the principle of unity of jurisdiction, meaning that they are competent to decide both criminal and civil cases. Of course, as a functional matter, judges within the courts work in specialized divisions or panels dealing with criminal, civil, administrative, commercial matters and so forth. Since 1989 until 2004, there were no specialized courts in Romania. An innovation of the 2004 law was to allow the creation of specialized courts, organized only at the district court level and limited to specific areas of law. Essentially, some specialized divisions within the district courts in the enumerated areas were reorganized as independent specialized courts. A specific feature of the Romanian court system is that all courts, including the specialized courts can be both courts of first instance and courts of last resort, depending on the nature and amount of the claim. In addition, district courts and courts of appeal may exercise appellate jurisdiction over the judgments issued by lower courts subject to certain rules. As a general rule, the court competent to decided appeals and supervisory reviews is the court immediately superior on the hierarchical level to the court issuing the judgment attacked. Apart from this general court structure, Romania also has a Constitutional Court and military courts.

b. The ordinary course of civil litigation before the Courts of First Instance

Under the current procedural system in Romania, there are three main phases in civil litigation: (1) the written preliminary phase, centered on the initial pleadings; (2) the trial phase consisting of the investigation of the case, administration of evidence and oral arguments; and (3) a final phase consisting of judges' deliberation and the rendition of judgment. In addition, a pre-litigation phase exists in certain limited circumstances.

The NCPC provides for some changes in the structure of litigation. Of notable importance is the creation of a separate phase of «investigation of the case», which entails the judicial administration of evidence. As envisioned by the NCPC, this phase would be clearly delimited from the preliminary written phase, as well as from the oral debates, by providing that the investigation phase would take place *in camera,* and not in public hearings as it is currently the case.

Under the current scheme, the trial phase essentially consists of a series of successive hearings where the case is investigated, evidence is administered and the parties engage in debates over factual issues or arguments on points of law. There is no clear distinction on the type of hearings, nor is there a limit on the number of hearings allowed. There may be as many hearings as necessary to prepare the case for the final disposition, depending on the complexity of the case. Many simpler cases are indeed disposed of within one or two hearings, while more complex cases requiring evidence will take a substantial number of hearings to investigate. As a practical matter, the judge will generally dedicate a hearing to a particular purpose and will not hear more than two witnesses in one hearing. Hearing dates are ordinarily scheduled on a three week interval depending on the case load of the court. All hearings are publicly held unless the law provides otherwise. In certain cases, the parties may agree to have the hearing held *in camera*.

All proceedings and rulings that take place during the hearings are indicated into a «closing order» («*încheiere*»)[1] which must be issued at the end of every hearing and must be

[1] Despite the similar terminology, the closing order described herein should not be confused with the «closing order» available under the French Civil Procedure (**ORDONNANCE DE CLÔTURE**), which marks the end of the preparatory stage in French civil litigation.

filed into the record of the case-file. There are two types of closing orders: preparatory and interlocutory. Preparatory closing orders are rulings which are aimed to prepare the case and move it forward toward a final resolution, i.e. an order providing for the administration of a certain piece of evidence. Interlocutory closing orders are those rulings in which the court decide exceptions or arguments that touch upon the substance of the dispute, without constituting a final judgment on the merits.

The code does provide certain rules regarding the sequence of issues to be disposed during trial. According to art. 137, the court must first rule on procedural exceptions and those affirmative defenses[1] that could make the investigation on the merits/substance of the case as unnecessary. The exceptions must be decided separately and cannot be united with the substance of the case, unless they cannot be resolved without administering proof on the merits of the case.

Another relevant provision is the requirement that the administration of evidence should take place prior to the debates on the merits of the case. (art. 167) As a consequence, during an «evidentiary hearing» the judge will try to restrict the arguments raised by the parties to factual issues and points of law that are directly relevant and limited to the evidence that is being administered.

From the various provisions of the code, there is an apparent tendency toward a concentration of the trial[2], at least in certain aspects. Thus, according to the same article 167, the contrary proofs must be administered in as much as possible on the same time, which means during the same hearing and in a close sequence. Furthermore, when witness testimony has been approved by the judge in cases where witnesses were not identified in the petition or in the answer, the contrary proof will be requested within the same hearing if both parties are present. (art. 167(2)). If a party is not present at the time the judge approved the offer of evidence, the party must provide any contrary evidence at the next hearing in which the party makes an appearance. (Art. 167(3)).

Also, as a general guideline courts generally do hold the debates over the merits of the case within one single hearing toward the end of the trial. When the court considers that all matters are clarified and has all the necessary facts to reach a decision, the presiding judge will declare the debates closed, which marks the end of the trial phase. The case would then be submitted for deliberation and judgment. The court may reopen the case on its own motion, at any point prior to the judgment, if it considers necessary to ask for clarification.

Throughout the trial, the judge has preeminently dominant position, characterized by an active role in investigating the claims, administration of evidence and conducting the arguments on the merits. Thus, the judge is the one in charge of approving and admitting offers of evidence into the record, conducts the interrogation of the parties and testimony of the witnesses, performs *in loco* investigations if necessary, and generally prepares the case file containing a summary of all arguments and evidence provided.

The principle of the active role of the judge represents a cornerstone of the modern Romanian Civil Procedure. Although it is not stated verbatim in any source of law, the

[1] These defenses may also raised by way of exception, but they mainly regard the substance of the dispute.

[2] Unlike the *Koncentrationmaxime* available in German Civil Procedure, such trend does not have the value of a recognized principle in Romanian Civil Procedure; rather, it appears to be consequence of the principle of the contradiction and the principle of immediacy.

principle enjoys a great deal of recognition in the doctrine and has been deeply entrenched in the judicial culture and practice.

Illustrative in this regard are doctrinarian descriptions of the principle, which considers the active role of the judge is the only rational way of achieving «a just and principled solution of litigation, to guarantee the social peace in a democratic society»[1]. Moreover, according to the same author, «the transition from a centralized socio-economical system to a free and democratic society cannot determine an abdication from the principle of the active role of the judge. To the contrary, a consolidation of the rule of law requires an enhancement of the duties and responsibilities of judges»[2]. Another author posits, in pertinent part:

«The active role of the judge expresses - in our procedural system as well - the exigencies and the characteristics of the «inquisitorial procedure', opposed to the «accusatorial procedure'. From the attribute of the justice as a «public service' derives the «officialdom' of the civil process, which implies among other things, an active role of the judge, which means neither partiality nor interference with the rights and interests of the parties. To the contrary, it represents a guarantee of such rights and interests»[3].

Similar assessments are found in the works of other academic writers[4].

In the current legislation in force, there are many statutory provisions that promote this principle. Chief among these statutory provisions is «the duty of the judge to insist by all available legal means to prevent any mistake in the ascertainment of the truth in the case». To this end, «the judge may order the administration of any evidence it deems necessary even if the parties oppose it». (art. 129 (5)). Moreover, with regard to the factual and legal grounds of the claims asserted by the parties, «the judge is within its right to request the parties with oral or written explanations, as well as to raise for debate any factual or legal circumstances, even if they are not mentioned in the [pleadings]». (art. 129 (4)).

The active role of the judge is generally limited by the principle of party-disposition, narrowly interpreted under art. 129 (6) insofar as it simply provides that «[i]n all cases however, the judge may not decided beyond the object of the demand». The principle of contradiction also limits the excessive application of the active role of the judge, by requiring the judge to put into discussion before the parties any points of law or fact raised by the court on its own motion.

The NCPC provides for a significant increase of the active role of the judge by conferring new powers to the judge. A rather (dis)concerning development in this regard is the power of the judge to initiate proceedings against a third party *ex officio*, even against the will of the parties, which is dubbed by the Expose des Motifs as a «derogation from the principle of party disposition»[5]. The enlargement of the judge's powers is justified in the Expose des Motifs as a method of increasing efficiency and provide for a faster resolution of the disputes.

[1] Les at 48.

[2] Ibid., at 48-49.

[3] I. Deleanu, *Tratat de Procedura Civila*, Editura C.H. Beck, Bucuresti, 2007, at 24.

[4] See Ciobanu at 130–136.

[5] Ironically, the NCPC proclaims for the first time the principle of party-disposition as a guiding principle of Romanian civil procedure. This principle has not been stated verbatim in any other official text so far, although it has been recognized as such in the doctrine.

III. Classifying legal systems. Romania's place within the legal families of the world

In the traditional classification of legal families, there is little doubt that Romania belongs to the civil law system, and more specifically to the Romanistic family. Romania adopted its Civil Code in 1864 modeled after the Napoleonic Code and it subsequently developed its body of laws primarily by French import. In the area of private law especially, French doctrine and case-law exerted a heavy influence on the development of Romanian doctrine and practice. Distinctions and doctrinarian concepts developed by French academics have been extremely well received and have been included in the academic treatises and works of Romanian legal commentators as a point of reference. They continue to enjoy a large audience at present times. Most comparative assessments undertaken in Romanian legal literature today (and in the past as well) are made through the eyes of the French legal writers, even when they refer to a non-French legal system or concept. This should be regarded not only as a tribute to the «*grandeur*» of the French legal tradition, but also as a consequence of a certain cultural affinity that has developed in the second part of the 19th century and reached its peak in the period before the 2nd World War. French remains the foreign language of choice for most legal academics and practitioners, although English is gradually taking over within the ranks of the younger legal professionals.

Similarly, in the field of civil procedure, Romania's 1865 code was largely a product of French inspiration. French academic writings on civil procedure continue to exert an overwhelming influence, even though Romanian civil procedure differs from French procedure in many important aspects[1]. It seems only fitting that Romania gains a New Code of Civil Procedure, just as the French *Nouveau Code de Procédure Civile* ceases to be «new»[2].

During Communism (1945–1989), we probably could have included Romania within the Socialist legal tradition, albeit with a heavy civil law substratum. Civil law had been deeply rooted in the Romanian legal tradition and culture by the time the communist regime was put into place. This is one reason why both the Civil Code of 1864 and the Code of Civil Procedure of 1865 were maintained by in large in their original form, with certain soviet inspired amendments made in only a few specific areas. After the fall of Communism, there is little doubt that Romania has returned to a pure civil law tradition. A more detailed discussion on this topic is provided in the next section of this paper. See *infra*.

In the classification proposed by Ugo Mattei referring to the rule of professional law, the rule of political law and the rule of traditional law[3], the place of Romania is open for debate. According to Mattei, the category of rule of professional law is characterized by a separation between the legal arena and political decision-making, and a secularization of the legal process. It includes the common law systems of England, North America and Oceania, the civil law systems of Western Europe and Scandinavian legal systems, and

[1] For instance, Romania does not have a preparatory judge («*le juge de mise en état*»).

[2] The French Code of Civil Procedure was often referred as the «New» Code of Civil Procedure to distinguish it from its 1806 predecessor, the «old» (*ancien*) code. Although the rules of civil procedure were primarily regulated by the 1975 Code (with the subsequent amendments), some parts of the 1806 code still remained in force. Only recently, the French legislature has finally abrogated the 1806 code in its entirety, making the distinction obsolete. See Law 2007-1787 of 20 December 2007.

[3] U. Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 5 *Am. J. Comp. Law.* 54 (1997).

some of the mixed systems such as Louisiana, Quebec, Scotland and South Africa. The rule of political law category comprises the systems where the political process and the legal process cannot be entirely separated, as the legal process is often determined by political relationships[1]. Countries belonging to this category have a high level of corruption, socio-political instability and low economic development[2]. According to Mattei, the rule of political law category includes the majority of ex-Socialist legal family, Cuba and the less developed countries of Latin America and Africa, with the exception of countries where Islamic law is strong enough to place them within the rule of traditional law category. The rule of traditional law family consists mainly of systems where the separation between the law and religious or philosophical traditions has not taken place[3]. It includes Islamic law countries, Indian law and other Hindu law countries, and certain countries having an Asian or Confucian conception of law, such as China and Japan.

Coming back to Romania, it would be a fair assessment to say that during the first decade after the fall of the Communism between 1990 and 2000, Romania was probably a part of the rule of political law category under Mattei's taxonomy, primarily due to the generalized corruption existent in the Romanian society and institutions. However, in the past decade I believe such classification is no longer sustainable, and currently, Romania may be included within the rule of professional law category. Mattei himself acknowledges that his division is dynamic and countries may change their position from one family to another if there is «a significant increase in structural characteristics of a different pattern»[4]. As an additional argument for this proposition is the strong civilian heritage that existed in Romania prior to the establishment of the communist regime and the relative success in preserving this tradition in the area of private law[5].

In the specific context of categorizing procedural systems, there are only a few relevant divisions that have been made in the comparative literature. The traditional distinction between adversarial and inquisitorial continues to generate a high amount of controversy among proceduralists. Much of the objection is centered on the labels themselves. The «inquisitorial» name used primarily by common law commentators to describe the Continental procedure is generally asserted to be misleading since it alludes to the Spanish inquisition and the procedural excesses of the ecclesiastical courts. The alternative denomination of «*ex officio*» model or «non-adversarial» model is generally preferred, although the majority of continental jurists are quick to characterize their own system as mixed. Conversely, the Continental jurists prefer to refer to common law procedure not as «adversarial», but rather «accusatorial», which expresses a slightly different idea[6].

Despite of having potentially misleading connotations, this traditional distinction remains useful (at the very least for teaching purposes) in distinguishing between two op-

[1] U. Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*,, at 27–28.

[2] Ibid., at 28–29.

[3] Ibid., at 35–36.

[4] Ibid., at 16.

[5] Noteworthy, Mattei would exclude Poland, Hungary and Czech Republic from the rule of political law family, primarily because of a «sophisticated civilian legal heritage» that may have lessened the impact of Socialist law.

[6] Ironically however, continental jurists use the term «adversarial» in describing and/or translating their own native principles of procedure. See for instance the French «*principe contradictoire*» or the German «*verhandlungs*» both translated as the «adversarial» principle. In my humble opinion a more appropriate translation should be the «contradictory principle», since «adversarial» suggests party control over the administration of evidence.

posing tendencies with respect to the role of the judge and the parties in litigation. The main distinction relates to the powers of the judge/court in the initiation of the claim, the substance and extent of demand, investigation of the facts, presentation of evidence, interrogation of witnesses and experts, conduct of the proceedings and goals of adjudication.

Unlike other Continental jurists, Romanian academics do not shy away from describing the Romanian procedure as having a profound «inquisitorial» character. As already noted, this designation is related to the active role of the judge, the officialdom of the litigation process and the degree of control the judge has over the investigation of facts, presentation of evidence and administration of proof[1]. The term «inquisitorial» does not raise unpleasant connotations within the academic writers on procedure. To be fair, from a historical perspective the term inquisitorial can also have some positive implications. The «rationalization» of evidence and professional trained decision-makers is largely due to the procedure used in the ecclesiastical courts when compared to the irrational solutions of trial by ordeal, divine intervention or duel, which existed in secular courts in the XII century throughout Western Europe[2]. Seen in this light, having an «inquisitorial» character may not be so bad after all! Under the changes envisioned by the NCPC, Romanian procedure appears to be moving toward an even more pronounced inquisitorial character than it currently stands. Thus, the judge's powers are expanded and in certain cases, the judge will have the power to initiate proceedings against a third party *ex officio*, even against the will of the parties[3]. Under the NCPC, the investigation phase would no longer take place in public hearings, but rather will be performed *in camera*[4].

Perhaps the most relevant and important distinctions in categorizing procedural systems have been made by Mirjam Damaska in its celebrated book *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1975). Essentially, Damaska provides ideal type models of categorizing legal (procedural) systems based on two different criteria: the function of the government and the structure of authority of a state. Under the first criteria related to the function of the government, Damaska distinguishes between the reactive state and the activist state. The reactive state is limited to providing a framework within which citizens pursue their own goals[5]. It has the characteristics of a «minimalist» government that restricts itself to the tasks of protecting order and providing a forum for the resolution of the disputes that cannot be settled by the citizens themselves[6]. In this context, the government celebrates self-regulation by the members of civil society and therefore, legal norms are created through agreements, contracts and pacts[7]. The adjudicatory process is characterized as a «conflict solving» process, whereby the parties have much control of the proceedings and the decision maker is guided by standards of «fairness» in reaching a

[1] See I. Deleanu, *Tratat de Procedura Civila*.

[2] See generally R.C. van Caenegem, *History of European Civil Procedure*, in M. Cappelletti (ed.), *International Encyclopedia of Comparative Law*, vol. XVI, *Civil Procedure*, Tubingen, 1973. See also C.H. van Rhee, *Towards a Procedural Ius Commune?*, in J. Smits, G. Lubbe (eds.), *Remedies in Zuid-Afrika en Europa*, Antwerpen, 2003, at 217–232; C.H. van Rhee, *Civil Procedure: A European Ius Commune?*, *European Review of Private Law* (2000), 589–611; C.H. van Rhee, *Harmonisation of civil procedure: an historical and comparative perspective*, in Kramer & van Rhee (eds.), *Civil Litigation in a Globalized World*, T.M.C. Asser Press (forthcoming 2012).

[3] Expose des Motifs to NCPC.

[4] Ibidem.

[5] Damaska at 73.

[6] Ibidem.

[7] Ibid., at 75.

decision. By contrast, the activist state has a disposition to manage society[1]. Legal norms emanate from the state and seek to implement governmental policies in a comprehensive manner: it tells citizens what to do and how to behave[2]. Legal proceedings in a truly activist state are organized around the central idea of an official inquiry and aimed at implementing a state policy[3]. The decision maker exercises control over the process and decides based on what is «right», taking into account the implementation of state policy.

On the second criteria related to the structure of authority in the state, Damaska distinguishes between the coordinate ideal and hierarchical ideal. The hierarchical model of authority, which in its purest and ideal form corresponds to the concept of classical bureaucracy, is characterized by a professional corps of officials, organized into a hierarchy which makes decisions in accordance to technical standards and exhibits a strong sense of order and desire for uniformity[4]. In a procedural context, the hierarchical model provides for a trial consisting of successive stages, judicial control over presentation of evidence, experts and witnesses, and comprehensive appellate review that includes both questions of law and fact. By contrast, the coordinate model of authority is defined by a body of nonprofessional decision makers organized in a single level of authority, which makes decisions by applying undifferentiated standards resulting in a lack of consistency and a considerable degree of uncertainty in judicial decisions[5]. Procedurally, the coordinate model is characterized by a single concentrated trial, where the parties bear the responsibility in presenting evidence, with live testimony preferred over documents, and with limited appellate review. According to Damaska, the interaction between socio-political values and administration of justice is evident: «dominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements»[6].

Within the categories developed by Damaska, Romania is clearly more closely related to the activist state and the hierarchical ideal. As described by Damaska, these two ideal models have the characteristics of the civil law systems and Continental procedure, whereas the reactive state and coordinate ideal resemble the common law systems and procedure.

The survival of the Socialist tradition? A contrary argument

Prior to the fall of the Iron Curtain, most classifications of legal families contained a special category devoted to Socialist law or Socialist legal tradition, as a distinct category from the Common law and Civil law traditions. After the fall of the Soviet Union, the vast majority of academic writers acknowledged that the Socialist tradition has faded away and that the former communist/socialist countries have reverted back to the civil law tradition. In the contemporary classification of legal families, the Socialist tradition has been abandoned and ceased to be considered as a distinct legal family[7].

[1] Damaska at 71, 80 et seq.

[2] Ibid., at 82.

[3] Ibid., at 147.

[4] Ibid., 18 et seq.

[5] Ibid., at 23 et seq.

[6] Ibid., at 11.

[7] Illustrative in this regard is the statement provided by JuriGlobe, a research group of the University of Ottawa which contains a comprehensive classification of legal families:

«Upon reflection, we have ruled out the category of «Socialist law» whose inclusion, in the past, was unavoidable in certain classifications. True, despite recent political upheavals, Marxist-Leninist thought still plays

One author however has expressed a different opinion. In a recent paper, Prof. Alan Uzelac challenged the common assumption and maintained that the Socialist law has survived as a «third legal tradition»[1]. The main argument raised by the author is that the socialist legal tradition may continue to exist independent of the existence of a socialist ideology and socialist state, and even independent of the values that prevail in the society at large. According to Prof. Uzelac, «[i]f there is an element of ideology or philosophy in the foundations of the legal traditions, it is the ideology of the lawyers-judges, advocates and law professors- not the ideology of society at large». The author continues, stating, in pertinent part:

«No matter how much Soviet doctrine insisted on adding attributes to legal notions, creating idioms such as «socialist legality», «socialist law» or «socialist justice», the ideological content was only the tip of the iceberg, whereas the real functioning of law and real institutions – courts and tribunals – was more affected by other features, that can coexist independently from the ideological labels accepted by the ruling elites»[2].

Denying the instrumentalist approach of the law, i.e. that socialist attitudes regarded law as an instrument of economic and social policy, Prof. Uzelac argues this element is in fact ideology-neutral and not fundamental to the socialist legal tradition as Merryman had previously asserted. Drawing from the experience of «ex-Soviet countries [of] former Yugoslavia», which is conceded to have had a more liberal and progressive regime than other countries of the Eastern bloc, Prof. Uzelac proceeds to identify what purports to be the characteristic features of the Socialist legal tradition. He identifies two «fundamental» features of the socialist tradition and nine other features dubbed merely as «typical» or «characteristic». In his opinion, the fundamental features relates to **1.** the use of the legal process as a tool for the protection of the interests of political elites and **2.** a fear of decision-making by the judges as «a guiding principle of socialist justice». The nine typical or characteristic features identified by Prof. Uzelac are in essence derivations from the «fear of decision making» aspect of the socialist legal tradition. As enumerated therein, they are:

1. Deconcentrated proceedings, lack of trial in the proper sense; 2. Orality as pure formality; 3. Excessive formalism; 4. The pursuit of material truth; 5. Lack of planning and procedural discipline; 6. Appellate control as impersonal and anonymous process; 7. Multiplicity of legal remedies that delay enforceability; 8. Endless cycles of remittals; 9. Disproportionate efforts for reaching ephemeral and socially insignificant results.

The claims made by Prof. Uzelac merit a closer analysis, which is relevant to the instant topic. Romania was a former Communist country and it is generally agreed that Romania experienced one of the harshest (if not «the» harshest) and most repressive regime among the countries in Eastern Europe. If the features identified by Prof. Uzelac are indeed representative of the Socialist legal tradition, one would assume they would be found in the Romanian legal system as well. However, with the exception of «the pursuit of material truth», most of the features were (and are) conspicuously absent in Romania. In the fol-

a sometimes significant role in the legal organization of certain countries. But the criterion which governed the creation of a category of «Socialist law», as opposed to western law, was a material one, whereas on the whole we have given greater importance to the methodological and technical aspects of the legal systems, to legal concepts and to methods of developing and expressing law, without confining ourselves to superficially formal criteria.» See http://www.juriglobe.ca/eng/sys-juri/intro.php (last visited 31/08/2011).

[1] A. Uzelac, *Survival of the third legal tradition?,* 49 *S.C.L.R.* 377–396 (2010).

[2] Ibidem.

lowing, I will proceed to analyze the more concrete characteristics found by Prof. Uzelac to be typical or common to the Socialist legal tradition.

As a threshold issue, the initial assumption made by Prof. Uzelac and namely, that law and legal institutions are not correlated societal values, but rather with the ideology of the legal profession, is somewhat questionable. The assumption presupposes that an ideology of the legal profession can exist in a vacuum, devoid of any connection with either state policy or with (cultural) values shared by the society at large. There are two very simple reasons that warrant some appropriate skepticism toward accepting such a gravity-defying existence. First and foremost, any ideology must have some form of support either from the top, for instance through a government imposed policy, or grow from the bottom by building on societal values of the general public. Second, the connection between law, culture and society cannot be negated. History has shown us repeatedly that law is deeply rooted in the historical traditions as well as in the economic, political and social realities of the societies at all times. Law and legal institutions change as society does, and although they may be slower to react at times, they do react nonetheless. The connection between law and culture has already been proven in a rather convincing manner, more recently by Oscar Chase, who explained, in pertinent part:

«I have presented two claims about institutionalized dispute processes and society: first, that these dispute-ways reflect the culture in which they are found – its values, its social arrangements, its metaphysics, and the symbols through which these qualities are represented; and second, that the relationship is reflexive – that the processes by which disputes are addressed will be an influential ingredient in the ongoing social task of maintaining or «constructing» the culture in which they are located»[1].

Prof. Uzelac argues a «fundamental» feature of the Socialist legal tradition is the fear of decision-making by the judges resulting in an evasion of responsibility to pass final judgments as «a guiding principle of socialist justice». This aspect is elaborated and explained in as much as «the socialist judiciary has developed over time numerous methods aimed at evading responsibility for decision-making». Thus, judges would decide cases on mere formal grounds without entering into the merits and would welcome formal objections and trivial procedural issues raised by the parties as a means to dismiss the case or to trigger a transfer to another authority or to a less fortunate colleague. Moreover, according to Prof. Uzelac, judges would make use of various case-management prerogatives as well as investigation measures in the quest for finding the material truth for purposely delaying the resolution of the case. Notably, Prof. Uzelac further submits the exercise of the right to appeal, which was «skillfully raised by socialist lawyers to an absolute, even constitutional right» lead successive remittals for retrial by the lower courts, in a «merry-go-round [that] could go as long as needed, preferably until the pressing social need for a decision would cease to exist».

This characteristic has never been present in Romania during Communist times. Quite the contrary, judges would take their active role seriously and were keen to ensure a quick judgment, often without much regard to the protection of individual rights, for «the greater good of the society» and the working class. As litigation and attorneys in general were seen as an evil to the society, the Communist government took great pains to paint the image of an ideal society, where no crimes are committed and few disputes took places among

[1] Oscar G. Chase, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context*, New York University Press, 2005, at 138.

comrades. Where crimes were committed, they were not publicized and where litigation arose, it was quickly disposed of. Furthermore, the appeal procedure identified «by socialist lawyers as an absolute, even constitutional right» in Croatia, was **not** even available in Romania during Communism. Both the appeal and the courts of appeal were abolished altogether in 1952 and it was reintroduced in Romania only after the fall of Communism. By virtue of the active role of the judge in conducting the proceedings, which necessarily led to an efficient and presumably fail-proof system of finding the truth, in Romania, the appeal was considered as unnecessary and a potential cause of excessive delay. One Romanian commentator from 1950's explained, in pertinent part:

«[The previous system] did not ... [allow] a better administration of justice, but it was maintained by the bourgeoisie because it provided an appropriate field for bureaucracy, whose labyrinth only those who disposed of sufficient material means to get the support of specialists could disentangle; maintaining appeal ... is no longer necessary because, due to the active role of the judge and the assignment imposed to justice to discover the objective truth, conditions are created for the solid administration of justice in first instance courts»[1].

By the contrast, the review procedure was maintained and it received a new «theoretical» justification. In the doctrinarian writings at the times, the review procedure was distinguished from the appeal procedure as follows:

«The review procedure had a class character, and the Court of Cassation, a central authority of the State, helped the enforcement of laws through which oppression was exercised; [in pre-communism times] appeal had only a formal nature, and uselessly led to slowing down the administration of justice, as there was no guarantee that the decision in appeal would be better than the one of the first instance judge»[2].

As already noted, the main method of reviewing judgments was through the review by revision procedure, whereby the reviewing court would keep the case and issue a modified judgment by itself, rather than quash the judgment and sending it back to the lower courts for reconsideration. Obviously, such a procedure would not result in «successive remittals for retrial by the lower courts» as was allegedly the case in Croatia. In this regard, it should be noted that the communist regime in Romania had used less subtle ways of exercising control over unwanted judgments. Thus, the General Prosecutor was given powers to exercise direct supervision over the courts, to control any case of record and to initiate a special type of «extraordinary» supervisory review, which could be exercised even against otherwise final and definitive judgments. This procedure was often used as a political tool against unwanted judgments. Moreover, during certain periods of time it was a customary practice to have a people's representative or a «social assessor» supervising professional judges in the courtroom to ensure that their rulings were compatible with the «will of the people» as expressed by party doctrine and ideology[3]. Furthermore, lawyers

[1] G. Porumb, *Codul de procedura civila comentat si adnotat*, Editura stiinţifica, Bucuresti, 1962, at 14 cited by S. Spinei in *Romanian Civil Procedure. The Reform Cycles,* in Kramer & van Rhee (eds.), *Civil Litigation in a Globalized World*, T.M.C. Asser Press (forthcoming 2012). Translation is approximate.

[2] I. Stoenescu, *Curs de drept procesual civil* (1956), cited by Spinei *Romanian Civil procedure. The reform cycles,* in Kramer & van Rhee (eds.), *Civil Litigation in a Globalized World*, T.M.C. Asser Press (forthcoming 2012). Translation is approximate.

[3] These «social assessors» were often people with little education, who had merely undertaken a six months crash course in Marxist theory and law. See Mircea Dan Bob, *Presentation at the Henri Capitant symposium on Law and Culture*, Louisiana (2009).

and other legal professionals were heavily supervised and admission into the law faculty was subject to a requirement of having an appropriate recommendation from the Communist Youth Organization[1]. Judges and prosecutors were carefully selected taking into account their social and political status[2], and often based on whether they had «healthy roots»[3]. Finally, the media was heavily censored and «whistle blower» organizations were virtually non-existent.

During Communism, civil procedure and justice in general was a rather quick and efficient affair with concentrated proceedings and no excessive formalism. It is true that one phenomenon described by Prof. Uzelac also took place in Romania for a few years immediately after the fall of Communism. Some cases involving high profile politicians or wealthy individuals were purposely delayed until the media and the general public would lose interest in the case. For this reason, many attorneys who have practiced law under the previous regime would agree that justice was more efficient under communist times. However, this phenomenon was a direct consequence of the high level of corruption that developed in the post-communist Romania due to generalized poverty and low standards of living. One could hardly qualify corruption and poverty as a fundamental or exclusive feature of Socialism, although I concede that a connection may exist. Corruption was a phenomenon that has marred the Romanian society in the first decade after the fall of the communism and the judiciary made no exception. In recent years Romania has made significant progress and at least with regard to judges cases of corruption have been reduced to an «acceptable» minimum. The cause of the improvement is related primarily to the increase in the standard of living in Romania and following the accession to the European Union.

Out of the other features identified by Prof. Uzelac, «the pursuit of material truth» is indeed found in Romanian procedure both during Communism and arguably, thereafter. As already noted, the need to ascertain the «objective» truth was ideologically justified by the need to protect the interests of the parties, to ensure procedural equality of arms and the only way to achieve social justice taking into account the supremacy of the public interest in litigation. By contrast, the «formal» truth (i.e. the truth as asserted by the parties) was regarded as a concept of the bourgeoisie-capitalist style of litigation and was therefore rejected. After Communism, the search for truth was maintained as an objective of the (civil) litigation; however the distinction between the objective truth and formal truth was abandoned by the doctrine. Maintaining the search for truth as a principle of procedure was closely connected with the idea of an active judge. It is also true that Romanian procedure has favored in the past written submissions to oral arguments, and to some extent it remains true in the post-1990 procedure. However, it is questionable whether the search for truth, the active role of the judge or the preference for written procedures can really be coined as characteristic of the Socialist style of litigation. These three «characteristics» are found in many Western

[1] On the same idea see Spinei, *The Romanian Legal Profession,* in Uzelac & van Rhee (eds.), *The Landscape of the Legal Professions in Europe and the USA: Continuity and Change*, Antwerp, Intersentia, 2011, at fn. 8 and accompanying text.

[2] Ibidem.

[3] The Communist regime regarded as «healthy roots» having ancestors from the working class. A parent or grandparent who had been in the past a big land owner, a business man or an industrialist would almost certainly result in a refusal of being accepted into the legal profession.

European countries, including France[1], and one could hardly qualify France as belonging to the Socialist tradition.

In conclusion, I do not believe the Socialist legal tradition has survived in the former communist countries in Eastern Europe, at least not in an institutionalized form and clearly not within the parameters set forth by Prof. Uzelac. I do however believe that certain cultural attitudes within the society and the legal profession may have continued in form of «mentalities», in accordance proverbial wisdom: «old habits die hard». What may have survived is a certain cultural inclination, which however is not necessarily particular to a (legal) profession, but rather remains entrenched in the values and habits of the general public.

IV. (Legal) culture and civil procedure

A discussion of Romanian civil procedure would be incomplete without mentioning some of the cultural elements that have an impact on the development of the legal process. The connection between the cultural values of a society and its systems of law is perhaps most evident in the field of procedural law, both civil and criminal. «The close link between civil procedural law and the cultural milieu in which it developed is a well-known phenomenon among proceduralists»[2]. Legal culture is an essential element that must be taken into account in every attempt to understand a particular system.

In the past, Romanian judges often assumed the role of an educator, with paternalistic lectures delivered throughout the hearings. They often adopted a condescending tone, especially toward younger attorneys, even admonishing them in public hearings for not being prepared enough to sustain a pertinent argument. In the last decade, the judiciary has received an influx of young professional judges, who have adopted a different attitude. They are knowledgeable, passionate and highly motivated in the pursuit of their professional careers. However, like many young graduates that lack a certain degree of professional and life experience, they strive for perfection and are often afraid to rule on trivial procedural incidents for fear of making an error. As one seasoned attorney explained, a skillfully raised (procedural) exception is often met with an adjournment by the judge, who takes the matter under advisement, resulting in a delay of the litigation process.

The Romanian market for legal services remains dominated by local firms, generally organized in small and medium undertakings. Foreign law corporations have had some difficulties breaking into the market by them and have generally resorted to an association with a politically connected local firm. The most profitable law firms are the ones providing services for government related activities such as privatization, foreign investment and public private partnerships agreements.

[1] In the French civil procedure the judge has an active role with large powers in the preparatory stage over the investigation of the claim and administration of evidence. Also, the importance of orality is greatly reduced in the French system, which favors written statements over oral arguments in both theory and practice. See generally, L. Cadiet, *Civil Justice Reform: Access, Cost and Delay – The French Perspective*, in A. Zuckerman (ed.), *Civil Justice in Crisis – Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999.

[2] W. de Vos, *French Civil Procedure Revisited*, 9 *Stellenbosch L. Rev.* 217 (1998); M. Cappelletti, *Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe*, 69 *Michigan L. Rev.* 847 (1971).

As already noted, civil procedure in Romania is under a continuous state of reform, with various amendments being passed almost every year. Most of these reforms are undertaken through the procedure of emergency governmental decrees (*O.U.G.*), whereby a newly formed government would assume responsibility before the Parliament in order to be able to regulate through packages of governmental decrees. From a historical perspective, the word «reform» has grown positive connotations with the general public, stemming from the series of social reforms undertaken by Al. I. Cuza between 1864–1866 and which have been highlighted and extensively taught throughout the primary, secondary and high school education. Needless to say this association is abused by all political parties in their electoral programs. Every party is promising extensive reforms and every successive government has tried to fulfill their electoral promises by implementing their agenda through the emergency governmental decrees procedure[1].

The justice system in Romania makes no exception from this regulatory practice. Emergency governmental decrees as well as ordinary laws are abundant and quite difficult to keep track on them. So far, Romania has had a «small» reform of justice[2], a «big» reform of justice and several other «major» and/or «fundamental» reforms. Law professors and other academics are involved in the process, also taking into account on their political affinity. Many established academics are also involved in politics, and many politicians are also law professors, having obtained law degrees and doctorate degrees while in office mainly through part-time or distance learning programs[3].

In the field of procedure, the NCPC promises again a fundamental reform. One of the innovations of the NCPC is to provide for an express legislative recognition of fundamental principles of procedure that had been developed by the doctrine and sanctioned to a large extent in the jurisprudence. The NCPC provides for no less than 15 such fundamental principles: the functioning of the justice as public service, the right to a fair trial (equitable process) within an optimal and foreseeable time, the principle of celerity (speedy trial), the principle of legality (rule of law), the principle of equality, the principle of party disposition, the principle of good faith, the right of defense, the principle of contradictory proceedings, the principle of orality, the principle of immediacy, the principle of publicity, the principle of continuity, the principle of the active role of the judge in the pursuit of truth and the requirement that all court proceedings are to be conducted in the Romanian language.

Despite the comprehensive proclamation of these principles, most of which had not been included in the previous formulations of the code, their usefulness in practice remains questionable. Many of these principles reflect an encyclopedic orientation of the code and doctrine, and do not really apply in practice. The principle of continuity and the principle of publicity are the best examples where the NCPC departs from the application of the

[1] This phenomenon is not particular to the field of civil procedure or the judiciary. Education and health care are among the most reformed fields in the past 20 years.

[2] See Law 202/2010 entitled the «The Small Reform of Justice.»

[3] Some have even received honorary degrees «doctor honoris causa» from various Romanian universities more or less prestigious. Law remains the preferred field of obtaining higher degrees. This obsession with academic titles is perhaps a vestige from the past. The dictator's wife had the ambition of obtaining several academic titles, which she eventually accomplished by appropriating the works in the field of chemistry written by others. She preferred using the following formula when being referred to or addressed: «Comrade Academician Doctor Engineer, World Renowned Scientist (*Savant*) Elena Ceausescu.»

stated principles by way of its concrete provisions[1]; other principles are subject to so many exceptions and/or derogations that to make the principle obsolete[2].

Perhaps the best example of how legal culture influences litigation is illustrated by the procedure of administration of evidence by the attorney. This novel procedure has been introduced in Romania for more than six years, yet it has rarely been used in practice. In the following, I will examine this topic in detail.

The administration of evidence by the attorneys. An experiment of legal culture?

One of the innovations introduced relatively recent in Romanian civil procedure is the possibility of evidence to be administered by the parties' attorneys, rather than by the judge. This procedural institution had a controversial history. It was first provided through the emergency governmental decree procedure by O.U.G. 138/2000. However, the procedure was short lived, being abolished within a few months by another emergency governmental decree O.U.G. 59/2001. The procedure was brought to life again by Law 219/2005, which confirmed and re-enacted the O.U.G. 138/2000. It remained in force ever since.

Essentially, the administration of evidence by the attorneys is intended to be an optional procedure, primarily aimed at relieving the court from its burden of micro managing every evidentiary aspect of litigation. The attorneys become more involved in the process having the duty to prepare the case file. However, as described below the judge remains highly involved in the process, as certain methods of proof cannot be administered by the attorneys. He continues to exercise supervision over the process, being required to intervene at any point where a controversy arises.

The procedure of administration of proof by the attorneys is available only in litigation involving patrimonial rights and only where the law permits private settlement (art. 241i)[3]. For the procedure to be available, the parties must specifically consent to it at the first day of appearance. Once given, the consent cannot be revoked by either party. If the procedure of administration of evidence by the attorneys is followed, all subsequent hearings may be held *in camera* in the presence of the parties and their attorney, in derogation from the principle of publicity.

After verifying the validity of the consent expressed by the parties for the use of the procedure, the court will rule on the procedural exceptions raised by the parties and on those that it may raise *ex officio*, it will decide on any motions, demands against third parties and requests for provisional measures.

Thereafter, the court will proceed to examine the claims raised by the parties in their pleadings and the offers of evidence. The court will approve the administration of the evidence it considers relevant to the case and may provide *ex officio* for any additional evidence it deems necessary for the dispute. The court will then provide for a term up to six month for the approved evidence to be administered by the attorneys. Within 15 days

[1] Contrary to the stated the principle of publicity, NCPC envisions a new investigation phase to the take place *in camera*, rather than in public hearings as currently is applied. The principle of continuity implies a single concentrated hearing, however this is clearly not the case as well. As one academic authority acknowledges: «[f]or objective reasons determined by the application of other principles (truth, right of defense etc.), the principle of continuity is not fully applied in our procedural system.» Les at 63–64.

[2] For instance, the principle of party disposition. See above.

[3] There are a few circumstances where settlement is not allowed by law, i.e. litigation involving rights and interests of minors.

from the approval of evidence, the parties are required to present the judge with a detailed schedule regarding the administration of evidence, indicating the date and location for each individual proof. The schedule must be approved by the judge *in camera* and once approved; it becomes mandatory for the parties and their attorneys.

The attorneys will then proceed on preparing the case file, which will be presented jointly to the court after the completion of the procedure. Different methods of proofs may be administered at the offices of the attorneys or in any other location agreed by them. When writings are involved, the attorneys must exchange and communicate with one another by certified mail, all acts intended to be included in the case file. When a document is in the possession of a third party or an official authority, the attorneys cannot request production of the document directly; rather, they must ask the court for an order directing the possessor to provide the court with the document. Copies of the same are subsequently mailed to the office of each attorney.

The attorneys may take the deposition of any witness previously approved by the court according to the schedule, except for minors and witnesses who are mentally incapacitated. These witnesses may only be heard by the judge at the court. When the deposition is taken by the attorneys, the entire testimony should be recorded verbatim and signed by the witness. The recorder may be any person agreed by the parties, no specific licensing or professional requirements operate in this regard. The attorneys have the option of having a public notary record and authenticate the transcript of the deposition. The transcript will be included in the case file.

The attorneys cannot interrogate the parties, as they are not considered witnesses. The parties are subject only to interrogation by the judge. In cases of expert evidence, the parties will agree upon one expert to provide a report that will be part of the case file. When the parties cannot agree on one person, the court will select the expert. Whenever a dispute arises over the administration of evidence or the admissibility of a method of proof, the parties must file a motion to the court. The judge will rule over the controversy and will decide the proper course of action.

After the expiration of the delay provided by the court for the administration of evidence (presumably completed by now), the parties will jointly present to judge with a case file. The judge will then set a final hearing for oral arguments over the merits of the case, to take place in less than a month. At that hearing the judge may order the re-administration before the court of any evidence it considers necessary. The order must provide reasons for such a measure.

While the administration of evidence by the attorneys is an interesting development in Romanian civil procedure, it remains largely a matter of academic interest. In practice, the administration of proof by the attorneys is extremely rare, to say the least. During many conversations I had with various academics and practitioners on this topic, the unanimous answer that I have received is that they never used the procedure and have never heard of anyone using it.

There are many possible reasons behind the lack of use of this procedure in practice. First of all, the procedure necessarily implies a certain degree of cooperation between attorneys toward creating a joint case file. This expectation is somewhat unrealistic and naïve I might add, considering the adversarial positions of the attorneys and their clients.

Second, the attorneys have little incentives to make use of the procedure. Since the judge retains a dominant role in the process, the attorneys have nothing to gain in terms of

procedural rights or control over the process that would translate in a potential advantage for their clients. As already mentioned, the judge remains actively involved in the process as he must approve all offers of evidence to be administered, may provide for new evidence *ex officio*, must approve the schedule and even thereafter, he may still order re-administration of any evidence before the court. Furthermore, the court is the only one that may perform certain evidentiary tasks, such as the interrogation of the parties, hearing certain witnesses, perform investigation *in loco* etc. Under the circumstances, it seems that the procedure is advantageous only to the judge himself who can delegate preparatory tasks to the parties' attorneys, if they are unfortunate enough to agree to such a procedure. To put it simpler, the attorneys have nothing to gain, just more work to do.

Furthermore, there is a certain cultural inclination, fueled perhaps by professional habit toward allowing the judge to perform the tasks that are traditionally associated with an active role of the judge. Thus, there is an expectation that the judge will take charge of approving, administering and evaluating the evidence. On top of that, there may also be a certain reluctance to embrace a novel procedure, which is a typical attitude within the legal profession.

Moreover, the procedure itself presents no clear change in the way evidence is being presented. Everything must still be part of a case file and the same rules of admissibility apply. The only relevant distinction may arise in the context of witness testimony. As detailed above, witnesses may be deposed at the office of the attorneys, without the presence of the judge, which may lead to extensive examination by the attorneys. In theory, this may leave the door open to cross examination by the attorneys. However, cross examination is something alien to a Romanian attorney. Moreover, even if performed, the judge will likely not see with good eyes such a practice and may order re-examination of the witness with possible sanctions being applied against the attorney for abuse of process. Not less important is the fact that Romanian attorneys are not accustomed to lead an extensive examination of the witnesses of any sort, whether direct or cross. Moreover, insofar as the witness testimony must be recorded verbatim and possibly notarized, it appears that the parties will have an increase in litigation costs. Seen in this light, it makes little sense to engage in such a procedure.

Finally, no one really knows how the procedure is supposed to work. Several of the attorneys I asked about how they envision the procedure have replied simply: «Just like in American movies!» Even leading academics seem to believe the same thing. One author suggests the procedure has been developed based on the discovery model of the Federal Rules of Civil Procedure in United States[1]. Whatever the source of inspiration for this procedure may have been, I can certainly attest this procedure has little or nothing in common with the American discovery process.

The doctrine seems to be divided over the benefits of such a procedure. Apart from the skepticism over the utility and efficiency of the procedure in practice, the critics have also raised concerns on whether the use of the procedure would affect the search for truth and whether a renunciation of the principle of immediacy is justified toward a better administration of justice[2]. Supporters of the procedure point out to certain benefits that may yield positive results: the realization of a partnership between the court and

[1] Deleanu at 853.

[2] See Les at 612.

the parties toward a better cooperation, the increase of the responsibility of the parties toward their procedural «destiny» (!), the input of the parties for a trial within a reasonable and optimal time, the increase in chances that the litigation will be solved through amicable settlement[1].

The NCPC provides for maintaining this procedure as an alternative to the classic way of administration of evidence by the judge. The Expose of Motifs is quite optimistic in acknowledging that the procedure is «not frequently used yet, but with time, it will find its field of application, as litigants will [gradually] increase their trust it its efficiency and in the responsibility of those called to accomplish it»[2].

Daniël van Loggerenberg and André Boraine[3]

SOUTH AFRICAN NATIONAL REPORT

SOUTH AFRICAN CIVIL PROCEDURAL LAW ON THE MOVE

A. Introduction

This report deals with the civil procedural system in the High Courts of the Republic of South Africa[4].

The South African law of civil procedure in the High Courts is adversarial in nature[5]. It «*owes its origin to and is essentially that of England*»[6]. In this regard the South African law is *sui generis*: its substantive law is of civil law (i e Roman-Dutch) origin whereas its civil procedural law is mainly of common law origin[7]. In other words, it is a mixed legal system.

The civil practice of the High Courts is, in essence, regulated by the Supreme Court Act 59 of 1959 and the Uniform Rules of Court[8]. The respective High Courts also have

[1] See Deleanu at 853.

[2] Expose des Motifs, translation is approximate.

[3] Professors of University of Pretoria (Republic of South Africa).

[4] In terms of the Constitution of the Republic of South Africa, 1996, the courts in South Africa consist of:
- The Constitutional Court;
- The Supreme Court of Appeal;
- The High Courts;
- The Magistrates' Courts.

[5] See, *inter alia*, D.E. Van Loggerenberg, *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormingsondersoek*, unpublished LLD-thesis, University of Port Elizabeth, 1987, Chapters 3–5; De Vos & Van Loggerenberg, *The activism of the judge in South Africa*, 1991 (4) *TSAR* 592.

[6] See Erasmus, *Historical Foundations of the South African Law of Civil Procedure*, 1991 (108) *SALJ* 265.

[7] See Erasmus, *The Interaction of Substantive and Procedural Law: The South African Experience in Historical and Comparative Perspective*, 1990 (1) *Stellenbosch Law Review* 348. As will be shown in this report, it has also, however, been influenced by the law of Holland.

[8] The Uniform Rules of Court are made by the Rules Board for Courts of Law, which, in terms of ss 2 and 6 of the Rules Board for Courts of Law Act 107 of 1985, has the power to make, amend or repeal rules for, *inter alia*, the High Courts.

local rules and practice directives issued in terms of their inherent jurisdiction to regulate their own process[1].

The Constitution of the Republic of South Africa, 1996, contains a Bill of Rights which includes, in section 34 thereof, the right to a fair trial[2]. This provides the benchmark for civil procedure in the High Courts.

B. The need for reform

Civil procedural law has through the centuries been under constant pressure to change in order to meet the changing needs of society[3].

Under the new socio-political and economic dispensation that came about in South Africa after the fall of apartheid in 1994, South African civil procedural law is also under constant pressure to change in order to meet the changing needs of society.

The greatest challenge facing South African civil procedure is that of making litigation less costly[4] and the courts more accessible to a far greater number of people.

As Roscoe Pound[5] was dismayed by, *inter alia*, court delay and antiquated procedural rules, so is more and more South Africans. Their dismay is also caused by high costs of litigation, late settlements, restricted resources, lack of alternative dispute resolution procedures and the like.

The South African government has realised the need for reform. Thus in a statement on the Cabinet meeting that was held on 5 May 2010 the following is said:

«*Cabinet discussed the Civil Justice Reform Project that seeks to improve the efficiency of the civil justice system. The primary objective of the project is to provide a speedy, affordable and simple process for resolution of civil disputes. The terms of reference for the project will entail investigation of the following elements: increasing the effectiveness of the civil courts; the impact and effectiveness of the current legislation on the civil justice system; simplification of court procedures and processes; modernisation of the courts system; effective case management; and harmonisation of the court rules.*

Cabinet approved the ***Constitution Amendment Bill.*** *The Bill provides for, among other things, defining the role of the Chief Justice as the Head of the Judiciary; to change the name of «magistrate's courts» to «lower courts»; provides for a single «high court of South Africa» comprising of various divisions; establishes the constitutional court as the highest court of the land on all matters and to further regulate the jurisdiction of the constitutional and the supreme courts; and to regulate the composition and functions of the Judicial Services Commission. The Bill will be published shortly for public comment.*

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[1] In terms of section 173 of the Constitution of the Republic of South Africa, 1996, the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[2] Section 34 reads as follows:

«*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*»

[3] See Erasmus, *Civil Procedural Reform – Modern Trends*, 1999 (10) *Stellenbosch Law Review* 3.

[4] In the wide sense of the word «costs» (*expensae litis*) are the expenses incurred by a litigant in actions or other legal proceedings, and they consist of money due to the attorney (i e solicitor) for his fees and disbursements, the latter embracing, for example, counsel's fees (i e fees due and owing to a barrister), sheriff's fees and witness expenses. The general rule regarding costs of litigation is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.

[5] *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), 29 *(ABA) Rep* 395. An abridged version appears in 1971 *American Bar Association* J. 348.

*The **Superior Courts Bill** was approved for submission to Parliament. This Bill aims to rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court in a single Act of Parliament. It incorporates existing specialist courts that are similar in status to the High Court such as the Competitions Appeal Courts, Electoral Court Income Tax Court, Labour Courts and the Land Claims Court, as specialist divisions of the High Court of South Africa*».

At a meeting of the Cabinet on 5 May 2010 terms of reference for the Civil Justice Reform Project were approved. These entail the following –

1. Increasing the effectiveness of the civil courts;
2. The impact and effectiveness of current legislation on the civil justice system;
3. Affordability and cost effectiveness;
4. Integration of the Alternative Dispute Resolution (ADR) mechanism and a mandatory referral system (court based Mediation and court based Arbitration);
5. The simplification of court procedures and processes;
6. Modernization of the courts system;
7. Effective case management;
8. Harmonization of the court rules.

Apart from the commendable Civil Justice Reform Project the High Courts have in the recent past embarked upon the reform of the civil procedural system in various respects. This reform by the High Courts has mainly been sparked by the provisions of the Constitution of the Republic of South Africa, 1996, and, in particular, s 34 thereof. The latter reform is dealt with under the next heading.

C. Procedural reform on the move

Provisional sentence

Provisional sentence is an extraordinary, summary and interlocutory civil procedural remedy in South African law designed to enable a creditor who has liquid proof of a claim to obtain a speedy judgment therefore without resorting to the more expensive and dilatory machinery of an illiquid trial procedure[1]. Provisional sentence precludes a defendant with no valid defence from «playing for time»[2].

The following characteristics of provisional sentence render it distinguishable from other remedies:

It only leads to a provisional or interlocutory order and final judgment is still to be considered in the principal case;

It entitles the plaintiff to payment of the judgment immediately, that is, before entering the principal case but, on the other hand, it affords the defendant to insist on security for repayment pending the final outcome of the principal case[3].

[1] See Van Loggerenberg & Farlam (eds.), *Erasmus Superior Court Practice,* Main Volume B1-62, fn. 2 and the authorities there cited. It made its way to South Africa as part of the law of Holland.

[2] See the judgment of the Constitutional Court of South Africa in *Twee Jonge Gezellen (Pty) Ltd v. Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA (CC) at 9E-F.

[3] Although the judgment obtained by provisional sentence is, initially, provisional only and does not prevent a defendant from entering into the principal case, in the vast majority of cases no further steps are taken, and the provisional sentence automatically becomes a final judgment (*Erasmus Superior Court Practice,* Main Volume B1-63).

Historically a High Court dealing with a provisional sentence case could only refuse provisional sentence if the defendant (on affidavit)[1] proved that the probabilities of success in the principal case were in the defendant's favour.

In ***Twee Jonge Gezellen (Pty) Ltd v. Land and Agricultural Development Bank of South Africa t/a The Land Bank***[2] the South African Constitutional Court found that the provisional sentence procedure constituted a limitation of the defendant's right to a fair trial in terms of s 34 of the Constitution of the Republic of South Africa, 1996, in cases where:

1. the nature of the defence raised did not allow the defendant to show a balance of success in his favour without the benefit of oral evidence;

2. the defendant was unable to satisfy the judgment debt; and

3. the court had no discretion, in the absence of narrowly defined «special circumstances», to refuse provisional sentence.

The court held[3] that the common law had to be developed so that courts would in future have a discretion to refuse provisional sentence in the following circumstances:

- an inability to satisfy the judgment debt;
- an even balance of success in the main case on the papers; and
- a reasonable prospect that oral evidence might tip the balance of success in the defendant's favour.

The following order was, *inter alia*, made[4]:

«*3. The procedure for provisional sentence is declared to be inconsistent with the Constitution and invalid to the extent that it does not give to courts a discretion to refuse provisional sentence where:*

(a) the nature of the defence raised does not allow the defendant to show a balance of success in hi or her favour without the benefit of oral evidence;

(b) the defendant is unable to satisfy the judgment debt; and

(c) outside «special circumstances», the court has no discretion to refuse provisional sentence.

4. The common law is developed so that courts will in future have a discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:

(a) an inability to satisfy the judgment debt;

(b) an even balance of prospects of success in the main case on the papers; and

(c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour».

Summary judgment

Summary judgment was a procedure introduced in England, in the second half of the last century, to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against the plaintiff's case an issue which ought to be tried, opposes the action merely in order to delay the granting of the plaintiff's rights[5]. Summary judgment has for many years been regarded by the High Courts as an extraordinary and a very stringent

[1] As a general rule provisional sentence proceedings are decided upon two affidavits: an affidavit by the defendant in response to the provisional sentence summons and an affidavit by the plaintiff in reply to the defendant's affidavit.

[2] 2011 (3) SA 1 (CC) at 22H-J.

[3] At 23A-B.

[4] At 24C-I.

[5] *Erasmus Superior Court Practice,* Main Volume B1-205/206.

remedy in that it closes the doors of the court to the defendant and permits a judgment to be given without trial[1].

Summary judgment has, however, passed muster as regards s 34 of the Constitution of the Republic of South Africa, 1996. In ***Joob Joob Investments (Pty) Ltd v. Stocks Mavundla Zek Joint Venture*** [2] the Supreme Court of Appeal, in holding that the time has perhaps come to discard labels such as «extraordinary» and «drastic», stated:

«*The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/her day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case*[3] *at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.*

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are «drastic» for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule.»

Arrest tanquam suspectus de fuga

The High Courts are in terms of the provisions of s 19(1)(*c*)(i) of the Supreme Court Act 59 of 1959 empowered to grant an order of arrest of a person *tanquam suspectus de fuga* in order to protect the creditor of such person, by the apprehension and detention of the person who is about to flee in order to avoid paying the debt to the creditor[4].

In the lower courts of South Africa (i e the Magistrates' Courts) s 30(1) of the Magistrates' Courts Act 32 of 1944 for decades contained a similar provision.

In ***Malachi v. Cape Dancing Academy Int (Pty) Ltd*** [5] the High Court of the Western Cape Province declared the common law which authorises arrests *tanquam suspectus de fuga* unconstitutional [6] and invalid. The court also declared the words «arrest *tanquam suspectus de fuga*» in s 30(1) of the Magistrates' Courts Act 32 of 1944 unconstitutional and invalid.

In ***Malachi v. Cape Dance Academy International (Pty) Ltd***[7] the South African Constitutional Court confirmed the order of constitutional invalidity made by the Western Cape High Court.

The effect of the aforesaid is that debtors cannot be arrested *suspectus de fuga* anymore.

[1] *Erasmus Superior Court Practice,* Main Volume B1-206.

[2] 2009 (5) SA 1 (SCA) at 11G-12D.

[3] *Maharaj v. Barclays National Bank Ltd* 1976 (1) SA 418 (A).

[4] The object of the arrest *suspectus de fuga* is to prevent the debtor's removing from the jurisdiction of the court unless the debtor gives security for the debt so that an effective judgment can be given against the debtor at the trial of the sued should the debt be proved (see, *inter alia*, *Segal v. Diner Club SA (Pty) Ltd* 1974 (1) SA 273 (T) at 275).

[5] [2010] 3 All SA 86 (WCC).

[6] Because it infringes the debtor's constitutional fundamental right to, *inter alia*, freedom, equality and human dignity.

[7] 2010 (6) SA 1 (CC) at 19A-B.

It is expected that s 19(1)(*c*)(i) of the Supreme Court Act 59 of 1959 will in due course be amended to reflect the aforesaid position.

Arrests to found or confirm jurisdiction

Historically s 19(1)(*c*) of the Supreme Court Act 59 of 1959 empowered High Courts to permit the jurisdictional arrest of a defendant in order to either found jurisdiction of the court or confirm such jurisdiction[1].

In ***Bid Industrial Holdings (Pty) Ltd v. Strang (Minister of Justice and Constitutional Development, Third Party)***[2] the South African Supreme Court of Appeal has now held that arrest to found or confirm jurisdiction infringed the right to freedom and security of the person as entrenched in s 12(1) of the Constitution of the Republic of South Africa, 1996. It was also held that s 19(1)(*c*), insofar as it permitted jurisdictional arrest, infringed the rights which the Constitution was at pains to highlight, *viz* human dignity, equality and freedom.

In the ***Bid*** case the court developed the common law by abolishing the common-law rule of arrest to found or confirm jurisdiction and adopting in its stead, where attachment is not possible, of a practice according to which a High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient.

The relevant provisions of s 19(1)(c) have therefore become redundant and could be removed by legislative amendment.

Execution

Under rule 46 of the Uniform Rules of Court execution in pursuance of an order of court can be levied against the immovable property of the judgment debtor[3] if the immovable property has been declared specially executable. Pursuant to the judgment of the South African Constitutional Court in ***Gundwana v. Steko Development and Others***[4] only a court is competent to declare a judgment debtor's primary residence (i e the debtor's usual or ordinary residence)[5] specially executable.

The effect of the judgment in the ***Gundwana*** case is that it is unconstitutional to levy execution against the primary residence of a natural person given such person's fundamental constitutional right not to be evicted from his or her home without an order of court made after considering all the relevant circumstances (s 26(3) of the Constitution of the Republic of South Africa, 1996).

D. Conclusion

This report shows the advantages of a civil procedural law system, and the reform thereof, based on fundamental rights entrenched in a Constitution.

[1] The procedure of arrest *ad fundandam et confirmandam jurisdictionem* also made its way to South Africa as part of the law of Holland.

[2] 2008 (3) SA 355 (SCA). The judgment is not free from criticism: see, *inter alia*, Bekker & Van Loggerenberg, *Freedom from arrest for the foreign debtor: A jurisdictional perspective* accepted for publication in *THRHR*.

[3] This means natural persons only (*FirstRand Bank Ltd v. Folscher* 2011 (4) SA 314 (GNP)).

[4] 2007 (4) SA 380 (SCA).

[5] Additional dwellings such as a holiday home do not fall within the ambit of the judgment (*FirstRand Bank Ltd v. Folscher* 2011 (4) SA 314 (GNP)).

Without such fundamental rights, which undoubtedly serve as a guideline for the development of a civil procedural system and/or specific elements of, reformists would largely be at a loss.

The advantage of the South African civil procedural system is that it is not cast in concrete but can, subject to the Constitution of the Republic of South Africa, 1996, be developed not only to make the High Courts more accessible to the public at large, but also to protect the public's fundamental rights entrenched in the Constitution and, in particular, the right to a fair trial embedded in s 34 thereof. Such development can be facilitated by the Legislature as well as by the High Courts in terms of their inherent jurisdiction to regulate their own process and their power to develop the common law.

Murat Ozsunay[1]

TURKISH NATIONAL REPORT

I. Introduction with historical background

1.1. Pre-republic – Ottoman Empire (1299–1923)

Until the last half of the 19th century, the procedural law of the Ottoman Empire («Empire») was Islamic. As such, it was administered in religious courts (Courts of Sheria). The procedure was the same in both civil and criminal cases. It should be remembered that the Ottomans, i.e., the people of the Empire, were composed of multi-cultural, multi-racial, multi-religious – and in historic due course multi-national – officially recognized «millet»s. These were, as such, granted partial jurisdictional autonomy within their own millet[2] and had their religious community (cemaat) courts. They were under the auspices of their corresponding recognized religious leaders.

Moreover, the so-called consular courts (*konsolosluk mahkemeleri*) of certain privileged foreign States also had jurisdiction for the resolution of disputes between nationals of such foreign States in the Ottoman Empire.

Following the historical milestone of the 1839 Tanzimat[3] (or Imperial Edict for Reform), which included partial secularization (i.e., westernization of the law), continental European procedure and continental European substantive law began to make their appearances such as the French-influenced Penal Code (1840) and the first Commercial Code (Kanunname-i Ticaret, 1850)[4]. An exception to this approach was the Mecelle-i Ahkam-ı Adliye[5] (1877), an authentic, detailed, quasi-civil code that was based on Islamic principles, but presented in a «codified» style. It did not cover law of persons, family and inheritance.

[1] Attorney (Turkey).

[2] See on PC «millet» in Encyclopedia Britannica, 2002 Expanded Edition DVD.

[3] See on PC «Tanzimat» in Encyclopedia Britannica, 2002 Expanded Edition DVD.

[4] Fatmagul Demirel, *Adliye Nezareti, Kurulusu ve Faaliyetleri* (1876–1914), Bogazici Universitesi Yayinevi, İstanbul, 2008

[5] See on PC «Mecelle» under «Cevdet Pasa, Ahmet» in Encyclopedia Britannica, 2002 Expanded Edition DVD.

However, it incorporated some procedural rules that were applicable in the traditional religious (ser'iye) courts as well as the secular civil and criminal (nizamiye) courts, which had been established in the early 1860s[1] Procedural rules were not historically always found in stand-alone procedural codes, therefore it was not unusual for codes on substantive law to include such rules[2]. Mecelle remained in force until 1926, i.e. in the third year of the Turkish Republic (1923).

Along with a slow and meticulous establishment of a secular Ministry of Justice, the French Code of Civil Procedure[3] was voluntarily chosen as a model and its effects became evident in the following laws:

The 1861 (IC 1278)[4] Usulü Muhakeme-i Ticariye Nizamnamesi[5] (or Regulation for Commercial Procedure), which was applicable only in (secular) commercial courts. These courts were initially attributed to the Ministry of Commerce and subsequently to the Ministry of Justice.

As noted above, although primarily a quasi-civil code, Mecelle-i Ahkam-ı Adliye (1877) also pertained to certain procedural issues as these had not yet been codified.

The 1879 (IC 1295) Usulü Muhakematı Hukukiye Kanunu[6] (or Code of Civil Procedure) for secular commercial and secular civil courts. This code was not applicable in religious courts. The 1862 Regulation, however, continued to remain in force in certain courts of the Empire[7].

The 1911 Zeyil[8] (or Annex), which brought major changes to the aforementioned laws, parts of which were subsequently amended.

It may be noted that the secular court system of the Ottoman Empire also offered an amicable resolution option utilizing local boards of elders[9].

For a fair representation of the above mentioned millets composed of various religions, in disputes between Muslim and Non-Muslim nationals of the Empire, such courts judgments were finalized by an equal number of Muslim and Non-Muslim judges sitting on the bench.

Even though their jurisdiction had shrunk in favor of the various secular courts, the religious courts remained until the Republic (1923). The 1915 (IC 1331) Usulü Muhakematı

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[1] Delmar Karlen & İlhan Arsel, *Civil Litigation in Turkey*, Ankara, Ajans-Türk Press, 1957, p. 7 [hereinafter «Karlen & Arsel»].

For details on the legal system and westernization of the law during the Ottoman Empire and after the foundation of the Republic of Turkey, see Ergun Özsunay, *Legal Science during the Last Century: Turkey*, in M. Rotondi (ed.), *Inchieste di Diritto Comparato, La science du droit au cours du dernier siècle; La scienza del diritto nell'ultimo secolo*, Padova, CEDAM, 1976, pp. 693, 697.

See also Ergun Özsunay, *The Total Adoption of Foreign Codes in Turkey and its Effects*, in *Le Nuove frontiere del diritto e il problema dell'unificazione*, II, Università degli studi di Bari, Quaderni degli Annali della Facoltà di giurisprudenza, Milano, A. Giuffrè, 1979, p. 801.

[2] Saim Ustundag, *Medeni Yargilama Hukuku*, Cilt I-II, Nesil Matbaacilik, Istanbul, 2000, at 84 [hereinafter «Saim Üstündag»].

[3] French Code de Procédure Civile (1806) [hereinafter «1806 French Code of CP»].

[4] Islamic Calendar («IC»), as used in the Ottoman Empire before the Republic of Turkey.

[5] [hereinafter «1862 Regulation»]; Hakan Pekcanitez, Oguz Atalay & Muhammet Özekes, *Medeni Usul Hukuku*, 5th ed., Ankara, Yetkin Yayinlari, 2006, p. 50 [hereinafter «Pekcanitez, Atalay & Özekes»].

[6] [hereinafter «1879 Code»], Pekcanitez, Atalay & Özekes, cit., p. 50.

[7] Pekcanitez, Atalay & Özekes, cit., p. 50.

[8] [hereinafter «1911 Annex»], Saim Üstündag, p. 84.

[9] Demirel, Fatmagul, cit.

Seriye Kararnamesi (Decree for Procedure before Religious Courts) may be cited as the final step in the procedural history of the Empire[1].

1.2. Republic of Turkey (1923), 1927 & 2011 Codes of Civil Procedure (Hukuk usulu muhakemeleri kanunu no. 1086[2] & Hukuk muhakemeleri kanunu no. 6100)

The Republic of Turkey («Republic» or «Turkey») was established in 1923[3]. Afterwards, it gradually became a secular state, particularly with respect to its «sources» of law. Mustafa Kemal Atatürk (1881-1938), now the founding father of the Republic, favored a swift and comprehensive modernization and secularization of the existing law. This was achieved through the voluntary adoption of «selected» continental European Codes, which underwent minor modifications. The changes in civil procedure, however, were not as radical. As noted above, Turkish commercial and (eventually) civil procedure had mainly been based on the French model since the 19th century.

As a result, Turkey's voluntary adoption (with modifications) in 1927 of the 1925 Swiss-Neuchâtel Code of Civil Procedure[4] made only relatively minor alterations to the former French-Turkish pattern, which had already been in effect in the Ottoman Empire for over half a century[5].

Roughly, one year before the 1927 adoption of the Swiss-Neuchâtel Code, the Turkish substantive law had changed. In 1926, the Civil Code – i.e., the 1926 Türk Kanunu Medenisi[6] and the accompanying 1926 Borçlar Kanunu[7] (or Code of Obligations = CO) – had already been adopted from Switzerland[8]. This new substantive law had called

[1] Timucin Musul, *Medeni Usul Hukuku*, Adalet Yayinevi, Ankara, 2012.

[2] No. 1086, Official Gazette: 02, 03, 04.07.1927, No. 622, 623, 624; Series: 3rd Order, vol. 8, at 1559–1656 [hereinafter «1927 HUMK» or «HUMK»].

[3] The Republic was established after the defeat of the Ottoman Empire in the First World War (1918), which resulted in the invasion of the capital (from 1453 to 1923) Istanbul, and vast parts of Asia Minor (Anatolia) – i.e., the core of the Empire. These events triggered the Turkish Inde-pendence War (1919–1922), which was led and won by General Mustafa Kemal Atatürk (1881–1938). Ankara became the new Capital of the Republic.

[4] Code de Procedure Civile (du 7 avril 1925) [hereinafter «1925 Swiss-Neuchâtel Code»].

This Code remained in force until it was replaced with a new cantonal Code (Code de Procedure Civile, 30 Septembre 1991) which entered into force on April 1, 1992 [hereinafter «1991 Swiss-Neuchâtel Code»].

See also H. Yavuz Alangoya, Kamil Yildirim, Nevhis Deren Yildirim, *Medeni Usul Hukuk Esaslari*, 4th ed., Istanbul, Alkin, 2004, p. 34.

[5] Karlen & Arsel, p. 5–7.

[6] No. 743, Official Gazette: 04.04.1926, No. 339 [hereinafter «1926 MK»]. The 1926 MK took no notice of Islamic substantive law references and principles derived from the black letter and interpretation of the Koran (the main religious text of Islam), including those pertaining to family law and law of inheritance as well as foundations. It was partially modernized and totally replaced in 2001 with the new Turkish Civil Code, the Türk Medeni Kanun, No. 4721, Official Gazette: 08.12.2001, No. 24607 [hereinafter «2001 TMK»]. Despite a new numbering system for its articles, the 2001 TMK also follows the basic Swiss model. The modernized Borçlar Kanunu (or Code of Obligations, hereinafter «BK»), No. 6098, Official Gazette No. 27836 of 4 February 2011 continues to reflect Swiss influence. It shall enter into force on 1 July 2012.

[7] No. 818, Official Gazette: 08.05.1926, No. 366 [hereinafter «1926 BK»]. Inter alia, the Law of Companies was excluded. This was to be found in the 1926 Türk Ticaret Kanunu (Turkish Commercial Code) which was subsequently replaced with the 1956 Türk Ticaret Kanunu (Turkish Commercial Code) No. 6762, Official Gazette: 09.07.1956, No. 9353 [hereinafter «TTK»]. This Code is roughly based on the German Handelsgesetzbuch («HGB») model, thanks to an influential German-Turkish law professor, Dr. Ernest E. Hirsch (1902–1995). The 1956 TTK was also modernized: Turkish Commercial Code, No. 6102, Official Gazette No. 27846 of 14 February 2011, shall enter into force on 1 July 2012.

[8] Some «federal» features of these voluntarily adopted Swiss Codes were naturally custom-tailored for the new republican – but non-federal, central – Turkish justice system.

for the revision and the unification of the existing procedural law. The contents of the 1926 Turkish CC were systematically updated, and a similar but new Turkish CC (Türk Medeni Kanunu, No. 4721) was adopted in 2001. The contents of the 1926 Turkish CO and 1956 Turkish Commercial Code (Türk Ticaret Kanunu) have also been updated in the same manner. Both new Codes (No. 6098 and No. 6102 respectively) shall enter into force on 01 July 2012.

The Code of Civil Procedure of the (French-speaking) Canton Neuchâtel (1925) was preferred for a number of reasons[1]: it was the most recent European Code drafted at the time; an influential professor in the Istanbul Law Faculty had studied law in Neuchâtel; and most lawyers in the Turkish 1925 Draft Commission could examine the original text easily, since they had learned French as a foreign (European) language[2].

In the Turkish adoption, the 1927 Hukuk Usulü Muhakemeleri Kanunu («1927 / Old HUMK / CCP»), there were a few omissions of the source Swiss-Neuchâtel Code. The provisions that were omitted were replaced with other rules that originated in different sources. Some of the existing rules of the 1879 Usulü Muhakemati Hukukiye was kept. Other rules were based on the German Zivilprozessordnung model[3]. In particular, rules dealing with evidence (German: Beweismaterial) and deeds were adopted from the French law[4].

Following its adoption, 37 legislative amendments were made to Turkey's 1927 HUMK – most of them for the sake of a «speedy» trial. However, these amendments were not always sufficient or effective enough to serve their purposes, and they were sometimes criticized for having harmed the genuine integrity of the CCP. Moreover, as some rules were revised and «moved» to more specific laws, they were deleted from the original 1927 HUMK[5]. In addition to various amendments, there were also many attempts in Turkey to «redraft» the entire HUMK. However, until 2011, the Turkish Grand National Assembly («TBMM»), i.e., Parliament, did not adopt any of the Draft Codes of 1946, 1952, 1955, 1967, 1971 and 1993[6].

Changes in recent years to the 1927 HUMK included the following amendments, which were also adopted in the 2011 CCP:

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[1] Saim Üstündag, p. 84.

[2] Since the 1950s, German and English have dominated as the foreign languages of choice among Turkish academics.

[3] Currently: Zivilprozessordnung of 05.12.2005 (BGBl. I S. 3202, ber. I 2006 S. 431, ber. I 2007 S. 1781, as amended) [hereinafter «German ZPO»].

[4] Pekcanitez, Atalay & Özekes, p. 50.

[5] For example, in the 1927 HUMK, Arts. 114–148 were shifted to the Tebligat Kanunu [hereinafter «TebK»] (or Act on Notifications), Art. 61 was shifted to the Avukatlik Kanunu [hereinafter «AaaL»] (or Act on Attorneys-at-Law), and Arts. 18, 537–545 were shifted to the 1982 Act on International Private Law and Procedural Law, No. 2675 [hereinafter «1982 MOHUK»], which was recently replaced, in 2007, By-law No. 5718 [hereinafter «2007 MOHUK»].

See Baki Kuru, Ramazan Arslan & Ejder Yilmaz, *Medeni Usul Hukuku – Ders Kitabi*, Ankara, Yetkin, 2006, at 78. Since the 2001 enactment of the Milletlerarasi Tahkim Kanunu, No. 4686 [hereinafter «AIA»] (or Act on International Arbitration), the 1927 HUMK provisions on arbitration (containing outdated rules that are seldom used) are solely applicable to domestic arbitration.)

[6] HMK-T Legislative Commentary – General Part (Genel Gerekçe) as reproduced in Ali Cem Budak, *Karsilastirmali Hukuk Muhakemeleri Kanunu Tasarisi* (comparatively printed Code texts, with notes, based on the pre-June 2009 HMK-T version), 2nd ed., XII Levha, Istanbul, February 2009, p. 1 [hereinafter «Ali Cem Budak»].

The right to reopen trial (yargilamanin yenilenmesi) was granted for finalized cases when the European Court of Human Rights («ECHR») finds a violation of the right to a fair trial under Article 6 of the European Convention on Human Rights[1].

New rules have been added with regard to the admissibility, as evidence, of electronic data and documents that feature e-signatures.

District-based courts of middle instance (istinaf) have been added to the two-instance civil trial system (although they are not yet operational).

The Turkish amendments to the 1927 CCP were not necessarily parallel to the amendments of the source Swiss-Neuchâtel Code. In Neuchâtel, the 1925 Code was replaced with a new code in 1992[2] and later with a Federal Code, which entered into force in 01.01.2011. In the comparative work of Turkish academics, 1927 CCP references are always made to the (initial) 1925 source Neuchâtel Code rather than to the subsequent 1992 Neuchâtel Code[3]. From now on, references are expected to be made also to the Swiss Federal Code, which was a major influence / source.

Finally, a new Code of Civil Procedure (Hukuk Muhakemeleri Kanunu (2011 HMK) No. 6100) was adopted on 12 January 2011 and entered into force on 01 October 2011 (Official Gazette 04 February 2011, No. 27836). Except for the issue of «subject matter jurisdiction», the 2011 HMK adopted the 2009 Draft HMK text with minor differences. My comprehensive article about the 2009 Draft HMK[4] cover all the changes in Turkish Civil Procedure. Please, see the attached article including an unpublished Addendum.

Major new restatements and changes in HMK may be briefly listed as follows:

• Some Established Concepts and Practices Made Their Way into the Black Letter of HMK, such as «interim legal protection» (HMK Arts. 389–405) including «interim measure» (HMK Arts. 389 – 399) and «the recording of evidence» (HMK Arts. 400–405), direct third party intervention (*asli müdahale*) (HMK Art. 65)[5],

• An Explicit List of Principles Applicable to Civil Procedure, including *inter alia* the right to be heard before the court, the duty to act in good faith and to tell the truth (German: *handeln nach Treu und Glauben*) (HMK Arts. 24–33)[6],

• Subject Matter Jurisdiction (*görev*) of General and Specifics Courts Redefined and Extended: Most monetary claims, irrespective of the amount in dispute, before Courts of General Jurisdiction, i.e. subject to the same full-feldged «written-form-procedure» (HMK Arts. 1–5)[7],

[1] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, art. 6(1) [hereinafter «European Convention»].

[2] Code de procédure civile (CPCN), Le Grand Conseil de la République et Canton de Neuchâtel, sur la proposition du Conseil d'État, du 11 mai 1988, et de la commission législative.

[3] Baki Kuru, Ramazan Arslan & Ejder Yilmaz, *Hukuk Usulu Muhakemeleri Kanunu ve Ilgili Mevzuat* (Selected Code texts with notes), 29th ed., Ankara, Yetkin, 2006, Neuchatel Kantonu Medeni Usul Kanunu (abbreviated as Nös. UK), p. 21.

[4] Murat Özsunay, *The Turkish 2009 Draft Code of Civil Procedure, Eight Decades after the Voluntary Adoption of the Swiss-Neuchâtel Code of Civil Procedure, Common Law, Civil Law and the Future of Categories*, in J. Walker & O.G. Chase, *Common Law, Civil Law and Future of Categories*, Lexis Nexis, Canada, 2010 [hereinafter «Özsunay, 2009 HMK-T»].

[5] Ibid., p. 126.

[6] Ibid., p. 127.

[7] Ibid., p. 130.

• Victim-Oriented Approach: Compensation Claims for «Bodily» Damages Suffered by Real Persons distinguished. Such claims Against a State Legal Entity or Administration only before Civil Courts of General Jurisdiction, i.e. not before Administrative Courts as before (HMK Art. 3)[1]. However, the Constitutional Court (*Anayasa Mahkemesi*) has (in February 2012) declared HMK Art. 3 unconstitutional, thus null and void, on the ground that the text of the Constitution explicitly anticipated the jurisdiction of administrative courts for all damages resulting from administrative acts. The said judgment has not yet been published,

• Effect of Agreements on Territorial Jurisdiction *(yetki)* narrowed under a protective social approach protecting parties with weaker bargaining power (HMK Art. 5–19)[2],

• Direct Liability of the State for the Acts of Judges, HMK Arts. 46–49,

• Known and New Types of Civil Law Suits (*dava çeşitleri*) listed and defined for the first time (HMK Arts. 105–113)[3],

The HMK explicitly lists and defines, for the first time, a number of new and established civil suit types. Although all of these types are recognized as doctrine – and most are also established in practice – this is their first appearance in the black letter of the law. These types include performance suits (eda davasi; German: Leistungsklage)[4], declaratory suits (tespit davasi; German: Feststellungsklage)[5], suits for change of legal right or status (insai dava; German: Gestalltungsklage)[6], suits for indefinite-value claims and indefinite-value declaratory judgments (belirsiz alacak ve tespit davasi; German: unbezifferte Forderungsklage)[7], partial suits (kismi dava; German: Teilklage)[8], joiner of parties (davalarin yigilmasi; German: Klagenhäufung, Anspruchshäufung)[9], suits for alternative claims with preferred sequence (terditli dava)[10], suits for performance of selective obligations unselected by the respondent debtor (seçimlik dava)[11] and legal action by association or legal persons for a specific group of people, quasi-class (topluluk davasi; German: Verbandsklage)[12].

1.3. New Types of Civil Lawsuits Introduced by HMK

Actions for indefinite-value claims and actions for indefinite-value declaratory judgments have previously been unknown to Turkish practice. The «new» provision, which is basically a mot-à-mot translation from the Swiss Federal CCP[13], allows a plaintiff to initiate an action for an indefinite-value claim when he or she cannot reasonably be expected to determine, completely and definitely, the amount or value of the claim at that time (i.e., the time at which the claim is initiated). The same is true when a determination of the amount or value of the claim would be impossible. The plaintiff does need to affirm,

[1] Özsunay, 2009 HMK-T, p. 131–132.
[2] Ibid., p. 132.
[3] Ibid., p. 133.
[4] HMK Art. 105, Id., Art. 111. Cf. Swiss Federal CCP.
[5] HMK Art. 106, id., Art. 112. Cf. Swiss Federal CCP, id., Art. 88; German ZPO, § 256.
[6] HMK Art. 108, id., Art. 114. Cf. Swiss Federal CCP, id., Art. 87.
[7] HMK Art. 107, id., Art. 113. Cf. Swiss Federal CCP, id., Art. 85.
[8] HMK Art. 109, id., Art. 115. Cf. Swiss Federal CCP, id., Art. 86.
[9] HMK Art. 110, id., Art. 116. Cf. Swiss Federal CCP, id., Art. 90; German ZPO, § 260.
[10] HMK Art. 111.
[11] HMK Art. 112.
[12] HMK Art. 113, id., Art. 119. Cf. Swiss Federal CCP, id., Art. 89.
[13] Swiss Federal CCP, Art. 85.

however, the legal relationship that gives rise to liability and a minimum amount or value. As soon (after the claim has been initiated) as it becomes possible to determine the exact or the appropriate amount of the claim, the plaintiff shall be allowed to increase the initial, minimum amount. As this increase is sanctioned and protected by the provision, it will not violate the broad, ordinary procedural prohibition against increasing an initial claim once an action is underway.

Additionally, no action for a partial claim can be initiated if and when the amount of the obligation is clearly agreed upon by the parties or otherwise undisputed. Contrary to present case law, the HMK does not require the plaintiff to explicitly declare in the initial petition that he or she reserves the right to make any remaining (i.e., excluded) claims through subsequent actions. This means that the plaintiff's failure to explicitly reserve such a right shall no longer be deemed a waiver thereof[1].

Finally, the HMK allows associations and other legal persons to file suits in their own names (in accordance with their statutes) in order to protect the interests of their members, their interest holders, or the group of persons that they represent; to determine the rights of the same; or to prevent the rights of the same from being violated presently or in the future. This new procedural vehicle, although far from the Anglo-American class action, is more or less derived from that system for the sake of establishing a mechanism that is more effective at protecting social interests.

- Prerequirements for Filing a Civil Lawsuit, i.e. Procedural Conditions of Action (*dava şartları*), HMK Arts. 114–115[2],
- Preliminary Objections (*ilk itirazlar*) Redefined, HMK Arts. 116–117[3],
- Types of Trial Procedures Reduced in Number and Refined: «Written» (*yazili*), Arts. 118–183 and «Simplified» (*basit*), HMK Arts. 316–322,
- Stipulated Advance Payments for Future Litigation Costs, HMK Art. 120[4],
- Voluntary Change of Parties (*tarafta iradi değişiklik*), HMK Art. 124[5],
- Pre-examination (*ön inceleme*) as a Distinct and Obligatory Initial Procedural Stage in Order to Detect and Resolve Certain Potential Procedural Problems as Early as Possible, in Written, Simplified and Reopening of Trial Procedures, HMK Arts. 137–142; 320; 379[6],
- Encouragement of Amicable Settlement by the Judge during the Pre-examination Stage (*taraflari sulhe teşvik*), HMK Arts. 137/1, 140/2[7],
- Live Audio-Visual Transmissions into the Courtroom, HMK Art. 149[8],
- Cross-Examination by the Parties' Attorneys at Law Is Allowed, HMK Art. 152[9],
- Limits of Permissible Audio-Visual Recordings of Court Hearings, HMK Art. 153[10],

[1] Bilge Umar, *Hukuk Muhakemeleri Kanunu (HMK) Tasarisiyla Simdiki HUMK Kurallarina Getirilmek Istenen Degisikliklerin Baslicalari*, (2007) 68 *Türkiye Barolar Birligi (TBB) Dergisi (Journal)*, at 328, para. 36 [hereinafter «Bilge Umar»].

[2] Özsunay, 2009 HMK-T, p. 134

[3] Ibid., p. 135.

[4] Ibid., p. 136.

[5] Ibid., p. 132.

[6] Ibid., p. 136.

[7] Ibid., p. 137.

[8] Ibid., p. 142.

[9] Ibid., p. 137.

[10] Ibid., p. 143.

• Prejudical Questions *(bekletici sorun*) explicitly defined, HMK Art. 165[1],

• Partial *reformatio* (*ıslah*) of the Party Petition, HMK Art. 181/1,

• Parties' Duty to Determine and Submit Specific Evidence for Each Alleged Fact, HMK Art. 194,

• Types of Recorded Evidence (*belge*), HMK Art. 199[2],

• Denial of the Authenticity of Documents with Secured e-signature, HMK Art. 210[3],

• The Court-ordered «Complementary Oath» (*tamamlayici yemin*) Is Abolished, HMK Arts. 225–239[4],

• The Wording of the Oath Is Secularized, HMK Art. 233[5],

• How the Deaf May Be Sworn, HMK Art. 234,

• Discretion of the Court to Refrain from Hearing Further Eyewitnesses When It Is Sufficiently Convinced from Hearing Some of the Eyewitnesses, HMK Art. 241,

• Judge's Pre-Briefing to the Eyewitness to Be Heard, Prior to Giving Testimony, About the Specific Incident in Question, HMK Art. 260,

• Compensation to Be Paid to Eyewitnesses, HMK Art. 265,

• Status and Responsibilities of Court-appointed Expert Witnesses revised, HMK Arts. 269, 285[6],

The HMK introduces rules for court-appointed expert witnesses that are parallel to provisions in the Turkish Code of Criminal Procedure («CMK»)[7].

Expert witnesses are to be selected from annually renewed lists that are prepared by Justice Commissions under District Civil Courts (which are not yet operational; see below). While the 1927 HUMK did not require expert witnesses to take an oath, but left this measure optional – at the discretion of the judge – the HMK-T mandates a compulsory oath before the local Civil Justice Commission. Further, expert witnesses are now deemed to serve as civil servants in the course of their activities[8].

• Mandatory Endurance to the On-Site Inspection of the Court, HMK Art. 291,

• Enforcable Medical Examinations to Determine Fatherhood, HMK Art. 292[9],

• Active Role of (Non-appointed, Optional) Party-selected Expert Witness (*uzman*) Recognized, HMK Art. 293[10],

• Consequences of the Subsequent Inability of a Judge to Sign the Final Judgment, HMK Art. 299,

• Certified Judgment Obtained Without Payment of the Remaining Judgment Fee (*bakiye ilam ve karar harci*), HMK Art. 302,

• Claimant's Waiver or Respondent's Acceptance of the Pending Claim Possible until the Judgment Becomes Final, HMK Art. 310,

• Amicable Settlement before the Court, time and effects, HMK Art. 314–315,

[1] Özsunay, 2009 HMK-T, p. 135.
[2] Ibid., p. 127.
[3] Ibid., p. 143.
[4] Ibid., p. 139.
[5] Ibid., p. 139.
[6] Ibid., p. 139–140.
[7] No. 5271, Official Gazette: 17.12.2004, No. 25673 [hereinafter «CMK»].
[8] CMK Arts. 62–73
[9] Özsunay, 2009 HMK-T, p. 127.
[10] Ibid., p. 140.

• Attorneys' Fees (*vekalet ücreti*) the Litigants May Eventually Recover from Each Other Ruled by the Court in the Name of the Litigants, Yet for the Account of Their Own Attorneys, HMK Art. 330,

• *Ex Officio* Return of Any Remaining Advanced Costs (*avansın iadesi*), HMK Art. 333,

• Introduction of Appelate Courts of Middle Instance (*istinaf*), (not yet operational), HMK Arts. 341–360[1],

• *Ex Parte* (*çekişmesiz*) Judicial Proceedings, HMK Arts. 382–388[2],

• Subsequent Compensation for Damages Resulting from Unfair Interim Measures, HMK Art. 399,

• Recording of Evidence with Local Court Assistance Prior to Examination of the Facts before the Main Trial Court, HMK Art. 404,

• 1985 UNCITRAL Model Law principles by and large adopted also for Domestic Arbitration, HMK Arts. 409–442[3], the 2001 Act on International Arbitration (AIA) containing similar provisions still applicable for international arbitration,

• Electronic Procedures: National Judicial Network Project (UYAP), HMK Art. 445[4],

• Strengthened Disciplinary Measures: Monetary Fines and Imprisonment, HMK Arts. 446, 151[5].

The HMK has introduced enhanced disciplinary measures that include court-ordered fines (*disiplin para cezasi*) and even imprisonment (*disiplin hapsi*). The former is meant to discourage disruptive behaviour that is conducted in bad faith with the aim of compromising the effectiveness of the proceedings. The latter is meant to preserve the order that is necessary in the hearings.

Attorneys at Law are exempt from these disciplinary measures. Finally, for the sake of effectiveness, the HMK requires the immediate execution of such court-ordered sentences (i.e., without delay).

II. Concept of civil procedural systems

As for Turkey, I can briefly say that Turkish civil procedure has gradually entered into and remained in the civil law system since the 19th century. However, certain tools and practices attributed mainly to common law eventually find their places in the Turkish civil procedure.

To name just a few: introduction of quasi-class actions, cross-examination (directly) by the attorneys of the parties, more common law features in arbitration. It is hard to say, at least for the time being and in Turkey that the Turkish academics have a tendency to re-think about sorting out or categorizing systems. They now seem to occupy more time to analyze the new 2011 HMK for urgent practice-oriented questions. The legal culture has so far been quite traditional / conventional and thus dispassionate to unique common-law procedural practices.

As for comparative law analysis of civil procedural academics in Turkey, one can observe that these academicians generally know German as their primary foreign language and

[1] Özsunay, 2009 HMK-T, p. 145.
[2] Ibid., p. 130.
[3] Ibid., p. 150–151.
[4] Ibid., p. 141.
[5] Ibid., p. 145.

thus follow literature in German, i.e. mostly from the Swiss Confederation and Germany. Therefore, they concentrate mainly on continental civil procedure law.

III. What system is related to Turkish civil procedure and why?

As seen in the answers above, until 19th century religious (Islam) substantive and procedural law dominated the system. The main reason was that the Ottoman Dynasty and the core of founding population of the Empire were Muslims (mostly Sunni, including Anatolian Alawites). Due to technological, military, economical, political and eventually (relatively) sociological progress of neighboring Christian West and North European countries and resulting pressures by foreign powers, fueled also by the nationalist movements following the French Revolution (1789), the Empire felt obliged to redefine its legal structure. Starting with commercial law, most new laws were inspired by from the «West», i.e. continental Europe.

As summarized above, after the Republic (1923), procedural law followed substantive civil law which was voluntarily adopted from Switzerland (Civil Code and Code of Obligations) in 1926 followed by the Swiss-Neuchàtel Code of Civil Procedure in 1927. All of these Codes along with the Turkish Commercial Code have been updated recently in the same tradition.

Regarding substantive civil law, the sources of Turkish law are defined in Art. 1 of the Civil Code as «Laws», «custom and usage» ve «judge-made law»[1].

Regarding civil procedure law, the sources of Turkish law are the HMK along with *inter alia* certain provisions of Turkish Civil Code, Turkish Commercial Code, specific Acts establishing certain courts, Regulations of Civil and Commerial Courts, and the decisions of the Grand Chambers of the Court of Cassation (*Yargitay*) in Ankara, the Capitol.

IV. What are the main features of your National civil procedure?

4.1. Civil Law

In short, the recent Turkish Civil Procedure is primarily influenced by the new Swiss Federal Code of Civil Procedure. However, as before the new HMK, some specific issues are historically adopted from other civil law countries, such as France or Germany.

4.2. Common law

Some traditionally common-law features such as direct cross-examination by the parties' lawyers and class action have found their ways in the new Turkish HMK, yet not necessarily in their original forms.

As for judge-made law, as stated above, only the Grand Chamber Decisions of the Court of Cassation are binding for the courts of lower instances. However, published decisions of the individual Chambers of the Court of Cassaiton are commonly observed by lower courts.

[1] Zeki Hafızoğulları, *Bir Kültür Ürünü Olarak Hukuk Düzeni*, Ankara, Laiklik, Atatürk Kültür Merkezi Başkanlığı Yayınları, 1998.

4.3. Unique, that don't exist nor in civil or common law, but just in your country

Maybe not unique, but some relatively rare features may be listed as follows:

1. In the 1920s, after the establishment of the Republic (1923), most major Codes were simply translated and voluntarily adopted with minor modifications. At that time, Turkey was (and still is) an independent country and there was no foreign pressure to adopt so many foreign laws in such short time.

2. Preliminary objections (*ilk itirazlar*) which may only be raised by the parties during the very first stage of the litigation but not in later stages involve particular objections which are listed in HMK. To my knowledge, this principle is no longer common in many countries.

3. Detailed provisions for *reformatio* (*islah, Änderung von Parteihandlungen im Prozess*) regarding a «permitted-once» complete or partial modification of the petitions and/or procedural acts of the parties is -to my knowledge- no longer common in other countries.

4. Legal transactions that exceed a certain monetary amount can only be proven by a deed, i.e. not by eyewitnesses as in some other Mediterranean countries[1].

5. The use oath (yemin) by eyewitnesses and especially (as the very last option) by a party who can otherwise not prove his/her allegations with any other type of evidence may also not be very common in other countries.

6. In the mid 1980s, the 1927 HUMK provisions regarding trial in absentia (*giyap*) were abolished as it had been abused by the parties and caused long delays in rendering judgments. Since then, a simpler and quasi-disciplinary tool is utilized to encourage the parties to be attentive in the proceedings. The case file is first simply suspended and if the parties do not react in due time the file shall simply be closed.

7. Rectification of judgment as a quasi-third stage: As the second stage (*istinaf*) was abolished with the 1927 HUMK, the need for the third stage was partially fulfilled with an artificially created «rectification of judgment» tool where the very same high-judges who rendered the Court of Cassation Chamber judgment review their own judgment and rectify it as they see fit. This tool is expected to disappear with the new HMK once the second stage (istinaf) courts are established and operational.

8. Until the new HMK, judges could still be sued personally for their wrongdoings in the course of their acts as judges. Under the 2011 HMK, only the State may be sued for the wrongdoings of judges as in most other countries.

9. Only citizens of Turkey may become members of Turkish Bars and act as Attorneys at Law (*avukat*). Foreigners who graduate from Turkish Law Faculties cannot act as Attorneys at Law if they do not also acquire Turkish citizenship.

10. Foreign attorneys at law who open law offices in Turkey may not practice Turkish law. Even Turkish attorneys at law who are Turkish citizen and members of a Turkish Bar may not practice Turkish law in Turkey if they become partners or employees of a foreign law office opened in Turkey.

V. Civil procedure and culture

As a relatively large Republic established on the remains of a multi-cultural Empire, even the present-day population of Turkey does not have a single culture. Cultural diversity may

[1] Özsunay, 2009 HMK-T, p. 126.

rarely have *de facto* influence in some issues of substantive civil law and criminal law; yet not much in the field of civil procedure where nationally trained judges have most control.

From the 1930s into the 1950s, the legal culture of many law professors from Germany who had found political and racial asylum in Turkey contributed to the new Republican culture. Many such professors taught in Turkish Law Faculties and were valuable in drafting new laws.

Following the establishment of the Republic, all remaining religious sources and practices of law were abolished within a few years. Although this had already begun in the second half of the 19th Century, many Islamic / Ottoman legal traditions rapidly disappeared with the newly adopted «Western European» procedures, mainly of French and Swiss origin.

A few «procedural» examples of this historical transition may briefly be noted as below:

Before its «westernization», the Ottoman courts generally tried both civil and criminal cases. Therefore, subject-matter jurisdiction eventually came about as a latter-day specialty.

The judges were only males, titled «*kadi*» who applied Islamic law. Their main sources were the book «Quran» and «sunnet», i.e. the words and acts of its late prophet Mohammed in his lifetime. If the kadi could find no reference in these two sources, he would first refer to «icma», the established views of the religiously learned (which might differ according to the particular sect), and finally he would utilize comparative analogy (kiyas) to find a solution to the particular problem before him[1]. On the other hand, the present republican secular system deems solely the judgments of the Grand Chamber of the Court of Cassation and of the Constitutional Court binding upon the judges. It could roughly be said that the former *kiyas* system was closer in its methodology (not substance) to common law than the later west European / continental system.

Islamic tools of proof were eyewitness, swearing and refraining from swearing (*nukul*). Until the adoption of Mecelle, a codified Islamic quasi-Civil Code, handwritten documents were deemed as falsifiable evidence and required supportive eyewitness testimony to their authenticity[2]. It should be remembered that the use of printing was not permitted for a long time and that illiteracy was quite high. Enhancements in these, along with the advance of trade eventually reversed the relative weight of the «document» and the «oral testimony». The 2011 HMK in the republican 1927 HUMK tradition preserves this change, i.e. written document is the sole accepted evidence for higher monetary amounts (HMK Art. 200)[3].

Turkish is a unique language, roughly related to Hungarian and Finnish. Unlike widespread belief, Turkish grammer has no roots in Arabic. However, since the Turks became followers of Islam whose religious book was originally written in Arabic, the learned Turks replaced Turkish words with words from Arabic and Persian. In centuries to follow, the vocabulary of oral Turkish spoken the countryside and of written Turkish created in major cities became quite different. Although both utilized the same grammer, in time formal / official / legal Turkish terms had almost become uncomprehensable for the common citizen.

The Republic aimed to purify the language, which was partially successful. For 2000s generation of law students even the post-Republic 1927 HUMK had become difficult to comprehend without an Ottoman to Turkish dictionary. In time, the same legal concept

[1] Nevin Ünal Özkorkurt, *Yargı Bağımsızlığı Açısından Osmanlı'da ve Günümüz Türkiyesinde Yargıya Genel Bir Bakış*, AUHFD, Ankara, 2008.

[2] Abdülaziz Bayındır, *Osmanlı (Teşkilat)*, in *Yeni Türkiye Yayınları*, C. 6, Ankara, 1999.

[3] Baki Kuru, Ramazan Arslan, Ejder Yilmaz.

or institution would be expressed with two or more terms, sometimes even within the same Code due to subsequent amendments. The 2011 HMK replaced most Arabic-rooted legal terms with contemporary Turkish ones except for those that have established themselves among all living generations.

Preparations regarding membership candidacy to the European Union, although recently without much thrill, along with European Court of Human Rights decisions as made public in the Turkish media especially in fair trial issues (such as length of trial, equality of arms) contribute to awareness of procedural issues in the population.

Symbolic signs of improved secularism in civil procedure were reflected in the provision related to taking oaths in the new HMK (Art. 233/4). The new wording drops the word «*Allah*» (God) and replaces it with «all beliefs and values which are deemed sacred (*kutsal sayılan bütün inanç ve değerler*»). In my opinion, it could be argued that even the term «sacred», which is used as a sort of substitute for the precise religious mandate of the previous oath, nevertheless recalls a religious significance or otherwise refers to a sense of dogmatic, non-human and supreme morality that an individual, in this day and age, need not possess in order to attach significance to his or her own individual beliefs and values. I believe that the change is, nevertheless, a step forward, that is, in the right direction[1].

As the Turks in general seem to adore technological progress, it was possible to establish rapidly a nationwide computerized network accessible from almost any PC with the use of secure e-signatures[2]. Court hearings with voluntary audio-visual broadcasting also became a new reality (HMK Art. 149).

Amicable dispute resolution (friendly settlement) is not a common tendency in the contemporary Turkish society. Among various reasons, distrust to non-judge lawyers, fear of possible corruption, lack of sufficient information and experience about alternative methods may be noted. Ad hoc and institutional domestic arbitration is rare; however, institutional international arbitration is spreading as Turkish companies fully integrate with the global economy.

Jeffrey Thomas[3]

AMERICAN NATIONAL REPORT

Introduction

Traditionally, legal systems, including their procedural aspects, have been classified as coming under the general headings of either «common law» or «civil law». The use of these two general categories has become increasingly problematic because of the ongoing fusion of common law and civil law approaches in western countries, and because this dichotomy tends to ignore non-western traditions that continue to grow in importance in a globalizing

[1] Özsunay, 2009 HMK-T, p. 139.

[2] For UYAP see Özsunay, 2009 HMK-T, p. 141.

[3] Professor of University of Missouri – Kansas City School of Law (USA).

world. Consistent with the direction received from the general reporter for this project, this paper takes up this problem from the perspective of the U.S. system of civil procedure.

The paper addresses the questions raised by the general reporter, but in a slightly different order. Instead of starting with the issue of how procedural systems might be sorted and the role of culture in the classifications, it starts with the classification of the U.S. procedural system in the traditional dichotomy and then explores the uniqueness of certain features in the U.S. system to set the stage for the question of whether culture influences civil procedure. It then concludes with the more general question about classification and the role of culture in that that system of classification.

Traditional Classification of U.S. Civil Procedure

It almost goes without saying that the U.S. has a common law system of civil procedure. Anyone who understands the distinction between common law and civil law systems would immediately classify the U.S. system as a veritable archetype of the common law. The seven characteristics of a classic common law procedural system identified by the general reporter basically describe the U.S. system: 1) civil juries; 2) pre-trial conferences; 3) party-controlled, pre-trial investigations; 4) concentrated trials, 5) passive judges; 6) class actions; and 7) party-selected and paid experts[1].

Each of these characteristic is an important, defining characteristic of the U.S. system[2]. The U.S. famous, or in some circles perhaps infamous, for its commitment to the jury trial[3]. The rules of civil procedure have explicit references to pre-trial conferences, a comprehensive system of pre-trial discovery, and party-selected and paid experts[4]. The use of concentrated trials is so widely understood and depicted in literature, film and television that the «courtroom drama» that is its own genre. Judges in the U.S. are among the most passive in the world, relying heavily on lawyers to present both the facts and the applicable law[5]. Class actions are common in the U.S.[6] and explicitly sanctioned by the civil procedure rules[7].

Even if one takes a more simplistic (and perhaps old-fashioned) approach to the common law, it is clear that the U.S. is a common law procedural system. Professor Chloros, in describing three classifications of legal systems (adding soviet law to common law and civil law), identified the key feature of the common law as reliance on «cases»[8]. Although

[1] General Report § 2.

[2] See, e.g., G.C. Hazard & M. Taruffo, *American Civil Procedure: An Introduction* at 5, 19–22, 86–104 (1993); F. James, G.C. Hazard, & J. Leubsdorf, *Civil Procedure* at 4–10 (1992).

[3] This commitment is reflected the Seventh Amendment to the U.S Constitution, and therefore is part of the highest law of the land. The right to a jury trial is also explicitly recognized and protected by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 38.

[4] See Fed. R. Civ. P. 16, 26–37.

[5] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 283–284 (2002).

[6] See R.L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 *American Journal of Comparative Law* 709, 736–737 (2005); see generally R. Mulheron, *The Class Action in Common Law Legal Systems* (2004).

[7] See Fed. R. Civ. P. 23.

[8] A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought*, *The Cambrian Law Review* at 12 (1978), reprinted in C. Varga (ed.), *Comparative Legal Thought*, 1992.

on the one hand, the U.S. does not rely directly on cases for the rules of civil procedure, the rules, like cases, come from the courts and are created by judges[1]. To be fair, this does not happen completely independently of legislative action. The rules are adopted pursuant to the Rules Enabling Act adopted by Congress[2], but the role of the Courts in making and adopting the rules is predominant, subject only to oversight by Congress. Once approved by the U.S. Supreme Court, notice is to be given to Congress of proposed rules by May 1; the rules (or amendments to them) take effect the following December 1 unless Congress passes a law limiting or blocking the rule[3]. This power has been invoked very rarely[4]. In addition, the U.S. courts often have local rules they have adopted that supplement (though may not contradict) the Federal Rules of Civil Procedure[5].

Perhaps more importantly, the U.S. Courts have broad power to «interpret» the rules and create new procedural methods. For example, the rules of pleading are meant to be relatively easy to meet, with the primary goal to provide a generalized notice of a claim to the party being sued[6]. Rule 8 of the Federal Rules of Civil Procedure therefore simply requires that a complaint provide a «short, plain statement of the claim showing that the pleader is entitled to relief»[7]. For many years this rule was interpreted liberally, making it difficult to obtain dismissal of an action «unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief»[8]. However, in 2007 the U.S. Supreme Court interpreted Rule 8 much more narrowly. In the case of *Bell Atlantic Corp. v. Twombly*[9], the U.S. Supreme Court rejected the «no set of facts in support of his claim» rule[10]. Some believed that this change might be limited to antitrust cases, but the Supreme Court made it quite clear that this was a change in pleading standards in 2009 opinion of *Ashcroft v. Iqbal*[11]. That case held that a plaintiff must provide enough factual detail to show that it's claim is «plausible»[12]. Moreover, the reviewing court is authorized to identify «conclusions» which the Supreme Court indicated are not entitled to any assumption that those conclusions are true[13]. These rulings are a radical departure from previous practice[14] that were «adopted» through judicial decisions consistent with common law principles.

[1] See D.R. Coquillette, *1-1 Moore's Federal Practice – Civil § 1.04[2]* (2012).

[2] See 28 U.S.C. §§ 2071–2077.

[3] 28 U.S.C. § 2074.

[4] See K.N. Moore, *The Supreme Court's Role In Interpreting the Federal Rule of Civil Procedure*, 44 *Hastings Law Journal* 1039, 1053–1057 (1993). Although the Congressional involvement is relatively infrequent, commentators have raised separation of powers concerns about it. Ibid., at 1057–1061; see also M.H. Redish, U.M Amuluru, *Essay: The Supreme Court, the Rules Enabling Act and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 *Minnesota Law Review* 1303 (2006).

[5] See D.R. Coquillette, *1-1 Moore's Federal Practice – Civil § 1.04[2][b]* (2012).

[6] See *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

[7] Fed. R. Civ. P. 8(a).

[8] See *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

[9] 550 U.S. 544 (2007).

[10] *Twombly*, 550 U.S. at 560–564.

[11] 556 U.S. 662 (2009).

[12] *Iqbal*, 556 U.S. at 678–679.

[13] *Iqbal*, 556 U.S. at 679.

[14] See, e.g., R.G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal,* 85 *Notre Dame Law Review* 849 (2010).

Unique Features of U.S. Civil Procedure

Although the U.S. system of civil procedure squarely meets expectations for a common law system, several of its common law characteristics are nonetheless unique. In particular, the U.S. use of the jury is unique when compared to the rest of the world[1]. Although the jury system originated in common law England, it has largely been abandoned there[2]. Other common law countries do not have a similar kind of commitment to the jury[3], so the use of the jury in the U.S. is unique.

U.S. discovery practices are also unique. While other countries have a role for pretrial investigation, the discovery tools available to legal counsel in U.S. results in very intrusive disclosures without judicial involvement. The U.S. discovery system seeks to substantially reduce or eliminate the element of surprise in civil litigation. It allows a party to obtain access to all relevant documents and witnesses[4], and to review these documents and examine parties under oath without a subpoena[5]. In the case of witnesses that are not a party to the case, a subpoena is required[6], but the clerk of court is directed to issue such subpoenas on request without significant court oversight[7]. To reduce expenses associated with the use of discovery tools, the rules were amended to require that parties disclose near the beginning of discovery all of the witnesses and documents upon which they intend to rely to prove their claims[8]. Thus, not only does a party to the lawsuit have to give the adverse party access to documents and witnesses, it must affirmatively disclose key witnesses and documents before they are even requested.

The Role of Culture for U.S. Civil Procedure

These examples of unique features of U.S. civil procedure provide a good starting place for analyzing the role of culture in the system. Although these features are consistent with the common law classification, the uniqueness of their use in the U.S. raises the question of whether culture might be the explanation. Although culture is complex and difficult to define[9], it provides useful insights into these characteristics and into the system as a whole. For example, why is the U.S. so committed to the jury system when other common law countries are not? It is because of the deep cultural suspicion that Americans have for the government[10]. The jury system was a mechanism to counterbalance the power of the British

[1] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 288 (2002).

[2] R.L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 *American Journal of Comparative Law* 709, 712–713 (2005); see also N. Andrews, *English Civil Procedure* at 775–776 (2003).

[3] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 288 (2002).

[4] See Fed. R. Civ. P. 26(b)(1).

[5] See Fed. R. Civ. P. 30, 34.

[6] See Fed. R. Civ. P. 30(a)(1), 34(c), 45.

[7] See Fed. R. Civ. P. 45(a)(2).

[8] See Fed. R. Civ. P. 26(a)(1).

[9] See O.G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 *American Journal of Comparative Law* 861, 863–864 (1997).

[10] See S. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 *University of Chicago Law Forum* 87, 106 (1990). See also O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of*

government[1]. Even after the revolution, Americans remained suspicious of governmental power, leading to a structural separation of power in the constitution and the adoption of a system of Federalism[2]. This inherent suspicion of government continues to be part of U.S. culture, from Watergate to Vietnam, to Weapons of Mass Destruction in Iraq. Because the jury represents a populist check on the official governmental power of the courts[3], it is popular with Americans[4].

The discovery rules are another example of the manifestation of the American cultural suspicion of government[5]. The discovery rules give power to the parties and their counsel, that is, to individuals, rather than relying on government officials[6]. Individuals have the right to obtain information and access to documents from the other parties to a lawsuit independent of any judicial or other governmental action[7]. This power extends to third-parties as well with the use of a subpoena[8]. While the courts could carefully supervise the issuance of subpoenas, in the U.S. system they do not; instead, the rules provide that subpoenas *must* be issued by the clerk of the court to parties or lawyers upon request[9]. Parties also have the benefits of receiving an initial disclosure of witnesses and key documents from the adverse party automatically under the rules without any governmental intervention[10]. The use of depositions for pre-trial investigations is more potent than simple witness interviews because they have the force of law behind them. Deposition witnesses are questioned under oath[11] which means that false statements may subject the witness to penalties of perjury. It is notable that, although there

Comparative Law 277, 289–290 (2002). Professor Chase uses the cultural construct of Seymore Martin Lipset outlined in his book *American Exceptionalism: A Double Edged Sword* (1996). Lipset reduces American culture to five words: liberty, egalitarianism, individualism, populism, and laissez-faire. S.M. Lipset, *American Exceptionalism: A Double Edged Sword* at 33 (1996). Professor Chase equates laisez-faire with anti-statism. See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 281(2002). I generally agree with this description of American culture, but combine elements of several of these characteristics in what I have called «suspicion» of the government. This suspicion has an egalitarian and populist element because of American reliance on people who are considered to be equal. It also has a laissez-faire and anti-statist dimension because it opposes government where the market can provide a reasonable solution. But I think that the government suspicion goes even further than reliance on the market or a general preference of the market over the state. Americans are suspicious of the government. This suspicion goes back to the creation of the government where the system of checks and balances was imposed because of concerns about potential governmental abuses. As Lipset notes, the Constitutional «established a divided form of government ... and reflected a deliberate decision of the country's founders to create a weak and internally conflicted political system.» S.M. Lipset, *American Exceptionalism: A Double Edged Sword* at 39 (1996).

[1] See J. Abramson, *We, the Jury* at 23–33 (1994).

[2] See S.M. Lipset, *American Exceptionalism: A Double Edged Sword* at 39 (1996).

[3] See Taruffo, *Transcultural Dimensions of Civil Justice*, *XXIII Comparative Law Review*, 1, 28 (2000).

[4] See Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in Robert E. Litan (ed.), *Verdict*, 1993, at 248.

[5] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 American Journal of Comparative Law 277, 294–295 (2002). As noted above, the terminology used by Professor Chase does not fit precisely with the «suspicion» of government argument used here. Instead, he evaluates discovery according to the cultural tenants of Seymore Lipset ans uses the language of egalitarianism, populism, laissez-faire and anti-statism. For more explanation of how the suspicion of government fits with these terms, see above.

[6] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 294–295 (2002).

[7] See, e.g., Fed. R. Civ. P. 30, 33, 34.

[8] See, e.g., Fed. R. Civ. P. 30(a)(1), 34(c).

[9] Fed. R. Civ. P. 45(a)(3).

[10] Fed. R. Civ. P. 26(a)(1).

[11] Fed. R. Civ. P. 30(b)(5)(A)(vi).

are some modest extra protections for government officials[1], discovery devices can be used ***against*** the government as well[2], show the extent to which the American suspicion of government really goes.

Using Culture to Categorize Procedural Systems

Having identified a cultural basis for the uniqueness of the U.S. commitment to the jury trials and the system of pretrial discovery, the question arises as to whether such cultural distinctions might be a basis for classifying procedural systems. At the very least, procedural systems reflect a country's culture[3]. The issue for me is whether these cultural reflections occur in sufficient patterns to allow for meaningful classifications. One of the challenges of cultural analysis is that when pushed far enough, it identifies the uniqueness of the country, society, group or individual. It therefore stands in some tension to classification.

The cultural basis for the rules discussed above is a suspicion of government. It is difficult to say whether that is a tendency that occurs in a way that allows for making meaningful categories. While surely some cultures are more or less suspicious of government, it is difficult to measure that tendency and to know if there is a demarcation or scale that would be useful for creating categories.

The general reporter has suggested classification based on the distinction between individual and collective orientation. I agree that this is a meaningful distinction, and certainly the U.S. can be evaluated on that basis. The powerful discovery devices provided for in U.S. procedure reflect a strong sense of the importance of individuals[4]. Asian cultures, such as Japan or China, represent an archetypal orientation to the community that is likely to be reflected in procedural law. But drawing distinctions at the two ends of the spectrum is not terribly useful. To say that the U.S. system reflects a commitment to the individual does not produce much of an insight. The more meaningful distinctions to be drawn are in the middle of the scale. For example, where does Germany fall on this approach? And perhaps more significantly, how does that approach compare to Turkey or India?

One additional problem with this approach is that it may not be very different from the traditional common law/civil law distinction. Professor Chloros argues quite persuasively that the common law approach, which focuses on the individual case and moves incrementally, is more individualistic, while the civil law, with this focus on theory and framework, is more oriented to the community[5]. Asian countries, of course, are distinct from those on the Continent in Europe, but the Asian countries have generally adopted a civil law system[6] and

[1] For example, a party that challenges the constitutionality of a statute must give notice to the appropriate government officials. See Fed. R. Civ. P. 5.1

[2] The rules for discovery devices do not contain any exceptions for government officials or agencies. See Fed. R. Civ. P. 26–37.

[3] See, e.g., O.G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 *American Journal of Comparative Law* 861, 864 (1997).

[4] See O.G. Chase, *American Exceptionalism and Comparative Procedure*, 50 *American Journal of Comparative Law* 277, 295 (2002).

[5] A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought*, *The Cambrian Law Review* at 12–15 (1978), reprinted in C. Varga (ed.), *Comparative Legal Thought*, 1992.

[6] See, e.g., C.F. Goodman, *Justice and Civil Procedure in Japan* 67 (2004).

so may just represent an even more extreme commitment to the community than European Civil Law countries.

Conclusion

Preparing this national report has been an interesting and worthwhile exercise. Not surprisingly, the U.S. is an archetypal common law procedural system. However, upon closer inspection the very characteristics that make it an archetypal common law system (the jury and discovery) are also the characteristics that are unique. This suggests that the traditional common law/civil law distinctions are losing their meaning and significance. Culture brings a great deal to the classification exercise. It helps to understand how the U.S. can be archetypally common law but also be distinctive in its common law approach. However, culture may also go too far to be useful for classification purposes. For example, the suggestion that the U.S. has a strong orientation to the individual is pretty obvious. Moreover, for those countries that are more in the middle of the spectrum, it is difficult to tell whether cultural distinctions can be made in a way that is meaningful and reliable. Of course, this brings us back to a question that perhaps should have been considered at the outset: what is the importance or utility of classification of procedural systems? It may be that systems can be grouped together for a particular characteristic, and then grouped with other systems for another. Such an approach may be helpful to identify more nuanced commonalities and differences, and more numerous categories with a broader variety of category members might create insights for harmonization or approaches to implantation or adaptation that will prove more likely to bear useful fruit.

SESSION 4. HARMONISATION OF CIVIL PROCEDURAL LAW IN EURASIA

General Reporter –
Prof. **Vladimir Yarkov**, Ural State Law Academy, Russia.

How does the integration of civil procedure in Eurasia works? Could we propose any uniform rules and principals? What are the main differences and similarities of civil procedure of the Eurasia countries?

National Reporters:
- Kyrgyzstan National Report: **Prof. Azamat Saliev**, Kyrgyz-Russian Slavic University, Kyrgyzstan
- Russian National Report: Prof. **Viktor Blazheev**, Moscow State Law Academy, Russia
- Slovenian National Report: Prof. **Aleš Galič**, University Ljubljana, Slovenia
- Ukrainian National Report: Prof. **Vyacheslav Komarov**, Yaroslav the Wise Law Academy of Ukraine

Vladimir Yarkov[1]

GENERAL REPORT[2]

HARMONIZATION OF CIVIL PROCEDURAL LAW IN THE EURASIAN COUNTRIES IN THE LIGHT OF CIVIL JUSTICE DEVELOPMENT IN THE POST-SOVIET REGION

1. Introduction

The Session on «Harmonization of Civil Procedure in Eurasia» of the Conference of the International Association of Procedural Law (that will be held in September 2012 in Moscow) is devoted to discussion of a number of important matters related to development of civil procedure in the countries of Eurasia. What are the major similarities and

[1] Head of civil procedural department and professor of Ural State Law Academy (Russia).

[2] This report is prepared with assistance of Andrey Neznamov, Assistant Professor of Ural State Law Academy. It was translated from Russian into English by the post-graduate students of the Department of Civil Procedure at the Ural State Law Academy: Natalia Baradanchenkova, Andrey Mamayev, Alexander Neznamov, Nikolay Roshupkin, Elena Salikova, and Anastasia Shirshova, under the guidance of Ksenia Sergeeva LL.M in Comparative Law, Economics and Finance (International University College of Turin, Italy).

differences of civil procedure in various countries of Eurasia? Is it possible to establish any unified rules and principles? We are offered to discuss these and some other issues within the framework of the proposed Session.

The First Report on approximation of procedural law in Europe was prepared under supervision of Professor Marcel Storm in 1994[1]. Approximation of the procedural systems can be recognized at several levels and within a few regions of the world. There are two forms of such approximation: unification (establishment of general supranational procedural rules and provisions) and harmonization (convergence of procedural systems on the basis of common principles)[2]. This report is devoted to the latter form.

It is wise to consider the harmonization areas of civil procedure law in Eurasia through comparative analysis of national legislation of various countries. Such approach helps not only emphasizing some similarities and differences of legal systems, but also defining the possibility to set forth some common trends in Civil Procedure Law development among the countries concerned.

For this reason, we asked scholars in the field of civil procedure law working in the countries of Eurasia[3] to characterize in their reports the present state of civil procedure in their countries. It is necessary so that on the basis of the national reports we could draw a clear picture of the civil procedure state in the countries of Eurasia.

All the national reporters were suggested several approaches for guiding them through drafting of the reports. Questions that were offered to the reporters corresponded to the objectives of the Session and were aimed at creation of a general idea of civil procedure in every country presented in the reports, analysis the basic similarities and distinctions in this sphere between the countries of the Eurasian region, and also at definition of some possible ways of unification and harmonization of Civil Procedure Law.

The list of the questions consisted of three parts: A general part which included the questions devoted to the most common spheres and institutes of civil procedure (civil procedure models, sources of civil procedure law, judicial structure and rules of procedure, standards of evidence and proof, etc.); a special part that covered the questions on some current issues and specific institutes of civil procedure (alternative methods of dispute resolution, information technologies); and a particular part where participants were asked to answer the following questions: To what extend is national legal system receptive to unification of civil procedure rules? Is harmonization of civil procedure legislation with other countries necessary? Are there any conditions or obstacles to each of these aspects in your country? And some other questions.

The national reports on civil procedure development in Ukraine, Kyrgyzstan, Slovenia, and Russia served as a basis for preparation of the present report. Among the national reporters, there were Professor V.V. Blazheev (Russia), Professor V.V. Komarov (Ukraine), Professor A. Galich (Slovenia) and PhD in Law A.R. Saliev (Kyrgyzstan) who prepared detailed analytical reports devoted to the state of civil procedure in their countries.

Besides, the information concerning the other countries of the Eurasian region was either kindly provided by our colleagues or was placed in publicly available sources and has also been

[1] Marcel Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne*, Wolters Kluwer, 1994.

[2] A more detailed analysis of unification and harmonization of legislation on the example of International Private Law was carried out by G.K. Dmitrieva. See Dmitrieva G.K. (ed.), *Mezhdunarodnoe chastnoe pravo* [International Private Law], Moscow, Prospekt, 2000, ch. 6.

[3] This generalization was carried out in terms of the countries of the Former Soviet Union.

used for drafting of this report. In particular, we are grateful to Associate Professor I.N. Koljadko and Professor Z.H. Bajmoldina for provision of the current legislation of the Republic of Belarus and the Republic of Kazakhstan accordingly. One of the first comparative legal researches on the legislation of the Commonwealth of Independent States that was carried out by Associate Professor S.V. Vasiliev[1] has also been used for preparation of this report.

Nevertheless, we cannot certainly assert that the present report is overall, because available information is quite limited, and the objective to analyze procedural legislation of all the Eurasian countries seems to be long-range and therefore cannot be accomplished at the moment.

This initial point is intended to outline the fact that the present report is not completely synthetic; instead it allows us to demonstrate only certain trends in the civil procedure development in some Eurasian countries and probably may serve as a basis for more detailed research.

However, this analysis has allowed us arriving to a variety of conclusions concerning approaches to harmonization of civil procedure which are essential for the majority of the countries of the former Soviet Union.

Thus, we can already draw a preliminary conclusion that present distinctions among the systems of civil procedure in each country do not influence the common trends of development. This fact certainly speaks for harmonization of the basic national legal institutes.

In view of this, it is possible to point out that there are some similar principles and institutes of civil procedure in all the countries considered. This circumstance is mainly caused by adoption of the common civil procedure model as the basis of all legal orders under investigation, also by certain procedural unification that took place in the recent past in the post-Soviet countries, and by general directions of development that are central for the majority of the countries of the former Soviet Union.

This latter conclusion is verified by general institutional similarities of all legal orders we discuss. It concerns the civil procedure model in general, the sources of Civil Procedural Law, evidentiary rules, and many other general provisions and institutions some of which will be examined further below.

However, every national legal system has its own peculiarities. They are most clearly visible on the example of judicial system structure and mechanisms of judicial acts enforcement. These aspects are rather disputable all over the world and their solution has to be found individually by each country.

Taking the above factors into consideration, further we will place emphasis on some (but not all!) similarities and certain indicative distinctions among the civil procedure systems of the Eurasian countries, and also some general trends in development that are indicative of harmonization of procedural law in the countries of Eurasia within the former Soviet Union region.

2. Similarities of the Models of Civil Procedure

Characteristics of a legal system have significant influence on understanding and coherence of approaches applied to the initial data analysis. They define to what extent the national legal system enters into the civil law family, the common law family, or represent an original legal formation.

[1] S.V. Vasilev, *Grazhdanskoe sudoproizvodstvo postsovetskih gosudarstv (sravnitel'nyj analiz)* [Civil Procedure of the Post-Soviet Countries (Comparative Analysis)], Moscow, Yurlitinform, 2011.

Even though this topic is difficult itself, we would like to mention that national law of the Eurasian countries generally has some similar features with legal orders of the civil law countries. This opinion has been confirmed by the national reporters. Taking this into account, we could conclude that in the majority of East European countries and countries of the Commonwealth of Independent States (hereinafter referred to as CIS) the civil law tradition is recognized and directly influences civil procedure.

Meanwhile, other points of view also exist. As far as this report is concerned the countries of the former Soviet Union, it will be relevant to note the influence of the socialist law which undoubtedly has played a significant role.

For this reason, René David included the socialist law with a special legal group despite its external similarity with the civil law countries[1]. In one of his latest works on comparative law Professor of the University of Poitiers (France) Raymond Legeais considered an issue of existence of a special legal model of the CIS countries and Russia, and as a result he suggested to continue considering Russia to a certain model of civil procedure without giving a final answer on the question about adherence of[2].

It is extremely significant that despite the difficulty of this question, there is a tendency to emphasize some of the traits that cover both, civil and common law, within the national systems. Thus, one of the Russian scholars, D.Y. Maleshin suggested that Russian civil procedure referred to the mixed type and comprised of a number of civil law characteristics and some common law characteristics[3].

A similar thesis was introduced by the national reporter professor V.V. Komarov in the context of Ukrainian civil procedure. In his opinion, the borders between the basic law groups such as civil law, which is peculiar for Ukraine, and common law are becoming more and more leveled at the present stage of globalization. This can be clearly illustrated by the fact that, case practice of the European Court of Human Rights is discusses openly in Europe, including Ukraine. Besides, according to the Civil Procedure Code of Ukraine, the decision of the Supreme Court of Ukraine, delivered as a result of consideration of an application for revision on the grounds of unequal application of the same substantive law rules to similar cases by the court of cassation is obligatory for all courts of Ukraine and other authorities that apply the legal act that contains this rule. The courts are obliged to adjust their practice in accordance with the decisions of the Supreme Court of Ukraine. Taking such provision of the civil procedure law into account, we can conclude that Ukrainian civil procedure has an element of case law that is inherent in Great Britain and USA[4].

In general, according to the opinions of the majority scholars in the field of Civil Procedure Law, including those who took part in preparation of the national reports, the type of the procedure should be defined in the terms of a judge's role in case management. In this context, the procedural models are arranged in a way to oppose each other

[1] René David, Camille Jauffret -Spinozi, *Osnovnye pravovye sistemy sovremennosti* [Great Legal Systems of the Times], Moscow, 1997, p. 114.

[2] Raymond Legeais, *Velikie pravovye sistemy sovremennosti: sravnitel'no-pravovoj podhod* [Major Systems of Contemporary Law: Comparative Legal Analysis], Moscow, Wolters Kluwer, 2009, p. 230–233.

[3] D.Y. Maleshin, *Osobennosti rossijskogo tipa grazhdanskogo processa* [Peculiarities of the Russian Type of Civil Procedure], in *Trudy juridicheskogo fakul'teta MGU* [Writings of the Judicial Faculty of the Moscow State University], 10th ed., Moscow, 2008, 14, 15.

[4] National report by V.V. Komarov. Hereinafter we use the materials presented by national reporters.

Another fair idea of Raymond Legeais, while characterizing differences between the English legal system, on the one hand, and French and German legal systems, on the other hand, is that «the English law is in the judges' disposal, whereas the French and German legal systems depend mainly on statutory provisions»[1].

In our opinion, compliance with the procedural form based on a strict coherence of a court and litigants by law prevails in civil procedure of the Eurasian countries, because it is the law that defines a civil procedure model. However, the latest judicial acts of the Supreme Commercial Court of Russia indicate a more creative approach of judges to interpretation of legal rules[2].

For example, the above stated idea entirely concerns the Russian law where a judge is to a certain extent «the servant of law». Moreover, the necessity to obey the procedural form oftentimes prevails over the content which leads to a leading role of written evidence. A special system of training for judges, their high status, role, and their mentality result from this statement.

A similar situation is described in other national reports. Thus, in the report devoted to the state of Ukrainian civil procedure it is said that this country referrers to the civil law family, therefore Ukrainian civil procedure is much closer to the model of civil procedure of civil law countries. Some positive trends in the procedural legislation of the European counties, such as Germany and France, have influenced the development of the civil procedural legislation of Ukraine. For example, the German legislation has affected the development of Ukrainian civil procedure by assigning the leading role in conducting the proceedings to a court. The civil procedural legislation of France also has influenced on the concept of civil procedure of Ukraine in terms of development of adversarial features, since civil procedure in France is considered as private law[3].

A similar approach is applied in the national report by A.R. Saliev devoted to the state of civil procedure in the Kyrgyz Republic, where the experts of Kyrgyzstan were guided by the German, French and American legislation and experience of the East-European countries while reforming of their own civil procedural legislation since the mid-90s of the XX century. At the same time, the Russian legal system and experience of the other CIS countries have also exercised a significant influence on the legislation of Kyrgyzstan[4].

It is also significant that in the process of civil procedure formation the legal system structure and legislation of the Republic of Kazakhstan experiences a great influence of the Soviet law and the German legal tradition. This is related to the fact that, firstly, the Soviet laws were in effect in Kazakhstan during a certain period of time even after collapse of the USSR. Secondly, the model legislation of the CIS countries has received a wide implementation. Finally, due to the fact that Kazakhstan remained in the civil law family, it is obvious that some general principles and the branch division of civil law have survived in the legal

[1] Raymond Legeais, op. cit., p. 60.

[2] It can be seen on an example of projects of Decisions of the Plenum of the Supreme Arbitration Court of the Russian Federation available at http://arbitr.ru/vas/proj/address. See, for example, the Project of the Determination of the Plenum of the Supreme Arbitration Court of the Russian Federation «On some issues of application of article 333 of the Civil Code of the Russian Federation», and also «On some issues of resolving disputes related to the guarantee». See also: the Determination of Presidium of the Supreme Arbitration Court of the Russian Federation No. 2929/11 of 6 September 2011.

[3] National report by V.V. Komarov.

[4] National report by A.R. Saliev.

system. Any new act should be incorporated in the current legal system; otherwise it will bring more harm than advantage or will not work at all. In particular, M. Sulejmanov hold up as an example the Law on Joint-Stock Companies adopted in 1998 at the initiative of the National Commission for the Securities Market of the Republic Kazakhstan that was developed with the participation of lawyers from the USA. The law absorbed the American concepts and tools aimed at construction of a joint-stock company as a speculative formation and a participant of the securities market rather than a manufacturing enterprise. This law practically did not work which caused the need for drafting a new law corresponding to principles of civil law. Such law was passed in 2003 and is still operating[1].

It is also remarkable that experts from Germany have rendered substantial aid in preparation of the Civil Procedure Code and projects of laws on arbitration courts and international arbitration of the Republic Kazakhstan[2].

Professor A. Galich representing Slovenia marked in his report a close correlation between the national law and the German legal tradition of civil legal proceedings. It is noticed that the law on civil procedure of this country (*Zakon o pravdnem postopku*) is closely corresponds with its Austrian predecessor (*ZPO*). Besides, the reforms of civil proceeding undertaken in Austria and Germany are the basic sources of inspiration to the reforms initiated in Slovenia and they are frequently used as a basis for drafting new legal acts[3].

We would like to notice here that a special geopolitical factor which is described by Professor A. Galich in the national report has a significant influence on the fact that the Slovenian civil procedure and Austrian civil procedure are in close connection.

Until 1918, the territory of Slovenia was a part of the Austro-Hungarian Empire. However this relation in sphere of civil procedure had not interrupted after the First World War (1918) when Slovenia became a part of a newly formed Yugoslavia. Upon acceptance of the new uniform legislation in the field of private law and civil procedure Yugoslavia was guided fully by the Austrian legislation because it was considered as the most modern and advanced. Thus, the first Yugoslavian law on civil procedure of 1929 represented an almost complete translation of the Austrian Civil Procedure Code of Franz Klein.

After the Second World War, Yugoslavia became a socialist and federative state consisted of six republics; and Slovenia was one of them. Even though the socialist law had introduced many far-reaching changes in the legislation, these changes were much less radical in comparison with other communist countries. In many respects, it had been caused by political reasons, including the fact that Yugoslavia was guided on so-called «soft version of socialism». It all has led to the fact that introduction of socialism in Yugoslavia after the Second World War had not excessively affected the traditions of civil procedure in these countries[4].

Perhaps, today Slovenia has kept many characteristics of the German civil procedure model, intermixed, however, with traditions of the socialist law. Despite of this fact, trends in civil procedure development which will be mentioned below in reference to Slovenia are very similar to the development trends in other countries of the region. This circumstance

[1] M. Sulejmenov, *Sistema prava i sistema zakonodatel'stva Kazahstana: vybor puti* [Legal System and System of the Legislation of Kazakhstan: Choice of a Path]. Available at http://www.zakon.kz/4466326-sistema-prava-i-sistema-zakonodatelstva.html address.

[2] Ibidem.

[3] National report by A. Galich.

[4] Ibidem.

is very indicative, since it allows demonstrating a certain general vector of development of procedural law on the basis of a general model, irrespective to combinations of various elements in it.

In our opinion, it is necessary to conclude that civil law is a basis of civil procedure in the majority of the Eurasian countries. Many CIS countries are characterized by retaining of the Soviet law traditions in their legal systems which have intermixed with the elements of the German civil procedure model to a greater or a lesser degree.

A uniform framework of the civil procedure model is one of the most important preconditions for harmonization. This framework creates the widest basis for integrated development of the national legislation.

3. Organization of the Judicial Power

Inspite of the unity of the civil procedure model that lies at the roots of the legal orders of the countries under our consideration, all of them have their unique national characteristics. Organization of the judicial institutions is one of the brightest indicators of originality and uniqueness of civil procedure in every country at issue. It includes availability or absence of a uniform system of courts, presence of specialized courts that resolve, inter alia, administrative and commercial disputes.

In civil law countries division into «public» and «private» law fundamental and particularly determinant for judicial organization[1]. However, it is not essential in some countries of Eurasia: All civil courts are the courts of public and private law simultaneously.

Foreign researches of the judicial systems note this fact. For example, Catherine Verbaere states that the Russian judicial system is based not on the fundamental division into «public» and «private» law, but on the differentiation between economic law interpreted in a broad sense and all the rest branches and spheres of law[2]. This idea is substantiated by the fact that all courts of the Russian Federation are divided into courts of general jurisdiction and commercial courts – the courts that resolve economic disputes in accordance with the rules of the Commercial Procedural Code of the Russian Federation.

In Belarus, Tajikistan, and Uzbekistan, the organization models of the judicial power, when specialized courts hear economic disputes, are the same. It should be noted that many other post-Soviet countries established their own unique judicial systems headed by the supreme courts (for instance, Kazakhstan, Moldova, Kyrgyzstan, Turkmenistan, Latvia, Lithuania, Estonia, Georgia, Armenia, Azerbaijan, and to some extent Ukraine as well).

Constitution of the specialized courts for administrative legal proceedings is also one of the current issues. Many aspects of administrative legal proceedings have a number of distinctive features which determine the necessity to modify the procedural form and take into account peculiarities of public law. The logic of dividing the law into «public» and «private» presupposes separation of the administrative courts into an independent judicial branch of justice administration.

[1] See J.-L. Aubert, *Introduction au Droit et Thèmes Fondamentaux du Droit Civil*, 9-e éd., Paris, Dalloz, 2002, p. 33, 45, etc.

[2] Catherine Verbaere, *Opredelenie publichnogo poryadka vo vnutrennem prave Rossii cherez frantsuzskoe pravo* [Defining Public Policy under the Russian Domestic Law Through French Law], in *Rossiisky ezhegodnik grazdanskogo processa* [Russian Yearbook of Civil and Arbitral Procedure], 2002, No. 1, Moscow, Norma, p. 273.

Opinions on establishment of administrative courts given by the Russian legal scholars and representatives of the highest judicial bodies that have a strong hold over law-making related to judicial matters are divided. For instance, the Supreme Court of the Russian Federation stood for creation of an autonomous system of administrative courts as a sort of subsystem of general jurisdiction courts. In view of this the court proposed two special draft laws, namely the Federal constitutional law «On the Administrative Courts» and the Code of administrative procedure. The position of the commercial courts is that their internal organization has already been structured in a way that implies division of law into public and private since every commercial court at any level has judicial panels for private cases and public cases[1].

In either case, administrative courts and a corresponding procedural code in Russian Federation still remain in capacity of a project at the moment. Nevertheless, an apparent novelty has become an adoption of the Law on establishment of a specialized court that should hear and decide certain categories of cases disputes, i.e. the Court for intellectual property rights. Disputes in sphere of intellectual property rights protection lie within the competence of this specialized commercial court which is both a trial and cassation court at the same time. Establishment of such court was covered by the Federal Constitutional Law of 2011 and the Court itself is supposed to be established within the system of commercial courts by the 1st of February 2013.

Consequently, the judicial system of the Russian Federation consists of courts of general jurisdiction which include military courts administrating justice in the Armed Forces and other military formations and units of the Russian Federation, commercial courts with the Court for intellectual property rights as a part their structure, the Constitutional court of the Russian Federation, and constitutional courts of the republics and other constituent entities of the Russian Federation.

It should be recognized that further discussion of the judicial system structure at the highest level (final instances) is still holding at the moment: Whether several subsystems of the judicial power (the Constitutional court of the Russian Federation, the Supreme Court and the Superior Commercial Court) should be retained as they are now or consolidated under a single Supreme Court consisting of a few chambers in accordance with the types of judicial proceedings: constitutional, civil, criminal, and administrative.

We are of the opinion that three judicial subsystems of the Russian Federation interrelating with each other reflect a modern worldwide trend of a simultaneous co-existence of general jurisdiction courts and specialized courts. This conclusion is demonstrational and also relevant to the Eurasian countries, but with some modifications: Organization of the judicial authorities is notable for individual character in each of the above mentioned countries some peculiarities in a greater or lesser degree.

The system of the courts in the Republic of Belarus is very similar to the Russian one: It is based on the principles of territoriality and specialization and consists of the Constitutional Court, courts of general jurisdiction (including military courts), and economic courts. In addition, there is a special judicial panel at the Supreme Court of the Republic of Belarus that hears patent cases.

[1] Yakovlev V.F., *Sudebnaya reforma: itogi i zadachi* [Judicial Reform: Results and Challenges], in *Ekonomika. Pravo. Sud. Problemi teorii i praktiki* [Economics. Law, Court. Issues of Theory and Practice], Moscow, 2003, p. 354.

As Professor V.V. Komarov noted in his national report, in accordance with the Constitution of Ukraine, jurisdiction of Ukrainian court extends over all legal relations arising within the territory of the country. Legal proceedings are carried out by the Constitutional Court and the courts of general jurisdiction. The courts of general jurisdiction form the single system of courts. As specified in Art. 18 of the Law of Ukraine on the Judicial System and Status of Judges, the courts of general jurisdiction specialize at deciding civil, criminal, economic, administrative cases as well as cases on administrative violations. Thus, civil lawsuits are heard and decided by the courts of general jurisdiction in accordance with the Code of civil procedure; economic disputes are considered by the economic courts pursuant to the Commercial and Procedural Code of Ukraine, and administrative cases are handled by the administrative courts as consisted with the Code of Administrative Proceedings of Ukraine[1].

Since 2005, the administrative courts of Ukraine have become a part of the structure of the general jurisdiction courts. However the administrative courts consider administrative cases in accordance with the special rules of the Code of Administrative Proceedings which was passed on July 6, 2005 and brought into effect on September 1, 2005. The Code of Administrative Proceedings defines jurisdiction of the administrative courts and their powers of deciding administrative cases, the procedure for the administrative courts applications and the order of administrative proceedings in general. Any appeal decision, action, or failure to act of power entities can be brought to the administrative courts, except when the Constitution and other laws of Ukraine specify that such decisions, actions, or failures to act shall be appealed against in a different procedure[2].

In Kyrgyzstan, the judicial power is instituted in a distinct manner. The system of the civil and commercial courts is integrated into a single judicial mechanism. Before 2003, the judicial system of the Kyrgyzstan was divided into several branches where the arbitrary courts (dealing with economic disputes) were autonomous alongside with the Constitutional court the courts of general jurisdiction. Today, economic cases are considered by the inter-district (*inter-rayon*) courts as trial courts. These courts were established for resolving economic disputes and cases arising out of administrative law. The inter-district courts are divided from general district (*rayon*) courts, but ultimately they are on the same level. There is one inter-district court in every region (*oblast*). There are three judicial panels for civil, criminal, administrative and economic cases within the structure of every region court which is a second instance court. The Supreme Court of the Kyrgyz Republic has the same internal structure. Therefore, the courts that consider economic cases are structurally autonomous and separate from the system of general courts that resolve civil and criminal cases only on the level of the first instance[3].

Integration of economic courts and general jurisdiction courts into the unified system resulted in consolidation of the procedural rules for hearing civil and commercial cases within the single Civil Procedure Code (CPC). As such the CPC of the Kyrgyz Republic has a special part on procedure for economic disputes resolution, Chapter VI «Peculiarities of civil procedure on economic cases». The Chapter represents the specific character of the disputes under consideration because the general rules of the CPC oftentimes do not fully

[1] National Report by V.V. Komarov.
[2] Ibidem.
[3] National Report by A.R. Saliev.

take this specificity into account, which means that the provision of Chapter IV CPC of Kyrgyzstan are primary for hearing and deciding economic cases. Functional responsibilities of the inter-district courts also include resolving administrative cases. Consequently, consideration of administrative cases is shared according to jurisdiction among the first instance courts of the Kyrgyz Republic[1].

The judicial system of the Republic of Kazakhstan has a similar structure that consists of the Supreme Court and local courts. Establishment of extraordinary courts under any name is forbidden. The local courts consist of regional (*oblast*) and equivalent courts, and district and equivalent courts. Specialized courts, such as military and tax courts, can also be created.

In the Republic of Slovenia, the judicial power is exercised by the courts of general jurisdiction that resolve civil, commercial, and family disputes and specialized courts. The courts of general jurisdiction are composed of 44 district, 11 regional and 4 higher (appellate) courts and the Supreme Court of the Republic of Slovenia (*Vrhovno sodišče*). There is also the Constitutional court, but it is not included into the general judicial system. Commercial disputes are resolved in accordance with the Civil Procedural Code that has a special chapter devoted to resolution of such matters. However, it should me mentioned that provisions of this chapter have no significant distinctions from the general procedural rules[2].

As previously stated, the issues of judicial system organization are resolved independently at the national level. The same statement is fair in terms of the system of judicial acts review.

Without going into details of the judicial systems structure of every country, we would rather draw your attention to the fact that such aspect as establishment of judicial supervisory authorities are decided on differently in each legal order. In addition the role and functions of these authorities as well as the entire national judicial system are being reformed permanently.

This statement is very topical for Russia where for the period of last ten years the systems of judicial acts review have been changing significantly in the framework of general jurisdiction and commercial courts. However, the courts of supervisory review within both of these two judicial subsystems still exist up to the present day, although they have been substantially modified.

Moreover, the modern Russian mechanisms of judicial acts review as in courts of general jurisdiction as in commercial courts have been restructures similarly. Judgments that authorities are the Superior Commercial Court of did not go into effect are reconsidered in consistence with the rules of appellate procedure. Judgments that have already entered into force should be reviewed by cassation courts. The supervisory review the Russian Federation (for commercial courts) and the Supreme Court of the Russian Federation (for courts of general jurisdiction). Supervisory review of judgments by either of these higher courts is an exceptional and extraordinary procedure.

In others countries, supervisory review authorities was abolished. For example, supervisory review established by the Civil Procedural Code of Ukraine (1963) was in effect until 2011. At the same time, many specialists note that the current model of cassation provides for the possibility to challenge all kinds of civil judgements, which caused lots of troubles in work of the Ukrainian Supreme Court, threatened a binding power of judgments and their

[1] National Report by A.R. Saliev.

[2] National Report by A. Galich.

validity which are secondary and interrelated characteristics in relation to requirements of legal efficiency and certainty[1].

The mechanism of judicial acts review in the Kyrgyz Republic also includes a supervisory instance. After a case is decided by the trial court the litigants have 30 days to appeal the decision (to oblast courts and the Bishkek City Court). According to its main features the appellate instance can be characterized as a full appeal. If the parties default the term, they still have the right to appeal the judicial acts into the same court by cassation procedure. In the cassation ascertainment of facts and representation of evidence is impossible, but the court of review has the right to transmit the case to the first instance (original) court for a new trial. Reviewing bodies have large powers for reconsideration of judicial acts. It has the right to examine propriety application of rules of law and ascertainment of circumstances.

The Slovenian system of judicial acts review has several peculiarities. It has an appellate instance, and a further recourse against judicial acts is possible via extraordinary proceedings at the Supreme Court. The procedure is called «*revizija*» and essentially is similar to cassation as it is stated in the national report[2].

We have to acknowledge that a system of judicial acts review is unique for every country exactly as a judicial system in general. At the same time, all these systems are some sort of a compromise between duration of court proceedings and efficiency of the system of judicial acts review.

4. Similarity of the Sources of Civil Procedure

Among the other questions that have been answered by the national reporters, there is a whole group of questions devoted to the sources of civil procedure. Upon studying the answers to these questions and other related materials, one may arrive to a rather predictable conclusion that sources of civil procedure are generally similar in all the countries under observation. This idea regards not only to the fact that all the countries have constitutions as the most important legal source of civil procedure or special codes, but also to the significance of the law enforcement practice and the same international instruments embodied in the law of many countries.

The analysis has shown that most of the countries have the following system of civil procedure sources: A constitution contains basic principles of court procedure and establishes a judicial system structure while an array of procedural regulations is contained in a procedural code. Likewise, matters of court organization and some the other procedural rules are determined by specialized laws.

Thus, Art. 2, § 1 of the Civil Procedure Code of Ukraine states that civil justice is administered in accordance with the Constitution of Ukraine, the Code and the Law of Ukraine «On International Private Law». Therefore, the Constitution of Ukraine appears to be the primary civil procedure source establishing fundamental principles of legal procedure. Among other sources of civil procedure there are the Civil Procedural Code of Ukraine, the Law of Ukraine «On Judiciary and Status of Judges», the Law of Ukraine «On Prosecution Service», the Law of Ukraine «On Advocacy», the Law of Ukraine «On Free Legal Assistance», etc.

[1] National Report by V.V. Komarov.

[2] National Report by A. Galich.

The current Civil Procedure Code of Kyrgyzstan came into effect in 1999. The judicial system and the system of legal procedure of the Kyrgyz Republic are defined by the Constitution that, however, does not provide for any legal rules that could be called purely procedural. At the same time, the Constitution sets forth the principles which are essential for the whole system of civil procedure, such as the principle of justice administration only by courts, the equality of everyone before the law and the court, adversarial procedure, etc.[1]

In the Republic of Azerbaijan, the rules of civil procedure are governed by the Constitution, the Law of the Republic of Azerbaijan On Courts and Judges (1997), the Civil Procedural Code, other laws and international treaties to which Azerbaijan is a contracting party.

The rules of civil procedure of the Republic of Kazakhstan are defined by Constitutional Laws, the Civil Procedure Code based upon the Constitution of the Republic of Kazakhstan, and generally recognized rules and principles of International Law. Other statutory provisions establishing the civil procedure rules shall be integrated into the Civil Procedural Code of the Republic of Kazakhstan (Art. 2, § 1 of the Civil Procedural Code of the Republic of Kazakhstan).

The Civil Procedure Code of the Republic of Slovenia has been in force since 1999. In addition, there are several specialized acts that also mean a lot to Civil Procedural Law. For example, the Act on International Private Law and Procedure regulates conflicts of jurisdictions including the rules of recognition and enforcement of foreign courts decisions. At the same time, the Constitution states some other rules that are important of a great importance for civil procedure as well.

Thus, there is no doubt that it is the Civil Procedural Code (and, where available, the Code devoted to specialized legal proceedings) which is the basic civil procedure source in all post-Soviet countries.

It is significant that none of the observed countries has formally recognized the role of judicial precedents as sources of civil procedure. However, the practice illustrates the opposite. For example, in Slovenia courts of the first instance usually follow the positions expressed by appellate courts and the Supreme Court. Moreover, one of the functions of the Supreme Court of Slovenia is to provide for consistency of judicial practice (Art.110 of the Courts Act).

Higher courts in the majority of Eurasian countries possess the power to elaborate and interpret legal norms. This can be partially explained by the fact that at the formative stage procedural legislation of these countries had been dramatically influenced by the legal heritage of the former USSR.

As mentioned in the National report on the state of civil procedure in the Kyrgyz Republic, until now there is a strong tradition coming from the Soviet times when guiding acts of the Plenary Session of the USSR Supreme Court and the Supreme Courts of the Union Republics are extremely significant to judicial practice. According to the Constitution of Kyrgyzstan the Plenary Session of the Supreme Court shall provide explanations on the issues of judicial practice. It is not said that these explanations are «binding on the courts below» phrase or other similar phrase, but this does not mean that lower courts and even the Supreme Court itself are not guided by legal rules interpretations based upon the briefed judicial practice[2].

[1] National Report by A.R. Saliev.

[2] Ibidem.

Therefore, the direction of judicial practice development is determined by the court above – that is a legal tradition that still survives in Kyrgyzstan. The tradition manifests itself in the way the courts interpret the most complicated and frequently applied legal rules which are practically equivocal[1].

Very similar situations exist in other countries of the region. According to Art. 51 of the Law of the Republic of Belarus on Judicial System and Status of Judges, the Plenary of the Supreme Court analyzes briefs of judicial practice and statistics, makes interpretation and gives explanations of the issues of law enforcement to the courts of general jurisdiction.

Under the Law of the Republic of Moldova, «On the Supreme Court of Justice» of the 26th of March 1996, the Supreme Court of Justice summarizes judicial practice, analyzes judicial statistics, and provides for *ex officio* explanations on the matters of judicial practice which are not considered as interpretation of the laws and are not binding upon judges (Art. 2, § «e» of the Law).

The Supreme Court of the Russian Federation gives explanation of the issues of judicial practice (Art. 19, § 5 of the Federal Constitutional Law of the Russian Federation «On Judicial System of the Russian Federation» of 1996), as well as the Supreme Commercial Court of Russia has the same power (Art. 23, § 5 of the Federal Constitutional Law mentioned above).

The Plenary Session of the Supreme Court of the Republic of Latvia discusses the topical issues of legal rules interpretation (Art. 49, § 2 of the Law of the Republic of Latvia «On Judicial Power» 1992). Moreover, in the original version of this article the Plenary Session was authorized to make rulings that were binding upon the courts in cases concerning application of the corresponding laws.

The Supreme Court of the Republic of Tajikistan generalizes the judicial practice and analyses judicial statistics, gives guiding instructions on law enforcement matters arising out of consideration of civil cases, and supervises implementation of the above mentioned guiding instructions by lower courts (Art. 23 of the Constitutional Law of the Republic of Tajikistan «On Judicial System of the Republic of Tajikistan»).

The Supreme Court of the Republic of Turkmenistan, firstly, examines and generalizes judicial practice of commercial and general jurisdiction courts, maintains judicial statistics and manages enforcement of judgments, analyzes and summarizes statistical data, provides lower courts with guiding explanations on the law enforcement matters related to consideration of civil cases. Secondly, it supervises compliance with the guiding explanations provided by the Plenary Session of the Supreme Court (of Art. 38, § 1, subparagraphs 3 and 4 of the Law of the Republic of Turkmenistan «On Court»).

According to the Law of the Republic of Uzbekistan «On Courts», the Plenum of the Supreme Court of the Republic of Uzbekistan is authorized to examine briefs of judicial practice and provide explanations on the issues concerning application of laws (Art. 17 of the Law). Within the scope of matters concerned, these explanations of the Plenum are binding upon all courts, other authorities, enterprises, institutions, organizations, and officials applying the legislation explained (Art. 31, § 3 of the Law). Implementation of such explanations by lower courts is supervised by the Supreme Court of the Republic of Uzbekistan (Art. 13, § 4 of the Law).

[1] National Report by A.R. Saliev.

Furthermore, there are a number of international instruments that are in effect in almost all the countries under consideration. For example, the list of civil procedure sources of Ukraine consists of the following international acts[1]:

- Hague Convention of 1 March 1954 on Civil Procedure;
- Convention of 3 November 1950 for the Protection of Human Rights and Fundamental Freedoms;
- Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;
- European Convention of 7 June 1968 on Information on Foreign Law and its Additional Protocol of 15 March 1978;
- Commonwealth of Independent States Treaty of 20 March 1992 on Settlement of Commercial Disputes;
- Commonwealth of Independent States Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters and its Protocol of 28 March 1997;
- Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards;
- European Convention of 21 April 1961 on International Commercial Arbitration.

It is easy to see that the majority of these international instruments are valid in most of the post-Soviet countries. As a rule, international acts oftentimes override the national legislation, although some exceptions could be found.

Unlike most of the other countries, the Kyrgyz Republic did not give any priority to international treaties over the national legislation.

Speaking of civil procedure sources, it should also be noted that Kyrgyzstan shows an excellent example of how customs can influence civil procedure. For instance, the Law of the Kyrgyz Republic «On Aqsaqal Courts» was enacted in 2002. Aqsaqal courts are public bodies voluntarily founded upon the bases of electivity and self-management. Aqsaqal courts try and, if possible, solve in full accordance with the civil procedure rules civil disputes remitted by local courts. In case of mutual consent of the parties these courts can also consider civil cases concerning property and family disputes in order to reconcile the parties. The Aqsaqal courts are usually much respected in rural regions of the country.

It is important to mention that almost all of the observed countries have similar hierarchies of civil procedure sources. This circumstance, alongside with the similar procedure model, could be taken as a fundamental basis of harmonization in the sphere of civil procedure.

Even though all the countries have unique backgrounds, individual rates, and sometimes even different directions of civil procedural legislation evolution, the role of judicial practice remains to be almost similar.

Once again, the foresaid emphasizes the idea that the common procedural model as a basis of civil justice greatly influences the essence of the latter.

[1] National Report by V.V. Komarov.

5. Similarity of the Principles of Court Organization and Court Procedure

The following similarity of the national legal systems relates to the principles of court organization and court procedure.

It is generally accepted that legal principles are fundamental underlying rules. This definition may be explained by significance of the principles to functioning and developing of law. Practically speaking, legal principles, together with the subject and the methods of legal regulation, constitute the autonomy of a legal branch. That is why legal principles can imply and express the essence of a particular legal branch. The above-made conclusion on similarity of the common procedure models enables to explain general similarity of the civil procedure principles in almost all the countries observed.

For the purposes of comparison, it should be mentioned that every country concerned, irrespective to the current structure and composition of system of civil justice principles, has, as a minimum, the following two basic principles of civil justice, namely: the legality principle, supremacy of law, administration of justice only by courts, independence of judges and their subordination only to law, equality of everyone before the law and the court, adversarial procedure, and equality of the parties to the case, access to justice, the principle of the free exercise of material and procedural rights by the parties (hereinafter referred to as the principle of optionality), etc.

There is no doubt that each country has its own, distinctive way of how the principles are expressed in the law. For instance, the Russian Federation, as a federative multicultural state, manifested the principle of the national language of court proceedings which is actualized in a very specific way.

However, in some countries, not all principles are claimed as such. Currently, the reasonable duration of trial is considered as a freestanding principle of Russian civil procedural law which is related to the corresponding enactments of 2010.

In our opinion, it is symptomatic that the most significant principles of civil procedure have similar legislative and judicial implementation in all countries under consideration.

Under the Code of Civil Procedure of the Republic of Moldova, the principle of optionality implies the possibility of trial participants (and, first of all, parties to a case) to dispose and exercise their material and procedural rights and legitimate interests freely, and choose the appropriate relief and methods of defense. Disposing of one's material right and using of counter-claim remedies is not allowed by the court if such acts can infringe the law or one's right and legitimate interests (Art. 27 of the Code of Civil Procedure of the Republic of Moldova).

As states in the Civil Procedural Code of Georgia (Art. 3), the parties start to initiate the trial under the Rules of procedure by filing a claim or a petition. The party to a potential case is free in determination of the subject matter of a dispute and making a decision on filing a claim (petition). The parties may complete the court proceedings by settling an amicable agreement. The plaintiff may waive a claim, while the defendant has the right to admit a claim.

According to the Code of Civil Procedure of the Republic of Belarus, the parties that have a legitimate interest in the outcome of a case may exercise all material and procedural rights freely and with respect to the rights and legitimate interests of the other parties and the state. A court can initiate civil proceedings only upon request of a party which has a

legal interest in the outcome of the case, so the court has a power to decide the case only within the scope of filed demands, however exceptions to this rule may be set forth by the Code of Civil Procedure and other laws (Art. 18 of the Code of Civil Procedure of the Republic of Belarus).

In Slovenia, significance of the optionality principle to the civil procedural law is underlined by the first articles of the Civil Procedure Act (Art. 2 and 3). The court is always bound by the claim and claimant's demands. For this very reason, a plaintiff must formulate his demands correctly and explicitly as early as at the stage of filing a claim. The parties to a trial may also exercise their rights freely, and choose an appropriate relief and a method of defense.

In the legal systems under our investigation, the principle of adversarial procedure is expressed in the same way as mentioned above. This principle, *inter alia,* determines the role of a court in civil proceedings. Pursuant to Art. 10 of the Civil Procedure Code of Ukraine, the parties to the case and other persons involved in litigation have equal rights to submit and examine evidence and prove their credibility to the court. Each party must prove the circumstances which it refers to as the basis of their demands or objections, apart from the exceptions established by the Civil Procedure Code of Ukraine.

A judge shall always secure compliance with the principle of adversarial procedure and base his decision solely upon the reasons discussed in the framework of adversarial proceedings, testimonies and documentation submitted by the parties. A court cannot deliver a decision grounded upon its own reasons and made in virtue of its professional status (Art. 9, § 3 of the Civil Procedural Code of the Azerbaijan Republic).

According to the Civil Procedural Code of Georgia, the parties have equal rights and possibilities for reasoning their demands, objections or discharge of claims, arguments, and proofs introduced by the other party. Each party has a right to self-determination of circumstances that should serve as a basis of their claims and evidences that are to prove these circumstances (Art. 4, § 1).

Adversarial civil procedure is organized in a way that the parties and other persons involved in litigation could have the possibility of formulating, reasoning and proving their positions, choosing the means of defense independently from the court, other authorities, and individuals. It also means the possibility to pass opinion related to any factual and legal matters of a case, and express its position towards the court (Art. 26, § 2 of the Code of Civil Procedure of the Republic of Moldova).

We have to admit that the civil procedural systems of almost every Eurasian country step by step revolve around the principle adversarial procedure which is that determines the fundamental characteristics of civil procedure and procedural roles of the participants.

As an example, the principle adversarial in Kyrgyzstan manifests itself in the following aspects: first, in proving activities of the parties (i.e. submitting evidence, reasoning the case, counter-arguing the position of the other party); second, in determining the circumstances to be proved; third, in free exercising of material rights during the proceedings; fourth, in a specific way of holding a trial organization which is aimed at affording each party an opportunity to turn the court to her own views in the course of judicial debates[1].

In other countries, the principle of adversarial procedure is interpreted in the same way. For instance, under the Civil Procedure Law of Latvia, the parties can exercise their

[1] National Report by A.R. Saliev.

procedural rights by means of controversality. Judicial contest takes place in the form of explanations given by the parties, submission of evidence and petitions or statements addressed to the court, participation in examination of witnesses and experts, in verification and evaluation of other evidence, participation in pleadings, and commission of other procedural actions in accordance with the procedures prescribed by the Law (Sec. 10 of the Civil Procedure Law).

It is very important to lay stress on the fact that the court is assigned to a guiding role in civil procedure of all the countries concerned. The court ensures conditions for effective disposal of their rights and procedural reliefs in order to enable the parties to maintain their case theories.

We described an approach that to a certain degree predetermines the content of many procedural rules which, in turn, explain similarity of the whole procedural institutes in different legal orders.

6. The Similarity of the Evidentiary Rules

The abovementioned ideas go with the institute of proof to the full extent. Without revealing details of this institute description, it should be noted that not only the rules of apportionment of the burdens (which are mainly determined by the adversarial principle), but also possible instruments of proof and the order of representation, examination, and evaluation of evidence are very similar in these countries.

For instance, according to the Civil Procedural Code of the Republic of Slovenia the rules of proof include the following general provisions. Each party should present circumstances of the case and introduce evidence that avouch the referred facts. At the same time the list of evidentiary facts is not exhaustive and comprises documents, testimony of witnesses, experts, and parties as well as examination of material evidence. There is no hierarchy of evidentiary sources; therefore, all types of evidence are equal according to the principle of open evaluation of evidence (Art. 8 of Civil Procedural Code of Slovenia). The requirements for the burden of proof follow from the substantive law. A plaintiff has to indicate and eventually prove the facts that caused the action, while the other party has to present evidence in disproof. However, no special procedure of discovery **is provided in the Code.**

It is obvious that the provisions mentioned above are to some extent very similar to the rules are set forth in the procedural legislation of the majority of the Eurasian countries.

Thus, an equivalent list of evidentiary facts can be found in the Civil Procedural Codes of other countries (Art. 57, § 1 of the Civil Procedural Code of the Russian Federation, Art. 47 of the Civil Procedural Code of the Republic of Armenia, Art. 178 of the Civil Procedural Code of the Republic of Belarus, Art. 57, § 2 of the Civil Procedural Code of the Republic of Tajikistan). The rules on gathering and examining of evidence are approximately same, but some national specificity occurs. For example, Art. 214 of the Civil Procedural Code of the Republic of Belarus provides the possibility to conduct a judicial experiment which can be initiated either upon request of the party in interest or by the court on its own motion and is carried out reconstitution of a certain event and actions that took place in the past and are relevant to the case in point.

Finally, pre-trial securing of evidence is allowed in many countries of the region. Securing of evidence prior to institution of a case is performed by a notary or consular officers

subject to applicable legal requirements (Art. 68, § 2 of the Civil Procedural Code of the Kyrgyz Republic, Art. 76, § 2 of the Civil Procedural Code of the Republic of Kazakhstan, Art. 67, § 2 of the Civil Procedural Code of the Republic of Tajikistan, Chapter XX of the Fundamental Principles of Legislation of the Russian Federation on the Notariat). As indicated in Art. 127, § 2 of the Civil Procedural Code of the Republic of Moldova securing of evidence before initiation of court proceedings is performed by a notary or officials of diplomatic missions in the manner requires by the current legislation. Securing of evidence necessary to be submitted to the foreign authorities is performed by notaries (Art. 234, § 2 of the Civil Procedural Code of the Republic of Belarus, Art. 61, § 2 of the Civil Procedural Code of the Republic of Uzbekistan).

In recent times, the institute of proof has been significantly modified in arbitrary (commercial) procedure of the Russian Federation.

First of all, the Arbitration Procedural Code of the Russian Federation was amended by the Federal law of 2010. According to the amendments, if one party substantiates her demands or objections by facts, and the other one does not litigate the facts directly and her disagreement with them does not follow from any another evidence pleading to the merits of the case, these fact shall be deemed admitted by the other party (Art. 70, § 3.1 of the Arbitrary Procedural Code of the Russian Federation).

Second of all, the arbitral court may admit written and physical evidence, testimonies of the parties and witnesses, expert opinion and professional consultation, audio and video records, other documents and materials in capacity of evidence. Besides, arguments of the parties to the case and other persons involved in litigation can be admitted in evidence via video conference communication (Art. 64, § 2 of the Arbitration Procedural Code of the Russian Federation).

Thirdly, every person involved in the case must disclose evidence substantiating her claims or objections to others before opening of a court session or within a period prescribed by the judge unless otherwise is provided by the Code (Art. 65, § 3 of the Arbitration Procedural Code of the Russian Federation). In case of violation of this rule the court can order the party to pay all court costs irrespective of the result of the case hearing. Consequently, the rule is aimed at implementation of discovery (disclosure) procedure[1].

The institute of proof is one of the lively illustrations of the idea that the countries of the Eurasian region have the common ground of civil legal proceedings. It is indicative that oftentimes the rules applicable in different countries are identical. The reasons are that the Soviet law is a common legal ground and the countries a massive impact on each other in implementing of legislative reforms.

7. Differentiation of Court Procedures and Efforts towards Their Simplification

One of the determinative trends of the civil jurisdiction system development is searching for optimal procedural forms of cases settlement. The contemporary system of civil jurisdiction is developing towards delineation of judicial procedures and elaboration of facilitated

[1] See V.V. Yarkov (ed.), *Kommentarij k Arbitrazhnomu Processual'nomu Kodeksu Rossijskoj Federacii* [Commentary to the Commercial Procedural Code of the Russian Federation], Moscow, Infotropic Media, 2011, p. 234–248. The author of this Chapter is I.V. Reshetnikova.

proceedings for resolving disputes subject to court jurisdiction in order to find the best balance between the result and ways to achieve it. It should be mentioned that specialists are constantly looking for methods to rationalize and optimize the procedural forms of cases consideration that would allow for achieving the purposes of proceedings by simplification of the major components of the trial without diminishing the level of the legal guarantees.

The foregoing defines the approach to solution of the problems related to simplification and acceleration of the procedure, i.e. an expanded and shortened sets of facts, optimal suit of legal circumstances that allow accomplishing the mission of civil proceedings. This problem is not new in the theory and practice of judicial work of all countries.

It may be noted that the approach to differentiation of the court procedures is in line with the worldwide trends. Thus, the judicial reform in England was largely aimed at simplification and acceleration of proceedings and elaboration of specialized proceedings[1]. Similar trends can be found in the Federal Republic of Germany[2] and many other countries[3]. From our point of view, the model for this movement is the Civil Procedure Code of France which includes almost the entire set of necessary procedural tools for comprehensive and all-staged (pre-trial, trial, post-trial) conflict resolution and dispute settlement.

The basic level of court procedures differentiation is reported in all the countries under discussion. For example, the Civil Procedural Code of Ukraine provides for writ proceedings as a standalone civil procedure alongside with action procedures and special procedure. In writ proceedings, after considering the results of the civil case the court renders a writ that is a special form of judicial decision. The Civil Procedural Code of Ukraine also allows for consideration of cases in absentia (default proceedings) as a specific sort of action procedure[4].

The legislation of the Russian Federation foresees the possibility of delivering default judgments and writs in the framework of civil procedure. And in commercial procedure, there is a possibility of considering cases under summary proceedings.

Legal regulation of summary proceedings in the procedural legislation of Georgia has some evident peculiarities. The legislation provides for two categories of cases: 1) adjudication of claims of bills for exchange bills and cheques (Chapter 23 of the Civil Procedural Code of Georgia); 2) consideration of lawsuits for assessed debt recovery (Chapter 24 of the Civil Procedural Code of Georgia).

In the Republic of Armenia, the legal provisions for fast track are set forth. Pursuant to Art. 70 of the Civil Procedural Code of the Republic of Armenia courts apply fast track as follows: 1) in cases with exigent circumstances; 2) if the claim is obviously reasonable; 3) if the claim is obviously unreasonable (frivolous). In addition, the grounds for fast track are, in particular, the situations when: 1) the claim is based on a written agreement; 2) the

[1] See the research on the English judicial reform: E.V. Kudrjavceva, *Grazhdanskoe sudoproizvodstvo Anglii* [Civil Procedure of England], Moscow, Gorodets, 2008, p. 6, 7, 23, etc. See also on the goals of the civil procedure reform in England: Raymond Legeais, op. cit., p. 368.

[2] See P. Gilles, *Sistema grazhdanskogo sudoproizvodstva na Vostoke i Zapade – 2007, a takzhe osnovnye tendencii reformirovanija grazhdanskogo processa i nekotorye razmyshlenija o razreshenii grazhdanskih sporov v budushem* [The System of Civil Procedure in East and West 2007 and the Main Tendencies to Reform of Civil Procedure and Some Ideas about the Settlement of Civil Litigations in the Future], in *Rossiisky ezhegodnik grazdanskogo processa* [Russian Yearbook of Civil and Arbitral Procedure], 2007, No. 6, Saint Petersburg, 2008, p. 513–525.

[3] See overall materials of the conference where stated tendencies are considered in detail: *The Last Tendencies of Development of Civil Procedure Legislation (Materials of International Conference in Honour of Professor Jonas Jerolius)*, in *Russian Yearbook of Civil and Arbitration Procedure*, 2007, No. 6, Saint Petersburg, 2008, p. 502–649.

[4] National Report by V.V. Komarov.

claim is based on the indubitable right with stipulated damages; 3) the alimony claim is filed without demand for paternity establishment; 4) the claim is concerned with employment dispute; 5) the asserted claim is not verified by evidence.

In Slovenia, summary proceedings are meant for claims with amount in controversy not exceeding 2 000 Euro. The possibility of delivering a default judgment is set forth by Art. 318 of the Civil Procedural Code of Slovenia. With regard to certain categories of cases, a writ procedure can be applied[1].

This is obvious that a tendency to implementation of simplified or facilitated proceedings reveals in legislation of various countries in many different ways. In some legal orders, it has been implemented in the least; in others, courts have the possibility of applying a more flexible approach and various forms of judicial proceedings acceleration.

8. Access to Justice and the Mechanism of Public Interest Protection

It is worth mentioning that all legal orders rely on the common and fundamental elements of public interest protection and some basic approaches to the access to justice issue.

The mechanism of public interest law is aimed at creation of equal legal conditions for judicial recourse and protection of interests for all people, compensation of some shortcomings, impossibility, or inefficiency of judicial protection of the rights and legal interests of individuals or groups of such individuals as well as society in whole.

More specifically, the mechanism includes, inter alia, such elements as rendering legal aid, peculiarities of the state duty payment, protection of a person's interests by other persons and organizations, class actions, participation of prosecution authorities in litigation, some peculiarities of jurisdiction and proof, etc.

Access to justice reflects a great impact of the human rights concept, but in a current context it has become a fully independent direction of the justice system development as a strongly pronounced trend of procedural law evolution that has a direct influence on the model of justice in general and in particular. For the Member States of the Council of Europe the obligation to provide access to justice also follows from Art. 6 of the European Convention on Human Rights confirmed the right to fair trial[2].

The multi-aspect nature of the access to justice issue also determines its solution at the legislative level. The entire systems of civil and commercial procedure as well as the civil jurisdiction in general guarantee access to justice. Therefore, improvement of the procedural regulations that govern the access to justice should take place simultaneously with drafting of new procedural laws and amending the ones in force.

[1] National Report by A. Galich.

[2] In the doctrine, the access to justice is the issue under continuative examination. See, e.g.: V.V. Yarkov, *Juridicheskaja pomosh' po sudebnym delam maloimushim grazhdanam* [Legal Aid for Poor People in Litigation], in W. Burnham, I.V. Reshetnikova, V.V. Yarkov, *Sudebnaja reforma: problemy grazhdanskoj jurisdikcii* [Judicial Reform: Problems of Civil Jurisdiction], Yekaterinburg, 1996, p. 104–111; Idem., *Dostupno li grazhdanam nashe pravosudie?* [Is Justice Accessible for Our Citizens?], *Russian Justice,* No. 2 (1999), P. 25, 26; V.M. Sidorenko, *Princip dostupnosti pravosudija i problemy ego realizacii v grazhdanskom i arbitrazhnom processe* [The Principle of Access to Justice and Its Implementation in Civil and Commercial Procedure]: Abstract of PhD thesis, Yekaterinburg, 2002; I.A. Prihod'ko, *Dostupnost' pravosudija v arbitrazhnom i grazhdanskom processe: osnovnye problemy* [Access to Justice in Commercial and Civil Procedure: Key Problems], Saint Petersburg, Publishing House of the Saint Petersburg State University, 2005, P. 79–109, etc.

It should be noted that the problems of public interest protection and access to justice are especially acute in former USSR republics. This is due to the fact that during the Soviet period, for instance, the access to justice matters in their modern understanding did not exist at all. Courts had limited jurisdiction; superior courts and justice agencies exercised strict control over observance of duration of cases consideration. Besides, court costs were low; and due to the soviet concept of justice the court was required to be active in gathering evidence and establishing the truth. At that time dismissal of a case because it was unproved by a plaintiff was inconceivable, since the duties of proofing and passing a lawful and reasoned judgment on a plaintiff's claim were imposed on the court.

After the collapse of the USSR, the legal systems of the post-Soviet countries adjusted themselves ***TO ACCOMPLISHMENT OF THE SOCIAL TASKS EACH*** in their own ways. Nevertheless, the common legal heritage and traditions have marked a deep imprint on the civil justice systems and still remain in the national legislations.

This is especially evident in respect of the role of prosecution authorities in civil procedure. Virtually in all post-Soviet countries they exercise the functions of public interests protection. For example, in Kazakhstan, a prosecutor may file a lawsuit or application seeking protection of the rights, freedoms, and lawful interests of individuals or organizations, and public or state interests. To the extent permitted by the national law, the government agencies and local self-government bodies, organizations or individuals may file an action seeking for protection of the rights, freedoms and lawful interests of other persons at their request and equally for protection of public or state interests. Legal action to defend legitimate interests of legally incapacitated person may be lodged regardless of requests of the person concerned (Art. 56, § 1 of the Civil Procedural Code of the Republic of Kazakhstan).

Analogous legal provisions are embodied in the legislation of Russia, Belarus, Moldova, Uzbekistan, Tajikistan, etc. The possibility of prosecutor's participation in litigation is also foreseen in Slovenia where the legal system imbibed the rules and spirit of the Socialist law least of all the countries under consideration.

Apart from the state duty relief, the most common method to ensure access to justice is enactment of a special law on legal aid. In view of this, granting of legal aid in Slovenia is thoroughly regulated by the special law of 2001.

In Russia, the Federal Law «On Legal Aid in the Russian Federation» was also passed at the end of 2011. On the 2nd of June 2011, the Law «On Free Legal Assistance» was adopted in Ukraine. In those countries where a special law on legal aid is not enacted yet, implementation of the access to justice principle is carried out by prosecutors (for example, in the Republic of Kyrgyzstan) and/or by attorneys at law (in some countries attorney's duty to assist in one form or another to welfare beneficiaries is defined in special laws on advocacy).

If minimum standards of access to justice in this aspect are implemented at least through traditional and, it must be allowed, rather effective remedies, the situation with protection of collective interests is considerably more complex.

Today, the concept of class actions is more or less clearly implemented only in the Russian Federation.

From the 1st of January 2010, the amendments to the Commercial Procedural Code of the Russian Federation that added a special chapter regulating consideration of claims for protection of the rights and legitimate interests of large groups of people went into effect. Discussions within Russian legal science and various government agencies over necessity of using the common law mechanism of class action were holding for many years, finally

class action has received legislative recognition and became a part of the Russian procedural system[1].

At the same time, the post-Soviet systems usually tend to have similar forms of certain categories of class actions (protection of public at large). For example, pursuant to Art. 25, § 9 of the Ukrainian law «On Protection of Consumer Rights» associations of consumers have the right to file actions to courts seeking for recognition of the seller's, manufacturer's, or contractor's acts unlawful in reference to unlimited range of consumers and for suppression of such acts.

Meanwhile, differences among the legal orders in this field have already become more conspicuous, despite many elements that are still is common.

For this reason it makes sense to refer to one of the most evident features of all the legal orders under our investigation, more specifically, to the law enforcement systems.

9. Different approaches to organization of judicial acts enforcement

The enforcement system is an important part of justice that allows putting the results of the entire judicial system activity into life. Comparison of the models of organization and functioning of the systems of civil jurisdiction, including enforcement, in different countries of our planet is extremely important. Today, comparative law researches are crucial not only and not so much for the scientific reasons. One can name many reasons of pragmatic implications in doing such researches which in many respects stem from the economy and need for efficient legal regulation and stimulation of economic life advancement.

It is unlikely that someone should prove the necessity and importance of a real and actual enforcement of judgments. There is no ground for speaking of consistency of the judicial power as well as full and adequate exercise of its authority within the legal system of our country without proper and timely enforcement of judgments. Thus the efficient system of enforcement is important not only for raising the prestige and credibility of the judicial power. The principal result of the system activity is economic in its effect because the mere fact of a strong enforcement system existence is capable of influencing preventively on behaviour of participants of the civil turnover, adjusting economic processes in the society, and promoting lawful behaviour.

Before defining the primary trends in development of the world enforcement systems, it is important to decide on their classification which is possible on the basis of several criteria. For example, Professor Alan Uzelac placed emphasis on the following enforcement systems: A judicial enforcement system, enforcement agencies as parts of the executive power, and a private enforcement system[2].

[1] At the same time, the first publications on class actions in Russian doctrine appeared as long ago as 1995. See: V.V. Yarkov, *Kak zashitit' prava neopredelennogo kruga lic?* [How to Protect the Rights of Public at Large?], *Capital Market,* No. 41 (1995), p. 1–3; Idem., *Novye formy iskovoj zashity v grazhdanskom processe (gruppovye i kosvennye iski)* [New Forms of Protection by Actions in Civil Procedure (Class and Derivative Actions)], *State and Law,* No. 9 (1999), p. 32–40; Idem., *Gruppovoj isk: kratkij kommentarij glavy 28.2 APK RF* [Class Action: A Brief Comment to Article 28.2 of the Commercial Procedure Code of the Russian Federation], *Bulletin of the Supreme Commercial Court of the Russian Federation,* No. 9 (2010), p. 6–25.

[2] A. Uzelac, *The Role Played by the Profession of Bailiffs in the Proper and Efficient Functioning of the Judicial System – An Overview with Special Consideration of the Issues Faced by Countries in Transition*, in Council of Eu-

Professor Burkhard Hess classified enforcement systems by the number of agencies which carry out the given functions on centralized systems and decentralized ones. Hess subdivided enforcement agencies into ones that are focused on enforcement assisted by judicial officers, court-oriented systems, mixed systems, and administrative systems[1].

In our opinion, depending on the nature of communication with courts, the enforcement systems are categorized into ones included within the system of executive or judicial power, and depending on the level of a private-law element they may be divided into state (public), mixed, and non-budgetary (private) systems[2].

Two points are essentially important for comprehension of the judicial officer status: First of all, integration of the judicial officers service into the structure of the judicial or executive power and, second of all, the degree of inclusion of non-budgetary professional organizations authorised in some or other way within the enforcement structure. Integration of the profession of the judicial officers into judiciary establishment reflects the historically developed communication between judicial activity and its ultimate result, i.e. judgement. If an enforcement service acts as a part of the executive body, this lays a special emphasis on its independent and autonomous character and more indirect communication with judiciary.

In Kazakhstan, for example, the state judicial officers are public employees of the Committee for judicial administration at the Supreme Court of the Republic of Kazakhstan. The enforcement system of the Republic of Belarus is characterized by originality due to co-existence of two parallel enforcement systems: The first one under the Supreme Court of Belarus reports to the Ministry of Justice of Belarus, and the other one is subordinate to the Supreme Economic Court of Belarus[3].

In the Soviet times, enforcement had been considered as a part of civil procedure. Guarantees provided for the parties to the case had been largely extended to the enforcement stage. After the reforms in the early 1990s, many experts committed themselves to the idea of an individual and autonomous presence of enforcement or civil enforcement law which holds an independent position in the legal system. Civil enforcement law embraces the spheres of enforcement agencies activity and the rules of enforcement proceedings; to

rope seminar: The Role, Organization, Status and Training of Bailiffs – Strengthening the Enforcement of Court Decisions in Civil and Commercial Cases, Varna, Bulgaria, 19 and 20 September 2002, p. 8.

[1] B. Hess, *Comparative Analysis of the National Reports*, in M. Andenas, B. Hess & P. Oberhammer (eds.), *Enforcement Agency Practice in Europe*, London, British Institute of International and Comparative Law, 2005, p. 31–36; Idem., *Systems of Enforcement*, in C.H. van Ree, A. Uzelac, V.O. Abolonin, V.V. Yarkov (eds.), *Enforcement Proceeding: Traditions and Reforms*, Mocsow, Infotropic Media, 2011, p. 57–62.

[2] More in detail: V.V. Yarkov, S.E. Ustyantsev, *Kontseptsija razvitija sistemy ispolnitel'nogo zakonodatel'stva i sluzhby sudebnykh pristavov Rossijskoj Federatsii (kratkie tezisy*) [Development Concept of the Enforcement Legislation System and the Bailiff Service of the Russian Federation (Short Theses)], *Arbitration and Civil Process*, 2001, No. 8, p. 29–40; V.V. Yarkov, *Kontseptsija razvitija sistemy ispolnitel'nogo zakonodatel'stva i sluzhby sudebnyh pristavov Rossijskoj Federatsii (osnovnye tezisy)* [The Concept of Development of the Enforcement Legislation System and the Bailiff Service of the Russian Federation (Basic Theses)], in *Problems of Protection of the Rights and Legitimate Interests of Citizens and the Organizations: Materials of the International Research and Practice Conference*, Part 1, Sochi, 2002, p. 118–144; Idem., *Nebjudzhetnaja (chastnaja) organizatsija prinuditel'nogo ispolnenija: «za» i «protiv»* [Non-Budgetary (Private) Model: Pro's and Con's], *Vestnik VAS*, 2007, No. 9, 24–43; Idem., *Principaux modeles d'execution forcee: le probleme de choix dans les pays de l'ex-URSS*, *Droit et proctedure. La revue des huissiers de justice*, 2007, No. 5, p. 13–15.

[3] V.V. Yarkov, *Ispolnitelnoe proizvodstvo v gosudarstvah – chlenah Mezhdunarodnogo sojuza sudebnyh ispolnitelej (otdel'nye tendentsii)* [Enforcement Proceeding in the Member States of the International Union of Judicial Officers (Distinct Trends)], *Arbitration and Civil Process*, 2011, No. 7, p. 25–29; No. 8, p. 32–37.

a certain extent, it covers some aspects of international enforcement of judgments. The system of enforcement agencies and the regulatory legislation are modelled on the basis of the same concept[1].

The problems of the Republic of Kyrgyzstan in this sphere are symptomatic. The system of enforcement agencies in the Kyrgyz Republic is comprised of the judicial officers who are public employees and united into divisions in accordance with the administrative-territorial structure of the country. Regional divisions, in their turn, are united into district departments. Centralized control over the district judicial officers is carried out by the Judicial Department at the Supreme Court of the Kyrgyz Republic. Director of the Judicial Department is simultaneously the Chief Judicial Officer of the Kyrgyz Republic. However it is hard to determine the prospects for future development of enforcement proceedings for the moment[2].

Two attempts to pass a new law on enforcement proceedings have been made since the time the current law is in effect in Kyrgyzstan, but for some reasons it did not happen. One can state that the law as now in force is obsolete and fails to fulfil the actual needs of time and society as it basically operates to the advantage of unscrupulous debtors. Thus, the mechanism of search for a debtor's assets is practically inoperative; particular and effective liability asserted against debtors and sanctions for improper enforcement imposed upon judicial officers are not provided; delay of enforcement takes place; outdated and poor material and technical resources of judicial officers also generates a negative impact on their work. The authority of the Judicial Enforcement Agency is insignificant because, inter alia, it has no such serious legal power, physical foundation, and facilities for taking autonomous enforcement actions unsupported by other state agencies (Ministry of the Interior, courts, etc.)[3].

Similar issues of enforcement proceedings are mentioned in the national report on the state of Ukrainian civil procedure: The enforcement system in this country is also far from being efficient due to a variety of external and internal factors. Among them one may indicate such factors as a heavy workload that falls on the state judicial officers, underfunding of the state enforcement service, non-existence of effective mechanisms for bringing the state judicial officers to responsibility for non-enforcement of judgments or bureaucratic hurdles as well as actual impossibility to enforce judicial acts[4].

Kazakhstan is the first member state of the CIS that has undertaken practice-oriented steps towards changing the organizational basis of the enforcement system[5]. Initial ideas of necessity to examine the foreign experiences of enforcement systems functioning on a private basis closely and determine the expediency of their perception in Kazakhstan were set forth by the President of the Republic Kazakhstan N.A. Nazarbayev in the report

[1] V.V. Yarkov, *Ispolnitelnoe proizvodstvo v gosudarstvah – chlenah Mezhdunarodnogo sojuza sudebnyh ispolnitelej (otdel'nye tendentsii)*.

[2] National report by A.R. Saliev.

[3] Ibidem.

[4] National report by V.V. Komarov.

[5] See more in detail: V.V. Yarkov, *Respublika Kazahstan na puti k nebjudzhetnoj (chastnoj) sisteme prinuditelnogo ispolnenija* [The Republic of Kazakhstan on the Way to Non-Budgetary (Private) System of Enforcement], *Vestnik VAS*, 2009, No. 3, p. 138–151; Idem., *Development of the Ideas of Private Enforcement Proceedings in the Countries of the Former USSR (Examples: Kazakhstan and Russia)*, p. 377–400 (in English); *L'évolution des idées de l'exécution libérale dans les pays d'ex-URSS*, p. 401–404 (in French), in Roger Dujardin (ed.), *Liber Amicorum Jacques Isnard*, éditions juridiaues et techniques, Paris, 2009.

at IV Congress of Judges of Kazakhstan in June 2005. In May 2006, a republican non-governmental organization, named «The Union of judicial officials», was set up. The First Republican congress of judicial officials of Kazakhstan that advocated for development of a law on private judicial enforcement agents and the international conference on enforcement proceedings were held in June 2007. In November 2007, the agreement on joining of Kazakhstan as an associate member to the International Union of Judicial Officers was signed by the Chairman of the Supreme Court of the Republic of Kazakhstan K.A. Mami in Paris.

In July 2007, the working group on drafting amendments to a new version of the Law of the Republic of Kazakhstan «On Enforcement Proceedings and Status of Judicial Officers» aimed at introduction of the private judicial officers institute was constituted at the Supreme Court of Kazakhstan and was composed of ten persons. The group was by both, composition and ideas, was international as long as it brought together the experts from Kazakhstan, the International Union of Judicial Officers (especially France and Latvia), and Russia. In late 2007–2008, the finishing touches were put on the proposed law by the experts of the Committee for judicial administration at the Supreme Court of Kazakhstan. Later on, it was finalized as the amended Law of the Republic of Kazakhstan «On Enforcement Proceedings and Status of Judicial Officers»[1].

While working at the draft legislation of the Republic of Kazakhstan on private judicial enforcement, the group was trying to resolve the key issues that reflected the essence of current enforcement proceedings. The experts applied the universal model of non-budgetary (private) enforcement which successfully works in many countries of the world by adjusting it to peculiarities of the legal system of the Republic of Kazakhstan. They also used the Russian experience, in particular, a new edition of the federal law «On Enforcement Proceedings» and the draft Code of Law Enforcement of Russia. In our opinion, such combination of the international experience and consideration of the unique features of the former Soviet states took a desired and satisfactory effect[2].

At the moment, out of the Post-Soviet countries we can therefore name Lithuania and Latvia (since 2003), Estonia (since 2001), and Kazakhstan (since 2011) as ones with non-budgetary (private) judicial enforcement[3]. In other former republics of the USSR enforcement systems remain public (state).

It is important to emphasize that the current situation with enforcement issues that initially were common and similar has changed drastically so that those issues vary around the region and are being settled differently by each country.

10. Implementation of Information Technologies

One of the key directions of civil process development all over the world is implementation of information technologies. It is indicative that the International association of a procedural law paid especial attention to this problem, and it was discussed among others for this reason, during the XI World congress already which was passing from August 23rd until August 28th, 1999 in Vienna, within a theme «The Procedural Law on a Threshold of a New Millennium».

[1] V.V. Yarkov, *Respublika Kazahstan na puti k nebjudzhetnoj (chastnoj) sisteme prinuditelnogo ispolnenija*.

[2] Ibidem.

[3] In Slovenia, non-budgetary enforcement was introduced in 1998.

Within the framework of XIII World congress (San Salvador, 2007) national reports have been presented on both the countries of the common law, and the countries of the civil law, on their basis the synthetic reports have been created and then generalized by the professor Angela Sosa in the form of the summary report about new information technologies in civil legal proceedings.

All this emphasizes a great importance of information technologies implementation into civil legal proceedings all over the world[1].

It is necessary to notice that usage of new technologies can appear in different spheres, such as:

a) Filing documents to the court and notification of process participants by court. For example, whether it is possible to do in electronic form, whether it is compulsory, whether it is the basic or additional way of communication;

b) Exchange of information and documents between the parties in trial: whether the parties are allowed to deliver documents, such as court summonses, to other party in electronic form, and whether it extends on the initial notification about proceeding commencement; whether the parties are allowed to represent documents in electronic form for the discovery procedure, and whether this implies to use more convenient for research data carriers, such as CD-ROM, etc.;

c) Managing the trial and presenting the position in the case. Whether the trial, in particular, may be carried out by phone or by means of video conferencing; whether the parties' counsels are allowed to use computer simulations for representation of evidence and presentations in Power Point program for arguing for their position; whether secretaries of judicial sessions and/or written reports are replaced by official audio records, etc.;

d) Court administration. It is a question, first of all, of «computerization» of courts and system of case prosecution, existence of a summary database, its use in case control systems, etc.;

e) Availability of judicial acts through creating and conducting a database of judicial acts;

f) Reception of information about court activity through an official site.

It is necessary to recognize that at the moment a level of information technologies development is very different in the countries of Eurasia.

For example, since 2010 the use and application of variety of information technologies is provided in Russian commercial process. In such a way, the possibility of filing all service documents in commercial cases in the electronic format via the Internet is implemented. As of today, litigants also have a possibility to participate in court sessions by means of video conferencing. In addition, audio recording of judicial sessions is provided.

Each court of general jurisdiction in Russian Federation (certainly, as well as each commercial court) has an official web-site on the Internet. One can find full materials on court's activities and information on cases and results of their consideration posted on such a web-site.

The influence of information technologies on legal proceedings in Ukraine is exercised in a form of internal and external electronic document flow management, i.e. in creation

[1] See more in detail: K.L Branovitsky, *Informacionnye technologii v grazdanskom processe Germanii (sravnitel-no-pravovoy aspect)* [Information Technologies in Civil Procedure of Germany (Comparative Legal Analysis)], Moscow, Wolters Kluwer, 2010; special issue of *Zakon*, 2011, No. 2.

of a uniform register of judgments, use of evidence in electronic format, and obligatory record of judicial sessions by technical means[1].

The Civil Procedure Code of Kyrgyzstan provides for the possibility of delivering judicial summons via e-mail. This rule, however, is not practically applicable since the implementation mechanism of participants' notification is not spelled out. Filing of official service documents is formalized by law; and the courts do not have their own official web-pages or electronic mail[2]. Such situation is very typical for many post-Soviet countries.

Since 2008, the possibility to hold judicial sessions with the use of video conferencing is regularized in Slovenia. The possibility to file documents to a court in the electronic form is de jure recognized for counsels, but yet this possibility is not practically implemented owing to the absence of subordinate legislation[3].

It appears that the information technologies development will be inevitably implemented in each country of the region in like manner, but obviously in diverse motion. This can be explained not only by the differences in amounts of funding available for courts in each country, but also by various levels of legal consciousness and readiness of consumers of the corresponding «services» for employing them actively. Not a small part to this technical modernization is also played by national factors such as the size of a state's territory which obviously preconditions currency and urgency of implementing the means of video conferencing.

11. Methods of Alternative Dispute Resolution

The need for developing alternative methods of dispute resolution is oftentimes related not only to lack of investments in the system of justice administration, but also with the fact that alternative methods, primarily arbitration, reconciliation, and mediation, are characterized by a variety of positive features.

Among other things, less procedural complexity, focus on conflict resolution and achievement of compromise, engagement of not only professional lawyers, but other persons, such as experts in certain spheres of legal practice, as mediators and arbitrators are advantageous. Implementation of arbitration in many countries of Eurasia is restrained by lack of traditions and also by a number of other factors which most likely should be overcome as the civil turnover evolves.

We consider that it is necessary to focus specifically on mediation as the development trends in legislation on arbitration legal proceedings are common for all countries and are carried out similarly since they often have a general legal framework and sometimes are even founded on reasonable adoption or assimilation of models elaborated in other legal systems.

As fairly said in the national report by professor V.V. Komarov, the regulatory framework of mediation can exist in numerous forms:

- general legislation on mediation (for example, the Law of Macedonia «On mediation», the Law of Bosnia «On mediation»);
- laws on court organization and rules of procedure (for example, art. 309 of the Civil procedural act of Slovenia);

[1] National report by V.V. Komarov.
[2] National report by A.R. Saliev.
[3] National report by A. Galich.

• case law;

• professional codes (Professional code of conduct for lawyers – BORA);

• resolutions or programs of courts (Slovenian court-annexed Ljubljana District Court Meditation Program aimed at reducing the quantity of non-considered cases);

• mediation rules of private foundations (Commercial Arbitration Rules and Mediation Procedures enacted by the American Arbitration Association);

• model laws (UNCITRAL Model Law on International Commercial Conciliation, 2002);

• strategic documents («Green book on Alternative Dispute Resolution in Civil and Commercial Law» adopted by the European Commission in 2002);

• recommendations of international organizations (Recommendation to member States of the Council of Europe Rec (98)1E on family matters adopted by the Committee of ministers on 21.01.1998, Recommendation to member States of the Council of Europe Rec (2001)9 on alternatives to litigation between administrative authorities and private parties adopted by the Committees of ministers on 05.09.2001)[1].

For instance, there is a considerable amount of scientific researches devoted to the topic of conciliation procedures in Russia[2]. Besides, a special Federal law «On the Alternative Procedure of Dispute Settlement with Participation of the Mediator (Mediation Procedure)» has been passed. A significant role in this matter is played by Art. 4, § 5 of The Code of Commercial Procedure, which states that for certain categories of disputes a federal law can establish a complaint procedure or any other pre-judicial procedure of dispute settlement; otherwise this pre-trial procedure may be established by the contract. In this case, the dispute should be submitted to arbitration only after such procedure is passed through.

In Ukraine, the institute of mediation has not been included into the statutory and regulatory framework, even though there are some examples of its practical application in

[1] National report by V.V. Komarov.

[2] See, e.g., E.I. Nosyreva, *Alternativnoe razreshenie grazdansko-pravovyh sporov v SShA* [Alternative Resolution of Civil Law Disputes in the USA], Voronezh, 1999; Idem., *Alternativnoe razreshenie sporov v SShA* [Alternative Dispute Resolution in the USA], Moscow, Gorodets, 2005; E.V. Bruntseva, *Mezhdunarodnyj kommercheskij arbitrazh* [International Commercial Arbitration], Saint Petersburg, 2001; Katarina Grefin fon Shliffen, Bernd Wegmann (chief eds.), *Mediacija v notarial'noj praktike. Al'ternativnye sposoby razreshenija konfliktov. Prakticheskoe posobie* [Mediation in the Notary Practice. Alternative Methods of Conflict Resolution. Practical Guide], Moscow, Wolters Kluwer, 2005; R. Valts (chief ed.), *Tehnika vedenija peregovorov notariusami. Prakticheskoe posobie* [Technics of Negotiating for Notaries. Practical Guide], Moscow, Wolters Kluwer, 2005; A.N. Kuzbagarov, *Primirenie storon po konfliktam chastno-pravovogo haraktera* [Reconciliation of the Parties to the Conflicts of the Private Law Character], Abstract of LLD thesis, Saint-Petersburg, 2006; M.E. Mednikova, *Dosudebnoe uregulirovanie sporov v sfere jekonomicheskoj dejatel'nosti (problemy teorii i praktiki)* [Pre-judicial Dispute Settlement in the Economic Sphere (Problems of Theory and Practice)], Abstract of PhD in Law thesis, Saratov, 2007; J.S. Koljasnikova, *Primiritel'nye procedury v arbitrazhnom processe* [Reconciliation Procedures in Commercial Procedure], Abstract of PhD thesis, Yekaterinburg, 2009; S.K. Zagajnova, *Mediacija v Rossii: byt' ili ne byt'?* [Mediation in Russia: To Be or Not to Be?], *Russian Law*, No. 1, 2009; S.K. Zagajnova, *Perspektivy razvitija mediacii v Rossii* [Prospects for the Mediation Development in Russia], in *Evoljucija rossijskogo prava: Materialy VII Vserossijskoj nauchnoj konferencii* [Evolution of the Russian Law: Materials of VII All-Russian Scientific Conference], Yekaterinburg, 17–18 April 2009, Yekaterinburg, UrGJuA, [USLA], 2009; S.K. Zagajnova, G.S. Sheremetova, V.V. Yarkov, *Ekspertnaja gruppa «Sovremennye napravlenija razvitija sistemy grazhdanskoj jurisdikcii»* [Expert Group «Modern Directions of Development for the System of Civil Jurisdiction»], *Russian Law Magazine*, 2010, No. 5; S.I. Kalashnikova, *Mediacija v sfere grazhdanskoj jurisdikcii* [Mediation in the Sphere of Civil Jurisdiction], Abstract of PhD thesis, Yekaterinburg, 2011.

the form of pilot projects on judicial mediation. In particular, in 2007 a pilot project on implementation of judicial mediation as an alternative to a judicial method of dispute settlement was launched in the framework of the Joint program of the Council of Europe and the European Union «The Transparency and Efficiency of the Judicial System of Ukraine»[1].

Recently, much attention has been devoted to development of alternative methods of dispute resolution in Slovenia. First of all, a number of pilot projects on court-connected mediation have been carried out in some Slovenian courts (based on the models of the USA, England and the Netherlands). Secondly, The Civil Procedure Code of Slovenia has been changed in suck manner as to make preliminary dispute settlement almost obligatory before proceeding to substantive hearings. The court can suspend proceedings for a period of three months if the parties came to the agreement on submitting their case to conciliation procedures[2].

Thirdly, the law on mediation in civil and commercial cases was passed in 2008. And in 2010, the law on alternative means of dispute resolution ordered by the court was enacted. This law is of great value since each Slovene court of the first instance must invite the parties to apply at least one of the forms of alternative dispute resolution. If the party withheld from participation in such processes without due cause, this might have an adverse effect on allocation of judicial expenses[3].

Chapter 17 of the Economic Procedure Code of the Belarus Republic is devoted to court-connected mediation procedure and contains the rules of mediator appointment procedure and his/her expertise, protocol and results of dispute settlement by way of mediation.

However mediation is implemented by far not in all countries. In the absence of mediation some other traditional methods of alternative dispute resolution are used. For example, the Law of Kyrgyzstan «On Aqsaqal Courts» of 2002 and the Law «On Arbitration Courts in the Kyrgyz Republic» of 2002 are effective instead.

It is necessary to point out that yet many Eurasian jurisdictions generally are not oriented to prevention and resolution of conflict, but mainly designed for adjudication. For example, in the majority of civil law countries the focus is maintained on the conflict avoidance control mostly with the help of the notary profession by stimulation of applying to the notary as an official who prevents conflicts at a very early stage and ensures legal propriety of the agreement subject-matter.

It is also necessary to take into account that in a number of countries the drive to settle dispute is determined by very long duration of case consideration, substantial expenses for legal assistance along with counsels' monopoly of in-court representation, and stability and the relative predictability of dispute resolution based on stability of the legislation and judicial practice.

In many Post-Soviet countries legal assistance is not so expensive, and in many cases parties represent themselves in civil proceedings. The legislation is not stable, and the judicial practice has not become predictable due to lack of a comprehensive system of precedents for resolving typical disputes. In such conditions the party to the case always has a temptation to trying to win by turning the situation to her own advantage through the elaborate system of legal tricks.

[1] National report by V.V. Komarov.

[2] National report by A. Galich.

[3] Ibidem.

Therefore, in the same manner as implementation of information technologies, numerous methods of alternative dispute resolution have been introduced nearly in all countries, but in different forms. There is no doubt that adoption or assimilation of experience from other legal systems will be having a positive impact on the uniform and efficient development of mediation, conciliation, and arbitration.

12. Basis for Harmonization

In our modern world, not only goods and services, but also various legal systems compete among each other. As fairly written in the doctrine, they [legal systems] approximate and «cross-pollinate» each other[1]. Apart from that, we observe the competition of various legal systems when the countries create better legal conditions for business and protection of investors' rights, offer more convenient jurisdictional conditions for dispute resolution and enforcement of judgments, and ultimately invite capitals and human resources[2].

Therefore all jurisdictional systems of the Eurasian countries, as opposed to the opaque Soviet system, operate in the context of competition with the legal systems of other countries. As a result, this competition leads to convergence and approximation of the rules and procedures. It is necessary to place emphasis on the fact that these processes are the parts of the world-wide trend in harmonization of procedural legislation in many countries.

The inner structure of procedural law is composed of many components which are relatively autonomous institutes, more specifically, jurisdiction and competence of the court, evidence and review of judicial acts, their mutual recognition and enforcement, and alternative methods of dispute resolution. Within the framework of these institutes, unification and harmonization are possible and may occur with varying rate and dimensions depending on the particular sphere.

In spite of the fact that every national legislation is original to a certain degree and comprises individual means of legal regulation, the organizational foundation of civil procedure of the civil process organization is generally very similar in all Eurasian countries.

At a minimum, there are the following reasons for this:

1. The initially all legal orders are based on common models of civil procedure. As demonstrated above, all countries of the Post-Soviet region are in some extent influenced by the German legal tradition of civil legal procedure mixed with the traditions of so-called «socialist» law in varying degrees.

2. Continuity of some Soviet law institutes. Even though the influence of the former USSR legislation displays variously in all countries under investigation, it undoubtedly had left a significant mark on application and development of a number of procedural institutes.

3. Similar directions of the gradual reforms of procedural legislation in all countries. The reforms are being carried out, inter alia, on the basis of adoption of experience from

[1] In the Russian doctrine, a number of the Russian specialists have paid attention to this circumstance. See, e.g., I.V. Reshetnikova, *Dokazatel'stvennoe pravo SShA i Anglii* [Law of Evidence in the USA and England], Yekaterinburg, 1997; E.V. Kudryavtseva, *Grazhdanskoe sudoproizvodstvo Anglii* [Civil Legal Proceedings in England], Moscow, Gorodets, 2008. See Marcel Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne*.

[2] See more in detail: V.V. Yarkov, *Zash'ita prav investorov v uslovijah konkurencii pravovyh sistem (otdel'nye voprosy)* [Protection of Investors' Rights in the Conditions of the Legal Systems Competition (Individual Questions)], in *Sudebnaja zashita prav investorov: Sbornik nauchnyh trudov* [Judicial Protection of the Investors' Rights. Collection of scientific articles], Saint-Petersburg, 2010, P. 39–59.

the neighboring countries as well as aspiration to follow the world-wide trends in civil procedure development.

Consequently, the Eurasian countries currently have every reason for a general harmonization of the rules of procedure. Some examples of such readiness for harmonization were represented above.

From our point of view, there are also some obstacles to harmonization of law in the region. In our opinion, these obstacles are the following: First of all, different rates of the reforms implementation has led to a serious disorder in a current state of many procedural institutes, and, second of all, various geopolitical positions and stages of involvement into the international economic turnover affect both, law as a whole and civil process in particular. These differences predetermine the variety of problems and corresponding ways of their solution.

Nevertheless, taking all the aforesaid into consideration we can say with assurance that in spite of the different rates and directions of procedural law development in the Eurasian countries, mostly in the countries of the Post-Soviet region, the national legal orders still have much in common. Harmonization of the national legislation offers a number of preconditions for a relatively coordinated and consistent development of civil legal procedure in the countries of Eurasia.

We consider that not a mere presence of the common procedural model and legal traditions in the countries under consideration, but also economic factors will be playing a significant role in the further harmonization of procedural rules. The latter factors predetermine competition of the legal systems in the region, which frequently leads to a rational and coordinated development of law.

Azamat Saliev[1]

KYRGYZSTAN NATIONAL REPORT:

Answers to the General reporter questions

1. The model of civil process

1.1. In your opinion, which model of civil process is more prevalent in your country: the common or civil law?

Answer: Continental law.

1.2. Can you point out a country, which had the greatest influence on the concept of process in your country (Germany, Austria, France, England, United States, other)?

Answer: Since the middle of the last decade of the twentieth century the reform of the civil procedure law, focused on the German legislation, the experience of Eastern European countries laws of France and the United States, certainly, as a result of historical factors have drawn great influence to the reform of procedural legislation of the Russian Federation, which had the greatest influence on the legislation of Kyrgyzstan. The experience of other CIS countries has also been useful for us.

[1] Professor of Kyrgyz-Russian Slavic University (Kyrgyzstan).

2. Sources of civil procedural law

2.1. Which act is a source of civil procedural law in your country?

Answer: In Kyrgyzstan the sources of civil procedural law are normative acts (laws and regulations, as well as ratified international treaties and conventions).

2.2. Does your country have the codification procedure?

Answer: In Kyrgyzstan there is the code of civil procedure, adopted in 1999.

2.3. Which special acts contain large amounts of procedural rules?

Answer: The Constitution of the Kyrgyz Republic defines the system of courts and justice in the Kyrgyz Republic. It does not contain norms that could be called directly by the process, but the Constitution contains certain basic principles on which a system of civil proceedings is build: the principle of justice just by the courts, equality before the law and Court, civil litigation, etc. The law of the Kyrgyz Republic on the «state duty» regulates the levying of admission, pays a State tax return too, and subjects assessed duties and other matters related to the Institute of Public Duties in a suit at law. In this part of the rules concerning State fee are contained in the code of civil procedure.

Law of Kyrgyz Republic «on enforcement proceedings and the status of the bailiffs in the Kyrgyz Republic» governs the interaction of enforcement proceedings with the enforcement authorities.

The Civil Code of the Kyrgyz Republic lays down the rules of substantive law, which is intertwined with the provisions of the code of civil procedure, in particular, the rule determines the category of «place of residence of a natural person, the location of the entity, recognition of incapable citizens, citizens' capacity restriction, limitation», etc.

Two laws regulate conservation and liquidation of legal entities including by the courts. Thus, within the laws of the Kyrgyz Republic «On conservation, the liquidation and bankruptcy of banks» contains the rules of court procedure with regard to financial and credit institutions. The laws «on bankruptcy (insolvency)» contains both material and procedural rules, setting out grounds for recognition of debtor (legal person of any organizational and legal forms and individual entrepreneurs) bankrupt (insolvent), regulates the conditions and measures for the prevention of insolvency (bankruptcy), the terms and conditions of bankruptcy procedures or other relations arising in the debtor's inability to satisfy creditor claims in full and (or) to fulfill the obligation to pay obligatory payments.

The Labor Law Code of the Kyrgyz Republic also contains procedural rules relating to jurisdiction, for example, labor disputes.

In the law of the Kyrgyz Republic «on the Prosecutor's Office» provides grounds for participation of Prosecutor in a suits, mainly those norms duplicate articles of the Civil Procedural Code.

Law of Kyrgyz Republic «on arbitration courts in the Kyrgyz Republic» defines the order of formation of extrajudicial authorities (arbitration courts), as well as regulates their activities to resolve disputes, including on the delimitation of competence between them and the State courts.

2.4. What is the role of practice?

Answer: The system of civil procedure of Kyrgyzstan refers to the continental system, but it should be borne in mind that a great influence on the development of procedural legislation has had legislation and practice of the Soviet Union. Thus, in the Soviet Union a significant enforcement role played the plenum of the Supreme Court of the USSR and

Allied republics. This tradition is also reflected up to today. Thus, the Constitution (para. 2, art. 96) establishes that the plenum of the Supreme Court of Justice provides clarification in matters of judicial practice. The absence of the phrase in the law are binding on lower courts «or close to the meaning of this phrase reservations does not mean that the interpretation of norms on the basis of generalization of jurisprudence is not a guide to vessels of the lower courts and the Supreme Court». Therefore, Kyrgyzstan has a tradition that a superior hierarchical ladder court determines the direction of development of law execution. This is evident in the judicial interpretation of the most complex and often applied in matters of law ambiguously defined legal environment.

2.5. Does the customs influence on civil procedural law?

Answer: A very good example of the impact of custom on civil procedural law of the Kyrgyz Republic was the adoption, in 2002, «the law on courts of elders». It is created on a voluntary basis and on the basis of eligibility and public authorities, whose responsibilities include consideration and possible approval by local courts on civil cases in the manner prescribed by the civil procedure legislation, as well as on the application of the citizens themselves (with the consent of the parties) to resolve the property and family disputes, with a view to achieve reconciliation. Courts of aksakals (elders) are generated in the settlements of the 25th inhabitants – one court of elders. Decisions taken by courts of elders within the limits of their competence are not subject to appeal in the courts. As a rule, this body has the authority of the provincial part of the country.

2.6. What are the international acts in the sphere of civil process? How big is their influence on civil procedural law and law enforcement practices?

Answer: The Hague Convention on civil procedure (1954). Hague Convention abolishing the requirement of Legalisation for foreign public documents from October 5, 1961. Convention on legal assistance and legal relations in civil, family and criminal matters (States parties to CIS) from October 7, 2002. Convention on the settlement of investment disputes between States and nationals of other States (Washington, 1966). The UN Convention on the recognition and enforcement of foreign arbitral awards (New York, June 10, 1958).

This is not a complete list, but contains the most frequently used in the jurisprudence of international acts. Their influence not so often applicable in daily practice. Therefore, their impact on the internal regulatory framework is not so great. Most of the other of applicable legal act of an international character is the «Convention for the countries of the CIS»; this is because of historically close relations with the CIS countries.

Also it should be borne in mind that, unlike many countries, in the Kyrgyz Republic, international treaties were not being in a privileged position vis-à-vis domestic legislation. Thus, the Constitution states that international treaties are part of the legal system of the Kyrgyz Republic and the only international treaties and other instruments relating to human rights were of great force before other types of regulations.

3. The judicial organization and jurisdiction

3.1. Does your country have a variety of judicial bodies for the consideration of civil and economic disputes? Whether for civil or arbitration/household process different procedural legislation?

Answer: The system of civil courts and economic courts in the Kyrgyz Republic is integrated into the unified judicial system. Prior to 2003, in the Kyrgyz Republic was the

judicial system in which the arbitrazh tribunals (courts, dealing with economic disputes) were an offshoot of the judiciary in line with the Constitutional Court and courts of general jurisdiction.

Currently, economic category of disputes dealt with in the first instance – rayon courts. These courts formed to deal with economic disputes and disputes arising from administrative legal relations. Inter-district courts separate from conventional district courts, but are on a par with them. In each area created a «mežrajonnomu» Court. In the second instance within the county courts, there are three panels reviewing civil cases, criminal cases, and the last reviewing economic disputes and disputes arising from administrative legal relations. The same principle of the separation was retained in the Supreme Court of the Kyrgyz Republic. Thus, only the first instance courts dealing with economic disputes structurally separated from courts of general jurisdiction dealing with civil and criminal cases.

Integration of Arbitration courts and courts of civil jurisdiction in a judicial system has also been united under a single code of civil procedural rules deal with civil and economic cases. For example, the CPC contains a special section on the order of consideration for the Economic Affairs (section VI). The section reflects the specifics of the dispute, because the General rules of CPC, as a rule, do not sufficiently reflect to the specificity of the consideration of economic disputes.

3.2. Are there special administrative, financial and other courts of public law with its special procedural law? Does your country have specialized courts for dealing with disputes involving intellectual property?

Answer: As noted in the previous response, system of the courts of the Kyrgyz Republic, considering economic and civil affairs is integrated into a single system of courts within the framework of the local courts (district, municipal, and inter-district – first instance court of the city and oblast, Bishkek – courts of second instance) and the Supreme Court of the Kyrgyz Republic. In the functional responsibilities of inter-district courts adjudicate Economic Affairs (economic disputes) and administrative cases (i.e., disputes arising between unequal relationships, for example, the body of local self-government and citizen, the Pension Fund and a pensioner etc.). Thus, the consideration of Administrative Affairs is divided in jurisdiction between the courts in the first instance of the judicial system of the Kyrgyz Republic.

Other specialized courts in the Kyrgyz Republic include the courts dealing with disputes involving intellectual property.

3.3. What are the basic principles of Justice in civil procedural law in your country?

Answer: The civil process in Kyrgyzstan is based on the basic principles of the civil process like in the vast majority of countries in the world, such principles as adversarial process, non-positive equality of the parties, transparency... Currently proposed changes to the code of civil procedure are also based on these principles and aimed to strengthening the role and effect on competition in the civil process, the increasing decline in control of the Court for administrative and evidentiary actions by stakeholders in the process.

3.4. What is the role of the Court in the process?

Answer: The Court in civil procedure has a leadership role; it is in aggregate organizational measures provided by the Court for the normal flow of process and compliance with the rules of procedure, the right of parties to civil proceedings. At the same time, the Court may affect the progress of the trial proceedings, by helping parties to identify the subject of proof in the event that the parties erroneously identify the item, assists the parties in seek-

ing and obtaining evidence. In the Kyrgyz Republic cannot be said that civil proceedings are fully competitive, since the Court was still granted significant authority to determine the fate of the process. For example, the Court shall not refuse recognition of the claim, suit, the conclusion of a settlement agreement, if this runs counter to the interests of persons not participating in a suit. At the same time, the Court had no authority to conduct process from a position of mediator. The Court in the Kyrgyz Republic is engaged in the administration of Justice, in the proper sense of this expression.

3.5. What forms is adversarial?

Answer: This principle together with the principle of effect is one of the main in procedural legislation and in a suit at law of the Kyrgyz Republic. Adversarial system is, firstly, the evidence of the participants in the process, the presentation of evidence, saying their own judgments about their position, presenting counter-arguments refuting the position of the opposite side, second, identifying subject to proof of the facts and evidence, thirdly, in the free disposition of material rights in legal proceedings, fourthly, the process is structured so that the parties could dispute in discussions and conduct during the trial to try to convince the Court that in his own position.

4. Proof and evidence

4.1. Who is on the right of your country is responsible for presenting the actual data (the party bearing the burden of proof, the Court, or other entities)?

Answer: As a general rule, the burden of proof lies on the parties that are linked to those or other facts that must be supported by appropriate evidence. Thus, the parties bear the risk of losing the process in the case of no evidence. At the same time, the Court is obliged to assist in obtaining evidence through public authorities and from the opposite side the receiving host evidence.

Witnesses do not have the right to refuse to testify and warned on criminal liability, including for perjury. This rule does not apply to witnesses or partially exempted under the law of evidence (CCP, art. 73). Expert warned about criminal liability for making a false conclusion. The administrative responsibility of the person, not involved in the process in which the circumstances of the case there is evidence relating to the case (para. 3, art. 61 ZPO).

4.2. What evidence provides for the right of your country?

Answer: The code of civil procedure provides the following types of evidence: explanations of the parties and third persons, witness statements, both written and physical evidence, expert opinion, audio and video recording.

4.3. Is there a certain hierarchy of evidence?

Answer: Legislation does not provide a hierarchy or ranking of evidences on the extent of their importance, on the contrary, art. CPC 71 stipulates that no evidence has predetermined position for the Court. While it may be noted that sometimes the legislator is on the way, when a certain fact can be established only if a certain type of evidence, for example, ownership or other proprietary right to property under civil law is determined by the record as State Register body.

We can also point out that the courts in practice more frequently and increasingly rely on written evidence than testimony. In this sense, the explanations of the parties and third persons are often used as information disclosing the essence of the dispute, rather than as a means of proof when resolving a dispute.

4.4. Free whether courts in assessing the evidence?

Answer: In principle, the courts are not burdened with additional duty in evaluating the evidence in addition to internal beliefs, respect for the law and the need to correct factual circumstances of the case.

5. Acceleration of proceedings

5.1. Does your country have ways to expedite judicial procedures (court order, simplified process, etc.)?

Answer: According to the legislation of the Kyrgyz Republic provisions for separate civil proceedings ordered process. This process is directed at the quick passing of the judgments on certain categories of cases under the simplified procedure.

5.2. Whether they are effective in practice?

Answer: Unfortunately, about the effectiveness of ordered process is not possible to say something concrete, because we do not have statistics on this type of process.

I can say only my subjective opinion that this kind of procedure should be improved. In practice, the situation where the courts cancel this writs on formal grounds.

6. Revision of the System of judicial acts

6.1. What is the system of judicial review of acts in your country, what instances it is?

Answer: The system of judicial review of acts of the Kyrgyz Republic consists of two levels. After a trial at first instance from the persons you have 30 days to appeal the Court decision on appeal (county courts and the Court of the city of Bishkek). The Appeals Court has on its main features as the full appeal.

If you skip 30-day period, the persons concerned, it is still possible to appeal in cassation in the same court, which considers the case on appeal. Time limit for appeal is equal to 6-months after the entry into force of the decision in force, i.e. after the expiry of 30 days from the date of the judgment in final form.

Cassation is characterized by the absence of an opportunity to establish new facts on the case, the lack of submission of new evidence and the law of the Court of cassation instance to refer the case to the Court of first instance. It should be noted that the 6-month period may be «artificially» extended by unscrupulous persons. Thus, the term for appeal against court acts in the exercise of oversight (this is the third court and second instance in the system of judicial review of acts) equals one year after the entry into force of the Court decision becomes enforceable.

The reviewing authority has extensive powers in the revision of the judicial acts and can check not only the correct application of the rule of law, but also the correct determination of the actual circumstances of the case.

Thus, the reviewing authority cannot revise acts of court, not the subject of review by the Court of second instance (appeal and cassation).

6.2. How the revision affects the timing of the trial?

Answer: The timing of any revision of judicial acts not such long (Court of second instance judicial act of CPC should be reviewed within a period not exceeding one month, the Court of supervisory instance-in 2 months). Deadlines for appeals against acts of the Court in the Kyrgyz Republic are stretched and not conducive to the effective protection

of the rights of the persons concerned. As mentioned already in the previous answer, in the second instance, there are two mutually exclusive of each other, the difference in treatment which depends on the timing of his complaint. If the complaint is made within 30 days from the date of the judgment, it would be an appeal, on the expiry of this period, but before the expiration of 6 months by cassation (this term can stretch up to one year).

The deadline for the consideration of the appeal and cassation complaints (filing) is one month. But this term has now become rather a recommendation rather than a mandatory requirement that judges can commit penalties.

In supervisory instance as not everything is in order with the timetable revision of judicial acts.

A cursory review of the timing of revision of judicial acts, said that the civil process in terms of speed of completion of the dispute between the parties is not as effective as it could be. Therefore, more often than not, the process initiated in the Court of first instance and the Court of supervisory instance, lasts an average of about 1.5–2 years.

The only exception is for disputes relating to the holding of elections during the election campaign. Firstly, they have short treatment to the Court of first instance, as the consideration of disputes in the first instance; secondly, the ACP appeal court on such matters can only be supervisory instance during the 10 days since the proclamation of the decisions by the Court of first instance.

7. Execution proceedings

7.1. Enforcement is governed by your country's specific laws?

Response: Since 2002, as subsequently amended and supplemented by Act of the Kyrgyz Republic «on enforcement proceedings and relating to the status of bailiffs in the Kyrgyz Republic».

7.2. How is the system of enforcement organized?

Enforcement system consists of several stages:

1. Initiation of enforcement proceedings. It begins with the presentation to the Enforcement Office document or body making the Enforcement order and makes the document instituting the Enforcement process.

2. The next stage, the bailiff powers appear on the application of the set of measures aimed at real execution Enforcement document. If necessary the following measures aimed at ensuring the enforcement of Enforcement documents: the seizures of property, prohibition orders, usage of the assets, the seizure of documents, etc.

3. Implementing actions aimed at the full, timely and effective response to the enforcement documentation. They begin with proposals for voluntary performance of the enforcements by the debtor in given term (no more than 10 days). In case of failure, within specified time limits, the Court will proceed to enforcement, accompanied by the imposition of property sanctions (administrative fee) to a debtor in timely and voluntarily not accomplishing requirements. The size of the collection – 10% for performing actual amounts recovered or the cost of enforcement of the property.

Enforcement proceedings as a general rule should be completed within 2 months from the date of the initiation of enforcement proceedings.

System of enforcement bodies of the Kyrgyz Republic consists of bailiffs, public service, which merged into units depending on the regional division of the country. Area offices into regional office. Centralized management of the regional structures of bailiffs is the

Department of courts under the Supreme Court of the Kyrgyz Republic. The Director of the judicial Department is both a principal judicial Director of the Kyrgyz Republic.

In the law on the Supreme Court of the Kyrgyz Republic and local courts, «pointed out that judges (courts) control the execution of their acts (para. 2, art. 35), but no such monitoring mechanism exists, so this rule is declarative, while the judicial Department is organizationally subordinate to the Supreme Court of the Kyrgyz Republic.

7.3. What are the key features of the status of the bailiff?

Answer: The bailiff is an officer in public service. Judicial executor can be the citizens of the Kyrgyz Republic who have attained the age of 25, higher juridical education. Bailiffs are appointed and dismissed by the Director of The Department.

Organizational and logistical support to the activities of bailiffs is financed from the Republican budget.

For misconduct, failure or improper performance of their duties bailiffs are liable in the manner prescribed by the legislation of the Kyrgyz Republic (the disciplinary or criminal liability).

The bailiffs' actions may be appealed to a higher judicial executor or in court.

The Court has the right to: make an order; collect the necessary information, explanations and help on issues arising when an enforcement action; implement in organizations monitoring enforcement documents and maintaining financial records; force open premises and storage facilities and to conduct examinations; Enter the premises and the storage occupied by or belonging to the debtor; take measures to find a property; seek the assistance of the staff of internal affairs bodies (because the enforcement authorities in Kyrgyzstan is not a structure has the right to apply special means (weapons, means of self-defence, etc.), or in special units in its structure to ensure the proper conduct in the course of enforcement proceedings), etc.

7.4. What are the main trends in the development of Enforcement process?

Answer: Currently, you cannot define the development prospects of Enforcement process. Twice during the existence of the current law attempts have been made to adopt a new law on enforcement process, but for various reasons, this does not happen. It can be stated that the law in its current version obsolete and does not meet modern demands of time and society. We can say that it operates in favor of unscrupulous debtors.

7.5. An effective system of enforcement?

Answer: Part of the answer to this question can be found in the previous question.

Unfortunately, is too small the credibility of the Bailiffs Service, including the fact that they do not have the legal and material base for independent work, without regard to other bodies (Ministry of Internal Affairs, Court, etc.) in the course of enforcement proceedings.

8. Proceedings on cases involving foreigners

8.1. Does your country have Resolved international competence for other rules than territorial?

Answer: As a general rule, courts of the Kyrgyz Republic consider civil cases with the participation of foreign persons, if the defendant is a citizen of the place of residence on the territory of the Kyrgyz Republic the defendant or a legal person located in the Kyrgyz Republic. There are also other cases of optional and exclusive competence to settle disputes by the courts in Kyrgyzstan. However, not all disputes involving foreign individuals may be subject to review in the Kyrgyz Republic. Rules for handling such disputes are the same as for national actors of the Kyrgyz Republic.

8.2. Does your country have different procedural status of foreign persons from national what they were?

Answer: For foreign persons procedural law of the Kyrgyz Republic is the national system of civil procedural legal capacity.

8.3. What are the conditions for the participation of foreign persons in the process?

Answer: A foreign physical person should provide duly certified translation of identity documents. The same applies to the legal persons, they must submit the appropriate registration documents in their own country from the official authorities of the country, translated into the language of the proceedings and notarized in the Kyrgyz Republic. If a participant in the process does not speak the language of the proceedings, he is provided by a translator, whose services are paid by the party to the proceedings.

8.4. How are notification and exchange of legal documents?

Answer: Courts of the Kyrgyz Republic are transmitted to them by the orders of foreign ships on the implementation of particular procedural actions (service of notices and other documents, pleadings, testimony of witnesses, expert opinions, on-site inspection, etc.). Exchange of procedural and other documents required in legal proceedings under The Hague Convention on civil procedure of 1954, Minsk (1993) and Chisinau (2002) conventions on legal assistance in civil, family and criminal matters, as well as bilateral treaties of the Kyrgyz Republic on legal assistance.

Letters rogatory are sent and received through the judicial Department of the Supreme Court of the Kyrgyz Republic. Letters rogatory to foreign court directly to the Court of the Kyrgyz Republic shall not be accepted and should be returned.

8.5. Which authorities are responsible for your country for the receipt and transmission of letters rogatory?

Answer: See the answer to the previous question.

8.6. Under what general conditions provides for the recognition and enforcement of foreign judgments, decisions of arbitral tribunals?

Answer: Decisions of foreign courts, arbitral tribunals are recognized and enforced in the Kyrgyz Republic, if that provided for by laws or international treaties of the Kyrgyz Republic, or on the basis of reciprocity. The solution can be brought to the enforcement within three years from the date of entry into the force (CPC, art. 380).

Requirements for processing applications for recognition of a foreign court are the same as for normal statement of claim. Additionally there are specified by those documents which are provided by CPC and international treaties. The application is considered within one month in the normal course with compulsory informing of interested persons. Their failure is not an obstacle to the consideration of the application. The Court does not have the right to review a decision of a foreign court on the merits.

9. The legal profession

9.1. What could you point out trends in the development of main legal careers in your country (judges, lawyers, bailiffs and notaries)? For example, trends in the appointment, establishment of SROs, specialization?

Answer: For the post of judge in the Kyrgyz Republic may claim citizens of the Kyrgyz Republic who have attained 30 years old and of experience in the legal profession, not less than 5 years. Pretenders' examination (in the form of testing) and enrolling to study as

candidates for judgeships. In the event of a vacancy the judge, the applicant appears to be the Council on the selection of judges to the President of the Kyrgyz Republic.

For the post of judge of the Supreme Court of the Kyrgyz Republic, citizens of the Kyrgyz Republic may claim no less than 10 years have served as judges of the Kyrgyz Republic. They submit their statements in the Council on the selection of judges, who recommends them to the President of the Kyrgyz Republic. The President may submit them for approval to the Parliament of the Kyrgyz Republic.

Judge headed the Congress delegates all judges of the Kyrgyz Republic. The Congress elected body of judicial self-management – the Council of judges. The main powers of the Council of judges shall be an annual calculation of the budget of courts, represent the interests of judges in the relationship with other bodies, disciplinary proceedings against judges, pending recommendations to the release from Office of judges.

The Legal Profession. Advocacy is a licensed activity. Notified body for license applicants to engage in advocacy is the Ministry of Justice. The Ministry of Justice created the qualification Commission. For exams that allows persons with higher legal education and experience of legal work for at least one year get the licenses.

Lawyers have the right to form professional associations. Professional associations uniting all lawyers in the Republic.

The State guarantees the provision of free legal assistance (provision of a lawyer at State expense) only in criminal cases.

The most popular legal profession in the country, a judge, lawyer, internal law council for commercial organizations.

10. The public interest

10.1. Does your country's legal aid system for poor persons? If so, what it is and what law governed?

Answer: At this point in the Kyrgyz Republic there is no legal framework for legal aid represented among persons at the same time, there are public organizations providing assistance to certain categories of persons including the poor. Funding for such organizations is foreign or national human rights centers.

10.2. How does your country protected by the public interest (including conditions of participation of the Prosecutor, government organizations, and individuals in the process of the protection of foreign interests)?

Answer: In the Kyrgyz Republic the broadest powers to protect the rights of the individual and society granted to the Prosecutor's Office. This permission is established by law on the Prosecutor's Office. The Prosecutor is obliged to represent the interests of poor, illiterate, the elderly and other socially vulnerable persons, including in courts.

State bodies and local self-government bodies have the right to apply to the Court in defence of the rights and lawful interests of individuals, if it is in their departmental authority. For example, the agency on the family and children affairs has the right to apply to the courts for protection of the rights of minors (para. 3, art. 78 FC).

Citizens in the protection of the rights of other persons have the right to act as representatives, i.e., in a suit at law there is no legal monopoly on conducting the process on behalf of subjective rights have been infringed. For the submission of individual rights and legitimate interests of another person, including legal, enough processing power of Attorney,

between individuals is notarially certified power of Attorney, if the trustee is a legal person, the power of attorney with the seal of this organization, signed by an authorized person.

Also without power of attorney can represent the interests of consumer associations in court (associations, unions), with the protection of the rights concerned.

10.3. Are there any ways to protect the collective interests of the (mass, class actions and other)?

Answer: individual articles or the law on the protection of collective interests (class actions) is not provided for in the legislation of the Kyrgyz Republic.

11. Information technology

11.1. What forms has effects of information technology in the judicial process in your country?

Answer: The code of civil procedure provides for the possibility of judicial notices via email. While this rule has no effect on the practice, because the mechanism for implementing the alarm procedure doesn't regulated yet.

11.2. In particular, whether it is mandatory to maintain audio recordings and/or video court sessions?

Answer: It is not compulsory. Rule on maintenance of audio dispositional, the Court may not prohibit transactions audio of open civil process.

11.3. Can I use videoconferencing?

Answer: There is no such Law.

11.4. Can I use the evidence in electronic form?

Answer: The code of civil procedure does not contain an explicit prohibition of the use of such evidence, so participants have increasingly resorted to such evidence.

11.5. Is it possible to filing with the Court in electronic form?

Answer: The official Feed of procedural documents is not possible. The courts have no official web pages, e-mail. But this does not apply to evidence in civil proceedings (response regarding evidence in electronic form look in previous answer).

11.6. Is it possible to notice of persons involved in a case in electronic form?

Answer: The answer is in the question 11.1. and 11.5.

12. Alternative forms of dispute resolution

12.1. What are the main sources of legal regulation?

Answer: Act of 2002 «on the courts of aksakals» and the law of the KR from 2002 «on arbitration courts in the Kyrgyz Republic».

12.2. What importance is given to arbitral tribunals and arbitration cases in the practice of your country?

Answer: Recently, a growing number of applicants in arbitration courts of persons interested in resolving the dispute. In accordance with CPC decision taken by the arbitral tribunal may be reviewed by the State courts. Owing to the heavy workload of State courts, the transfer of part of the dispute on contract in arbitration courts creates favorable conditions for the allocation of disputes among the various bodies. Currently, there are up to ten of the arbitration courts, among them the most famous is the International Arbitration Court at the Chamber of Commerce. There are also arbitration courts specializing in specific areas of business.

12.3. How often do you turn to arbitral tribunals and arbitration cases?

Answer: The concrete figures in arbitration courts and ratio figures by year I won't be able to provide. However, the fact remains that the number of cases considered in arbitration courts increases every year in relation to previous years. This is supported by several circumstances. Firstly, the lack of State courts. Secondly, the duration of the processing of cases, often unreasonable objective circumstances dragging out the process in State courts.

12.4. Does your country is allowed to use mediation and other forms of conciliation procedures at the pre-trial/trial phase?

Answer: Conciliation procedures at the legislative level, in a suit at law.

12.5. As regulated conduct conciliation procedures?

Answer: The labor law provides for conciliation procedures for the settlement of collective labor disputes and conciliation by the Commission or a mediator. None of the parties to a collective labor dispute shall be entitled to refuse to participate in the conciliation procedure. Representatives of the parties and the Conciliation Commission must use all the possibilities for resolving collective labor disputes (art. 431 LC).

12.6. What measures are foreseen for use conciliation procedures (promotion, incentives, etc.)?

Answer: In the context of labor relations provides for disciplinary or administrative liability of the employer, his representative refusing to receive claims of workers and to participate in conciliation. Representatives of employers and workers, organizations responsible for failure to comply with obligations under the agreement reached in the conciliation procedure, bear administrative liability pursuant to the procedure provided for in the legislation on administrative offences (arts. 443 LC).

12.7. How often do you go to mediation?

Answer: This information is, unfortunately, not available.

13. It is planned to be currently held in your country with respect to the reform of the civil procedure legislation? What part of the civil procedure law exists in your opinion in your country with respect to the initial need for reform?

Answer: Today a draft law amending and supplementing the code of civil procedure of the Kyrgyz Republic are on the hearings, it supplements certain provisions of the code, make adjustments in the regulations of CPC in the light of the current practices and trends to improve procedures for addressing and resolving civil and economic cases.

The most vital areas to reform the CPC at this period will be enacted. But we would like to see improved not only the procedures relating to civil procedure law, but also the accompanying regulatory framework, the selection of judges, improvement of their skills, improving the procedures for bringing them to justice, etc. as in respect of the civil procedure law it is «Achilles heel», insufficient evidence of process equipment of vessels in modern communications, subject to progressive restructuring system of revision of judicial acts, and of course, a matter of great concern to the system of forced execution of court' acts because of the backwardness of this system from today's reality.

14. As far as possible, please note the cultural characteristics of your country, which, in your opinion, affected the civil procedural law in your country, the largest and/or most striking and specific features of the civil procedure law of your country.

Answer: You cannot say that national peculiarities are somehow influenced by the civil procedure law, if affected, this influence is slight. Rather, Kyrgyzstan is in the same period, which develops the post-Soviet Republic and as far as Russia. Because of the historical background so far, we are in the same cultural, linguistic and mental space, therefore,

influence or modern developments of legal space of the CIS and all other world trends in the development of the law, also applies to Kyrgyzstan.

The most striking element in CPC, I believe merging under the arches of one of the rules relating to the examination and resolution of civil and economic cases.

Positive practical side process is that parties often dictate the development process, but it depends on legal literacy stakeholders. Therefore, in a process where participating professional representatives of the parties, and this has become almost commonplace, you can expect a truly competitive process, especially in the higher instances.

15. As far as the legal system of your country sensitive to the unification of civil procedural rules? Whether harmonization of procedural law with other countries in the region, are there any parcels or obstacles to this in your country?

Answer: A growing influence to the present legislation of Kyrgyzstan has the rules of different countries and even those who do not belong to the system of civil law (Romano-Germanic family). Therefore we can say that the system of civil procedural law in Kyrgyzstan is not closed, it is increasingly called the law of Germany, France, the United States, Eastern European countries, countries of CIS and Russian course.

The ongoing reform of procedural legislation focuses on Russian experience, quite notable imprint imposes of procedural legislation. Therefore, we can confidently say that the Kyrgyz Republic is trying to keep up with the procedural laws of other countries with a well-developed civil procedural law and culture.

The need for the harmonization of civil procedure law is felt because the procedural legislation of neighboring CIS countries farther away from each other. Therefore, creating of the most approximate to each other procedural legislation would facilitate life subjects of law in the context of globalization and expansion of areas of natural and legal persons. At this point, the national legislation of various countries leads to often conflicting decisions of courts, particularly with regard to international commercial contracts, family relationships, recognition and enforcement of foreign judgments. At this point visible obstacles does not exist to harmonization of procedural legislation of Kyrgyzstan with countries in the region, based on the best practices of foreign countries, but, taking into account the socio-economic and cultural specificities of Kyrgyzstan.

Viktor Blazheev[1]

RUSSIAN NATIONAL REPORT

Comments on the Issue of the Mechanism of Harmonizing Russian Civil Procedural Law and the Practice of the European Court of Human Rights

Each country that has signed the Convention on the Protection of Human Rights and Fundamental Freedoms (from now on «the Convention») on November the 4-th, 1950, has been facing the problem of searching for the most balanced combination of domestic law and the European conventional law.

[1] Rector and Professor of Moscow State Law Academy (Russia).

On the one hand, the clauses of the Convention secure general standards of administering justice which are later reinforced in a creative way in the law-applying practice of the European Court of Human Rights (from now on «the European Court»).

On the other hand, the domestic civil procedural law of each state reflects the unique historical, national, geographical, cultural, mental features inherent to different nations and states. If one fails to take into consideration all these factors the whole law-making and law-applying practice will prove ineffective.

The process of working out the effective mechanism of the interrelation between the norms of civil procedural law, the practice of their application and the conventional practice of the European Court appears to be an acute problem for some states including Russia which in 1998 ratified the Convention and extended its application to its own territory[1].

By the act of signing the Convention the Russian Federation recognized *ipso facto* without any special agreement the jurisdiction of the European Court whose discretionary powers according to Article 32 of the Convention extend to all the issues relating to the interpretation and application of the clauses of the Convention and its Protocols. As logics suggests, all the orders and decrees of the European Court have become legally binding for Russia in both aspects: while considering final court rulings and also while stating the legal positions, i.e. the interim conclusions that serve as a basis for the adjudication of the European Court concerning the Russian Federation.

Moreover, the member countries including the Russian Federation took the obligations «to secure the effective implementation of any clause of the Convention» in its domestic law (Article 52 of the Convention). It means that substantive and procedural law of the Russian Federation shall comply with the clauses of the Convention interpreted by the European Court.

Considering all the mentioned phenomena Russian lawmakers and legal successors have faced the situation where the European Court in interpreting conventional norms proceeds from general, universal notions concerning law, rights and freedoms of citizens and other legal categories. Directed by them the European Court employs rather wide discretional interpretation of extremely abstract conventional provisions filling them with virtually new contents.

One can support this idea with the example of legal determination which is not secured directly in the Convention but is deduced by the European Court from the universally recognized principle of the supremacy of law. Later in a series of regulations the European Court gave a more detailed interpretation of separate provisions of the principle of legal determination proclaimed earlier by the Court itself.

Such practice of interpreting conventional legal norms by the European Court entails the situation when universal interpretation of certain conventional legal norms given in its regulations sometimes does not conform with the provisions reflecting national legal features of civil procedural law of the Russian Federation. One cannot require taking into consideration these features as one is well aware of the supranational status of this body.

At the same time the practice of applying conventional legal norms that ignore national features of domestic law inevitably leads to collision with a separately taken law system.

[1] Federal Law No. 54 dated March the 30-th, 1998 FL «On the Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms and the Protocols relating to it», in *Compiled Laws of the RF*, 1988, No.14, article 1514.

In support of this idea Jean-Paul Costa having in mind such collisions pointed out that «the European Court will have influence on law systems and its adjudications will be properly understood and fully exercised only if it takes into consideration the existing resistance on the part of judges and other representatives of national authorities, if every time it thoroughly explains what arguments serve as the ground for its adjudications»[1].

There seems to be the only one way out of the present situation – not only the practice of applying conventional legal norms should influence the development of domestic law, the interpretation of the conventional legal norms should be performed with the reference to domestic law. They should match and interrelate inherently with each other.

To provide this there should be created the mechanism of interpreting conventional norms where the national legal principals as well as law institutions, fundamental provisions of the domestic law system will be taken into account. Resolutions of the European Court should be made consistent with the domestic law system without destroying its foundations.

This problem proves to be virtually acute in the context of interrelations of the European Court not only with Russia but with other countries as well. One of the most illustrative examples in this sense is a dispute between the European Court and Germany concerning the execution of the adjudication of the European Court regarding the case *Guergu v. Germany*.

The appeal to the European Court was preceded by a series of trials in German courts regarding parental rights of the claimant who was the biological father of the child[2]. An individual claimant's complaint has become the subject of the litigation in the European Court that ruled the adjudication on custody and termination of communication as violating Article 8 of the Convention[3]. While giving such ruling concerning the right to custody the European Court was referring to its own judicial practice. It stated that in cases where the existence of family ties with a child is evidenced the state should encourage the development of such relations. According to the adjudication of the European Court it generates the obligation of the state under Article 8 of the Convention to provide measures to reunite a biological father with his child (Clause 45 of the Resolution). Violating this provision, as stated in the resolution of the European Court, the Higher Court of land had failed to explore all the possible ways to solve the problem having acknowledged the fact that the claimant was Christopher's biological father and was undoubtedly eager and capable to take care of his child (Clause 46 of the Resolution).

Giving assessment of the earlier adjudications referring to the case (including the Resolution of the European Court) in its resolution dated October the 14-th, 2004, adopted on the ground of the constitutional complaint of the Turkish citizen G. (2 BvR 1481/04)[4], the Federal Constitutional Court of Germany formulated a principally relevant position.

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[1] J-P Costa, *I Suggest Organizing General States on Issues of Human Rights in Europe*, *The Bulletin of the European Court on Human Rights*, 2009, No. 3, p. 130.

[2] The claimant is the father of Christopher who was born out of wedlock on August the 25-th, 1999. The father learnt about the birth of the child only in October 1999 since all the contacts with his mother had been terminated in July of 1999. Failing to inform the authorities about the claimant as the child's father, Christopher's mother rejected from her son in favour of adoption the next day after his birth. Since August the 29-th, 1999, the child has been living with the foster parents.

[3] The given circumstances served as the ground for claimant's filing suits to German courts claiming to identify his fatherhood and cede to him custody and communication rights. See http://cmiskp.echr.coe.int.

[4] *The Bulletin of the Constitutional Court of the RF «Foreign Practice of the Constitutional Control»*, 86th ed., 2004, pp. 11–24.

The essence of this position is that «the failure to comply with the Resolution of the European Court as well as its mechanical execution being in collision with the law enjoying the priority can bring the violation of the fundamental rights together with the principles of a jural state».

This conclusion contains two main principles of the interrelations of domestic law and Conventional law.

Firstly, national courts shall incorporate a resolution of the European Court into the corresponding subarea of the national system of law and order since a direct introduction of necessary changes in the subsystem of domestic law is neither the aspired international legal goal, nor the will of the European Court itself (subsection c) of section 3 of the Resolution). While interpreting domestic law including fundamental rights and constitutional guarantees courts should proceed from the fact that the Convention enjoys the status of a federal law. That is why in determining of the contents and the sphere of application of the Fundamental law the provisions of the Convention and the judicial practice serve a landmark of the applicable law only on the condition that it does not lead to restricting or lessening the protection of constitutional rights of an individual.

Secondly, while giving legal assessment of new circumstances, weighing such competing fundamental rights as rights of the foster family and in incorporating of a definite case into the context of family law cases relating to the right to communication, the Higher Court of land is not bound in its concrete conclusions (Item 2). This means that legal assessments of the European Court given in its Resolutions have no determining significance if we take into account their relevance to the factual side of the case.

One believes that the introduced comments may be regarded as original ones for Russian courts as well in trying a concrete civil case. While applying the resolutions of the European Court one should, firstly, take into consideration the factual side of the case which was subjected to the application of the European Court's resolution. Secondly, the legal positions of the European Court, regarding a certain case, cannot be applied «mechanically», without critical assessment on the part of the court that is trying this concrete civil case. In this situation the court shall adapt the legal position of the European Court expressed by it while interpreting the conventional provision to the law system of the Russian Federation. The indicated mechanism presents a process of incorporating the resolutions of the European Court into the law system of the Russian Federation. While doing it the court is bound by the resolution of the European Court only in the part of interpreting conventional norms and has no discretionary powers to reassess them.

These principles should be viewed as guiding ones while estimating the efficiency of the actual system of civil procedural law and its separate institutions. This is particularly relevant if we consider the issue of further destiny of the supervisory bodies in civil and arbitration proceedings.

It has been stated more than once in the resolutions of the European Court that supervisory instance should not be regarded as inalienable and final stage (part) of civil proceedings of the Russian Federation[1].

Externally this position of the European Court was expressed in non-recognition of the complaint submitted by a supervisory body as a means of legal defence, the invalidation of

[1] See the case *Larin v. Larina* (complaint № 74286/01) dated June the 7-th, 2007; the Resolution of the European Court of acceptance of the complaint on the case *Toumilovitch v. Russia* (complaint № 470033/99) dated June the 22-nd, 1999 and others, in collect. ConsultantPlus.

which enables the claimant to appeal to the European Court (item 1 Article 35 of the Convention). The European Court considers exclusively the ruling of the court of the second instance as «the final resolution of the national court» as stated in item 1 Article 35 of the Convention. Only this event is considered to be the initial point of a six-month term available for a claimant's appeal to the European Court with a complaint that certain provisions of the Convention have been violated while trying the case in Russian courts. By this the European Court has come to the conclusion that appealing the court rulings as part of supervisory activities is not a binding condition for submitting the case to the European Court.

The essence of the critical remarks of the European Court consists in the fact that supervisory order of the review of the adjudications contradicts the principle of legal determination. According to it the enacted sentences should be submitted not to appeal but to enforced execution. With the aim of removal of the present violations of the principle of legal determination the Committee of Ministers of the European Council in the Interim Resolution ResDH (2006) 1, dated February the 8-th, 2006, determined the main directions of reforming of supervisory activities in civil proceedings of the Russian Federation[1].The Committee of Ministers of the Council of Europe pointed out to them the following directions:

1) vesting the court with the power of correcting all the miscarriages in the rulings of lower courts while trying a certain case thus making a further appeal for reviewing the case an exceptional or even an unnecessary event;

2) restricting the review (as a kind of supervisory activities) of the enacted adjudications and adjudications submitted for execution only in exceptional circumstances providing by this legal grounds for excluding the situation when supervisory procedure allows to reverse a sentence due to a violation of substantive and procedural law in the adjudication.

3) correcting any errors and miscarriages by conventional appeals of the court rulings of the appellate and/or cassation instance.

The Committee of Ministers of the Council of Europe has formulated the interim measures designed to reach the above said goals. The most important among them are the following:

1) restricting the possibility of application of supervisory activities, specifically by means of setting a shorter term of filing complaints that can be submitted for supervision and reducing the number of allowable grounds for initiating such proceedings limiting them by exceptional cases of violations of law;

2) limiting at the most the number of complaints referring to the same case that are submitted for supervision and might be allowed;

3) impeding to deal with groundless complaints submitted for supervision when the complaints are based only on the disagreement with assessments given by lower courts within their competence and in conformity with the law;

4) encouraging the parties to employ all the available means of cassation with the aim of correcting adjudication miscarriages before the adjudications are given legal force and are exercised.

With the aim of improving civil procedural law and bringing it in conformity with the provisions of the Convention and the practice of the European Court there has been adopted Law № 330-FL, dated December the 4-th, 2007, «In reference to the Introduction of the Changes to the Civil Procedural Code of the Russian Federation» which reformed

[1] http://sutyajnik.ru/rus/echer/school/int_law.html

considerably the actual order of supervising activities. As a result, practically all the recommendations given by the Committee of Ministers of the Council of Europe in its Interim Resolution, have been legally put into practice.

Thus according to part 2 of Article 377 of the State Procedural Code of the Russian Federation the term of appealing of the court rulings available for supervision is limited with six month from the moment of their enactment. Moreover, appealing to a supervisory instance is acceptable only under the circumstances when the appellant has employed all the options of the adjudication's appeal contained in the CPC (Civil Procedural Code) prior to the day of its enactment.

The exceptionality of supervisory appeal is justified by the fact that under part 4 Article 112 of the CPC of the RF (in the ultimate variant of the indicated law) the renewal of the initial term is available only on the two conditions: a) the court has acknowledged the seriousness of the reason of failing to submit the appeal on time (grave illness of the appellant, his disability and other circumstances that objectively exclude the possibility of submitting the appeal within the prescribed term); b) a year term of the enactment of the court ruling has not expired.

The law in question has restricted the grounds of transferring the case for supervision to a corresponding instance only with serious violations of the norms of substantive and procedural law that had a serious impact on the outcome of the trial since without their removal the restoration and protection of the violated rights, freedoms and lawful interests as well as protection of the legally safeguarded public interests proves to be impossible (part 2 Article 387 of the CPC of the RF).

The changes have not affected the notorious practice when enacted adjudications are submitted to numerous supervisions: the possibility for successive appealing of adjudications in three supervisory instances has been preserved.

This inconsistency was removed by Federal law № 353-FL, dated December the 9-th, 2010, «On the Introduction of Changes to the Civil procedural Code of the Russian Federation». The introduction into the system of the review of appellate procedure has successfully solved the problem of unjustifiably numerous supervisory reviews of the adjudications in civil procedure. Under part 1 Article 391.1. enacted adjudications can be reviewed in conformity with supervisory proceedings exclusively by the Presidium of the Supreme Court of the Russian Federation. By means of this enactment the measures adopted by the lawmaking authorities regarding the reformation of civil procedural law have provided the conditions when the review system in civil procedure has no significant differences from the one that exists in arbitration procedure.

Earlier the European Court recognized supervisory practice in arbitration procedure not contradicting the principle of legal determination as «a finalizing element in a string of domestic legal defence means available to the parties»[1] because it is performed exclusively by the Higher Arbitration Court of the Russian Federation and is restricted with precise and strict terms.

Consequently, a resolution of the Higher Arbitration Court adopted within the framework of supervisory activities becomes «the ultimate resolution» for the goals item1 Article 35 of the Convention and marks the initial point of a six-month term.

[1] See the case *Kovalev and others v. Russia* (complaint № 6025/09) dated June the 25-th, 2009; the case *LLP Link Oil St. Petersburg v. Russia* (complaint № 42600/05) dated June the 25-th 2009, in collect. ConsultantPlus.

Despite this the Council of Europe strongly recommends to exclude supervisory activities from the system of the court rulings (adjudications) review.

Thus in the above-mentioned Interim Resolution ResDH (2006) 1, dated February the 8-th, 2006, the Committee of Ministers of the Council of Europe unequivocally pronounced in favour of the situation when even after the removal of all the existing shortcomings, the presence of supervisory proceedings in the actual civil procedure should be regarded as a temporal phenomenon. While stating it the Committee of Ministers of the Council of Europe calls for the Russian Federation to conduct a reform of civil procedure with the aim of legal enforcement of the procedure according to which judicial errors shall be rectified by means of conventional order of filing an appeal in the course of appellant and/or cassation activities prior to the moment when the rulings are given legal force.

With a reference to this there comes a logical issue about the necessity of a stage of supervisory review as an inherent element of national (domestic) means of legal defence in the framework of civil and arbitration procedure. What are the exact legal grounds that justify its existence in civil and arbitration procedure?

It should be noted that supervision as a procedural form of court rulings review has a solid background in the form of the Constitution.

Under Article 126 of the Constitution of the RF the Higher Court of the RF along with other functions exercises supervision over courts of general jurisdiction activities within the framework of procedural forms prescribed by the federal law.

A similar provision is proclaimed in Article 127 of the Constitution of the Russian Federation applicable to the Higher Arbitration Court of the RF.

Supervisory powers of the higher judicial bodies were indirectly confirmed by the Constitutional Court of the RF while testing the conformity of a number of provisions of the RF Civil Procedural Code regulating the procedural order in a supervisory instance to the Constitution of the Russian Federation[1].

In resolution №-P, dated February the 5-th, 2007, the Constitutional Court of the RF unequivocally pronounced in favour of the provision that «in the law system of the Russian Federation the institution of the review of adjudications in civil cases available for supervision (chapter 41 CPC of the Russian Federation) is based on the provisions of the Constitution of the Russian Federation, contained in Article 46, which in connection with Articles 15 (part 4) and 17 (parts 1 and 3) suggests a possibility, generally accepted in a jural state, to review the enacted adjudications in case of grave errors and miscarriages, as well as on the provisions of Article 126 under which the Supreme Court of the Russian Federation being the supreme judicial body in civil, criminal, administrative and other cases existing within the competence of courts of general jurisdiction, exercises judicial supervision over them in the framework of procedural norms prescribed by the federal law and also gives interpretations of the issues of the judicial practice(i.3)[2].

[1] Resolution of the Constitutional Court of the Russian Federation dated February the 5-th, 2007, No. 2-P «Regarding the examination of conformity with the constitution the provisions of articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedural Code of the Russian Federation in connection with the inquiry of the Cabinet of Ministers of the Republic of Tatarstan, complaints of the joint-stock companies «Nizhnekamskneftekhim» and «Khakasenergo», and also complaints of a number of individuals» (further – the Resolution of the Constitutional Court of the Russian Federation dated February the 5th, 2007, No. 2-P), in collect. ConsultantPlus.

[2] Ibidem.

Consequently, the supervisory review of the enacted adjudications is included in the system of the national means of protecting the rights of citizens and legal persons being, as it has been stated in the specified resolution of the Constitutional Court of the RF, an additional guarantee in the actual mechanism of the efficient restoration of the violated rights[1].

Under part 3 Article 46 of the Constitution of the RF every individual enjoys the right, in conformity with the international agreements of the Russian Federation, to address the international bodies regarding protection of the rights and individual freedoms if all the available domestic means of legal defence have been employed.

Since the review of the enacted adjudications is an inherent element of the actual system of civil procedure, the measures of the national means of defence of the rights and interests of citizens and legal persons cannot be recognized exhausted in the circumstances when the term of the supervisory appeal has not expired. It is not excluded that violations of the provisions of the Convention committed by courts while trying a certain case may be removed by the supervisory instance (Article 387 of CPC of the RF). That is why the European Court should acknowledge the expiration of a six-month term for submitting a supervisory appeal as a binding condition for admitting this appeal for examination.

One should also exclude the possibility to appeal to the European Court in the situation when the court of the supervisory instance has already started the examination of the complaint submitted by the claimant. This statement is partially based on the legal position of the Constitutional Court of the RF according to which a judge after starting the examination of the case meeting the request that is contained in the complaint, information or another type of solicitation suspends the execution of the appealed sentence till the completion of the proceedings in the supervisory judicial instance. That is why the suspended court ruling cannot be recognized as an ultimate one (moreover, a court of supervisory instance in contrast to the European Court is empowered not only to state the fact of the violation of the law, but also to reverse the court ruling that has entailed such violation). Till a court of the supervisory instance doesn't come out with the relevant adjudication, the domestic means of the legal defence cannot be regarded as exhausted ones in the sense of Article 46 (part 3) of the Constitution of the RF[2].

Finally in Resolution № 2-P, dated February the 5-th, 2007, that has been mentioned above, the Constitutional Court of the RF unequivocally pronounced in favour of preserving the institution of supervisory proceedings as a compulsory stage of civil procedure, after the completion of which it is allowable for a claimant to appeal to the European Court as an efficient means of judicial defence with the reservation that supervisory proceedings after being reformed by federal legislation will comply with all the requirements introduced by the Constitution of the RF and the present Resolution[3]. As one has already noted, Federal law № 330 FL, dated December the 4-th, 2007 «Regarding the Introduction of Changes to the Civil Procedural Code of the Russian Federation» and Federal law № 252-FL, dated December the 9-th, 2010, «Regarding the Introduction of Changes to the Civil Procedural Code of the Russian Federation» the institution of supervisory proceedings has been considerably reformed.

Similar forms of supervisory proceedings as an exceptional form of court rulings review exist in judicial systems of European countries. Thus under the French legislation, cassation is regarded as one of the exceptional methods of the appeal, the aim of which is to scrutinize

[1] Resolution of the Constitutional Court of the Russian Federation dated February the 5th, 2007, No. 2-P.
[2] Ibidem.
[3] Ibidem.

the rulings of the court of the highest instance examining its conformity with legal rules (Article 604 of the CPC of France). This provides for the unification of the national law and the equality of all the citizens before law[1]. In Germany a claimant enjoys the right to file a «constitutional complaint» to the Federal Constitutional Court concerning the final adjudication that violates civil rights and freedoms guaranteed by the Constitution of the FRG (paragraphs 1,2 clause 90 of the legislation regarding the Federal Constitutional Law)[2]. The indicated extraordinary (exceptional) methods of appealing of the court rulings are an integral part of the system of domestic mechanisms of protection of rights and freedoms of citizens of the corresponding countries.

The introduction to the civil code two conventional stages of the review of court rulings (appeal and cassation) is absolutely correct and justified. However there is a strong necessity in preserving supervision as an exceptional examining phase of civil procedure whose constitutional character was confirmed by the Constitutional Court of the RF in the Resolution that has been thoroughly analyzed above. Actually one should not attribute any particular importance to naming this legal phenomenon – «supervision» or any other form of the review of the enacted adjudications (court rulings). The expediency of its existence is justified with geographical, cultural, historical, legal, national and other factors providing for proper functioning of the judicial system in the Russian Federation.

Consequently, supervisory review of the court rulings is an important and indispensable element of the domestic system of protection of rights and freedoms of individuals and legal persons. The constitutionally legal nature of the institution of supervisory proceedings confirmed by the Constitutional Court of the RF possesses the determining character while deciding the issue of its place and role in the mechanism of the court rulings review in civil procedure. While reforming supervisory procedure in Russian law lawmaker should proceed from the determining character of the constitutional provisions including conventional norms.

Along withsupervisory proceedings initiated on the ground of newly revealed circumstances should also be attributed to the extraordinary forms of the court rulings review.

The institution of the court rulings review initiated under newly revealed circumstances that has been traditionally formed in procedural law has been recently developing along the way of extending the amount of reasons for reviewing due to attributing to them newly revealed circumstances.

Specifically, under item 5 part 3 Article 311 of the APC of the RF, new circumstances that constitute the ground for reviewing the enacted court rulings may be either the definition or changes in the practice of application of legal norms contained in the Resolution of the Plenum of the Higher Arbitration Court of the Russian Federation or in the Resolution of the Presidium of the Higher Arbitration Court of the Russian Federation if there is an indication for availability of the enacted court rulings review on the ground of these circumstances that is contained in the corresponding act of the Higher Arbitration Court of the Russian Federation.

The similar provision is contained in item 5part 4 Article 392 of the CPC of the RF.

However the provision contained in part 3 Article 312 of the APC of the RF under which an application for the review of the enacted court ruling may be filed within a three-month term from the day of arising of new circumstances but not later than six months since the

[1] E. Borisova (ed.), *The Examination of the Court Resolutions in Civil Procedure in the European Community Countries and in the CIS Countries*, Moscow, 2007, p. 337.

[2] *The Law about the Federal Constitutional Court*, Publishing House «Inter Naziones», FRG, 1996, p. 80–81.

day of the enactment of the latest court ruling that has examined the case in essence (if the possibility of the appeal to the courts of the appellate and cassation instances has been exhausted), the CPC of the RF does not contain such time period limitations.

According to Article 394, item7 Article 395 of the CPC of the RF an application for the court ruling review on the ground of such circumstances may be filed within a three-month term since the enactment of the resolution of the Presidium of the Supreme Court of the Russian Federation or the publishing of the resolution of the Plenum of the Supreme Court of the Russian Federation.

By means of this the CPC of the RF establishes the unlimited terms of giving the reverse force to a legal position contained in the resolution of the Presidium of the Supreme Court of the Russian Federation or the Plenum of the Supreme Court of the Russian Federation. Taking this into consideration a review on the ground of newly revealed circumstances becomes admissible in connection with the changed law-applying practice of the court ruling that was enacted decades of years ago. As logics suggests, the very possibility of such review contradicts to the principle of legal determination under which there should exist reasonable terms for changing of the previously enacted and liable to execution court ruling (that may have been executed long ago).

The principle of legal determination admits the reverse of the adjudication (the court ruling) only in the presence of exclusive circumstances. It appears that the changed legal system of the higher judicial body regarding the interpretation of a legal norm cannot be considered as an exceptional ground for the review of court rulings on other cases adjudicated earlier on the ground of a specific interpretation of the legal norm that existed at the moment of its application. Actually the reverse legal force is given to a new judicial provision of the higher judicial body while acknowledging that such situation is excluded even in reference to the law proclaimed by the legislative power. Quite logically, there arises an issue about the correlation of the court ruling and the law or another legal act.

The indicated legal provision demands serious corrective work since in its present form it does not provide for attaining determination in law-applying practice.

Aleš Galič[1]

SLOVENIAN NATIONAL REPORT

Current Status of Civil Procedure in Slovenia

1. Model of civil procedure

The Slovenian Civil Procedure Act (*Zakon o pravdnem postopku*) is closely linked to its Austrian predecessor (ZPO). Strict rules regarding the respect of the adversarial principle and initiative of the parties are significantly softened by the rules on «material procedural guidance» (*materielle Prozessleitung*), which give a judge wide powers and responsibilities

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concerning substantive preparation and examination of the case. Also with the latest amendments and discussions about reforming civil procedure, developments in Austrian (and nowadays more frequently) German civil procedure are main sources of inspiration and are often invoked as a ground for similar reforms in Slovenia as well. The close connection of the Slovenian and Austrian civil procedure is not surprising for the time period before 1918 since the territory of what is nowadays Slovenia was until then a part of Austrian part of the Austrian-Hungarian Empire. It is however interesting that this development was not interrupted when Slovenia became a part of the newly formed Yugoslavia after the First World War (1918). Yugoslavia, when adopting new unified legislation in the fields of private law and civil procedural law decided to transplant Austrian laws which were considered to be more modern and advanced than, for example laws of former Kingdom of Serbia, which was also integrated in the newly formed Yugoslavia. Thus, the first Yugoslav Civil Procedure Act from 1929 was nearly a complete translation of the Austrian (*Franz Klein's*) ZPO.

After the World War II Yugoslavia became a socialist state, consisting of six federal units («republics»), which one of Slovenia was. Although the introduction of socialism brought many far reaching changes to the legislation and to the functioning of the justice system, it must however be stressed out that these changes were much less radical in comparison to the other communist states. Yugoslavia was not a part of the Soviet dominated economic and military block. At least after the late fifties' Yugoslavia opted for what could most easily be described as a «milder version of socialism» – concerning both the economic system and the status of human rights and the development of civil society. Consequently also the status and tradition of civil procedure has not been excessively affected. The principles of party autonomy and disposition (settlement, admission of a claim, voluntary withdrawal with res iudicata effect) were fully retained; the court was bound by the limits of the claim and could also rely on the facts, ascertained by the parties; possibility of an intervention of a public prosecutor was very limited and there was no possibility for appeal courts to give binding directions (or to take cases from) to lower courts. Bar as an independent legal profession was retained (and the Yugoslav Bar association was the only one from the Socialist states, which has, due to fulfilling criteria of independence, been admitted to the International Bar Association).

In 1991 Slovenia became an independent state, whereby a full international recognition followed in 1992 and at the same time this meant a shift to a parliamentary democratic system and a market economy. Slovenia's transition from a socialist economy to a free market was gradual and cautious but steady, clearly rejecting ideas and often hard lobbied proposals for «shock therapy». Today the country enjoys relative economic and political stability. As the first one among former Yugoslav republics it joined the European Union in May 2004.

2. Sources of Civil Procedure

Civil Procedure Act of Slovenia has been enacted in 1999. Since its coming into force, the CPA has already been amended four times. The amendment of 2002 (the CPA-A) brought certain changes, predominantly in the field of promoting settlement. The amendment in 2004 (the CPA-B) broadened the court's jurisdiction in family law matters. The amendment in 2007 (the CPA-C) founded a basis for an `e-service´ in civil litigation (but implementer measures have not been achieved yet), while the latest amendment (2008) emphasized on the strengthening of judge's powers in order to achieve a concentration of procedure and at the same time strengthened the system of procedural sanctions against parties.

There are also several statutes, which contain norms, relevant for civil procedure. Rules on international jurisdiction (and on recognition and enforcement of foreign judgments) are found in the Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku*[1]*)*. For matters which are decided in a non-contentious procedure (for example, certain family law matters and certain patrimonial matters such as the division of joint property, regulation of relations between co-owners, land border disputes, tenants relations rules of Non-Contentious Procedure Act (*Zakon o nepravdnem postopku*[2]) apply. The enforcement of judgments as well as provisional (protective) measures is not regulated by the Civil Procedure Act but by a separate statute (Enforcement of Judgments and Protective Measures Act – *Zakon o izvršbi in zavarovanju*[3]). The composition, status and subject matters, the jurisdiction of courts as well as the position of employees of the courts (such as administrative staff, judge's assistants, legal advisors, court clerks), except for judges, a system of assigning cases to judges within the same court, the position of the Judicial Council etc., are regulated in the Courts Act (*Zakon o sodiščih*[4]). The Judicial Service Act (*Zakon o sodniški službi* [5]). determines the status of a judge, in particular concerning access to office, elections, rights, responsibilities, dismissal from office and disciplinary procedures. Legal aid is regulated in the Free Legal Aid Act (*Zakon o brezplačni pravni pomoči* [6]). The profession, election, status, rights and obligations of attorneys are regulated by the Attorneys Act (*Zakon o odvetništvu*)[7]. The Labour and Social Courts Act (*Zakon o delovnih in socialnih sodiščih*[8]) establishes five specialized courts and determines some particularities in their procedure, while the Administrative Disputes Act (*Zakon o upravnem sporu*[9]) establishes the Administrative Court. The Court Order (*Sodni red*[10]) contains detailed provisions concerning administrative, technical and organisational matters of the courts, the case flow management, detailed rules on the assignment of cases and the functioning of the court administration. Remedies against the violation of the right to trial within reasonable time are regulated by the Act on Protection of the Right to Trial without Undue Delay (*Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja*[11]).

Several norms, important also for civil procedure, are contained in the Constitution. These refer to the position of courts (for example, independence), to the position of judges (for example, permanence, election, immunity, termination of office) and to fundamental procedural guarantees (for example, right of access to court, right to an impartial and independent court, right to have a case decided by a natural judge, predetermined by a statute, right to trial within reasonable time, right to be heard and of equality of arms, right to public trial, right to appeal, guarantee of unchengeability of final of judgments; *res iudicata*).

[1] Official Gazette RS, No. 56/99
[2] Official Gazette SRS, No. 30/86.
[3] Official Gazette RS, No. 40/04 – consolidated version.
[4] Official Gazette RS, No. 23/05 – consolidated version.
[5] Official Gazette RS, Nos. 19/94... 57/2007.
[6] Official Gazette RS, Nos. 48/01 and 50/04.
[7] Official Gazette RS, No. 18/93... 48/01.
[8] Official Gazette RS, No. 2/04.
[9] Official Gazette RS, No. 105/06.
[10] Official Gazette RS, Nos. 17/95... 138/2004.
[11] Official Gazette RS, No. 49/2006.

Case law is not formally recognized as a source of law. But in practice, an established case law is an important authority and lower courts tend to follow positions of the appellate courts and of the Supreme Court. One of the functions of the Supreme Court of Slovenia is also to safeguard the uniformity of the case law (Art. 110, Courts Act). Besides, according to an established doctrine of the Constitutional Court, it is one of the elements of fair trial that a judge may not arbitrarily (without providing extensive reasoning) depart from a settled and uniform case law[1]. If such a departure occurs, the Constitutional Court may, upon a constitutional complaint, quash a judgment and order a retrial. This does not mean that a case law is unchangeable, but it imposes an additional burden onto a judge, who intends to depart from a uniform and settled case law to explain, why he or she does not find such a case law suitable any more. In fact, through this constitutional procedural guarantee, a case law in Slovenia is gaining a similar position as it has in precedential system (*stare decisis* doctrine)[2].

3. Judicial organisation and the public prosecutor

Judicial power is implemented by courts of general jurisdiction (which cover civil, commercial, family-law and criminal cases) and by specialized courts. There are 44 county Courts (*okrajno sodišče*), 11 district courts (*okrožno sodišče*), both county and district courts are courts of first instance; there exist 4 higher courts (courts of appeal, *višje sodišče*) and the Supreme Court of the Republic of Slovenia. There is also the Constitutional Court, but it is not a part of the regular court system (although a party to civil litigation can, after the exhaustion of all legal remedies within civil procedure, file a constitutional complaint if he or she believes that a judgment, rendered in civil litigation violated certain human right or liberty). Courts, including the Supreme Court, are not empowered to decide upon the conformity of the law with the constitution. This is reserved for the Constitutional Court (*Ustavno sodišče*)[3]. If, in course of proceedings, a judge of an «ordinary court» suspects that the law they should apply is unconstitutional, they must stay the proceedings and refer the matter to the Constitutional Court (Art. 156 of the Constitution). There are only two kind of specialized courts (labour and social courts and administrative courts), but neither of these deal with civil litigation. There are no specialized commercial courts in Slovenia, but there exist specialized divisions for commercial cases within larger district courts, as well as in the appellate courts and in the Supreme Court.

Also in the time of Yugoslav socialism the role of (state) public prosecutors has been restricted compared to their position in the countries of so-called Soviet bloc. There was no possibility for a public prosecutor to intervene in pending actions between other parties. There has however existed and to a certain degree still exists a possibility to file an extraordinary legal remedy («A request for protection of legality»), which is decided upon

[1] E.g. Decision of the Const. Court, Up 188/02, 11.12.2003. See in detail: A. Galič, *The human rights dimension of the argument of precedent in the case law of the Slovenian Constitutional Court*, *Slovenian Law Review*, Vol. 2 (December 2005), p. 41 et seq.

[2] M. Pavčnik, *Argument sodnega (pravnega) precedensa* [Argument of Legal (Judicial) Precedent], 30 *Podjetje in delo*, 2004, No. 6–7, p. 1032 et seq., M. Novak, *The Promising Gift of Precedents: Changes in Culture and Techniques of Judicial Decision-Making in Slovenia*, in: Priban, Roberts, Young (eds.), *Systems of Justice in Transition*, Hampshire, 2003, pp. 94–108.

[3] A. Mavčič, *The Slovenian Constitutional Court and its activities during the period of transition*, *Revue de justice constitutionnelle Est-Européenne*, No. 2, 2001, pp. 229–251.

by the Supreme Court. It may be filed by the supreme state prosecutor against a final judgment on the grounds of an alleged violation of substantive or procedural law. This role of the state prosecutor in civil procedure has considerably diminished since the 2008 reform, which reshaped the remedy of revision (*see infra*), and its role is closely connected with the described system of revision[1]. As the revision is excluded already *ex lege* in certain types of proceedings and claims (such as judgments is small claims proceedings, decisions in bankruptcy proceedings, certain non-contentious matters, and in proceedings concerned with enforcement of judgments and provisional and protective measures), in such types of cases it is beneficial that there exists another tool that enables the Supreme Court to take a stand on important legal questions and to safeguard the uniformity of case law. Therefore, this extraordinary legal remedy in hands of a state prosecutor was retained, but restricted to cases, where the revision is excluded already by statute. It must be stressed out that the aim of this extraordinary appeal is not to control the correctness of decision in an individual case but rather to enable the Supreme Court to reach precedents concerning important legal issues and to strive for unification of the case law.

Parties, who know that a further appeal on points of law («revision») is not admissible in their case, often approach the state prosecutor with a plea to file the request for the protection of legality. But they have no right to appeal against the `notification´ of the state prosecutor informing them that this extraordinary appeal will not be filed. The decision on whether this extraordinary appeal shall be filed remains totally in the hands of the state prosecutor[2]. However, if the request for the protection of legality is filed, it can have a substantial effect on the parties' position (if the Supreme Court finds that the request is well-founded and that the judgment, which it is directed against, is based on an erroneous application of substantive law or that a grave procedural error occurred, the Supreme Court can alter the judgment or set it aside and order a re-trial. It is not, unlike in certain other legal systems that provide for a similar role of the state prosecutor or an attorney general, restricted to rendering a declaratory decision which does not affect the outcome of the particular case but merely serves as a guidance for future cases. It is highly questionable whether the Slovenian system is in line with the guarantees, contained in the Art. 6 ECHR. The critical point does not concern the right of both parties to be heard – they both are served with the state prosecutor's request for the protection of legality and may respond to it. It is the right of access to court that might be infringed by the rules that the outcome of the proceedings before the Supreme Court may affect the determination of the parties' civil rights and obligations, but the decision, whether the access to the Supreme Court is possible, depends neither on the parties nor on the court, but on the decision of the state body which is not a part of judiciary (the State Prosecutor).

4. Distribution of roles between a judge and parties

The principle of free disposition is recognized in Slovenian civil procedural law and its importance is stressed out already in the introductory part of the CPA (Arts. 2 and 3). Without an action, there can be no judgment and when deciding on a dispute (except in some cases in

[1] See, e.g., L. Ude, *Reforma revizije in zahteve za varstvo zakonitosti* [Reform of Remedies of Revision and Protection of Legality], 33 *Podjetje in delo*, 2007, No. 6–7, p. 1085.

[2] See, e.g., L. Ude, *Civilno procesno pravo* [Civil Procedure], Ljubljana, ČZ UL, 2002, p. 343.

family matters), the court is bound by the claim as determined by the claimant (a court may decide neither *extra* nor *ultra petitum*). The action must contain a **specified relief** or remedy claimed in respect of the cause of action, the lateral claims, the statement of facts constituting the cause of action and the statement of evidence proving these facts (Art. 180, CPA). Thus, it is obligatory for the claimant to state a concise and concrete claim already in the initial statement of the claim. Parties are also free to **dispose of their claim and defences** during the trial. The voluntary dismissal of the claim, the acknowledgment (admission) of the claim and the in-court settlement result in a termination of litigation and produce a *res-iudicata* effect thereby preventing a relitigation regarding the same claim. The initiative of the parties prevails also in the field of assertions of facts and evidence. It is a responsibility of the parties to assert facts and present means of evidence (Art. 7). On the other hand, it is the responsibility of the court to determine the issues of law (which covers not only domestic law but also foreign law)[1]. The ***iura novit curia*** rule applies (Art. 180, CPA).

Strict rules regarding the respect of the initiative of the parties are significantly softened by the rules on active case management[2]. Following the well known patterns of Austrian and German law, the Slovenian CPA provides for the so called «substantive procedural guidance» (*materialno procesno vodstvo*) of a judge (Art. 285, CPA). The judge, as explained above, is bound by factual assertions and evidence, offered by the parties, but has a right and a duty to stimulate the parties (with questions, hints and observations) to amend and clarify their assertions of facts. The judge also needs to warn the parties if they considered the evidence, which the parties offered, as insufficient and warn them on the distribution of the burden of proof. The judge also needs to openly consult with the parties the legal viewpoints which the parties have neglected[3]. By enabling the judge and the parties to define as soon as possible which issues are disputed, and particularly which are relevant for adjudication, if properly performed, such trial and conduct of proceedings do not delay the proceedings but make possible for faster, more rational and economical proceedings and thus for a better access to justice. It enables the proceedings to quickly concentrate to the points relevant for the case which is extremely important for the rationalisation of the taking of evidence. The material procedural guidance is practiced mainly during the trial, but since the Amendment of the CPA in 2008, additional tools were implemented, which enable a judge to pose written questions and demand written clarifications already in the preparatory stage of litigation.

5. Procedural sanctions for delay

A judge in Slovenia has certain tools to disregard statements of fact and evidence that were not given on time without a proper excuse. It is therefore not left entirely to the parties in what stage of proceedings shall they present relevant facts and evidence. A certain

[1] J. Juhart, *Zbiranje procesnega gradiva* [Production of Facts, Evidence and Legal Basis], 12 *Pravnik,* 1957, No. 5–8, p. 227.

[2] See, e.g., D. Wedam Lukić, *Vloga strank in sodišča pri zbiranju procesnega gradiva* [The Role of the Parties and the Judge at the Collection of Procedural Material], 24 *Podjetje in delo*, 1998, No. 6–7, pp. 984–990; J. Juhart, *Zbiranje procesnega gradiva*, p. 223, L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek – zakon s komentarjem* [Civil procedure – Act with the commentary], vol. 2, p. 582 et seq.

[3] This requirement follows also from the case law of the Constitutional Court; decisions Nos. Up 130/04 (24.11.2005) and Up 133/04 (1.12.2005).

system of preclusions was introduced in Slovenia by the CPA-1999. According to Art. 286, the parties can assert new facts and evidence until (including) the first session of the main hearing (according to the Yugoslav CPA-1976 there was no limitation and parties were free to come out with new facts and evidence till the end of the last session of the main hearing and except in commercial cases even in appeal). At later hearing sessions, the parties shall be allowed to present new facts and new evidence only if at the opening session they were prevented from presenting them by reasons beyond their control.

The Slovenian CPA was substantially reformed in 2008[1]. The system of procedural sanctions for delays in litigations was strengthened and more importance was given to the preparatory stage of litigation. In order to enable the other party a right to be heard and to organize its case, a party is now obliged to, whenever possible, file new written submissions in sufficient time for them to be serviced to the other party in an adequate time limit before the main hearing, so the main hearing would never need to be adjourned for the reason that the other party must be given a reasonable time period to prepare a response (Art. 286a/4, CPA). Besides, a judge now has powers on his or her own initiative to request from the parties (and to impose binding time limits for this purpose) to submit further written observations, comments or clarifications on their factual assertions, the evidence offered or already taken, to comment on legal questions or to reflect to submissions, provided by the opponent (Art. 286a/1, CPA). The judge can also put questions and request further clarifications in writing to the parties *even before the first session of the main hearing* and requests from them to offer further evidence or to supplement their factual assertions (Art. 286.a CPA). If a party does not react, he or she is, unless justified reasons caused the default, precluded from making such submissions in the later stages of the procedure, including the first session of the main hearing. So, if the judge is active in a proper manner (with exercising material procedural guidance through means of written procedure) already before the first session of the main hearing, parties need to react in the same manner as otherwise, they will be precluded from stating new facts and evidence on the first oral hearing. In this manner, the goal that the procedural material is sufficiently collected already before the commencement of the main hearing can be more effectively achieved[2].

The strengthening of procedural obligations, combined with the system of sanctions (as implemented by the 2008 reform) should not be seen as a formalization of the procedure or as an expression of an (assumed) trend that a goal of reaching a substantive justice is fading and that courts shall more and more often use procedural operations, merely to quickly «get rid of the case», without a proper examination of merits[3]. Such reproach, although nowadays quite often expressed in Slovenia, is, I believe, not well-founded. With the aforementioned tools, the reform is aimed at stimulating parties diligently to participate in procedure in order to assure a timely gathering of procedural material, which it the same time does not mean that responsibilities and activities of the court are diminished. In consequence this

[1] Amendment to the Civil Procedure Act (ZPP-D); Official gazette of the Republic of Slovenia, No. 45/2008 (in force since October 1, 2008).

[2] V. Bergant Rakocevic, *Materialno procesno vodstvo v pisnih fazah postopka in razmerje do prekluzije* [Material Procedural Guidance in Written Stage of Litigation and it Relation to Preclusions], *Podjetje in delo*, 2008, No. 6–7, p. 1598. See also *The Explanatory memorandum of the Ministry of Justice to the draft amendment of the Civil procedure Act*, p. 135.

[3] M. Jelačin, *Novela ZPP-D, njene skrite pasti in pravne praznine* [The CPA Amendment, Its Hidden Traps and Legal Loopholes], *Pravna praksa*, 2008, No. 25, p. 10.

contributes also to the substantive quality of adjudication[1]. Also the Constitutional court of Slovenia has already confirmed that a proper system of procedural sanctions, burdens and time limits in civil litigation is not only admissible but actually welcome[2]. By expecting parties and their attorneys actively and diligently to prepare the case and participate in the course of litigation, the law strives to achieve not only acceleration of proceedings but better substantive quality of adjudication[3].

A **judgment by default** (*zamudna sodba*) is a sanction against a defendant who fails to defend a claim by filing an answer to a claim within 30 days (Art. 318, CPA). If a (sufficiently grounded) answer is filed, there can be no judgment by default in the later stages of proceedings. If statutory conditions for a judgment by default are fulfilled, the court renders it *ex officio* – no motion of the plaintiff is necessary. Besides the obvious procedural prerequisite for the judgment by default that a claim had to be properly served on the defendant (and the warning of a possible default judgment must be included in the writ), there is also a substantive condition for rendering a judgment by default: the court must be satisfied that the facts alleged in the claim are legally sufficient to justify the remedy claimed (*Schluessigkeit der Klage*)[4]. Thus, the passivity of the defendant in fact constitutes a presumption that they have admitted all the facts asserted in the claim (which means that there is no need to take evidence regarding these facts). Thus, the court is not authorized to deny the rendering of a default judgment on the grounds that plaintiff's allegations don't seem probable or that the evidence the plaintiff offered is insufficient – the factual assertions of the plaintiff are all considered to be admitted. But the court must then still find that the claim, based on these facts, is legally justified in substantive law. If that is so, a judgment on default is entered, if not, the case is dismissed on merits.

The judgment by default binds the defendant in the same manner as if it had been entered after a contested trial. Unlike in, for example, German law, where a defendant can get rid of the effects of default and have a judgment by default set aside by a simple objection, in Slovenia, this can only be reached through an appeal (invoking violations of substantive or procedural law, but not incorrect findings of facts – logically, as the judgment by default is based on a presumed admission of facts) or a motion for the restoration of the previous state of affairs (*restitutio in integrum*), but for the latter the defendant needs to satisfy the court that his or her failure to file a defence plea was due to reasons beyond his or her control.

6. Certain features of litigation in Slovenia

In Slovenian law, there are no formal requirements for the plaintiff before the filing of an action. There is no mandatory **pre-action** mediation and no obligation to formally communicate with the opponent (for example, via the pre-action protocols). There is no formal distinction between **pre-trial** and **trial**. The preparatory measures concerning the main hearing (*see infra*) could only roughly be equated with a pre-trial stage. The notion of a trial is not used in Slovenian civil procedure. Rather, it is spoken about a main hearing

[1] See J. Zobec, *Predlagane novosti glede zamudne sodbe in posledic izostanka ter glede vmesne sodbe* [The Proposed Reform Concerning Default Judgment, Sanctions for Inactivity and Interim Judgment], *Podjetje in delo*, 2007, No. 6–7, p. 1060.

[2] Decision of the Constitutional Court of Slovenia, No. Up-2443/08, dated October, 7, 2009.

[3] Ibidem.

[4] See, e.g., decision of the Const. Court, Up 201/01, 6.11.2003.

(*glavna obravnava*). The main hearing is considered to be a single event even if it consists of several sessions[1]. Usually, the date of a main hearing is not fixed long in advance (it will rarely be fixed more than 30 days in advance)[2]. It is also not unusual for the court to fix a date of a main hearing already together with the serving of the claim to the defendant (whereby it must be considered that a defendant must always be given a 30 days period for the filling of a defence plea). But this is advisable only in cases, when it cannot be expected that the court will need to carry out any other preparatory measures for the trial.

An oral hearing is an obligatory phase of every civil procedure. Although the principle, envisaged in Art. 4, CPA, speaks in favor of orality, in fact, civil procedure in Slovenia is a **mixture between written and oral proceedings**[3]. Often, practice even tends to a greater importance of written procedural acts. On the other hand, the importance of the main hearing is diminished because it is often conducted in a «piece-meal» manner; with a number of short consecutive short hearings. True, Art. 298.2 of the Slovenian CPA provide that litigation, whenever possible, should be terminated in one single main hearing (trial). In this provision a principle of concentration is envisaged. But in reality, litigations which are terminated after one hearing are rare. However, during the time period between consecutive hearings parties often file preparatory submissions and in practice these are very important. Although according to the wording of the Act (Art. 286/3, CPA) in these written submissions parties should only announce facts, which they will later assert during a hearing. Besides, according to the wording of the act, preparatory submissions should not contains legal views, but only facts. However, the practice has long ago abandoned such a restrictive approach. In practice it is never demanded that facts and legal observations, asserted in preparatory submissions, are than pleaded orally[4]. Another instrument that gives importance to written form is the obligatory answer to the claim. If a defendant fails to answer a claim, a judgment by default can already be entered against him. Besides, it also speaks in favor of the finding that in reality, the character of civil procedure in Slovenia gravitates more towards written proceedings, that the procedure before the Supreme Court is always and before appellate courts almost always purely written, as these courts decide *in camera*, without parties and their attorneys having a chance to be present and to plead orally.

The major principle concerning the costs in litigation is that «**the loser pays**». If the party only partially succeeds in the litigation, such party is entitled to an appropriate (proportionate) amount of costs. Lawyers' fees are calculated in accordance with the Attorneys' Tariff. It must be stressed out that in the (contractual) relationship between an attorney at law and a client, they can agree on the use of other criteria for the payment and not for the application of the Attorneys' Tariff.

As a principle, a party is **not obliged to be legally represented**; everyone can present his or her case by him/herself. The only exception concerns proceedings with so called «extraordinary legal remedies» (such as revision and plea for reopening of proceedings; Art. 87/3, CPA). In such case, a party is obliged to be represented by an attorney at law (except if a party or the party's legal representative personally passed the state legal exam). As explained

[1] L. Ude, *Civilno procesno pravo*, p. 281.

[2] N. Betetto, *Pospešeni pravdni postopek* [An Accelerated Litigation], 29 *Pravna praksa*, 2004, No. 37, p. 3 et seq.

[3] L. Ude, *Civilno procesno pravo*, p. 122.

[4] L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek – zakon s komentarjem*, vol. 2, p. 607.

above, even a lay party can represent him or herself in a court (except in proceedings with extraordinary legal remedies). However, if a party chooses to be represented by another person, such party can only authorize an attorney at law or another lawyer with a state legal exam. Only in the lowest court (county court) there are no limitations as to the question, to which a power of attorney can be conferred (Art. 87/1, CPA). In any case, only a physical person can act as a representative at a court. The only exception is that the power of attorney can also be conferred to a law firm (which may be a legal entity; Art. 87/4 of the CPA).

7. Evidence

According to Slovenian CPA, the court may not take evidence on its own motion, but only the evidence proposed by the parties (Art. 7). Such system would indicate that the court retains a passive role at the gathering of evidence, but such conclusion would be wrong. First, it must be taken into account that a court should, by putting questions and hints (also regarding the distribution of the burden of proof), provoke the parties to adduce evidence (Art. 285, CPA)[1]. But it is foremost important, that, after the party has proposed certain evidence, it is the court, rather than the parties and their lawyers, who have the main responsibility for the achieving and taking it. It is the judge who takes the active role at, for example, the examination of witnesses and who always poses the questions to witnesses and experts first. Only afterwards, the attorneys and parties may also ask questions (Art. 289, CPA). It is not obligatory for the parties to be present during the taking of evidence. Besides, there is a very narrow scope of obligation on the parties to exchange the proofs in their possession between themselves. It is the court›s task to gather the proposed evidence However, after the court takes evidence, the parties must be given the opportunity to comment orally or in writing.

Every party must propose evidence already in their initial submissions (that is, a statement of claim and the answer to the claim; Arts. 180 and 278, CPA). As the system of «fact pleading» is accepted, facts must already be asserted in detail and means of proof proposed[2]. Each party must state the facts and adduce the evidence, upon which their claims are based, and by means of which they contest the facts stated and evidence adduced by the opposing party (Art. 212). But, as already explained, the parties are free to propose new means of evidence till (the end of) the opening session of the main hearing and also later, if they prove that at the opening session they were prevented from presenting them by reasons beyond their control. So, in practice, the taking of evidence is often conducted in a «piece-meal» manner. The insufficient means of production of evidence before the trial is one of deficiencies of the Slovenian CPA, for which it has already been established that it lacks an appropriate organization of the pre-trial stage in general. A partial improvement was brought by the CPA amendment in 2008, which gave the judges the power to make observations and to put questions in writing to the parties even before the main hearing and to request from them to offer further evidence (Art. 286.a CPA). The party, who does not react, may be precluded from stating such evidence in the later stages of the procedure.

[1] Decision of the Const. Court, No. Up 266/01, 25.4.2002; decision of the Supreme Court, II Ips 152/2003; Z. Trampuš, *Metode racionalnega vodenja postopka* [Methods of rational case-management], *Pravosodni bilten*, 1999, 2, pp. 39 et seq.

[2] J. Zobec, *Nesklepčnost tožbe in zamudna sodba* [Unconclusiveness of the Action and Judgment by Default], 21 *Pravna praksa*, 2002, No. 18, p. II (suppl.).

Means of proof are statutorily limited (but there is no hierarchy between them) to the following: inspection of person or object («view»), documents, witness testimony, expert testimony and party testimony. In a regular civil case, a court may only take evidence, relied on and adduced by the parties. In principle, all forms of evidence have the same weight under the principle of free evaluation of evidence (Art. 8, CPA). Evidence is produced in respect of all facts relevant for the adjudication of the case in dispute, and it is the court who decides which evidence will be produced for the determination of the ultimate facts (Art. 213). So, the court may not take evidence which was not proposed by the parties, but can refuse to take evidence, although it was proposed by the parties if it finds that evidence irrelevant – i.e. that it is meant to prove the facts, which are not relevant for the case (Art. 287, CPA)[1]. Otherwise, there are few restrictions on the admissibility of evidence. According to the case law of the Constitutional Court, a party has, in principle, a constitutionally protected right to have all the adduced evidence taken. It is a part of the constitutional right to be heard that a party may not only state the facts but also propose evidence. To this right of the party corresponds an obligation of the court to take all the proposed evidence unless there are constitutionally justifiable grounds for refusing it[2]. The court has no general discretion to exclude evidence which is uneconomical or unfeasible to achieve[3]. Only if the circumstances involved give rise to reasonable belief that evidence will not be able to be produced in the expected period of time, or if evidence must be produced abroad, the court may determine how long will it wait for the evidence to be produced (otherwise, it shall continue with the case irrespective of such evidence); Art. 219, CPA. There is no rule against adducing a statement made outside court as evidence of the facts contained in that statement (`hearsay' evidence). However, hearsay evidence will usually have less weight than direct testimony and this will be taken into account by a final evaluation of evidence.

In Slovenia, the **standard of proof**, as it is defined by Art. 216, CPA, are high. Pursuant to this rule, the judge should decide according to the burden of proof if he or she cannot reliably establish the (non)existence of the disputed fact. The judge must be (practically) convinced about the existence of a certain fact, if not, the judge should find against the party whom a burden of proof for this fact rests upon[4]. In the doctrine as well as in case law, the harshness of the high standard of proof (combined with a very limited scope of pre-trial production of evidence and a very limited access to evidence in the possession of the opponent) is sometimes rectified by shifting a burden of proof. This is the case if the claimant (for example, in a medical malpractice case) establishes a prima facie proof (*res ipsa loquitur* doctrine); typically with regard to establishing a causal link and the liability[5]. Besides, some authors try to relax the standard of proof and propose a solution that a standard of proof in a civil case should not, as Art. 216, CPA could imply, be practically identical as the one in criminal cases (beyond reasonable doubt); therefore a *clearly overwhelming degree of probability* should be sufficient in a civil case. But in any case, a mere decision on the preponderance of probabilities is definitely not sufficient. A preponderance of evidence as a standard of proof is sufficient

[1] Decision of the Const. Court, 12/97, 25.3.1999.

[2] Decision of the Supreme Court, II Ips 438/99, 24.2.2000; decision of the Const. Court, Up 266/01, 25.4.2002.

[3] N. Betetto, *Ustavna procesna jamstva v dokaznem postopku* [Constitutional Procedural Guarantees Concerning Evidence], 22 *Pravna praksa*, 2003, No. 21, p. 18.

[4] Judgment of the Supreme Court, II Ips 492/2002, 8.7.2004: «...convinced of the existence of material fact beyond doubt of any reasonable person».

[5] E.g. Judgment of the Supreme Court, II Ips 712/2004, 16.2.2006.

only with regard to certain procedural decisions and prerequisites (such as standing to sue and legal interest) and with regard to the issuing of protective measures[1].

The judge may **exclude evidence** which is obviously unsuitable[2], but in general, the court may not refuse evidence, proposed by a party, on the grounds that it has already come to an adverse decision on the existence of the disputed facts. In general, the court may not make an beforehand evaluation of evidence (for example the court may not refuse to hear a witness, proposed by the defendant, on the grounds that it is unreliable or biased and that whatever she would say, could not overturn the judge's conclusions, made on the basis of evidence adduced by the other party. The principle of free evaluation of evidence presupposes that the evidence is first taken[3]. Evidence may be rejected on the grounds that it was not submitted on time. The court may also refuse evidence if the party did not demonstrate with a sufficient accuracy why the proposed evidence would be beneficial to the case[4]. Furthermore, the court must exclude evidence, aimed at the proving of facts, which would contravene the *res iudicata* effect of a prior judgment, which the court is bound about. The same goes for the collateral estoppel, produced by criminal conviction in relation to the later civil litigation, arising from the same set of facts. In case a party submits very extensive and complex documentary evidence (for example, a company's files); she may be ordered to prepare a summary of its contents, including the index of pages where the relevant information is contained in the submitted documents. If the party fails to observe such order, the documentary evidence is deemed to be withdrawn (Art. 226/4, CPA).

The issue whether **illegally obtained evidence** may be presented in court in a civil case is not regulated by the CPA and has, till recently, not been thoroughly discussed either in theory or in case law (the situation is the opposite with regard to criminal procedure). The traditional position was that all evidence, regardless of how it has been obtained, may be used in a civil case (whereas the act of illegal obtaining of evidence can result in penal sanctions). However, this issue has recently been addressed by an influential precedent of the Constitutional Court[5]. The position of the Constitutional Court is that evidence, which was obtained by unlawful means, and the taking of which would violate a constitutional right (such as the right to privacy in case of unlawful video or audio recording) may in principle not be used in court. However, a test of proportionality should be applied and the use of illegally obtained evidence may still exceptionally be justified by balancing the interests involved, having regard also to the plaintiff's right to effective access to court and his or her right to be heard (which the right to evidence is a part of)[6].

Concerning the **expert evidence**, the principle is that a court will appoint one expert – but such must fully comply with the demands of independence and impartiality. The expert is considered to be an assistant for the court[7]. Therefore, the grounds for disqualification of judges are applied also with regard to the experts (Art. 247, CPA).

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[1] L. Ude, *Civilno procesno pravo*, p. 117.

[2] N. Betetto, *Ustavna procesna jamstva v dokaznem postopku*, p. 18.

[3] Decision of the Const. Court, Up 121/00, 18.9.2001.

[4] Decision of the Const. Court, No. Up 266/01, 25.4.2002. See also L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek – zakon s komentarjem*, vol. 2, p. 353.

[5] Decision of the Const. Court, Up 472/02, 7.10.2004.

[6] Ibidem.

[7] L. Ude, N. Betetto, A. Galič, V. Rijavec, J. Zobec, D. Wedam Lukić, *Pravdni postopek – zakon s komentarjem*, vol. 2, p. 481.

The CPA does not provide for a special procedural stage, aimed at **disclosure of evidence**. The CPA (Art. 227(provides only for a very narrow scope of the duty to produce documents (and precisely that is the reason why no additional privileges against the disclosure are imposed). As a party must, in principle, sufficiently identify the document he or she is seeking, the regulation is merely proper to avoid the concealing of the documents, the existence of which is already known, but not the documents, for which the seeking party does not even know to quite a concrete degree what their contents is or that the other party possesses them; this system does not facilitate any kind of discovery of new information[1]. Besides, the party cannot demand the opponent to disclose evidence, only the court is authorized to do so;

Since the CPA amendment of 2008, there exists a (limited) possibility to gather depositions and affidavits from witnesses[2]. In general, attorneys are discouraged from contacting potential witnesses, and a **preparation of witnesses** is regarded as a breach of rules of professional conduct. Only since the CPA amendment of 2008, the parties may present signed statements of witnesses and also a court may request a proposed witness to give a written statement (Art. 236a, CPA). Due to the principle of orality and immediacy, and also to safeguard the parties right to be heard (which a right to pose questions to witnesses is a part of[3]), a witness must nevertheless be summoned if a party requests so, even if he or she has made a written deposition beforehand.

8. The system of review of judicial decisions

The right to appeal against first instance courts' decisions is expressly guaranteed by Art. 25 of the Slovenian constitution. It is not possible to waive the right to appeal before the judgment of the first instance court is rendered. A party may waive the right of appeal only after the judgment is announced or, if it has not been announced, after it has been served on her (Art. 334, CPA). The grounds for appeal in the Slovenian CPA (Art. 338) consist of errors in substantive law, errors in procedural law and errors in the findings of facts (except in small-claims matters; Art. 458 CPA)[4]. Errors of procedural law can be divided into two groups: the first are known as «absolute violations of procedure», which are exclusively listed (such as a violation of the right to be heard, violations regarding the jurisdiction, the disqualification of judges, violations regarding the capacity and representation of parties, violation of the rules on public trial, violation of the right to use one's own language, violation of rules concerning *res iudicata* and *lis pendens* or the circumstance that the judgment is affected by shortcomings for which it cannot be reviewed, in particular if the ordering part thereof is incomprehensible, inconsistent, or in contradiction with the reasons for the judgment, or if the judgment fails to contain reasons or fails to contain reasons in respect of ultimate facts or if such reasons are vague or self-contradictory). These violations cause a nullity of a judgment in the sense that the appellate court must crush the judgment, appealed against, regardless of the question whether this violation of procedure resulted or could have resulted in the erroneous final decision on the substance (Art. 339.2 CPA). Regarding all other possible violations of procedure

[1] Judgment of the Supreme Court, II Ips, 544/2002, 11.9.2003.

[2] N. Betetto, *Predvidene novosti v ZPP glede dokaznega postopka* [The Foreseen Novelties in CPA Concerning Evidence], 33 *Podjetje in delo*, 2007, No. 6–7, p. 1073.

[3] Decision of the Const. Court, No. Up 39/95, 16.1.1997.

[4] See L. Ude, *Civilno procesno pravo*, p. 324 ff.

(known as «relative violations of procedure»), such test of the appellate court must be invoked (Art. 339.1 CPA). With regard to the errors in findings of facts, it should be stressed out that the appellate court can only consider evidence and facts, asserted already during the trial in the first instance (Art. 337.1 CPA).

A further appeal on points of law is called **revision** (revizija) in Slovenian legal system and is similar to the remedy of the same name in e.g. German or Austrian law and can also be compared to the *cassation* in e.g. French or Italian law[1]. It enables for access to the Supreme Court and thereby strives to achieve that this court will be able to effectively fulfil its constitutionally determined role of the supreme judicial authority, responsible for the unifying of case law. In Slovenian law, a revision is considered to be an extra-ordinary legal remedy. It neither prevents the enforceability of the judgment it is directed against, nor it's becoming *res iudicata* (Art. 369, CPA). However, if the revision is well-founded, the attacked judgment can be altered or set aside. The grounds for revision consist of errors in substantive and procedural law; most of the so-called «absolute violations of procedure» may be invoked and only those «relative violations of procedure» which were committed in the proceedings in the appellate court. With the 2008 reform, the legislator has changed the criteria of admissibility of the revision with the result that the revision now amounts to a remedy, the availability of which depends rather on the **discretion of the Supreme Court**. The importance of the role of the Supreme Court in creating precedents and thus unifying of case law and the giving of guidance for the application of law is emphasized. Only if the amount in dispute exceeds 40,000EUR (200,000 EUR in commercial cases), the revision is admissible already by statute and it is not necessary for the applicant to obtain a leave from the Supreme Court.

9. Alternative dispute resolution

In the last two decades, a great emphasis was put on a development of ADR in Slovenia. First, pilot projects of court-annexed mediation were introduced in some Slovenian courts (relying greatly on best practices from e.g. USA, England and the Netherlands). Then, the CPA was changed in order to introduce a settlement conference as a (nearly) obligatory device before the main hearing. The CPA, to a limited extent, also acknowledges the forms of out-of-court ADR – irrespective of the fact whether these are performed independently from the court or whether they concern the programs of ADR established as court-annexed[2]. The court may stay the proceedings for three months at most if the parties agree to make use of some other ADR procedure. (thereby, the legislator explicitly recognized the importance of already on-going court-annexed mediation schemes). In 2008 the Act on Mediation in Civil and Commercial Matters was adopted (which followed to a great extent both the EU Directive on Mediation as well as the UNCITRAL Model law on UNCITRAL Model Law on International Commercial Conciliation. Moreover, in 2010 the Court-annexed Alternative Dispute Resolution Act was introduced. This Act is of a huge significance as it requires from every Slovenian court of first instance (Labor courts and Family divisions included) to introduce at least one form of ADR as an offer to parties to already pending

[1] See L. Ude, *Civilno procesno pravo*, p. 337.

[2] N. Betetto, *Pravdnemu postopku pridružena mediacija* [A Court-Annexed Mediation), 27 *Podjetje in delo*, 2001, No. 6–7, pp. 1264–1271; N. Betetto, Court-Based Mediation and its Place in Slovenia, in Van Rhee, Uzelac (eds.), *Public and Private Justice*, Antwerpen, Intersentia, 2007, ch. M.

civil proceedings. ADR remains voluntary, but sanctions in costs are imposed (following the example in the UK). If party fails to participate in an offered ADR proceeding without fair grounds, it may adversely affect her when it comes to distribution of costs in the end of civil proceedings. As it has already been mentioned, there have already for more than 10 years existed pilot court-annexed mediation schemes in most of Slovenian courts. They were introduced without an explicit basis in the law. Thus, the new Act more or less merely formally recognized the practice and ADR schemes which have been operating (as court-annexed ADR) already for some time in Slovenia. It might be concluded that with the aforementioned Act Slovenia adopted the doctrine of «multi-door courthouse» as it has developed in certain common-law jurisdictions.

The legislatory framework for commercial arbitration is adequate as Slovenia introduced the new Arbitration Act, which is based on the UNCITRAL Model Law The Permanent Court of Arbitration attached to the Slovenian Chamber of Commerce has also been operating for a long time. However, in reality arbitration is insufficiently developed as a means of dispute resolution in Slovenia.

10. Final remarks

There are currently no plans for major reform of civil procedure in Slovenia. In my opinion however, there is still much room for improvement especially with regard to the following issues: (1) disclosure of documents should be regulated more in detail and should be made easier, (2) system of recovery of attorney fees should be determined in such a manner that it would prevent pursuing piece-meal litigation, adjournments of hearings and dilatory tactics in general), (3) although the 2008 amendment brought some improvements concerning the preparatory stage of proceedings, even more emphasis should be put to that aspect; promoting also co-operation between court and attorneys in fixing time-limits and time-frame for litigation; (4) further measures to avoid litigation and promote settlements before filing of a claim should be adopted (such as pre-action protocols or similar), (5) introduction of special summary proceedings, which would enable the court quickly to dispose with clearly unmeritous claims and defenses; (6) promotion of use of modern technologies in litigation.

The development of civil procedural law since the transition in the early 1990' has been rather turbulent in Slovenia. In the early stage, the debates concerning reform have been burdened by excessive amount of ideology (e.g. concerning passive or active role of the judge), whereby also a serious lack of knowledge of historical and comparative aspects of civil procedure was evident. In the last decade, the debate however seems to have stabilized and is now focused on similar issues as debates in every other comparable country which have recently or which plan to implement reforms of civil procedure. Comparative legal research accompanies every reform work. Thereby, Austrian and German law are still the biggest inspiration for Slovenian law reforms which is natural, as their civil procedural laws are most closely connected to Slovenian (whereby the language element should not be neglected either). Nevertheless, it is obvious that examples are sought for also in other legal cultures and certain implemented reforms are in line with world-wide trends of civil procedure, foremost those concerning (1) the development of ADR, (2) the improvement of a pre-trial stage of proceedings, (3) empowering the judge with more discretion with aim to adjust proceedings to the specifics of individual case; (4) strengthening both the

powers of the judge as well as the responsibility of the parties to contribute to accelerating and substantive quality of adjudication; (5) reshaping the role of the Supreme court and amending the admissibility criteria for access to the Supreme court.

Concerning the practical aspect of functioning of civil justice in Slovenia, one negative factor that might be mentioned is that tools, implemented in 2008 and designed to enable preparation of a trial are still rarely used in practice and are favoured neither by some judges nor by some attorneys. This may not come as a surprise as these tools require a diligent preparation before the trial and a good knowledge of the file both by a judge as well by attorneys. This should of course be welcome. But unfortunately, it still happens too often in the practice that both the judges as well as the attorneys come totally unprepared to the first session of the main hearing and still some judges and attorneys only then really start to study the case only in the moment of the first oral hearing.

On the other hand, from the side of the users, a major negative factor in my opinion is the lack of respect for authority and dignity of the courts. It is especially worrying as the disrespect of courts comes not only from certain media and regular litigants, but also from some politicians (and political parties) which are involved in court cases. The aforementioned refers to style of commenting on pending and lost cases and defamatory language used, avoiding attendance at scheduled court hearings without proper excuse, avoiding accepting service of judicial documents (!) and even avoiding voluntarily to fulfil an obligation, imposed by final judgment (so that formal enforcement proceedings need to be implemented). Especially politicians should be aware of the fact that they set example which shall probably be followed in general public. As well should they be aware of a danger of losing of confidence in public that courts are a reliable and proper forum for solving disputes. The position of judiciary as one of fundamental state powers is thereby – probably quite intentionally – undermined, which is especially troublesome as unlike the legislative and executive powers the judiciary is much more vulnerable to such attacks.

Vyacheslav Komarov[1]

UKRAINIAN NATIONAL REPORT

Reforms of Civil Procedural Legislation of Ukraine and the Problem of Globalization of the Civil Procedure

Introduction

In recent years the continuously widening range of scientific problems has resulted in a considerable increase of the value of the civil procedural law as a science. This is manifested in some key postulates constituting the basis of scientific researches.

First of all the tradition to interpret issues of civil procedure through the mechanism of procedural safeguards of administering justice in civil cases should be mentioned. The pro-

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cedural doctrine implies that justice and legal proceedings institutions need updating to respond to challenges of the modern society, and the obvious fact that human rights are being fundamentalized not only within national, but also within international law and order, should be taken into account.

In the situation of internationalization of legal relations efficient protection of law in the foreign economic activity area, protection of rights and freedoms of natural and legal persons is required. Hence, more and more pressing become issues concerning international cooperation and international legal aid in civil cases, interaction of national and international procedures in the area of protection of civil rights – interdependence of national civil procedures, interrelation of national and international court hearings. In other words, problems arising in the modern civil procedure should be considered in the global context[1].

Attempts to Carry out the Reforms and Search for the Model of Ukraine's Modern Civil Procedure

In the late 50's – early 60's of the 20th century in the Soviet Union as a whole and in individual soviet republics intensive, large-scale work on drafting legislation was conducted. As a result Fundamentals of Civil Legal Procedure of the USSR and soviet republics were adopted. On their basis the Supreme Councils of soviet republics passed civil procedure codes. The Civil Procedure Code of the Ukrainian SSR (CPC 1963) was adopted on July 18, 1963 and came into force on January 1, 1964.

Compared to the preceding CPC of the Ukrainian SSR 1924 and CPC of the Ukrainian SSR 1929, CPC 1963 was a better developed legislative act in terms of both legal technique and the content of its institutions and particular rules.

The main features of CPC 1963 were the following:

– formation of court instances as a three-level system corresponding to the administrative-territorial system;

– creation of a unified procedure in the first instance;

– introduction of the institute of people's assessors;

– the prosecutor's active participation in the civil procedure;

– sidelining the defense counsel's activity

– intense activity of the judge and insufficiency of the litigants' dispositive rights;

– adoption of the principle of examining the case for the purpose of establishing the objective truth;

– creation of a single-stage system of appeal;

– the institute of appeal on the legality of a court decision.

The salient feature of litigation under CPC 1963 was the dispositive principle and the principle of adversary nature of a trial. These principles were embedded into the code within the conceptual framework constituted by community of interests of personality and interests of state and society as well as the objective truth as the aim of civil procedure.

[1] See P. Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, *Indiana Journal of Global Legal Studies*, Spring 2007, p. 119–145; J.H. Rubinstein, *Global Litigation (International Law's New Importance in the U.S. The Supreme Court's Latest Term Provides the Most Recent Example)*, *The National Law Journal*, Monday, September 15, 2003; *Лукашук И.И.* Глобализация, государство, право, XXI век. М.: Спарк, 2000. С. 9–17; *Алексеев С.С.* Линия права. М.: Статут, 2006. С. 114–137.

Under the original version of Article 5 of CPC 1963 the court commenced the consideration of a lawsuit on the complaint of a person who applied for protection of her right or legal interest; on the prosecutor's application; on the application of state government bodies, trade unions; state institutions; enterprises; collective farms, and other cooperative and non-profit civic organizations or individuals in cases when by the law they may apply to the court to protect other persons' rights and interests.

Article 15 of CPC 1963 provided for the responsibility of the court to take all possible measures stipulated by law to ensure a full, detailed and objective finding out of facts of the case and of litigants' rights and duties without being restricted by the presented pleadings.

The court was to explain to the litigants their rights and duties, warn them about consequences of doing or a failure to do procedural actions and facilitate parties exercising their rights.

Article 30 of CPC 1963 stated that each party must prove those facts which constitute the grounds for its claim or defense. Evidence was presented by the litigants and other persons participating in a case. However, if the presented evidence is insufficient, the court must offer the litigants and other participants an opportunity to present additional evidence or collect it on its own initiative.

CPC 1963 also provided for an active role of the prosecutor in the civil procedure.

It should be noted that the code introduced the institute of appeal on legality of judicial decision despite the classical institutes of appeal and cassation. Article 328 of CPC 1963 stipulated that the right to protest under judicial review procedure against decisions and other acts of the court that have come into effect belongs to the Procurator General and other prosecutors, subordinate to him, as well as the Chairman of the Supreme Court and some other officials.

During the period from 1991 to 1996 a number of significant changes were made to CPC 1963, which indicated the attempts to modify civil procedure. Thus, the definition of functions of civil procedure was amended. The new wording of Article 2 of CPC 1963, in accordance with the Law of Ukraine of 15 December 1992, stated that the task of civil procedure was the protection of rights and legal interests of individuals, legal persons and state by means of thorough consideration and disposition of civil cases in full compliance with the current legislation.

Another positive tendency in reforming civil procedure is related to the extension of civil courts jurisdiction.

Crucial amendments are those dealing with new adversarial principle regulation. The Law of Ukraine of February 2, 1996 modified Article 15 and Article 30 of CPC. The new wording of Article 15 sets forth that trial of civil cases in courts is adversary in nature and the court must facilitate the litigants exercising their rights. Under Article 30 of CPC each party must prove those facts which constitute the grounds for its claim or defense. Evidence is presented by the litigants and other persons participating in a case. In cases when litigants or participants face difficulties in discovery of evidence, the court must assist in discovery of evidence on the motion of the parties.

The Law of Ukraine of December 15, 1992 modified Article 13 of CPC and abolished public prosecutor's supervision in civil procedure. The new wording provided that the prosecutor participates in the trials of civil cases on applications for protection of the interests of the state or of the rights and legal interests filed by the citizens who are not able to protect their rights for reasons of health or other reasonable excuse.

On June 28, 1996 the new Constitution of Ukraine was adopted. It consolidated the priority of human rights, providing that human and citizens' rights and freedoms are protected by the court, and everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Article 55).

The Constitution of Ukraine also consolidated the basis of the judicial system and justice. Thus, under Article 124 justice in Ukraine is administered exclusively by the courts. Article 125 provides for creation of courts of appeal and introduces complaint of a court decision by appeal, which had not been provided by the existing procedural legislation of that time.

According to the Transitional Provisions of the Constitution the powers of the Supreme Court remained effective under the legislation that provided review of court decisions, which have not entered into force, in the exercise of supervisory power. It is quite natural, that the expiration of the Transitional Provisions of the Constitution concerning the powers of the Supreme Court became the factor that stimulated the legislator to take urgent measures and make the current procedural legislation and laws governing the judiciary consistent with the Constitution of Ukraine.

The Law of Ukraine of June 21, 2001 brought about innovations concerning the introduction of appeal and cassation (Sections 40, 41 of the CPC). Had those innovations not been passed the judiciary and civil procedure would have been out of constitutional framework.

The institute of review of judgment due to newly-discovered evidence was significantly changed. The law laid down such specific ground for review as unconstitutionality of the law applied by the court in the trial (p. 2 art. 347-2 CPC).

In addition to grounds for review of judgment due to newly-discovered evidence Chapter 42 of the CPC laid down grounds for review of court acts due to exceptional circumstances, which meant a new form of review of court acts that have entered into force. Exceptional circumstances that constitute ground for a review included finding out of unequal application by the courts of general jurisdiction of the same provision of law or its application contrary to the rules of the Constitution of Ukraine, provided such finding out took place after examination of the case under cassation procedure. They also included the fact, established by the decision of an international judicial institution whose jurisdiction is recognized by Ukraine, that Ukraine broke its international obligations (p. 3 art. 347-2 CPC).

Civil Procedure Code of Ukraine of 2004

After the innovations were introduced to CPC 1963 and especially after «minor» judicial reform was carried out in 2001 it became obvious that adoption of the new CPC of Ukraine was likely to take place in the nearest future. CPC was adopted on March18, 2004 and put into force on January, 1 2005 (hereinafter CPC 2004). This Code differs from the previous one not only in content and institutes but, to a certain extent, in the conception behind it, i.e. the model and structure of civil procedure.

P. 1 Article 2 of CPC 2004 states that civil justice is administered in accordance with the Constitution of Ukraine, this Code and the Law of Ukraine «On International Private Law». It should be noted that international treaties are considered to be sources of civil procedural law. Pursuant to P. 2 Article 2 of CPC whenever the treaty establishes the rules other than those set forth by this Code, the rules of the treaty must be applied.

The secondary sources of the civil procedural law are the decisions of the European Court of Human Rights (hereinafter ECHR) and particularly Article 6 of the European Convention on Human Rights, which provides for a right to a fair trial. Pursuant to Article 17 of the Law of Ukraine «On enforcement of judgment and application of practices of the European Court of Human Rights» Ukraine's courts apply the Convention and decisions of the European Court as a source of law.

Specific sources of the civil procedural law are the decisions of the Constitutional Court of Ukraine.

CPC of 2004 consists of eleven sections. Originally it contained the following sections: I. General provisions; II. Writ proceeding; III. Action proceeding; IV. Special proceeding; V. Review of judicial decisions; VI. Procedural matters relating to the execution of judgments in civil cases and decisions of other bodies (officials), VII. Judicial control over the execution of judgments; VIII. On the recognition and enforcement of judgments of foreign courts in Ukraine. IX. Restoration of lost judicial proceedings; X. Proceedings in matters involving foreigners; XI. Final and transitional provisions. Later, according to the Law of Ukraine of February 3, 2011 «On Amendments to the Civil Procedure Code of Ukraine concerning appeals against the decisions of the arbitration court and the issuance of a writ of forced execution of arbitral tribunals decisions» CPC was supplemented with the section «VII-I. Proceedings on appealing against the decisions of the arbitration court and the issuance of writs of forced execution of arbitral tribunals decisions».

The main features of CPC of 2004 can be summarized as follows:

– adaptability of the regime of civil proceedings concerning the constitutional grounds of justice, capacity development and professional judicial practice;

– diversification of the process in the court of first instance (the writ proceedings and investigation by default have been introduced);

– examination of a civil case in the court of first instance by a sole judge and the more important role of the judge presiding in the review proceedings;

– status of the prosecutor is «equalized» to statuses of the similar participants in the proceedings (Ombudsman in the Verkhovna Rada of Ukraine, state agencies and local self-government bodies and others, which can protect the rights of these individuals);

– increasing importance of the role of the defense lawyer and legal aid institutions;

– liberal adversarial model and leveling the excessive activity of the court, strengthening the dispositive rights of the parties;

– implementation of the principle of unbiased examination of civil cases as an objective of civil justice, the rejection of the principle of examining the case for the purpose of establishing the objective truth;

– creating a two-level system of appeal as a minimum standard of access to justice;

– retaining the institute of reviewing court decisions under exceptional circumstances, introduced in the CPC 1963, its combination with cassation within the powers of the Supreme Court of Ukraine.

The adaptation of the regime of civil proceedings on the constitutional grounds of justice, which formed the basis of Civil Procedure Code 2004, is considered to be the most crucial achievement. The constitutional grounds of justice are logical and epistemological concepts that, on the one hand, reflect the scope of the constitutional-legal regulation of the judiciary and justice, and, on the other hand, are prerequisites for the theoretical interpretation of the civil procedural law in the context of the constitutional and legal regime of

civil proceedings. Analysis of the Constitution from this point of view allows determining such basic constitutional grounds of civil proceedings as:

1. The court as an independent body in the triad of powers which should have the exclusive prerogative to administer justice, and the constitutional right to judicial protection as an absolute value.

2. Differentiation of judicial jurisdiction and judicial forms on the basis of the constitutional provisions on territorial organization, specialization of the judiciary and the availability of economic and administrative courts.

3. The principle of the law-governed state and the principle of the rule of law as determinants of the functioning of justice, of the nature and content of the legal status of citizens and the judiciary.

4. The constitutional principles of justice have the greatest importance among the legal values that characterize the mode of the proceedings.

5. The postulate of adherence to constitutional rights of citizens, that is to such fundamental values that define the scope of absolute rights and freedoms as the primary objects of judicial protection.

6. Access to justice as a modern social and legal feature of the functioning of justice.

The Structure of the Civil Procedure of Ukraine

The objectives of civil proceedings are fair, impartial and timely consideration and resolution of civil cases in order to protect the violated, unrecognized or disputed rights, freedoms or interests of individuals and the rights and interests of entities, the interests of the state (Article 1 of CPC 2004).

Structurally, in accordance with CPC, civil justice is a system of civil proceedings such as action, writ, special, and pre-trial proceedings. Based on the fact that the court system includes three instances and that courts of different instances have different procedural functions, besides proceedings in courts of first instance (action, writ, special, and pre-trial), civil procedure as a structural system comprises appeal proceedings, cassation proceedings and proceedings in the Supreme Court of Ukraine. In addition, the CPC provides for such specific proceedings, as review of court decisions, rulings and regulations on the newly discovered evidence (Chapter 4 Section V of CPC), proceedings on reversal of arbitration decisions and the issuance of writs of execution to enforce arbitration decisions (Section VII-1 of CPC), recovery of lost court proceedings (Section IX of CPC), proceedings in matters involving foreigners (Section X of CPC).

As it can be seen, civil proceedings are primarily asymmetric system of various court proceedings. This asymmetry of judicial proceedings means a real differentiation of judicial procedures and certain flexibility of the civil proceedings, adapted to carrying out the tasks of civil proceedings, and court proceedings themselves, as structural components of civil procedure have the system-forming and substantial nature. It is no accident that in the theory of the legal process focus is on the conceptual character of the category of civil proceeding and on the fact that judicial proceeding is the basic structure of the legal process[1].

In the light of these approaches it is obvious that the modern civil procedure, based on the action proceeding and its institutes, reflects to some extent the specific style of the

[1] Теория юридического процесса / Под общ. ред. В.М. Горшенева. Х.: Вища школа, 1985. С. 71–91.

national civil procedure, which consists in existence of not only fundamental action proceeding as a form of exercising judicial power and administering justice in civil cases, but other judicial proceedings such as writ and special ones. In the Ukrainian civil procedural law theory writ and special proceedings are qualified as being quasi-judicial[1].

The efficiency of civil procedure is determined by the existence of court instances and the role of the higher courts. In accordance with par. 8 art. 129 of the Constitution of Ukraine and Article 13 of CPC appeals and cassations are provided for in order to review the decisions of courts. Moreover, our legislation provides for the respective powers of the High Specialized Court of Ukraine for examination of civil and criminal cases as the court of cassation, and of the Supreme Court.

The principle of three levels is applied in the civil procedure of Ukraine. The main idea is that civil procedure comprises proceedings in three instances. In the classical three-instance framework the system of proceedings presupposes that examination of a case in substance is held in two instances, where questions of fact and questions of law are decided, while the third instance performs a controlling function (review or cassation).

Despite the fact that civil proceedings in Ukraine embodies the classical three-instance model, the peculiarity of civil justice consists in the fact that it reflects specificity of the current judicial system, in which the Supreme Court of Ukraine has the status of the highest judicial body (Article 125 of the Constitution of Ukraine). Prior to adoption of the Law of Ukraine «On judiciary and status of judges» on July 7, 2010 the Supreme Court of Ukraine was the court of cassation. This Law substantially modified the functions of the Supreme Court of Ukraine (Article 38 of the Law).

According to Article 355 of CPC an application to review judgments by the Supreme Court of Ukraine may be submitted exclusively on the following grounds: 1) the unequal application of the same substantive law rules by appellate courts that led to the delivery of different in content judgments in similar legal relationships; 2) establishment by an international judicial institution, the jurisdiction of which is recognized by Ukraine, of a violation of international obligations by Ukraine in deciding a case in court.

The activity of the Supreme Court of Ukraine, from the point of view of its procedural functions, has nothing to do with cassation. Still it facilitates the unification of court practices and compliance of acts of justice of Ukraine with the international obligations. It is obvious that the powers of the Supreme Court of Ukraine and the differentiation of procedural functions of the courts of various instances constitute a unique model of organization of civil justice and, accordingly, define a new specific role of the Supreme Court of Ukraine.

The current model of the review of judicial decisions by the Supreme Court of Ukraine in a certain way is a result of the transformation of the one which had existed before changes were made to the model of review of judicial decisions under exceptional circumstances (Chapter 3 Section V CPC 2004).

The changes that were made in the Civil Procedure Code 2004 in connection with the adoption of the Law of Ukraine «On Judiciary and Status of Judges» caused a lot of discussions[2]. The impulse for the adoption of this law was the decision of the Constitutional Court

[1] Див.: Окреме провадження: монографія / В.В. Комаров, Г.О. Світлічна, І.В. Удальцова; За ред. В.В. Комарова. Х.: Право, 2011. С. 38–40; Курс цивільного процесу: Підручник / В.В. Комаров, В.А. Бігун, В.В. Баранкова та ін.; За ред. В. В. Комарова. Х.: Право, 2011. С. 658–660, 696–705.

[2] *Сірий М.* Кассация. Чье слово последнее? // Дзеркало тижня. № 13 (793). 3–9 апреля 2010; Украина слишком снизила роль Верховного Суда – Венецианская комиссия [Электронный ресурс]:

of Ukraine in the case of March 11, 2010, № 8-рп/2010 (Case № 1-1/2010) based on the constitutional request by 46 deputies as to the construction of the concept of «cassation appeal» contained in Articles 125, 129 of the Constitution of Ukraine. In this decision the Constitutional Court concluded that the definition in par. 8 p. 3 Article 129 of the Constitution of Ukraine as one of the fundamental principles of justice «to ensure ... cassation appeal against the decision of the court» in the system connection with the provisions of Part 1 of Article 8 and of Article 125 of the Fundamental Law of Ukraine means a one-time cassation appeal and review of the decision of the court; the law may provide for other forms of appeal and review of decisions of courts of general jurisdiction; the definition given in Part 3 of Article 125 of the Constitution of Ukraine of the high court's as the highest judicial bodies in the system of specialized courts means that high courts exercise, on the grounds and within the limits prescribed by the laws on civil procedure, the powers of the court of appeal against decisions of the specialized courts; the definition, given in Part 2 of Article 125 of the Constitution of Ukraine about the Supreme Court of Ukraine as the highest judicial a body in the system of Ukrainian courts, means that the constitutional status of the Supreme Court does not involve granting it the powers of a court of appeal against the decisions of the high specialized courts, which exercise the powers of an appellate instance[1].

Factors in Globalization of Civil Procedure as Theoretical Grounds for Researching Its Efficiency

In modern conditions an essential factor in globalization of civil procedure is fundamentalization of human rights and the right to a fair trial.

In this regard the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms has become a landmark in the development of the legal systems of the Member States of the Council of Europe. One should admit new significant phenomenological aspects of the influence which ECHR exerts on court practices. National courts are offered an opportunity to gain new experience related to applying ECHR. As Michele de Salvia rightly notes, from now on a national judge is bound by the responsibility to proclaim law as a judge ruling on questions of rights and freedoms. Actually, he is the first to rule on questions of rights and freedoms. Therefore, a person applying to a court is aware of his right to refer to the European Convention as it is construed by the European Court of Human Rights in Strasbourg (Strasbourg Court)[2].

Article 6 (1) of the ECHR provides that every person who is a party to a dispute on his civil rights and obligations is entitled to a fair and public hearing within a reasonable

[16 октяб. 2010 р., 18:11] // Подробности: по материалам УНИАН. Режим доступа: http://podrobnosti.ua/power/2010/10/16/723608.html]; *Колычев В.* Мнение Венецианской комиссии – не догма // 2000: Еженедельник. 2010. 29 окт.– 4 нояб. (№ 43). С. 6–7 (http://2000.net.ua/2000/forum/mnenie/69749); Звернення суддів Верховного Суду України до Президента України // Вісн. Верхов. Суду України. 2010. № 5. С. 8; *Гусаров К.В.* Повторная кассация и производство по исключительным обстоятельствам в процессуальном праве Украины: позиция Конституционного Суда // Арбитражный и гражданский процесс. 2010. № 5. С. 41–44; *Гусаров К.В.* Инстанционное построение судов гражданской юрисдикции в Законе Украины «О судоустройстве и статусе судей» // Арбитражный и гражданский процесс. 2010. № 9. С. 26–28.

[1] Вісник Конституційного суду України. 2010. № 3. С. 7–13

[2] *Де Сальвиа М.* Прецеденты Европейского суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской конвенции о защите прав человека и основных свобод: Судебная практика с 1960 по 2002 г. СПб.: Юрид. центр Пресс, 2004. С. 21.

time by an independent and impartial tribunal established by law. Judgment must be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice[1].

In handling cases dealing with violations of the right to a fair trial the European Court of Human Rights construes this Article as the one which not only details the guarantees given to the litigants, but primarily protects the right that makes it possible to use these guarantees in practice, namely, provides for access to justice. If a person has no access to trial such characteristics of a trial as fairness, publicity and dynamism become pointless[2]. Thus the right to a fair trial should be understood in a broader sense, not as the wording of the provision literally means. It should be understood as the right to access to justice, which is not explicitly expressed in the Article, but may be inferred from it. Thus, the State Parties to the ECHR are obliged to create sufficient and optimal conditions to provide access to justice as commonly recognized international standard of fair legal procedure.

Fundamentalization of human rights and recognition of the right to a fair trial as a factor integrating national court systems have become the basis for further collective efforts to improve efficiency of civil justice (to harmonize polices of improving the efficiency of civil justice). International community is interested in ensuring accessibility of justice as a common universal standard of fair justice required for protection of human rights and freedoms that are to be guaranteed in all law-governed democracies and in maintaining this standard within national legal systems. That is why Member States of the Council of Europe elaborated and the Committee of Ministers adopted resolutions and recommendations on ensuring easier access to the efficient justice for citizens. In recent years the European Commission for the Efficiency of Justice (CEPEJ), established by the Committee of Ministers of the Council of Europe in 2002, has played an important role in improving the efficiency of civil justice. The aim of the CEPEJ is the development of concrete measures to be taken by the member States for:

– effective promotion of the existing European instruments relating to the organization of justice;

– pursuing common judicial policy taking into account interests of users of the judicial system;

– assisting the European Court of Human Rights in reducing the caseload by proposing practical solutions for prevention of violations of Art.6 of the ECHR.

In December 2004 the CEPEJ prepared the Report «European Judicial Systems – Facts And Figures». This Report was the first result of the pilot research based on a questionnaire survey dealing with evaluation of judicial systems. It was intended to obtain comparable quantitative and qualitative data on the organization and functioning of 40 judicial systems in 46 Member States of the Council of Europe. The Report was based on the information prepared by the national correspondents appointed by member States. It was approved at

[1] Конвенція про захист прав людини і основоположних свобод. Застосування в Україні. К.: М-во юстиції України, 2006. С. 11.

[2] Европейский суд по правам человека: Изб. решения: В 2 т. Т. 1. М.: Норма, 2000. С. 45.

the 7th plenary meeting of the CEPEJ. The aim of the Report was to give a brief survey of the European judicial systems[1].

Another factor in the globalization of civil procedure is evolution of its typological models.

Civil procedure has evolved over many centuries within different legal cultures. Foreign experts, Western researchers in particular, are trying to gain modern understanding of civil procedure in terms of those essential features that determine its nature, potentialities and efficiency. They are developing models of civil procedure which reflect the level of legal culture and as such set legislative tendencies and conceptual principles of civil procedural law as a science. In our view, the recent codifications of civil procedural law in Europe manifest synchronism in modernization of procedural legislation as well as development and topicality of procedural doctrine. Notable enough are civil procedure reforms in Germany, France, England and other countries of Western, Central and Eastern Europe and a great number of scientific literatures on this subject[2]. Besides, there is a strong tendency toward the convergence of different national and continental civil procedure cultures and intensive search for models of efficient and accessible justice according to the modern challenges of provision of access to justice.

For example, the latest civil proceedings reform in England and substantial alterations in the US civil procedural law indicate deviation from adversarial litigation as a characteristic of the Anglo-Saxon civil procedure in the common law states. This tendency has received widespread response in academic publications and court practice analyses[3]. As regards peculiarities of England, Lord Woolf's reform made a significant breakthrough in the adversarial civil procedure system and established the principles of court management in litigations.

The problem of contemporary models of civil procedure, being burning and topical, has been discussed at numerous congresses of the International Association of Procedural Law. Special attention to this issue was paid at the conference «The future of Categories – Categories of the future», held by the Association on June 3–5, 2009 in Toronto. The conference was mostly devoted to the fact that reforms and harmonization of the civil procedure are more and more leveling differences between the systems of civil procedure in the countries of common and continental law. However, the main point is that old categories have become less topical for characterizing the models of civil procedure as the conceptual

[1] *European Judicial Systems*, edition 2006 (2004 data), European commission for the efficiency of justice (CEPEJ), Council of Europe, 2006, printed in Belgium.

[2] See V. Komarov, *Zivilprozeßgesetzgebung der Ukraine und Reformierung des Ziviprozeßrechts*, *ZZPInt*, 1999, No. 4, p. 361–379; *Веливис С., Вишинскас В.* Основные черты гражданского процессуального права Литвы // Арбитражный и гражданский процесс. 2009. № 4. С. 28–32, № 5. С. 42–44; СНГ: реформа гражданского процессуального права: Материалы Межвузовской конференции / Под общ. ред. М.М. Богуславского и А. Трунка. М.: ООО «Городец-издат», 2003, etc.

[3] See J.A. Jolowicz, *The Woolf Report and the Adversary System*, *C.J.Q.*, 1996, vol. 15(Jul), p. 198–210; K. Uff, *«Access to Justice»: Lord Woolf's Final Report, Procedure and Evidence*, *C.J.Q.*, 1997, vol. 16(Jan), p. 17–22; N. Andrews, *A New Civil Procedural Code for England: Party-Control Going, Going, Gone*, *C.J.Q.*, 2000, vol. 19(Jan), p. 19–38; J. Shapland, *The Need for Case Management? Profiles of Liquidated and Unliquidated Cases*, *C.J.Q.*, 2003, vol. 22(Oct), p. 324–348; M.E. Frankel, *The Search For Truth: An Umpireal View*, *University Of Pennsylvania Law Review*, 1975, No. 5, p. 1031–1059; M.H. Freedman, *Judge Frankel's Search for Truth*, *University Of Pennsylvania Law Review*, 1975, p. 1060–1066; H.R. Uviller, *The Advocate, the Truth, And Judicial Hackles: A Reaction To Judge Frankel's Idea*, *University Of Pennsylvania Law Review*, 1975, p. 1067–1082; R. Garnett, *International Arbitration Law: Progress towards Harmonisation*, *Melbourne Journal of International Law*, vol. 3, 2002, p. 400–413.

bases for building mechanisms of dispute settlement. The keynote of the conference was the thesis that the changes undergoing in the systems and the roles of the civil procedure participants – parties, lawyers and witnesses, roles of arbiters, judges and court as the judicial body, show that harmonization of mixed jurisdiction projects is becoming evident, that traditional differences cannot determine the procedure for dispute settlements and trials in the future. Furthermore, it was specifically emphasized that paradoxically enough reforms can lead to more practical differences between the countries of civil or common law than differences between civil and common law on the whole[1].

In this respect, J. Jolowicz's opinion is notable since he writes that there is a widely spread thought that England and other common law countries have an adversarial civil procedure system whereas the continental countries apply inquisitorial system. In fact, adversarial process just does not exist in the real world, neither does the inquisitorial one. It should be admitted that some systems are more adversarial or more inquisitorial than others. There is a scale that comprises all procedural systems: on the one hand — theoretically pure adversarial system, on the other — theoretically pure inquisitorial system.

The main drawback of the adversarial system is in the fact that the judge does not have any commitment to find the truth. This justice is procedural, that is the system of dispute consideration. Therefore, the author emphasizes, there are no reasons for persistent adherence to the adversarial system, the system, which better suits for discussing decisions rather than finding the «right» decisions. Thus, it is advisable to approach the inquisitorial system, but not the traditional adversarial one.

The latest reform in England, as J. Jolowicz notices, has made the English system remote from the classical adversarial system and made it closer to the French system. The adversarial system has long been a cornerstone of the English civil procedure. This system guarantees procedural justice, but in its essence it does not fully meet the principle of impartial justice. Settlement of a dispute is not the main function of the legal proceedings any more in contemporary England and, therefore, it must be admitted that there is a need for the procedure, less focusing on the freedom of the parties and more on achieving right decisions[2].

Thus, there are strong reasons to claim that there have been trends within national procedural law, confirming the entire convergence of two well-known classical forms of civil procedure – civil procedure of purely adversarial type and purely inquisitorial type. Nevertheless, under these circumstances the overall doctrinal description of the civil procedure model is becoming more complicated. In our opinion, in the civilization aspect of continental and Anglo-Saxon procedure traditions, basing on the availability and significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms as the regional international legal act, as well as other similar regional regulations, it is possible to suggest the model of the fair civil procedure as a standard, which reflects the general concept of international harmonization of justice, and in the culturological aspect

[1] See Mirjan Damaska, *The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction*, in *International Association of Procedural Law «The future of Categories – Categories of the future»*, Toronto Conference, June 3–5, 2009, p. 1–4; Soraya Amrani Mekki, *The Future of the Categories. The Categories of the Future*, in *International Association of Procedural Law «The future of Categories – Categories of the future»*, Toronto Conference, June 3–5, 2009, p. 207–221.

[2] J. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, *International and Comparative Law Quarterly*, 2003, vol. 52, p. 289–291.

it is the achievement of both national and international legal cultures. Using this approach, the civil procedure in the global context is acquiring the feature of monocultural legal value.

Globalization of the civil procedure as an actual contemporary trend in its development, which determines unified properties, still may not, to our mind, level the identity of national procedural systems, taking into consideration the specifics of their historic development, doctrinal views, condition of legal practice and other factors. Therein, such equally vital scientific problems as the national identity of the civil procedure may not be ignored due to globalization. Thus, it seems important for the civil procedural science that recently there have appeared fundamental research papers, dedicated to the study of socio-cultural specifics of civil justice and typology of the national civil proceedings[1]. Undoubtedly, this research field is promising and unique for the development of the modern civil procedure science.

[1] D. Maleshin, *The Russian Style of Civil Procedure*, *Emory International Law Review*, 2007, vol. 21, No. 2, p. 543–562; *Малешин Д.Я.* Социокультурные основы российского права // Юридическая наука и образование. Вып. 1. 2008. С. 7–34; *Треушников М.К., Малешин Д.Я.* Новый Гражданский процессуальный кодекс России 2002 г.: некоторые социокультурные особенности // Вестн. Моск. ун-та. Серия 11. Право. 2004. № 4. С. 54–60; *Малешин Д.Я.* Особенности российского типа гражданского процесса // Тр. юрид. ф-та. Кн. 10. М.: Правоведение, 2008. С. 9–154; *Он же.* Гражданская процессуальная система России. М.: Статут, 2011. С. 496.

SESSION 5. CULTURAL DIMENSIONS OF GROUP LITIGATION

General Reporter –
Prof. **Janet Walker**, IAPL Presidium member, Osgoode Hall Law School, Canada.

How does culture influence the model of group litigation? What kind of solutions exists in other countries than civil or common law?

National Reporters:
- Australian National Report: Prof. **Vicki Waye**, University of South Australia and Prof. **Vincenzo Morabito**, Monash University, Australia
- Brazilian National Report: Prof. **Ada Pellegrini Grinover**, University of São Paolo, Brazil
- Belgium National Report: Dr. **Stefaan Voet**, Ghent University, Belgium
- Canadian National Report: Prof. **Jasminka Kalajdzic**, University of Windsor, Canada
- English National Report: Prof. **Rachael Mulheron**, Queen Mary University of London, England and Wales
- Italian National Report: Prof. **Elisabetta Silvestri**, University of Pavia, Italy
- Dutch National Report: Dr. **Helene van Lith**, Erasmus University, Netherlands
- Russian National Report: Ass. Professor **Dmitry Tumanov**, Moscow State Law Academy, Russia
- Swedish National Report: Prof. **Per Henrik Lindblom**, Uppsala University, Sweden

Discussion Panel:
- Spain: Dr. **Javier López Sánchez**, University of Zaragosa
- Russia: **Dmitry Magonya**, Art de Lex Law firm

Janet Walker[1]

GENERAL REPORT[2]

Introduction: Who's Afraid of U.S.-style Class Actions?

U.S.-style class actions have become a flashpoint for debate over group litigation and the collective redress regimes emerging around the world. Everyone wants to develop better ways for consumers and others who suffer loss from mass harms to receive compensation for claims that are too small to litigate individually. Everyone wants to improve the means

[1] Professor of Osgoode Hall Law School (Canada).
[2] A version of this paper is published in Volume 18 of the Southwestern Journal of International Law.

for encouraging responsible conduct on the part of those who might cause such harms. But everyone, at least outside the United States, seems also to agree that they do not want to adopt U.S.-style class actions in their legal systems.

Despite this widespread agreement, it is difficult to work out the precise nature of the complaint. What is it about U.S.-style class actions that offends the sensibilities of other legal communities? Could it be the basic objectives of the procedure, the way in which the class is represented and the litigation is financed, the kinds of remedies that are available, or the nature of the court's involvement? And if it is one or more of these features, is the offending feature integral to the successful operation of a collective redress system, or could it be omitted or adjusted without impairing the effectiveness of the regime? Finally, if the concern about U.S.-style class actions is merely a «not-in-my-backyard» objection, is there a means by which alternative procedures might work cooperatively with U.S. class actions to further the objectives of collective redress elsewhere?

To study these questions[1], proceduralists from other countries were asked to report on various aspects of the collective regimes that have been implemented or contemplated in their countries and to comment on the compatibility of these regimes with U.S.-style class actions. Reports were received from Canada, Australia, England and Wales, Netherlands, Italy, Belgium, Sweden, Brazil and Russian Federation. They provided remarkable insights into the range of procedural values that mark the diversity of these legal systems. This paper is based on the information and analysis provided in those reports[2].

Questionnaire

The questionnaire on which their reports were based, consisted of the following six parts.

1. *Objectives* – Access to justice, judicial economy, and behaviour modification have been identified as the main objectives of class actions in North America. What would you regard as the key objectives of group litigation in your legal system? How does group litigation enhance your civil justice system or how might it do so? How does this compare to the role played by U.S.-style class actions; and to what qualities of your civil justice system do you attribute the similarities or differences?

2. *Representation* – In traditional litigation in the common law, under the principle of party prosecution, the plaintiff's right to direct the proceedings serves as a key safeguard of procedural fairness. In public interest litigation, the law of standing similarly serves to ensure

[1] This is by no means the first consideration of these issues. There is a small but rich body of commentary from a U.S. perspective containing incisive economic and governance analysis of the perceived concerns of members of other legal systems. See, e.g., Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?,* 62 *Vand. L. Rev.* 179 (2009); John C. Coffee, Jr. *Litigation Governance: Taking Accountability Seriously,* 110 *Colum. L. Rev*. 288 (2010). This study seeks to go beyond the application of a U.S. perspective on the differences in approaches to collective regimes by surveying comparatists from those legal systems about specific aspects of collective redress that might shape their perceptions of U.S. class actions.

[2] The authors of the National Reports for this study were: Canada – Professor Jasminka Kalajdzic, University of Windsor, Faculty of Law; Australia – Professor Vicki Waye, Dean of Teaching and Learning, University of South Australia and Professor Vincenzo Morabito, Department of Business Law and Taxation, Monash University; England and Wales – Professor Rachael Mulheron, Queen Mary University of London; Netherlands – Dr. Helene van Lith, Erasmus Universiteit Rotterdam; Italy- Professor Elisabetta Silvestri, Faculty of Law, University of Pavia; Belgium – Dr. Stefaan Voet, Institute for Procedural Law, Ghent University; Sweden – Professor Per Henrik Lindblom, Uppsala University, Faculty of Law; Brazil – Professor Ada Pellegrini Grinover, Faculty of Law, University of São Paulo; and Russian Federation – Associate Professor Dmitry Tumanov, Moscow State Law Academy.

that the plaintiff or applicant adequately represents the interests of the public in respect of the issues in dispute. In group litigation, which determines the interests of claimants who do not participate and who will be precluded from seeking other relief, it is all the more important to ensure that the representation is adequate. In your legal system, what kinds of persons or organizations are eligible or might be considered eligible to represent a group in litigation? How are they selected and authorized to do so? And what is their role in the litigation?

3. ***Funding and Financing*** **–** One of the most controversial features of U.S. class actions is the size of awards for plaintiffs' counsel fees, and yet, to many Americans considering the alternative of publicly funded regulation of consumer goods and services, the awards and fees are well-justified. Furthermore, among the various legal systems where group litigation exists, the means by which proceedings are funded and financed is thought to contribute significantly to the relative success of the class actions regime. How is group litigation funded and financed in your legal system, or how might it be funded and financed if it were introduced? How does or would this economic model fit with traditional forms of litigation in your country? How does it contribute or might it contribute to the success of the group litigation regime?

4. ***Available Relief*** **–** One way in which the objectives of group litigation depart significantly from traditional litigation is in the kinds of relief that are thought to constitute a just result. Where making a plaintiff whole again is thought to serve the interests of compensation and deterrence in traditional litigation, such an outcome is rarely possible or desirable in group litigation. In some cases, individual recovery of a portion of the loss suffered is regarded as appropriate, in others, an injunction or a declaration, or some form of alternative or cy près result is appropriate. What forms of relief are available in group litigation in your legal system and how do these achieve – or fail to achieve – justice?

5. ***Court Involvement*** **–** Mechanisms for court involvement to safeguard against abuse have evolved over the history of traditional litigation and are woven into the process, but the modifications necessary to permit group litigation create new risks of abuse. In North America, judicial involvement at the stages of certification and judgment or settlement approval is an important safeguard against abuse. In group litigation in your legal system, what kinds of court involvement serve this supervisory role, or might serve this role?

6. ***Compatibility with U.S.-style Class Actions*** **–** Based on the previous questions and any other relevant features of group litigation as it operates or might operate in your legal system, identify the most significant challenges to integrating U.S.-style class actions with mechanisms for collective redress in your legal system. How might such integration affect the culture of dispute resolution and consumer protection in your country? Describe some of the ways in which these challenges might be addressed to maximize the effectiveness of collective redress in your country.

Analysis

Overview

In order to appreciate the finer distinctions in the procedures that have been adopted or proposed in the various legal systems it is helpful to begin with a brief overview of the regimes operating in each country[1]. In particular, in assessing the perspectives of other

[1] The comparative analysis in this paper assumes a basic understanding of the workings of the class action procedure under Fed. R. Civ. P. 23, pursuant to which one or more named plaintiffs may be authorized by a court in

legal systems on U.S.-style class actions, it is important to understand that of the seven legal systems considered, only two – Canada and Australia – have systems for collective redress that would be described in the United States as class actions. In no other system for collective redress may claimants be represented on an opt-out basis in matters in which the courts can order relief for individual members of the group. What follows, then, is a brief overview of the most salient features of the various regimes as a backdrop against which the more specific comparisons can be highlighted.

Canada – Since 1978, legislative regimes for class actions have been established in all but one Canadian province, and in the Federal Court[1]. The legislation is modelled on U.S.-style class actions and, apart from underlying differences in the legal systems affecting the operation of the class actions regimes in Canada and the United States, the regimes have similar objectives and features.

Australia – Similarly, in the Federal Court[2] and in the New South Wales[3] and Victoria Supreme Courts[4] class actions may be commenced on behalf of claimants who may opt-in or opt-out of the proceedings and/or the settlement[5]. There are some minor differences, such as the lack of a certification requirement causing the suitability for class treatment to be determined on a motion by the defendant rather than the plaintiff. However, apart from relatively minor differences, like the Canadian class actions regime, the Australian regimes are similar to that in the U.S. and the primary distinctions in their operation arise from differences in the underlying civil litigation process.

England and Wales – Collective redress in England and Wales is pursued primarily by way of Group Litigation Orders. Group Litigation Orders are case management tools for aggregating claims on an opt-in basis. They may involve the determination of claims by way of test cases[6], generic issues[7], and trying a series of preliminary issues based on a set

a certification motion to sue on behalf of a class defined in a manner that is approved by the court. In U.S. federal courts and in the majority of states, the action may be certified to determine one or more legal or factual claims common to the entire class where: those issues predominate over individual issues; the representative party or parties will adequately protect the interests of the class; the class is so numerous as to make individual suits impractical; and the claims are typical of the plaintiffs or defendants. Court approval is also required for the content and method for notices to the class, such as those informing class members of the action and the fact that they will be bound by the result unless they opt-out. Court approval is also required for the terms of any proposed settlement reached between the named parties, and for the fees to be paid to plaintiff's counsel, which are typically in excess of a standard hourly rate and often calculated as a percentage of the award.

[1] An Act Respecting the Class Action, R.S.Q., c. R-2 (Can. Que); Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 999-1051 (Can. Que.); Class Proceedings Act, R.S.O. 1992, c. 6 (Can. Ont.); Class Proceedings Act, R.S.B.C. 1996, c. 50 (Can. B.C.); Class Actions Act, R.S.S. 2001, c. 12.01 (Can. Sask.); Class Actions Act, R.S.N.L. 2001, c. C-18.1 (Can. Nfld.); Rules Amending the Federal Court Rules, 1998, S.O.R. 98-106 (Can.); The Class Proceedings Act, C.C.S.M., c. C130 (Can. Man.); Class Proceedings Act, R.S.A. 2003, c. C-16.5 (Can. Alta.); Class Proceedings Act, R.S.N.S. 2007, c. 28 (Can. N.S.).

[2] Federal Court of Australia Act 1976 (Cth) pt IVA.

[3] Civil Procedure Act 2005 (NSW) pt 10 (Austl.).

[4] Supreme Court Act 1986 (Vic) pt 4A (Austl.).

[5] In the other State Supreme Courts representative proceedings may be commenced joining the claims of those who have *similar interests* but the judgment or settlement does not bind all such persons. See South Australia Supreme Court Rules 2006 (SA) r 80; Queensland Uniform Civil Procedure Rules 1999 (Qld) r 75 (Austl.); Western Australia Rules of the Supreme Court 1971 (WA) O 18, r 12.

[6] *Pirelli Cable Holding NV v. Revenue & Customs Comm'rs*., [2007] EWHC (Ch) 583, [2007] All E.R. 408 (Eng. & Wales).

[7] *Esso Petroleum Co. Ltd. v. Addison*, [2003] EWHC (Comm) 1730, [2003] All E.R. 253 (Eng.).

of assumptions. In theory, collective redress may proceed also by way of Representative Actions. However, this is permitted only where claimants have *the same interest* and *more than one person* shares the claim with the representative[1]; and such actions are often defeated by defendants on the «same interest» criterion.

In the English bank charges litigation, which involved numerous individual matters in the county courts, where the results in one case were not binding in other cases[2], an effort was made to instill order by deciding a test case[3], which could then be appealed to the Supreme Court[4]. This improved the coherence of the process, but the decision did not resolve all the outstanding issues, and certain aspects of the individual cases remained to be determined. The experience with these cases prompted the development of a proposal for a collective action that was included in the Financial Services Bill 2010[5]. Under this proposed regime the court could order either an opt-in or an opt-out class action, and the drafting of supporting rules of court[6]. However, this legislative initiative lapsed in 2010 with the change in government[7].

Netherlands – There are two collective redress regimes for mass damage in the Netherlands, and they are available in most areas of law. The Dutch Act on the Collective Settlement of Mass Damage Claims (WCAM)[8] was introduced in 2005 to permit representative organizations to enter into settlement agreements with allegedly liable parties and to apply jointly for a declaration by the Amsterdam Court of Appeal that presumptively binds those covered by its terms on an opt-out basis[9]. During the pendency of the declaration, all other related proceedings may be suspended[10]. The WCAM was designed to complement U.S. class actions and class settlements by facilitating the inclusion of class members from outside the U.S., primarily from Europe, who would otherwise be excluded. It has proven to be an efficient, simple, and relatively inexpensive mechanism of group litigation[11].

In addition, the Dutch Civil Code provides for a collective right of action in mass damage cases[12] under which a Dutch foundation or association incorporated to represent the interests of a group may initiate proceedings to protect the common interests of the group.

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[1] Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.6 (U.K.).

[2] Over 53,000 claims were filed in the English County Courts between March 2006 and August 2007. the rate of monthly litigation is outlined in Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for the Civil Justice Council, Feb 2008), section 17, and see, e.g., *Brennan v. National Westminster Bank Plc* [2007] EWHC (QB) 2759. [42] (Eng. & Wales).

[3] *Office of Fair Trading v. Abbey National Plc* [2008] EWHC (Comm) 875, [2008] 2 All E.R. 625 (Eng. & Wales).

[4] *Office of Fair Trading v. Abbey National Plc* [2009] UKSC 6, [2009] 3 W.L.R. 315 (Eng.).

[5] Financial Services Act, 2010, §§ 18–25 (U.K.).

[6] Financial Services Act, 2010, (U.K.) (proposed CPR 19.IV).

[7] This left collective redress to be pursued by way of Group Litigation Orders, thus limiting the predictability of the process and, possibly, the outcome. *Multiple Claimants v. Sanifo-Synthelabo Ltd*. [2007] EWHC (QB) 1860 (Eng. & Wales) (regarding the use of the anti-epileptic drug Epilim by pregnant women).

[8] Burgerlijk Wetboek [BW] [Civil Code], bk. 7, art. 907–910 (Neth.); Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure], art. 1013 (Neth.).

[9] The agreement may provide for cancellation should too many injured parties opt out.

[10] Dutch Arbitration Act [DCCP], art. 1015 (Neth.).

[11] See, e.g., *Shell Petroleum*, [Hof] [Court of Appeal Amsterdam] May 29, 2009, NJ 2009, 506 (Neth.); *Converium,* [Hof] [Court of Appeal Amsterdam] Nov. 12, 2010, LJN 2010, BO3908 (Neth.); confirmed Scor Holding (Switzerland) AG and the Stichting Converium Securities Compensation Litigation, 17 Jan 2012 [Court of Appeal Amsterdam].

[12] BW, bk. 3, art. 305a-c (Neth.).

Available remedies are limited to declaratory judgments and injunctions for the benefit of interested persons, and the judgment binds only the organization and the defendant. Once a judgment is rendered, interested parties must initiate separate proceedings to establish the responsible party's liability to them, along with questions of causality, and the amount of damages to be awarded to them.

Italy – In 2007, following decades of scholarly debate, legislative initiatives to introduce class actions began. The financial failures of large corporations[1] affecting thousands of investors underscored the persistent problems of court dockets clogged with individual civil suits and bankruptcy proceedings. Class actions provisions were incorporated into the Consumer Code[2] and after various revisions came into effect in 2010 for cases arising after mid-2009. With only six class actions having been brought and one having been declared admissible to date, the procedure is largely untested and observations on its functioning are necessarily theoretical.

Pursuant to EU Directives[3], collective actions have been developed for consumer claims and expanded to environmental protection, securities regulation, anti-discrimination protection, and other areas. Such actions may be brought only by qualified bodies, such as accredited consumer associations, and these actions may seek only injunctive relief. However, a new public class action was introduced in 2009 to permit individuals and groups to apply to the administrative courts for claims in connection with public bodies that fail to fulfil their official obligations. The relief available consists of mandatory orders. Damages must be sought separately in the civil courts in individual claims or in accordance with the class action provision incorporated in the Consumer Code. Despite this range of procedures for vindicating group rights, the general lack of efficiency in the Italian judicial system is widely thought to represent a major impediment to the protection of group rights.

Belgium – In Belgium, the Judicial Code and Civil Code contain procedural techniques that are being used for multi-party actions[4], including joinder of claims that should be tried together to prevent contradictory decisions, voluntary or coercive intervention, and party representation, in which a person (natural or legal) may receive a mandate from a group of individuals to represent them[5]. These techniques have been criticized as too cumbersome for large-scale mass claims because each group member's participation must be established individually[6].

As in Italy, there are also a series of legislative initiatives in Belgium implementing European directives[7]. These regimes permit private professional, inter-professional or

[1] Such as Parmalat, Cirio, and Giacometti.

[2] Codice del Consumo [Consumer Code], art. 140 (It.).

[3] See, e.g., Council Directive 98/26/CE, 1998 O.J. (L166/45) (EU); Council Directive 2009/22/CE, 2009 O.J. (L110/30) (EU).

[4] Piet Taelman & Emilie De Baere, *New Trends in Standing and Res Iudicata in Collective Suits (Belgium)*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Intersentia, 2008.

[5] Hubert Bocken & Bernadette Demeulenare, *The Defence of Collective Interests in Belgian Civil Procedure*, in *Effectiveness of judicial protection and the constitutional order: Belgian Report at the II International Congress of Procedural Law* 161, Kluwer, 1983 (Neth.).

[6] Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in E. Dirix & Y.H. Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law* 305, 325, Bruylant, 2011 (Belg.).

[7] See, e.g., Wet betreffende de intracommunautaire vorderingen tot staking op het gebied van de bescherming van de consumentenbelangen [Cross Border Injuctions Act] of May 26, 2002, *Belgisch Staatsblad* [B.S.] [Official Gazette of Belgium], July 10, 2002 (Bel.) (implementing Council Directive 98/27/EC, 1998 O.J. (L166/51)

public associations, or organizations that satisfy certain legal criteria[1] to bring injunctive or preventive actions falling within their statutory objectives (so called «group actions»). Areas covered include consumer protection, misleading advertising, unfair contract terms and long distance agreements, amicable recovery of consumer debts, environmental harm, discrimination and racism, and copyright. Such actions are rare because funding is limited, damages cannot be claimed, and the outcome does not bind the group.

Currently, there is no provision for damages class actions in which a representative may seek monetary damages on behalf of a similarly-situated group, the members of which would be bound by the result. However, three proposals have emerged[2]: the government[3] has proposed a settlement track regime based on the Dutch Collective Settlements Act, and a litigation track based on the Quebec class action; the two Green opposition parties[4] have proposed a procedure with a phase for the common issues followed by a phase for individual issues; and the Flemish Bar Council has proposed a class action bill. None of these have yet been submitted to Parliament.

Sweden – The Swedish Group Proceedings Act of 2002 (SGPA) permits group actions in all types of cases in the general courts, including private, organizational and, public group actions. Claims for injunctions and for individual damages for group members may be brought. Group members who have opted-in are bound by the judgment. Although only twelve actions have been commenced in the decade since its introduction, the SGPA has had considerable effect by increasing the number of claimants, improving the impact of litigation, and broadening access to justice[5].

(EU) (on injunctions for the protection of consumers' interests)). The Anti-Discrimination Acts implemented Council Directive 2000/43/EC, 2000 O.J. (L180/22) (EU) (on equal treatment in employment and occupation); Council Directive 2000/78/EC, 2000 O.J. (L303/16) (EU) (on equal treatment in employment and occupation); and Council Directive 2004/113/EC, 2004 O.J. (L373/37) (EU) (on equal treatment between men and women in the access to and supply of goods and services, etc. See Wet van ter bestrijding van bepaalde vormen van discriminatie, [General Non-Discrimination Act] of May 10, 2007, *Beglisch Staatsblad* [B.S.] [Official Gazette of Belgium], May 30, 2007 (Belg.); Wet van ter bestrijding van discriminatie tussen vrouwen en mannen, [Gender Act] of May 10, 2007, *Beglisch Staatsblad* [B.S.] [Official Gazette of Belgium] May 30, 2007 (Belg.); Wet van tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden [Racism Act] of May 10, 2007, *Beglisch Staatsblad* [B.S.] [Official Gazette of Belgium] May 30, 2007 (Belg.).

[1] For example, having legal personality for some period, generally three years.

[2] For a thorough analysis of these proposals see Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, at 325–342.

[3] For example, the minister of Consumer Affairs and the minister of Justice. For an analysis (by the authors of the proposal) see Hakim Boularbah, *Des actions groupées vers l'action de groupe: quelle valeur ajoutée pour l'avocat?*, in *La valeur ajoutée de l'avocat. Actes du Congrès de l'O.B.F.G. du 17 février 2011*, Anthemis, 2011, at 33 (Bel.); Andrée Puttemans, *L'introduction d'une forme d'action collective en droit belge*, in A. Legendre (ed.), *L'action collective ou action de groupe. Se preparer à son introduction en droit français et en droit belge* 24, Larcier, 2010 (Belg.).

[4] Ecolo & Groen!.

[5] In *Grupptalan mot Skandia v. Försäkringsaktiebolaget Skandia* [*Skandia*], 2003-10 T6341 (Swed.) a non-profit organization (*«Group Action against Skandia»)* was formed in October 2003 to seek a declaration on behalf of 1.2 million policyholders of a subsidiary whose asset management business had been transferred to the parent company. More than 15,000 people paid membership dues of about € 15 to cover the running expenses of the organization in pursuing the relief. The media coverage was extensive. The proceedings, ultimately through arbitration, were protracted but in time, the company was ordered to pay about €145 million to the subsidiary, thus indirectly compensating policyholders. The organization said that the relief would not have been possible if there had been no class action procedure to pursue it. Per Heinrik Lindblom, *National Report: Group Litigation in Sweden* 22 (Dec. 6, 2007) (Swed.) available at http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf.

In addition, potential defendants have been given the incentive to make amends voluntarily and to compensate potential group members. Thus, arguably the most important function of group actions for individually non-recoverable claims has been preventative through behaviour modification. A feasible opportunity to seek legal redress has provided considerable incentive to responsible conduct in preventing and addressing harm.

Brazil – The Brazilian Constitution of 1988 provides for class actions to protect diffuse and collective interests in all areas of law. Class actions are federally regulated but may be filed in state and federal courts in a range of matters including consumer rights, environmental problems, and public corruption. The process is generally an opt-out one in which claimants may choose to proceed independently of the class. While the claims must be similar, there is no certification procedure in which such a determination would be made, only a statutory requirement concerning the formal adequacy of the representative for the purposes of standing. Class actions may be brought by the Public Prosecutors Office (*Ministério Público*) and the Public Defenders' Office (*Defensoria Pública*); public entities, such as the Federal, State and Municipal Governments and other Agencies; private associations and unions, such as consumer organizations, which must be registered before public authorities; and by individuals in the case of citizen class actions for the protection of public assets (*ação popular*). The full range of remedies available in ordinary litigation are available in class actions.

Russian Federation – There are two forms of group action in the Russian Federation: one for the vindication of the rights of persons who cannot specifically be identified, which was first introduced in the Consumer Protection Act of 1992, and which is commonly known as a *public* class action; and another, for the vindication of the rights of persons who can be identified, which was introduced in 2009, and which is commonly known as a *private* class action. By way of background, many business disputes in Russia are resolved through arbitration in the Arbitration Courts under the Arbitration Procedure Code, and private class actions are provided for only in the Arbitration Procedure Code. In contrast, other disputes are generally resolved in the courts of law under the Civil Procedural Code of the Russian Federation, and most public class actions are decided in those courts (although they may also be considered in the Arbitration Courts).

Public class actions may be authorized specifically in legislation, such as the Consumer Procedure Act[1] or implicitly through the nature of the legal relationship. For example, the law protecting objects of cultural heritage provides that «the objects of the cultural heritage (historic and cultural monuments) of the peoples of the Russian Federation are of unique value for the whole multinational population of the Russian Federation and represent an integral part of the world cultural heritage»[2], therefore, if issues relating to cultural monuments are raised in court, it is the public interest that the public rights affected should be defended.

Particular Features

Objectives

There is a considerable agreement among the reports that the objectives of group litigation are to advance access to justice, judicial economy, and behavior modification. However, the

[1] Articles 45, 46 of the RF Law dd. February 7, 1992, No. 2300-I «On Consumer Protection», in Legal reference system «Consultant-Plus.»

[2] On Objects of the Cultural Heritage (Historic and Cultural Monuments) of the Peoples of the Russian Federation, Law No. 73-FZ dd. June 25, 2002.

differences in the way in which these objectives are weighted and described reveal each legal system's particular aspirations for meeting the challenges of providing for collective redress.

Access to justice has particular significance among common law regimes, in which claimants ordinarily must finance the prosecution of their claims, including developing and presenting the facts to the court. The obstacles faced by their civil law counterparts are different in that the courts are primarily responsible for investigating the facts and compiling the record, reducing the expense faced for individual claimants. In those countries, the improvements in access to justice tend to be more closely related to easing the burden on courts whose dockets would otherwise be clogged by large numbers of individual matters that could be aggregated.

Among common law countries, improving *judicial economy* may be more prevalent a concern in the United States, where lawyers may carry inventories of similar claims in areas of the law that in some other countries are processed in administrative tribunals. In those countries, class actions made in cases of individually, economically non-viable claims may actually serve to increase, rather than reduce the caseload for the courts[1]. In these situations, access to justice is improved, but the gains in judicial economy in aggregating claims that would not otherwise be brought is less obvious.

However, a related concern for *consistency* can arise from the need to resolve large numbers of claims raising the same issues in situations or legal systems where stare decisis does not apply. For example, as mentioned, this concern arises in the county courts in England for claims that are not subject to binding precedent from higher judicial authority and, of course, it arises in civil law jurisdictions where the doctrine of stare decisis does not operate.

Nevertheless, it may safely be said that the objective of behavior modification is the most controversial of the objectives and there has been considerable debate in civil law and common law countries alike over the extent to which civil litigation undertaken by private persons should serve this function. This is not a feature of logistical differences between common law and civil law procedure, or even between the traditions of individual legal systems so much as it is an important feature of American exceptionalism.

In the following descriptions of the objectives of collective redress in the various legal systems surveyed, it is interesting to see the commitment to ensuring that class actions enhance the effectiveness of collective redress within the civil justice system without altering or interfering with what are understood to be the core procedural values of each system.

Canada – In 1978, with the rise in public law litigation[2] and the hope that private Attorneys General could use class actions to fill the gaps in regulatory enforcement, Quebec passed class action legislation[3]. Soon after, in 1982, the Ontario Law Reform Commission published a three-volume report recommending the enactment of legislation

[1] Nevertheless, such claims would need to be distinguished from those described in the U.S. as *negative value claims* in that the threshold for viability in other legal systems may be much higher than in the U.S. where contingency fees have long been a regular feature of named-party litigation and claimants do not ordinarily face the prospect of paying a defendant's attorneys fees if they are unsuccessful.

[2] Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report,* in M. Cappelletti & B. Garth (eds.), I *Access to Justice* 36, Sijthoff & Noordhoff, 1979; see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1041 (1976).

[3] See W.A. Bogart, *Questioning Litigation's Role: Courts and Class Actions in Canada,* 62 *Ind. L.J.* 665 (1986–1987); Catherine Piche, *The Cultural Analysis of Class Action Law,* 2 *LSU L. Ctr. J. Civ. L. Stud.* 101, 118 (2009); Shaun Finn, *In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission*, 2 *Can. Class Action Rev.* 333, 352–353 (2005) (Can.).

in Ontario[1]. The Report recognized the increasingly complex and interdependent nature of society resulting from «mass manufacturing, mass promotion, and mass consumption» and the fact that the activities of major corporations, international conglomerates, and big government can be affecting and possibly causing injury to large numbers of people[2]. Bearing in mind that «the individual is very often unable or unwilling to stand alone in meaningful opposition»[3], class actions could serve an important function in promoting access to justice. «By affording «an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing «judicial» system», [class actions] may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis»[4].

Access to justice, judicial economy and behavior modification were the three principal justifications for recommending that Ontario enact class proceedings legislation. The Report noted that «many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers»[5]. It was hoped that class actions could help to overcome these barriers and, in this way, perform an important function in society.

When the legislation was passed in 1992, both the access to justice and the regulatory functions were acknowledged. According to the Attorney General of Ontario, there was more to the initiative than access to justice: «Representative plaintiffs [...] serve in effect as some sort of private attorneys general to attack what they consider to be shoddy workmanship, environmental banditry[,] or corporate skulduggery [...] [in this] cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-restrained government ministries»[6]. Despite this, the regulatory function of class actions has received less recognition than the access to justice benefits[7]; and class actions have far more commonly been described as serving the tripartite role of access to justice, judicial economy, and behaviour modification[8].

Australia – As in Canada, the main objective of group litigation in Australia is understood as improving access to justice by permitting matters with high ratios of litigation cost to claim size to be aggregated so as to overcome the disproportionately high cost of litigating individual claims[9]. Still, as in Canada, the procedure also supports regulatory

[1] Ont. Law Reform Comm'n, Report on Class Actions (1982) (Can.).

[2] Ibid., at 3.

[3] Ibidem.

[4] Ibid., at 130.

[5] Ibid., at 139.

[6] I. Scott & N. McCormick, *To Make a Difference: A Memoir* Stoddart, 2001, 182 (as cited in Hon. I. Binnie, *Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat*, 22 *Advoc. Soc'y J.* 4 (Spring 2004) (Can.)).

[7] The Supreme Court of Canada referred to class actions as having a «social dimension» in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at para. 106 (Can.). In *Alfresh Beverages Can. Corp. v. Hoescht AG* (2002), CarswellOnt 77, [2002] 16 C.P.C. 5th 301 (Can. Ont.), the Ontario Superior Court stated at paragraph 16 that «the private class action litigation bar functions as a regulator in the public interest for public policy objectives.» However, explicit acknowledgments of the class action's broader public policy function are rare.

[8] *Western Canadian Shopping Centres v. Dutton* (*Dutton*), [2001] 2 S.C.R. 534, para. 28 (Can.). The extent to which these objectives are realized through class actions has been considered by Jasminka Kalajdzic in *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley,* 53 *Sup. Ct. L. Rev.* 2d 3 (2011) available at http://www.uwindsor.ca /law/kalajj/system/files/Introduction-%20Kalajdzic.pdf (Can.).

[9] *Access to Just. Taskforce, A Strategic Framework for Access to Justice in the Federal Civil System* 114 (2009) (Austl.), available at http://www.ag.gov.au/Documents /A%20Strategic%20Framework%20for%20Access%20to%

objectives[1] by promoting consumer protection, efficient markets, and a better environment through the initiation of largely privately funded and privately driven litigation[2]. This is particularly true in areas where gaps in regulatory action will leave harm undercompensated and where the internalization of such harm by wrongdoers will enhance deterrence.

England and Wales – Group litigation in England and Wales has been described as having six objectives: proportionality; predictability; access to justice; judicial and wider economy; (to a lesser extent) deterrence; and fairness.

Proportionality, an overriding objective for all litigation under the Civil Procedure Rules (CPR)[3], requires the allotment of an appropriate share of the court's resources to each case taking into account the need to allot resources to other cases[4]. For example, in an appropriate case, the requirement of proportionality may warrant the recommendation that claimants participate in an opt-in Group Litigation Order rather than pursue a representative action[5].

Predictability is an obvious benefit of aggregating claims that otherwise could follow a myriad of courses producing a range of outcomes, and which could be subjected to different case management strategies by the courts. The 2010 legislative initiative to establish a class action regime would have furthered this objective under the Group Litigation Orders regime, but the initiative lapsed with the change in government.

Access to Justice, was named by Lord Woolf in his 1996 Report as one of three key principles underpinning any new regime of collective redress, «where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable»[6]. The Court of Appeal has also noted that the

20Justice%20in%20the%20Federal%20Civil%20Justice%20System%20%20Report%20of20the%20Access%20to%20Justice%20Taskforce.pdf; *Cth, Parliamentary Debates, House of Representatives*, 14 Nov. 1991, 3174 (Michael Duffy, Att'y Gen.) (Austl.); *Austl. Law Reform Comm'n, Grouped Proceedings in the Federal Court: Report no. 46*, at 13 (1988).

[1] Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 *Melb. U. L. Rev.* 399, 404 (2006) (Austl.).

[2] See ibidem.; John Sorabji et al. (eds.), *Civil Justice Council, Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* 13 2008 (Eng. & Wales), available at http://www.lawcentres.org.uk/uploads/Improving_Access_to_Justice_through_Collective_Actions.pdf.

[3] See Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 1.1(1), (2)(c) (U.K.).

[4] CPR r. 1.1(2)(e).

[5] *Emerald Supplies Ltd v. British Airways Plc,* [2009] EWHC 741 (Ch) 741 [38], [2010] Ch. 48 (claim for price fixing against airlines), *aff'd*, [2010] EWCA (Civ) 1284, [2011] Ch. 354 (Eng. & Wales) (claim for price-fixing against airlines); see *Taylor v. Nugent Care Soc'y*, [2004] EWCA (Civ) 51 [22], [2004] 1 W.L.R. 1129 (Eng.) (proportionality referred to in the Group Litigation Order). But see *Millharbour Mgmt. Ltd. v. Weston Homes Ltd.*, [2011] EWHC (TCC) 661 [22(6)], [2011] 3 All E.R. 1027 (Eng.) (proportionality militated in favour of a representative action).

[6] Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,* ch. 17, para. 2 (1996) (Gr. Brit.). (According to the Civil Justice Council of England and Wales: «A civil justice system: 1. should be just in the results it and they deliver; 2. should be fair and be seen to be fair; 3. should ensure litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights; 4. should ensure that every litigant has an adequate opportunity to state his or her own case and answer their [sic] opponent's; 5. should treat like cases alike (and conversely treat different cases differently); 6. should deal with cases efficiently and economically, in a way which is comprehensible to those using the civil justice system and which provides litigants with as much certainty as the litigation permits; and do so within a system best organised to realise these principles... It is these principles, which reflect Lord Woolf's commitment to procedural justice now being as important as substantive justice, which guide the Civil Justice Council in making its recommendations [for collective redress reform]); John Sorabji et al. eds., Civil Justice Council, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, at 9–10.

importance of efforts to permit viable actions to be brought in situations where claimants would find it prohibitively expensive to bring individual proceedings[1].

Judicial, and wider, economy, also named as a key principle by Lord Woolf, would be served by a procedure that could «provide expeditious, effective[,] and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure»[2]. The potential benefit of this feature of the proceedings to defendants has also been noted[3].

Deterrence, though only a by-product of achieving compensation for class members, is an important ancillary consequence of effective private enforcement. Accordingly, the Office of Fair Trading and the European Commission[4], and the U.K. government[5] have acknowledged that private actions by victims in competition law are a necessary complement to public enforcement efforts, as they broaden the scope of cases that can be investigated; they promote greater awareness of competition law; and they reinforce deterrence.

Fairness was also emphasized by Lord Woolf's report, which acknowledged that collective redress should «achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner»[6]. The Civil Justice Council Report in 2008 emphasized that fairness remains a valid benchmark when considering any collective actions reform and design for the jurisdiction[7].

Netherlands – The WCAM procedure promotes access to justice and judicial economy by enabling Dutch claimants to benefit from the results of foreign class actions (typically in the United States) and to enable them and the defendants to avoid re-litigation of the claim. In addition, the WCAM seeks to promote finality or legal certainty by providing for judicial declarations of the parties' rights and obligations in respect of the matters in which settlements are approved[8]. To the extent the WCAM provides compensation that is not otherwise obtain-

[1] *Afrika v. Cape plc* [2001] EWCA Civ 2017, para. 1.

[2] Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*; see *Emerald Supplies*, [2010] EWCA (Civ) 1284 [4] (Eng. & Wales).

[3] John Sorabji et al. eds., Civil Justice Council, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*.

[4] *Ibid.,* at 60, 69.

[5] Her Majesty's Treasury, Budget 2007, H.C. 342, 3.45 (U.K.), cited in John Sorabji et al. eds., Civil Justice Council*, Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, at 50 n. 82.

[6] Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*; see Civil Procedure Rules [CPR], 1998, S.I. 1998/3132 r. 1.1(2)(a), (d) (U.K.).

[7] Civil Justice Council*, Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*, 43.

[8] *See* Helene van Lith, *The Dutch Collective Settlements Act and Private International Law*, Maklu Publishers, 2011 (2010) (Neth.); M.B.M. Loos, Frank Alleweldt et al. (eds.), *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – Country Report The Netherlands*, 2008 (Neth.), available at http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf; *Memorie van Toelichting* [*Explanatory Memorandum to the WCAM*], *Kamerstukken* II 2003-04, 29 414, no. 3 (Neth.); The Dutch Class Action (Financial Settlement) Act (WCAM) (Neth.), available at www.rijksoverheid.nl; I.N. Tzankova, *Financiering en kosten van massaclaims: legal realism. Ofwel: wat kunnen we leren van de Engelsen (en van andere common law landen)?*, in *Massaclaims: Class actions opz'n Nederlands 171–204*, Stichting Mordenate College ed., Ars Aequi Libri, 2007 (Neth.); I.N. Tzankova, *National Report: The Netherlands: Part II* (2008) (Neth.), available at http://globalclassactions.stanford.edu/sites /default/files/documents/Netherlands_National_Report_2.pdf;

able, it has been regarded as found money and few if any interested parties have opted-out. Execution of settlements and the payment of compensation have encountered few problems and the process has succeeded in providing closure for the parties responsible.

Behaviour modification has been understood to be a by-product and not a main objective of the WCAM, and the WCAM has succeeded in promoting collective negotiation instead of confrontation in a collective litigation procedure. The WCAM was inspired by the fact that collective settlements have enabled collective redress in mass damage cases in the United States, but the WCAM seeks to promote this process without court intervention and outside the process of a pending class action brought to the court. It seeks to change the way that negotiations are carried out by enabling them to be based on the idea of dialogue instead of confrontation in court proceedings.

Italy – The main objective of the class action procedure under the Italian Consumer Code is to enhance access to justice. The right to sue to protect one's rights under civil and administrative law is predicated on the principle of equality, which is a fundamental tenet of the Italian Constitution[1]. With the growth in mass harms, the lack of means of collective redress was seen to represent a major deficiency in the implementation of these guarantees. With the inclusion of collective redress in the Consumer Code, this gap has been filled for consumers of goods and services. It is too early to tell whether group litigation will also serve the purpose of behaviour modification and deterrence.

Belgium – The existing Belgian procedures for group litigation fall short of the objectives of access to justice, judicial economy, and behaviour modification[2]. The procedural techniques of joinder, intervention, and party representation seek to enhance judicial economy[3], but they require each claimant to opt-in. Accordingly, the procedures are ineffective for individually non-recoverable claims and their effectiveness in other claims is impaired by the fact that they do not prevent a multiplicity of group proceedings[4]. The existing procedures for group actions also fall short of these objectives because they do not permit claims for damages and so serve only the objective of deterrence. Neither the traditional procedural techniques, nor the existing group actions regimes create credible access to justice for victims of a mass harm. The current class action proposals seek to remedy this.

Sweden – Despite the relatively few group proceedings commenced to date, with the publicity surrounding ongoing and upcoming trials[5], group litigation has proved effective in promoting access to justice and behavior modification. Judicial lawmaking and prece-

Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, 21 *Eur. Bus. L. Rev.* 857, 865–866 (2010) (Neth.); Helene van Lith, *Case note Converium*, *Ondernemingsrechm* 3, 117–121 (2011) (Neth.); W.M. Schonewille, *De financiering van collectieve acties*, *Ondernemingsrecht* 137 (2010) (Neth.).

[1] See art. 3 Costituzione [Cost.] (It.) (providing that «[a]ll citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions»); ibid., art. 24, § 1 (providing that «anyone may bring cases before a court of law in order to protect their rights under civil and administrative law»).

[2] These objectives, which were based on Ont. Law Reform Comm'n, *Report on Class Actions*, at 117 (Can.), were summarized in *Dutton*, [2001] 2 S.C.R. 534 at para. 27–29.

[3] Charles van Reepinghen, Ministerie van justitie, *Verslag over de gerechtelijke hervorming* 327 (1964) (Belg.).

[4] *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *Harv. L. Rev.* 356, 397–398 (1967); Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court: Report no. 46*, at 107 (1988).

[5] On the role of courts and functions of civil procedure in Sweden, see Per Heinrik Lindblom, *National Report: Group Litigation in Sweden* (in English).

dent-building[1] occur mainly in public and organization group actions brought by strong and established agencies and non-profit organizations, but private group actions may also produce these results. Moreover, group actions promote legal policy debate and ethical/moral discourse that can result in important changes to the law. While defendants initially try to avoid group actions, such actions provide closure by binding every member of the group. Group actions also have a potential to contribute to judicial economy, particularly in individually recoverable cases[2].

Brazil – The objectives of Brazilian class actions are the same as those of North American class actions. To these must be added the desire to prevent inconsistent results because Brazil does not follow the model of the binding precedent of the common law. Group litigation in Brazil has transformed civil justice from an individual model to a social model. There may be differences in terminology, but the systems are substantially similar: «diffuse» or «collective» interests in Brazil are similar to those protected by US Federal Rules 23(b)1 and 23(b)2 and «homogeneous» individual interests correspond to those protected by Rule 23(b)3.

Russian Federation – The development of economic and legal relations has created a pressing need for defense of a group of persons with claims that have common issues of fact and law. Given the number of participants involved, conventional joinder is inefficient and the academic literature has stressed the need for the development of a kind of proceeding capable of meeting the specific needs of group litigation.

Representation

Important distinctions exist between the approaches taken in the various legal systems to representing claimants. In general, in the common law, there is a well-established tradition of individual claimants framing and prosecuting their own claims in consultation with their legal advisors. Under the principle of party prosecution claimants themselves are thought to be in the best position to assess their own needs and to exercise judgment in resolving in the way that best achieves this result. This provides a basis for public confidence in the prospect of permitting an individual claimant advised by counsel to represent the interests of other similarly situated claimants, subject to the right of class members to opt out.

In contrast, in the civil law, where the courts have primary responsibility for directing the case, the lack of a tradition of party-prosecution can limit public confidence in the ability of individual claimants who have suffered the harm for which redress is sought to direct the litigation. In the civil law, community organizations, or ideological plaintiffs, may be thought better able to meet the challenges of advocating on behalf of the class. In those countries, the debates centre on whether established community organizations alone should be permitted to represent claimants or whether associations created for the purpose

[1] This refers to judicial review and judicial control of consistency of national law with EU law.

[2] See *Ozum v. Sweden*, Tingsrätt [TR] [Uppsala District Court] 2008 T3897 (Swed.), *aff'd*, Hovrätt [HovR] [Svea Court of Appeals] (Swed.). A quota rule was applied to admissions to the veterinary medicine program at the Swedish University of Agricultural Sciences in Uppsala that gave the underrepresented gender among applicants (currently male students) a better chance of being admitted to the program. In a private group action in July 2008, the plaintiff claimed damages in total of 4.6 million Swedish kronor (about € 500,000) for herself and 46 other female students who were not admitted. The plaintiff was represented by the Centre for Justice Foundation (*Centrum för rättvisa*), which had undertaken to pay the plaintiff's litigation costs. Through the Office of the Chancellor of Justice, the State declared that it had no objections to trying the case as a group action. The Uppsala District Court decided in September 2008 to hear the case as a group action and ordered the Swedish state in a final judgment to pay 35,000 Swedish kronor (about € 3,500) to the plaintiff and each member of the group, for a total of 1.6 million Swedish kronor (€ 160,000). The decision was affirmed by the Court of Appeal (Svea Hovrätt).

of pursuing the litigation should also be permitted to represent claimants, and on how the capacity of such organizations applying to serve as representatives should be determined.

For U.S. lawyers, the prospect of casting a community organization in the role of representative plaintiff could give rise to agency concerns and suspicion of the potential for capture. Professors Issacharoff and Miller noted that:

«The interests of nonprofit consumer organizations may reflect ideological considerations that may not necessarily coincide with the economic interests of consumers. [...] This potential for distorted representation as a result of a distinct policy agenda is not as worrisome in U.S. class action litigation, where the class is usually represented by attorneys whose interests are in obtaining a fee, not in changing the world[1].

Even within the common law, interesting differences in approach have emerged among legal systems. In part, this is a product of the simple fact that, despite the principle of party prosecution, the claimant is not representing his or her own interests alone, but also the interests of a group of persons who, apart from the similarities between their claims, may have little in common. In Australia, this prompted legislators to abandon the pretense of party prosecution directed by a claimant and to impose instead a fiduciary duty on class counsel to serve the interests of the class. The representative plaintiff in the Australian systems serves more as an example of the harm suffered as a means of providing a factual substratum for the assessment of the claim than as the person responsible for determining the direction of the litigation.

The Australian and civil law approaches contrast with the approach taken in the United States in which a responsible representative plaintiff, capable of exercising judgment independently from counsel, is seen as an important safeguard against the risk of harm to the interests of the class that might result from the inherent conflicts of interest faced by class counsel. Despite the acknowledged potential for conflicts of interest between the representative plaintiff and other members of the class[2], solutions have been sought in ensuring that the representative plaintiff is at least a plaintiff with a material interest in the litigation[3].

It is interesting to see in the following commentaries how the common concerns relating to questions such as the representatives' dedication to the welfare of the class representative's capacity to instruct counsel effectively give rise to such different solutions from one legal system to another.

Canada – In order to be certified as a class action, the plaintiffs in a proceeding must have a representative who is able to «fairly and adequately represent the interests of the class»[4]. Adequacy of the representative will usually be determined as a function of the plaintiff's motivation to prosecute the claim, the ability to bear the costs of the litigation, and the competence of the plaintiffs' counsel[5].

Motivation per se may be difficult to assess, but a representative plaintiff must at least have «an interest the same as others in the class» and not be impecunious[6]. In theory, any

[1] Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, at 194.

[2] Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, 49 *Osgoode Hall L.J.* 1, 11–12 (2011) (Can.).

[3] See ibid., at 25–26 (citing Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006)). In addition, while the legislation refers to *a* representative plaintiff, this function is often supported by a committee of plaintiffs.

[4] Class Proceedings Act, R.S.O. 1992, c. 6 § 5(1)(e)(i) (Can. Ont.).

[5] *Dutton*, [2001] 2 S.C.R. 534, para. 41.

[6] *Smith v. Canadian Tire Acceptance Ltd*. (1995), 22 O.R. 3d 433, para. 63 (Can. Ont. Gen. Div.), *aff'd*, 26 O.R. 3d 94 (Can. Ont. C.A.).

legal person with a direct cause of action may serve as a representative plaintiff. Most representative plaintiffs are individuals, but where corporations are permitted to serve in this capacity, the law imposes restrictions[1]. In Quebec, consumer organizations have served as representatives, but this is rare elsewhere in Canada.

Most representative plaintiffs are recruited by class action lawyers[2]. This practice is controversial: practitioners regard it necessary to promote access to justice, but academics and judges doubt whether it promotes effective oversight of counsel[3]. A representative plaintiff recruited by a lawyer based on the lawyer's research of a potential claim may lack of the necessary interest, independence, and incentive to fulfill his or her duties to the class to exercise independent judgment in instructing counsel[4]. Nevertheless, in some cases the plaintiffs' recruitment and limited contact with counsel has not resulted in disqualification[5]. Once the representative plaintiff has been approved by the certification judge he or she has the power to instruct, hire, and fire counsel, and the duty to act in the best interests of the class[6]. The extent of the involvement of representative plaintiffs varies considerably from case to case[7].

Australia – In Australia, class actions are generally pursued by specialist law firms, but few are large enough to underwrite and manage large scale group proceedings[8]. A minimum of seven claimants must instruct a firm[9] in order to commence a class action[10]. The firm acts on their instructions, but it owes fiduciary duties to all group members[11] and it must protect

[1] See Code of Civil Procedure, R.S.Q., c. C-25, arts. 999, 1048 (Can. Que.) (providing that a legal person established for a private interest, partnership, or association may apply for the status of representative if one of its designated members is a member of the group that intends to bring a class action, and the interest of that member is linked to the objects for which the legal person or association has been constituted).

[2] Data collected in a small-scale survey reflects the class action activity of approximately 77 class action lawyers, working in thirteen firms, who reported between them a total of 332 class actions as at January 1, 2009. None of the four firms with the largest portfolio of class actions (over 40 cases each) attributed more than twenty five percent of their cases as having been initiated by a client who sought legal advice from the firm. Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario*, LLM thesis, U. Toronto, 2009, at https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic_ Jasminka_200911_LLM_Thesis.pdf.

[3] See Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*; Catherine Piche, *The Class Action Settlement Actors: Who Protects Whom?*, 23 *Sup. Ct. L. Rev*. 2d 57 (2011) (Can.).

[4] *Chartrand v. Gen. Motors Corp.*, 2008 BCSC 1781, paras. 96-112 (Can. B.C.); *Singer v. Schering-Plough Can. Inc.*, 2010 ONSC 42, paras. 221 (Can. Ont.); *Poulin v. Ford Motor Co. of Can.* (2006), 35 C.P.C. 6th 264, paras. 85–95, 105 (Can. Ont. Sup. Ct. J.), *aff'd*, [2008] O.J. No. 4153 (Can. Ont. Div. Ct.) (plaintiff, who was described as a «pawn» by counsel who recruited him, was ultimately found not to be an adequate representative).

[5] *Fantl v. Transamerica Life Can.* (1998), 66 C.P.C. 6th 203, paras. 26–40 (Can. Ont. Div. Ct.), *aff'd*, 2009 ONCA 377 (Can. Ont.).

[6] Fantl, 2009 ONCA 377, paras. 48–74.

[7] Kalajdzic, *Legal Ethics and Class Action Praxis*.

[8] Vicki Waye & Vince Morabito, *The Dawning of the Age of the Litigation Entrepreneur*, 28 *Civ. Just. Q.* 389, 425 (2009) (U.K.). Between 1992 and 2009, roughly one-third of all class actions commenced in the Federal Court were filed by two law firms, who were the only firms to be involved in more than ten such proceedings. See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, First Report: Class Action Facts and Figures* 28 (2009).

[9] *Matthews v. SPI Electricity Pty. Ltd.* (No. 1) [2011] VSC 167, paras. 44–46 (Austl.).

[10] Federal Court of Australia Act 1976 (Cth) s 33C(1)(a); Supreme Court Act 1986 (Vic) s 33C(1)(a) (Austl.); Civil Procedure Act 2005 (NSW), s 157(1)(a) (Austl.).

[11] *Petrusevski v. Bulldogs Rugby League Club Ltd.* [2003] FCA 1056, para 7 (Austl.); *King v. AG Austl. Holdings Ltd.* (2002) 121 FCR 480, 488–89 (Austl.); *Courtney v. Medtel Pty. Ltd.* (2002) 122 FCR 168, 182, 184–85 (Austl.); *McMullin v. ICI Austl. Operations Pty. Ltd.* [1997] No NG 305 (Unreported, Wilcox J, 27 Nov. 1997) (Austl.) cited in King, 121 FCR at 482.

the interests of the class in the event of a conflict between the class and the representative claimants. Related class actions are common place[1], accounting for nearly half of the representative proceedings filed in the Federal Court of Australia[2], with nearly one-third commenced by different law firms[3]. In one case, following the court-ordered formation of an independently selected litigation committee to determine how to proceed in the best interests of the group, all the proceedings were heard together[4].

Individuals, corporations, trade unions, incorporated associations and local government councils may all serve as representatives[5]. Their interests need not be identical with the class members' interests provided their claims have substantial common issues of law and fact[6]. However, each representative and each class member must have a claim against each of the defendants[7]. Class representatives must have standing to bring their own claims[8], but they are not agents or fiduciaries of class members[9]. It is the class lawyers who interact with class members and who have this responsibility. This has prompted commentators to question the need for representatives[10]. Representatives can be removed if they do not adequately represent group's interests[11], and class members can opt out[12] if they are dissatisfied with the conduct of the proceedings.

Most class actions are commenced by private parties, but the Australian Competition and Consumer Commission (ACCC)[13] and the Australian Securities and Investment Commission (ASIC)[14] were authorized in 2001 to commence proceedings in the public interest on behalf of persons who have been harmed and who have provided their written

[1] See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* 21 (2010).

[2] Ibid., at 22.

[3] See ibidem.

[4] *Kirby v. Centro Properties Ltd.* [2008] FCA 1505, paras 9–12, 39 (Austl.).

[5] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives*, at 45.

[6] E.g., *Williams v. FAI Home Sec. Pty. Ltd.* (No 2) [2000] FCA 726, para 12 (Austl.); *Rod Inv. Pty. Ltd. v. Clark* (No 2) [2006] VSC 342, para 53 (Vic.) (Austl.); *Woodcroft-Brown v. Timbercorp Sec. Ltd.* [2010] VSC 68, paras 14–17 (Austl.).

[7] *Philip Morris (Austl.) Ltd. v. Nixon* (2000) 170 ALR 487, para 3 (Austl.). However in *Bray v. F Hoffman-La Roche Ltd.* (2003) 200 ALR 607, paras 122–130, 246–248 (Austl.), a majority of the Full Court of the Federal Court said (in obiter) (at 630–631, [122]–[130] per Carr J and at 657–659, [246]–[248] per Finkelstein J) that they considered *Philip Morris* was wrongly decided on this point. Nevertheless, Philip Morris has been largely followed. E.g., *Cook v. Pasminco* (No 2) (2000) 107 FCR 44, 46 (Austl.); *Johnstone v. HIH Ins. Ltd.* [2004] FCA 190, para 38 (Austl.); Rod Inv. [2006] VSC 342; *Kirby*, [2008] FCA 1505, paras 175–176 (Austl.).

[8] Federal Court of Australia Act 1976 (Cth) s 33D; Supreme Court Act 1986 (Vic) s 33D (Austl.); Civil Procedure Act 2005 (NSW) s 158 (Austl.). Moreover, these provisions allow a class representative who has commenced proceedings to maintain those proceedings even though he or she ceases to have a claim against the defendant.

[9] Federal Court of Australia Act 1976 (Cth) s 33E; Supreme Court Act 1986 (Vic) s 33E (Austl.); Civil Procedure Act 2005 (NSW) s 159 (Austl.).

[10] Damian B. Grave & Kenneth A. Adams, *Class Actions in Australia*, 131–132 (2005).

[11] Federal Court of Australia Act 1976 (Cth) s 33T; Supreme Court Act 1986 (Vic) s 33T (Austl.); Civil Procedure Act 2005 (NSW) s 171 (Austl.).

[12] Federal Court of Australia Act 1976 (Cth) s 33J; Supreme Court Act 1986 (Vic) s 33J (Austl.); Civil Procedure Act 2005 (NSW) s 162 (Austl.).

[13] The ACCC carries out these broad functions using an array of statutory powers conferred by the Competition and Consumer Act 2010 (Cth) (Austl.).

[14] Australian Securities and Investment Commission Act 2001 (Cth) s 1 (2).

consent to this representation[1]. This power was meant to redress the difficulties of pursuing expensive and complicated litigation[2], but it was not exercised[3]. From 1992-2009 only 15 out of 241 applications commenced in the Federal Court of Australia were filed by the ACCC and the ASIC[4], who preferred to leave it to private parties to assess the costs and benefits of litigation[5].

In 2010, the ACCC and the ASIC were given authority to commence actions without written consent following a judicial declaration that a respondent had breached statutory prohibitions against unconscionable behaviour or misleading and deceptive conduct, or had taken advantage of consumers through unfair contract terms[6]. In such actions, the courts do not award damages[7], but they are authorized to make various orders, including declaring a term of a contract or a whole contract void; varying standard form contracts; directing refunds or the return of property; or mandating the supply of services. The orders are binding on non-party consumers who accept the redress from the respondent acting at the direction of the court.

Enforceable undertakings falling within the array of powers belonging to these regulators can lead to the initiation of other forms collective of redress[8]. These powers include issuing public warning notices[9] and infringement notices[10]. They are not litigious, but they can augment group litigation. Privately initiated group proceedings for compensation relying upon a finding in an action taken by a regulator may precede, follow, or operate in tandem with regulatory action.

For example, in the *Multiplex* dispute, a 2005 ASIC investigation of misleading and deceptive conduct by an international construction company culminated in an enforceable

[1] See Competition and Consumer Act 2010 (Cth) s 87 (1B) (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 50.

[2] *Austl. Sec. Comm'n v. Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 115 (Austl.); *Somerville v. Austl. Sec. Comm'n* (1995) 60 FCR 319, 324 (Austl.).

[3] Janet Austin, *Does the Westpoint Litigation Signal a Revival of the ASIC Section 50 Class Action*, 22 *Austl. J. Corp. L.* 8 (2008).

[4] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: First Report: Class Action Facts and Figures* 28 (2009).

[5] ASIC Regulatory Guide 4, 1991 (Cth) reg 4.4 (Austl.); ACCC Compliance and Enforcement Policy 2012 (Cth) 2 (Austl.) (The ACCC is more likely to act in cases of egregious breaches of national and international significance involving important interpretations of law than in cases involving the private commercial rights of the parties).

[6] Competition and Consumer Act 2010 (Cth) s 239 (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 12GNB.

[7] Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) sch 2 pt 7. The omission of damages awards may be a response to the ruling in *Georgiadis v. Austl. & Overseas Telecomm. Corp.* (1994) 179 CLR 297 (Austl.) that an action for damages is a proprietary right that may be extinguished only on just terms under Australian Constitution s 51(xxxi) or that the proceeding was developed to fill a gap in regulatory incentive where the damages were not large, which is consistent with ASIC's ability to recover compensation as an adjunct to its power to seek civil penalties pursuant to Corporations Act 2001 (Cth) ss 1317H, 1317HA (Austl.) and the regulator's power to seek compensation on behalf of consumers as a component of an enforceable undertaking.

[8] Competition and Consumer Act 2010 (Cth) s 87B (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 93AA.

[9] Competition and Consumer Act 2010 (Cth) s 51ADA (Austl.); Australian Securities and Investment Commission Act 2001 (Cth) s 12GLC.

[10] Corporations Act 2001 (Cth) s 1317DAC (Austl.); Competition and Consumer Act 2010 (Cth) s 134A (Austl.).

undertaking to establish a $32 million compensation fund for investors, to undertake an independent review of disclosure policies and practices, and to implement any recommendations that resulted[1]. A class action followed and it was eventually settled[2] for many times what the investors would have received if they had accepted the terms of the original ASIC settlement[3]. Similarly, in the *Amcor/Visy* settlement, an ACCC application for pecuniary penalties under the *Trade Practices Act 1974* (Cth) for a price fixing and market sharing agreement, resulted in a fine[4] and was followed by a class action on behalf of businesses that purchased their product within the period under investigation[5]. Finally, in the *Opes Prime* litigation, a securities lending and stockbroking firm extended loans to investors that were secured by their shares, often having much greater value than the loans[6]. The shares were transferred to *Opes Prime's* financiers, two leading banks. When the securities firm went bankrupt, the banks seized the shares, and ASIC launched an investigation into allegations that the firm and its bankers had been promoting an unregistered management investment scheme. A class action was started on behalf of the investors and, following an ASIC initiated mediation, a global settlement was reached in which a scheme of arrangement required the banks to pay the liquidators a sum that permitted some recovery by investors[7].

To date, there has been little public debate over the balance between publicly and privately initiated class actions despite the substantial transaction costs of private class actions in legal fees and litigation financier premiums[8] and a report on Australia's Access to Justice Framework in 2009[9].

England and Wales – In the English civil justice system, there has been considerable debate over whether ideological plaintiffs should be permitted to represent claimant groups in litigation. The Group Litigation Order regime requires a litigant with a direct cause of action to pursue the claim rather than an entity that represents the interests of the class[10]. Under the representative action regime, in recent years, trade associations and others have been refused permission to represent their members[11]. However, in the recently-enacted

[1] *06-443 ASIC accepts an enforceable undertaking from the Multiplex Group*, Austl. Sec. Inv. Comm'n (Dec. 20, 2006), www.asic.gov.au/asic/asic.nsf/byheadline/06-443+ASIC+accepts+an+enforceable+undertaking+from+the+ Multiplex+Group?openDocument.

[2] *P Dawson Nominees Pty. Ltd. v. Brookfield Multiplex Ltd*. (No. 4) [2010] FCA 1029 (Austl.).

[3] Ben Butler, *ASIC attacked on Multiplex deal*, *The Age* (Australia), July 22, 2010, available at http://www.theage.com.au/business/asic-attacked-on-multiplex-deal-20100721-10l8a.html.

[4] *Austl. Competition & Consumer Comm'n v. Visy Indus. Holdings Pty. Ltd*. (No. 3) (2007) 244 ALR 673.

[5] *Jarra Creek Cent. Packing Shed Pty. Ltd. v. Amcor* [2011] FCA 671, para 6 (Austl.).

[6] See, e.g., *Beconwood Sec. Pty. Ltd. v. Austl. & N.Z. Banking Grp. Ltd.* (2008) 246 ALR 361 (Austl.).

[7] *Fowler v. Lindholm* (2009) 178 FCR 563 (Austl.).

[8] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010).

[9] *Access to Just. Taskforce, A Strategic Framework for Access to Justice in the Federal Civil System*, at 119–127. But see Elizabeth Boros, *Public and Private Enforcement of Disclosure Breaches in Australia*, 9 *J. Corp. L. Stud*. 409 (2009) (commenting on the incremental development of the remedial regime and its overlapping remedies, and arguing in favour of enforcement against individual defendants rather than «pocket shifting' compensation against entities).

[10] Civil Procedure Rules [CPR] S.I. 1998/3132, Practice Direction 19B, para. 3.1 (U.K.) (an application for a GLO «may be made either by a claimant or by a defendant»).

[11] *Consorzio del Prosciutto de Parma v. Marks & Spencer Plc* [1990] F.S.R. 530 (Ch), *aff'd*, [1991] R.P.C. 351 (A.C.) (U.K.); *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd*. [1998] R.P.C. 117 (Ch), *aff'd*, [1999] R.P.C. 826 (A.C.) (U.K.).

sectoral representative action for follow-on actions in the competition law sector[1], the English Consumers' Association, Which? was approved as a representative of consumer claimants. The proposed reforms to the Financial Services Bill 2010 contemplated permitting representation by ideological plaintiffs[2].

Further debate has related to whether an ideological plaintiff would need to be one of a list of pre-designated organizations or whether any organization that met the criteria for adequacy should be permitted to represent claimants. In the competition law sector regime, only pre-designated organizations were permitted to serve, but in the proposed Financial Services Bill regime, any suitable entity that met the statutory requirements for an «appropriate person» would have been permitted to do so[3]. Finally, there has been debate on whether ideological claimants should be the sole option for representatives or whether this should be in addition to members of the class. Again, in the competition law sector regime, only a pre-designated organization was permitted to serve, but in the proposed Financial Services Bill regime both could bring claims, provided that they were «appropriate» persons.

The methods of selecting representatives and their roles also vary from one regime to another. In the representative action regime, the representative must have the same interest as those represented. This has proved to be a difficult threshold to meet[4]. Under the Group Litigation Order, if the court adopts a test case approach[5], the claim of one of the claimants could be considered and the result could have a precedential effect on the claims of other claimants entered on the group register. Under the proposed reforms in the Financial Services Bill 2010, the representative claimant would have to meet the criteria of adequacy and satisfy the court of the ability to pay the defendant's recoverable costs if ordered to do so[6].

Netherlands – In deciding whether to approve a settlement under the WCAM procedure, the Dutch courts will consider carefully the adequacy of the representation by the representative organization. The formal standing requirements for such organizations are not onerous, but there is a rigorous judicial assessment of whether an organization is sufficiently representative of the interests of persons on whose behalf the agreement has been concluded. Whether a representative organization is generic in nature, such as the Consumers' Association, the Investors' Association, or an ad hoc foundation established to promote the interests of persons for the benefit of whom a specific settlement agreement has been concluded[7], it must persuade the court that it serves the interests of those who it is asking the court to bind with the settlement it has reached.

In determining the adequacy of the representation, the court may consider various criteria, such as the activities undertaken by the representative association on behalf of the interests of its members, the number of interested parties that are members of the association, and the general acceptance of the association's representation by the interested parties. The court is not empowered to declare the settlement binding only on a portion of

[1] Competition Act, 1998, § 47 (U.K.).

[2] See Financial Services Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing CPR 19.21(3)).

[3] Ibidem.

[4] *Emerald Supplies Ltd. v. British Airways Plc.* [2009] EWHC 741 (Ch), *aff'd*, [2010] EWCA (Civ) 1284 (A.C.) (U.K.).

[5] Civil Procedure Rules [CPR] S.I. 1998/3132, r. 19.13(b) (U.K.).

[6] See Financial Services Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing CPR 19.21(2)(b)(iv)).

[7] Examples include the Shell Reserves Compensation Foundation in the Shell Settlement and the Stichting Converium Securities Compensation Foundation in the Converium Settlement.

the proposed group, but it may suggest that the parties modify the petition and limit the binding effect of the settlement agreement to those who are sufficiently represented. The reduced coverage may affect the viability of the proposed settlement as it affects the extent of the closure on questions of liability available for the responsible party.

Some have questioned the ability of a representative organization established under Dutch law to represent claimants from outside the Netherlands. Various practical solutions have emerged, such as written expressions of support for a settlement by representative organizations from other countries whose residents are included in the class that is sought to be bound, participation by those organizations in negotiating and concluding the settlement agreement, or agreement by them to become a party to it. In cases involving multi-jurisdictional classes, the question is not whether any one representative organization represents the class as a whole, but whether the representative associations and foundations are jointly sufficiently capable of representing the interests of the persons for the benefit of whom the settlement has been concluded.

Italy – Any class member or consumer association can serve as the representative plaintiff. Once an ordinary civil proceeding is declared admissible as a class action, the court issues an order providing for notice to potential class members and for a deadline to opt in. Class members who opt in are bound by the outcome but are not considered parties to the suit, which proceeds between the lead plaintiff and the defendant. The opt-in period can be short and, in any event, cannot exceed 120 days, after which, no other class actions can be brought against the same defendant on the same set of issues.

The only reference in the legislation to adequacy of representation relates to the ability of the plaintiff to afford adequate protection to the interests of the class. While the opt-in requirement enables class members to avoid participation in a class action in which they are not confident that their interests will be adequately represented, the lack of authority to take initiative in the suit prevents class members from taking steps to ensure that their interests are adequately represented should they choose to opt-in.

Belgium – Claimant groups must be represented by established private professional, inter-professional or public associations, or organizations whose statutory aims correspond with the cause of action. The requirement of representation by these ideological plaintiffs has been defended[1] on three grounds: the representative's interests are aligned with the class as a whole and not with any individual member[2]; individuals are shielded from the risks and burdens of representation[3]; and financing the litigation is more manageable.

Sweden – There are three kinds of group actions in Sweden: those led by private persons, those led by organizations, and those led by public authorities. A private group action may be commenced by a natural or legal person who is a member of the group and who has standing to be a party to the proceedings with respect to at least one of the causes of action. Non-profit consumer organizations may represent consumers or workers in the area of consumer and

[1] Rachael Mulheron, *The Class Action in Common Law Legal System: A Comparative Perspective,* Hart Publishing, 2004, 303 [hereinafter Mulheron, *Common Law Class Action*].

[2] This is the «class-entity» or «class-as-client» theory. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev*. 913 (1997–1998); S. Afr. Law Comm'n, *The Recognition of a Class Action in South African Law,* para. 5.5 (Working Paper No. 57); Vince Morabito, *Ideological Plaintiffs and Class Actions – An Australian Perspective*, 34 *U.B.C. L. Rev.* 459, 497 (2000–2001); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 13, 26–32 (1996).

[3] Ont. Law Reform Comm'n, *Report on Class Actions*, at 128, 132; Pierre-Claude Lafond, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 *Consumer L. J.* 329, 332 (2000).

environmental law in claims concerning goods, services, or other utilities offered in the course of business to consumers, primarily for personal use. Non-profit organizations dedicated to nature conservation and environmental protection (and professional federations in the fishing, farming, reindeer husbandry, and forestry industries) can bring actions for injunctions and/or damages for environmental impairment. Any organization, no matter how small or new, can obtain court approval[1] to serve as a representative of its own members and the public[2]. Finally, the Consumer Ombudsman, the Swedish Environmental Protection Agency, or any other public agency authorized by the government may initiate public group actions[3].

A representative plaintiff must be represented by an advocate unless the court authorizes the representative to appear without an advocate or to appear with an advocate who is not a member of the bar[4]. The representative plaintiff's role is to protect the interests of the members of the group by giving them an opportunity to express their views on important matters where feasible and by keeping them informed upon request[5]. The right to represent the group does not cease if there is a change in the circumstances on which the right to institute the action has been founded[6]. However, if the plaintiff is no longer considered appropriate to represent the members of the group in the case, the court appoints someone else who is entitled to do so. If no new plaintiff can be appointed the group action is dismissed. If the plaintiff is the appellant's counterparty in a superior court, the court may appoint someone else who is considered appropriate to conduct the group's action as plaintiff[7].

Brazil – In Brazil, the class representative is granted standing on the basis of certain formal requirements alone, leaving adequacy to be assessed indirectly by means of tests such «thematic relevance». In the «popular» actions any citizen may sue because this litigation is more like public interest litigation than class actions.

Russian Federation – Generally speaking, the claimants in public class actions are not represented by a member of the class, but by an entity – usually a governmental authority – who is authorized by law to do so[8]. Such entities may include consumer organizations and public prosecutors and they usually pursue claims such as regulatory matters and environmental matters[9]. Any claim brought by a person who does not have standing to do so under the legislation is rejected[10].

[1] The representative must satisfy the court that it is an appropriate representative in view of its interest in the matter, its financial capacity to bring a group action, and the circumstances generally. (SPGA §5.) LAG OM GRUPPRÄTTEGÅNG (Svensk författningssamling [SFS] 2002:599) (Swed.).

[2] In the case of organization and public group actions, the representative plaintiff is not a member of the group. If an organization or public authority has a claim as a member of a group, the action is treated as a private group action.

[3] In The *Consumer Ombudsman v. Kraftkommission i Sverige AB Umeå* [TR] [District Court] 2004 T5416 (Swed.), the Consumer Ombudsman sought damages on behalf of about 7,000 people for the defendant's failure to supply electricity as agreed under a fixed price contract. The defendant challenged the representation unsuccessfully and about 2,300 people opted in. A plea for a declaration that the defendant must compensate all group members was heard and finally approved by the Court of Appeal in September 2011.

[4] SGPA §11.

[5] SGPA §17.

[6] SGPA §7.

[7] SGPA §21.

[8] CPC RF, art 45.

[9] Part 2, article 11 of the Federal Law «On Protection of the Environment» dd. January 10, 2002, No. 7-FZ, in Legal reference system «Consultant-Plus».

[10] CPC RF, art 1, item 1, pt 1.

The limitations on standing for public class actions have been criticized on the basis that authorized representatives may not have the time or inclination to pursue claims promptly or at all despite their merit. Furthermore, the law of standing generally has been criticized as taking too restrictive an approach to the question of whose rights may be affected by, for example, misappropriation the intellectual property[1], or affronts to the honour and dignity[2] of deceased persons. Similarly, there has been criticism of the law of standing in areas of the law such as that relating to elections, where standing is restricted to entities whose interests may conflict with that of the public at large[3] and where standing is otherwise restricted to persons whose specific rights have been breached, despite the larger public interest. Similar concerns have been expressed over the laws protecting animals, where the legal protections are incomplete and in need of modernization[4].

In this regard, the procedure for private class actions in the Russian Federation may also be subject to criticism for failing to provide the procedural safeguards for class members of either opt-in or opt-out proceedings. There appears to be no way to opt-out or to commence separate proceedings and, once included in the class, the class member receives whatever is awarded in the proceeding. Under the private class action procedure, the initiator is the person who has the rights and responsibilities of a party[5], including the right to define the class[6] and the responsibility for fees. The law does recognize another category of claimants consisting of those concurring in the request, whose rights seem to be confined to demanding substitution of the representative under specified conditions if a majority agrees[7]. This group also has the right to be informed of the steps taken in the proceeding[8]. A third group, comprised of those who will be bound by the result, have only the right to join the second group.

Funding and Financing

Perhaps the most controversial feature of U.S.-style class actions is the economic context in which it operates. Epithets such as outrageous and obscene are routinely leveled at the quantum of fees awarded to class counsel upon the successful conclusion of a class action

[1] E.P. Gavrilov, V.I. Eremenko, *Comments to Part Four of the Civil Code of the Russian Federation (article-by-article)*, Moscow, 2009; E.A. Pavlova, O.Yu. Shilokhvost (eds.), *Current Issues of Russian Private Law: Collected Works Dedicated to the 80th Anniversary of Professor V.A. Dozortsev*, 2008 (author: E.I. Kaminskaya); S.P. Grishayev, *Copyright Defense and Protection,* prepared for «Consultant-Plus» system, 2008, in Consultant Plus.

[2] Decree of the Plenum of the RF Supreme Court dd. February 24, 2005, No. 3 «On judicial practice on proceedings related to defense of citizens' honor and dignity, as well as reputation and goodwill of persons and legal entities», in Legal reference system «Consultant-Plus».

[3] Thereat it is important to take into account for which purposes such entities have actually been established. For example, part 2, article 1 of the RF Federal Law dd. October 6, 2003, No. 131-FZ «On General Principles of Local Administration in the Russian Federation» states that «local administration in ... is a form of power exercise by the public, that ensures... independent resolution of local issues by the public at its own risk directly and (or) through local authorities, based on the interests of the population...»

[4] Sanctions for abusive animal treatment are stipulated in the Criminal Code of the Russian Federation (article 245). At the same time, such abusive treatment shall be considered as a crime only if it caused death or permanent injury of the animal, provided that such act was undertaken based on hooligan motives or for financial gain, or using sadistic approaches, or in the presence of minors. It is easy to notice that the aforementioned includes only a small part of possible situations.

[5] APC RF, art 225.12.

[6] APC RF, art 225.12, pt 1.

[7] APC RF, art 225.15, pt 8.

[8] APC RF, art 225.16, pt 3.

in the United States. All manner of potential abuses are feared inevitable through adoption of the U.S. approach to funding and financing, and yet in the United States this approach is thought to be essential to the successful operation of the regime.

Nevertheless, even in legal systems that once regarded conditional fees as fundamentally unacceptable, their merit in the context of group litigation has prompted reforms to relax the restrictions on them. And in some legal systems in which there has not been reform to provide adequate financial incentives, and in which safeguards for claimants have not been introduced, there is concern that the effectiveness of group litigation may be diminished as a result.

The comparisons below on the topics of funding and financing are among the most striking in the questions they raise about whether introducing the changes necessary to meet the basic requirements of a regime for group litigation inevitably results in «Americanizing» a civil justice system.

Canada – Most class actions are financed by class counsel, but some rely on third party financing. In all cases, counsel enters into a contingency fee arrangement with the representative plaintiff and agrees to be reimbursed for disbursements and paid for legal services at a rate of 20-35% of the award or 2-4 times counsel's base fee when and if the action settles or succeeds at trial[1]. Upon approval by the court as fair and reasonable, the fee arrangement binds all class members. Some judges give weight to the terms of the contract with the representative plaintiff[2], but others do not[3] on the basis that, unlike the situation in named party litigation, the agreement has not involved a client who is directly affected by the level of fees claimed[4].

In Ontario, contingency fees were once prohibited, but the need for them in class actions prompted a review of this restriction on fee arrangements – a review that ultimately extended to all matters except those in family law. It is recognized that class actions rely upon entrepreneurial lawyering with the caveat that «the entrepreneurial lawyer is a means to an end, not an end in and of itself»[5]. Nevertheless, counsel fees in Canada do not seem to be as generous as those awarded in the United States.

The governments of Quebec and Ontario have established funds to which class counsel may apply for financial support. Applications are accepted on the basis of a number of factors including the likelihood of success and the public interest in the case. In return for a percentage of the award[6] both funds cover disbursements and provide indemnification

[1] Benjamin Alarie, *Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions,* 4 *Can. Class Action Rev.* 15 (2007) (Can.).

[2] See, e.g., *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. 3d 543, para. 63 (Can. Ont. Sup. Ct. J.) («there was nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted»). See also *McLay & Co. v. Cascades Fine Papers Grp. Inc.* (2008), CarswellOnt 7936, para. 6 (Can. Ont. Sup. Ct. J.) (WL) (where Leitch J was «prepared to approve this fee request because it is consistent with the retainer agreement entered into with the representative plaintiff»); see Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis*, at 11.

[3] *Martin v. Barrett* [2008] O.J. No. 2105, para. 48 (Can. Ont. Sup. Ct. J.) (QL).

[4] Ibid., at para. 52.

[5] *Fantl v. Transamerica Life Canada*, at para. 66.

[6] In Ontario, the percentage recovery is 10 percent on top of the amount of funding previously paid by the Ontario Fund to the representative plaintiff. Class Proceedings, O. Reg. 771/92, s. 10(3)(b) (Can. Ont.). In Québec, the amount collected by its Fund varies depending on the method of recovery by the class, and applies in

against adverse costs awards[1] and the Québec fund may also provide for legal fees. In a legal system in which an unsuccessful plaintiff may be required to pay the costs of the defendant, the indemnity is an important safeguard for representative plaintiffs, and for their counsel who may otherwise be called upon to provide it.

Apart from this, the Ontario Class Proceedings Fund has not been regarded as entirely successful. On the one hand, there is concern that its limited resources could easily be depleted by a large unsuccessful matter; and on the other hand, established plaintiff's counsel prefer to finance the litigation themselves if they are confident of success, rather than invest the time in making an application to the Fund knowing that it will claim 10% of a successful recovery.

Finally, third party financing arrangements are now being approved. Under these arrangements, financiers indemnify plaintiffs in return for a levy on settlement or judgment proceeds of less than 10%[2]. If such arrangements become commonplace, there may be need for greater regulatory or judicial oversight[3].

Australia – Since the Australian High Court approval of litigation financier underwriting and control of class proceedings[4], conditional fee agreements have frequently been combined with litigation financing. Conditional fee or «no win no fee» agreements address some of the concerns of cost shifting[5] by permitting lawyers to charge uplift fees of tewnty-five to fifty percent on their prescribed fees, which are payable only in the event of success, but otherwise they leave the claim holder liable for disbursements and adverse costs. Litigation funding, however, costs an average of thirty percent of the proceeds[6] but it provides indemnity for adverse costs awards and it covers all or a part of the legal costs and disbursements[7].

The courts have recognized the public importance of taking the financial risk of pursuing class actions by requiring class members to enter into a litigation funding agreement, thereby closing the class to free riders[8]. This has made the indemnities in such agreements significant in attracting members. Furthermore, third-party funding has been important in Australia,

every class action, not just those in which funding has been granted. See Regulation Respecting the Percentage Withheld by the Fonds d'aide aux recours collectifs, R.R.Q. c. R-21, r. 3.1 (Can. Que.).

[1] Law Society Act, R.S.O. 1990, c. L.8, amended by Law Society Amendment Act (Class Proceedings Funding), S.O. 1992, c. 7, s. 3 (Can.). In Québec, if a cost award is made against the representative plaintiff and he or she is unable to pay, the defendant may then apply to the Québec Fund for payment. See An Act Respecting the Class Action, R.S.Q. 2000, c. R-21, s. 20 (Can. Que.). The Fund then becomes subrogated to the defendant's rights as against the unsuccessful representative: See ibid., at s. 31. Adverse costs awards are not inevitable in Ontario, but they are not available at all in some other provinces, and this distinction has resulted in some debate about whether they can inappropriately discourage claims from being brought.

[2] See *Metzler Investment GMBH v. Gildan Activewear Inc.* [2009] O.J. No. 33150 (Can. Ont. Sup. Ct. J.) (QL); *MacQueen v. Sydney Steel Corp.,* 2011 NSSC 484 (Can. N.S.); *Dugal v. Manulife Corp.* (2011), 105 O.R. 3d 364 (Can. Ont. Sup. Ct. J.).

[3] Sandra Rubin, *Enter the Silent Partner, Lexpert Mag.* July/Aug. 2011, at 56–61; Luis Millan, *Why class actions create ethical minefields*, *Law. Wkly* (Aug. 19, 2011), at 4, 7.

[4] *Campbells Cash & Carry Ltd. v. Fostif Pty. Ltd.* (2006) 229 CLR 386 (Austl.).

[5] Vince Morabito, *Contingency Fee Agreements with Represented Persons in Class Actions - An Undesirable Australian Phenomenon*, 34 *Common L. World Rev.* 201 (2005).

[6] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives,* 38–39 (2010).

[7] Ibidem.

[8] *Multiplex Funds Mgmt. Ltd. v P Dawson Nominees Pty. Ltd.* (2007) 164 FCR 275 at paras 141–142 (Austl.).

where all the States prohibit contingency fee arrangements and the challenges of financing the action through to its conclusion have proved onerous[1].

The acceptance of third-party funding of class actions was foreshadowed by litigation financing in insolvency and in other commercial applications[2]. It has been part of broader economic changes to the legal profession[3], which have included the de-regulation of legal services, the introduction of multi-disciplinary practice, permitting non-lawyers to own interests in law firms[4], and the listing of law firms on the Australian Securities Exchange[5]. Access to capital markets to underwrite the expansion of legal practice and access to capital markets to underwrite litigation have prompted increased corporate regulation, new causes of action, broader shareholder ownership, and an enhanced sense of entitlement to monetary compensation for investment losses[6].

However, these developments, particularly in securities class actions[7], have caused concern that lawyers are opportunistically stirring up claims for financial gain and little social benefit[8]. Conflicts of interest between financiers, law firms, and claim holders have exacerbated the concern[9]. Nevertheless, the government and ASIC have not been persuaded to require litigation financiers to register their underwriting of class actions as managed investment schemes[10] or to hold an Australian Financial Services License[11], but new regulations are being drafted to address conflicts of interest[12].

England and Wales – Like Canada and Australia, civil litigation in England and Wales operates on the principle of cost-shifting. Accordingly, a representative claimant must be able to finance the litigation and pay adverse costs in the event that the claim does

[1] Greg Houston, Svetlana Starykh, Astrid Dahl & Shane Anderson, *NERA Econ. Consulting, Trends in Australian Securities Class Action: 1 January 1993 – 31 December 2009*, at 2 (May 9, 2010).

[2] See Vick Waye, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US* (2008).

[3] On the nature of this transformation see more generally Richard Susskind, *The End of Lawyers Rethinking the Nature of Legal Services* (2010).

[4] Steven Mark & Tahlia Gordon, *Innovations in Regulation – Responding to a Changing Legal Services Market*, 22 Geo. J. Legal Ethics 501, 527–528 (2009).

[5] Ibid., at 515.

[6] Michael Legg, *Shareholder Class Actions in Australia – The Perfect Storm*, 31 *U.N.S.W.L.J.* 669, 671–674 (2008) (Austl.); Peta Spender, *After Fostif: Lingering uncertainties and controversies about litigation funding*, 18 *J. Jud. Admin.* 101, 102 (2008) (Austl.).

[7] E.g., Kathy Merrick, *The Multiplex class action settlement – best and fairest outcome or is there room for improvement?*, 62 *Keeping Good Cos.*, Oct. 2010, at 542; Hon. PA Keane, *Access to Justice and other Shibboleths, Judicial Conference of Australian Colloquium in Melbourne* (Oct. 10, 2009), available at http://www.jca.asn.au/attachments/2009Accessto Justice.pdf; Peta Spender, *After Fostif: Lingering uncertainties and controversies about litigation funding*.

[8] See, e.g., *Campbells Cash & Carry Ltd. v. Fostif Pty. Ltd*. (2006) 229 CLR 386, 487 (Austl.) (Callinan & Heydon, JJ., dissenting).

[9] Law Council of Austl., *Position Paper, Regulation of Litigation Funding in Australia* (June 2011).

[10] *Brookfield Multiplex Ltd. v. Int'l Litig. Funding Partners Pte Ltd.* (No. 3) (2009) 256 ALR 427 (Austl.) (a full federal court decision determining that litigation funding of class actions was a managed investment scheme subject to Corporations Act 2001 (Cth) s 5C (Austl.)).

[11] But see *Int'l Litig. Partners Pte. Ltd. v Chameleon Mining NL* (2011) 276 ALR 138 (Austl.) (determining that litigation funding was a financial product and that litigation financiers therefore required Australian Financial Services Licenses under Corporations Act 2001 (Cth) c 7 (Austl.)).

[12] Australian Securities and Investments Commission 2010 (Cth.) CO 10/333 (currently effective until 30 June 2011); see also Hon. Chris Bowen, Address to Shareholder Class Action Conference (May 4, 2010), available at http://www.chrisbowen.net/media-centre/allNews.do?newID=3132.

not succeed. Conditional fee arrangements are permitted and counsel may recover up to twice its regular rate of fees in the event of success, but percentage recoveries are not yet permitted.

Third party funders may finance the litigation and provide indemnity against adverse costs awards. A Working Group is presently drafting a voluntary Code of Conduct for such arrangements. After-the-event insurers may provide coverage for adverse costs, and before-the-event insurers, presumably through coverage held by the claimants, may join together to finance the litigation. The class members may contribute to a common fund for the costs of litigation and the potential costs of an adverse costs award[1]. The Legal Services Commission may provide financing through legal aid for the costs of litigation and to indemnify a claimant against adverse costs awards. Such funding has not generally been provided for consumer claims. Other funding mechanisms that have been considered include a Supplementary Legal Aid Scheme, or an Access to Justice Fund set up under statute[2].

The rules governing costs and funding in litigation in England and Wales, including group litigation, are under review pursuant to the Jackson Costs Enquiry[3], and presently, a proposal for «damages-based agreements» (which largely replicate a true contingency fee), contained in Part II of the Legal Aid, Sentencing, and Punishment of Offenders Bill, is undergoing Parliamentary debate. The Civil Justice Council had earlier recommended that contingency fees should be permitted where no other form of funding is available to enhance access to justice[4]. Currently, claimants seek to address the risks of adverse costs awards through costs-capping orders[5] and the Civil Justice Council has recommended a presumption in favour of such orders in group litigation[6].

Netherlands – Group litigation is financed and funded in the same way as ordinary litigation. There are no conditional or contingency fee arrangements, but generic representative organizations, which still depend upon the contributions of members, are considered *professional funders*. Ad hoc representative groups employ some forms of contingency arrangements with interested parties and there is public discussion of introducing some form of contingency fees, but there is concern that this could lead to high costs and litigation that is excessively lawyer-focused.

There is no public funding of representative organizations[7], but there is legal aid and legal insurance, which has been sought in mass claims, and there is public discussion about whether a policy of public financial support would improve access to justice. Nevertheless, the need for funding and financing of the WCAM procedure needs to be understood in context. The need for financial resources is eased by the fact that the principle costs of

[1] This was used in the Equitable Life Group Litigation and Railtrack Private Shareholders Action Group Litigation. See *Equitable Life Members Support Group*, http://www.equitable lifemembers.org.uk/ (last visited Mar. 16, 2012); *Weir v. Sec'y of State for Transp*. (No. 1) [2005] EWHC (Ch) 812 (U.K.) (brought by RPSAG).

[2] Legal Services Act, 2007, c. 29, § 194 (Eng.).

[3] See Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report,* 330–336 (2009).

[4] CJC, *Improved Access to Justice: Funding Options and Proportionate Costs: The Future Funding of Litigation: Alternative Funding Structures,* 68 (2007).

[5] See *A B v. Leeds Teaching Hospitals NHS Trust* [2003] EWHC (QB) 1034 (Eng.).

[6] CJC, *Improved Access to Justice: Funding Options and Proportionate Costs*, 26, recommendation 7 (2005).

[7] Such as the Dutch Consumers Organisation (Consumentenbond) established by the Injunctions Directive 98/27/EC. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51–53.

negotiating, realizing, and executing a settlement agreement are borne by the representative organizations and the responsible parties. The settlement, once reached, usually provides for recovery of the costs of the representative organizations, including the costs of adequate worldwide representation for ad hoc representatives. The relatively inexpensive nature of the WCAM procedure is an important feature of its success.

Italy – There are no special funding or financing rules for class actions. As in ordinary proceedings, each party must bear its own expenses during the proceeding and, pursuant to the loser-pays rule, the prevailing party is generally entitled to recover its costs when the matter is over. In the handful of class actions commenced to date, consumer organizations were probably motivated to represent individual claimants more by a desire to raise their profile than by a hope for financial benefit from bringing a successful action.

Contingency fee agreements are forbidden, but attorneys may enter into an agreement to receive a success fee calculated according to a mandatory rate, approved by the government if they win the case. This is unlikely to make such actions profitable, particularly as damages awards are strictly compensatory. Moreover, in making an award in favour of the plaintiff, a court may choose merely to set the criteria for determining damages for class members, who would then need to commence separate actions to recover damages on the basis of the criteria. Finally, there is no statutory regime for third-party funding, either to permit it or to regulate it, placing this in an area of legal uncertainty.

Belgium – Under the existing procedures, the litigation is funded and financed by the claimants, or, in the case of group actions, by the organizations that are permitted to seek the injunctive or preventative relief. Apart from agreement on the possibility of funding through a government fund, the three proposals for class actions lack a clear vision on this aspect of group litigation.

Despite the range of apparent options – funding by the class, funding by the class representative, funding by the class attorney, and funding by a third party – only funding by the government seems likely to provide a way forward. Funding by the plaintiff is feasible only for ideological plaintiffs and even then, the risk of adverse costs awards seems likely to create considerable disincentive[1]. Funding by the class attorney is not an option because contingency fees are prohibited as a violation of public order and as incompatible with professional ethical obligations[2]. It is conceivable that fees partially dependent on the outcome of the case might be permitted, but this could be seen as creating a personal financial stake in the litigation, which would impair counsel's ability to fulfil the role of securing the due administration of justice as part of counsel's professional responsibility.

Only outside funding seems likely to meet with success. Whether this funding takes the form of legal expenses insurance (before–the-event insurance)[3], legal aid funding, a govern-

[1] Issacharoff & Miller, *Will Aggregate Litigation Come to Europe?*, at 199; Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report No. 46, para. 252 (1988).

[2] See Code Judiciare [C.Jud.] art. 446 (Belg.); see generally Vincent Sagaert & Ilse Samoy, *Belgian Report*, in Christopher Hodges, Stefen Vogenauer & Magdalena Tulibaca (eds.), *The Costs and Funding of Civil Litigation. A Comparative Perspective,* Hart Publishing, 2010, 217, 217.

[3] In this context, see the *Eschig* decision of the Court of Justice of the European Union in which the Court ruled that article 4(1)(a) of Council Directive 87/344 on the coordination of laws, regulations, and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned. See Case C-199/08, *Erhard Eschig v. UNIQA Sachversicherung AG*, 2009 E.C.R. I-08295.

ment fund[1], or third party funding[2], it is much more likely to succeed with an ideological plaintiff as class representative, because such a representative will be more likely enjoy the respect and confidence of funders in its discharge of the responsibilities of representation.

Sweden – In Sweden, the costs of litigation are borne by the losing party except in small claims cases where parties represent themselves or pay their own lawyers. In group litigation, representative plaintiffs and any group members who intervene in the proceedings are liable for adverse costs awards. However, conditional fee arrangements called *risk agreements*, are commonplace, with attorneys receiving double or triple the normal rate if the action is successful and half the rate or nothing if the action fails.

These agreements are not binding on defendants, who cannot be ordered to pay more than the customary hourly rate. Any plaintiff's counsel fees that a defendant cannot pay are borne by the members of the plaintiff class from the proceeds of the award. Risk agreements are binding only if approved by the court as reasonable in view of the nature of the case[3]. Thus, among the criteria for determining the adequacy of representative plaintiffs is the financial capacity to prosecute the action, including investigations and counsel[4], but not necessarily an adverse costs award if unsuccessful.

The assessment of financial capacity was intended to be limited to determining that the plaintiff's financial affairs were in order, in that he or she had a reasonable annual income and access to public legal aid[5] or private legal insurance (although both are usually limited to an amount equal to customary attorney's fees for less than 100 hours of work or €10,000). Nevertheless, the risk of adverse costs awards is a strong deterrent to pursuing an action and there are no government funds to which a representative plaintiff may apply for indemnity.

Accordingly, it was anticipated that of the expected ten or so group actions per year most would be commenced by organizations and not by individuals. In fact, in the first six years of operation the group action regime saw only twelve group actions commenced in total, and despite very liberal standing rules for representative organizations, none have been commenced in this way. Only one public group action has been brought, that by the Consumer Ombudsman, and the other eleven have been private group actions, albeit with many enjoying the support of non-profit organizations. Such organizations are not eligible for public legal aid or private legal insurance, but they may raise funds from their members and shield them from personal responsibility for adverse costs. Alternatively, a number of the members of the class may agree to be named so as to share the financial risk involved and, possibly, to benefit from multiple legal insurance policies, where this is not excluded by the policies.

In «true» organization actions, the organization cannot also be a group member (i.e., have an interest of its own); if the organization is a group member, the lawsuit is treated as a private group action. However, legal persons, such as non-profit organizations, may

[1] The best example can be found in Québec with the *Fonds d'aide aux recours collectifs*, Gov't Quebec, www.farc.justice.gouv.qc.ca/ (last visited Mar. 16, 2012). Also Ontario has a *Class Proceedings Fund*, *L. Found. Ontario*, www.lawfoundation.on.ca/cpcabout.php (last visited Mar. 16, 2012).

[2] See Rachael Mulheron & Peter Cashman, *Third Party Funding: A Changing Landscape*, 27 *C.J.Q.* 312 (2008).

[3] SGPA §38 (SFS 2002:599) (Swed.).

[4] Note however that, unlike in the United States, the court both issues and pays for notice to group members in group actions under the Swedish Act. See 50 § SGPA (Swed.).

[5] Public legal aid is available only to plaintiffs who do not have and should not be expected to have private legal insurance (due to poverty or comparable circumstances).

initiate private group actions. A group of people who want to initiate a group action may form an organization or foundation solely for the purpose. By transferring one of the members' claims for damages, or only part of it, to the legal person (the organization) becomes a member of the group. By this means, the organization gains standing to initiate a private group action (but not an organization action) on behalf of everyone who opts in, whether or not they are members of the organization. While the organization's finances must be «in order»[1] for the organization to be accepted as a plaintiff, this can be arranged by collecting dues or other funding from the association's members (such as a limited guaranty). By this means, the members can limit their financial risk. In addition, members are shielded from the risk of being required to pay the opponent's costs because the named plaintiff – the organization – bears the entire risk. This «transfer method» is also open to existing organizations, foundations, and other legal persons not formed solely for the purpose of litigating a claim.

Brazil – Since standing to sue in public civil actions is granted only to public entities and associations, who generally have lawyers on staff, counsel fees do not create a barrier to access to justice. Furthermore, there is no cost shifting (except in cases of bad faith). Accordingly, funding and financing do not create special issues for class actions.

Russian Federation – The issue of legal expenses is resolved as follows: if a specially empowered person or a public prosecutor files a lawsuit in court, they are exempted from payment of the related legal expenses[2]. If the case is lost by the defendant, such expenses are charged to it/him/her.

Available Relief

Ultimately, for the members of the class, the nature of the relief available for individual claimants is the most significant feature of the regime. Are they able to receive individual compensation? Must they commence separate proceedings to do so? If so, in what forum must this be done? Does the relief granted preclude them from making other claims? For members of the public whose claims are subject to collective redress, these considerations can be determinative of the effectiveness of the regime.

Canada – Most class proceedings in Canada, like most ordinary proceedings, seek compensatory damages for pecuniary losses. Declarations and injunctions are available, but they are often more efficiently and cost-effectively resolved through test cases or ordinary litigation[3]. Accordingly, for example, class actions against the government seeking declaratory relief and damages for breaches of aboriginal rights have been difficult to certify[4].

For cases that go to trial, the legislation provides for the determination of damages. In particular, the legislation provides for the assessment of aggregate awards and the use of sampling evidence in appropriate circumstances and for making awards to members of the class on an average or proportional basis[5]. The legislation further provides for the participation of individual members of the class for determination of issues particular to them[6]

[1] SGPA §8 para 5.

[2] CPC RF, arts 45, 46.

[3] *Roach v. Canada* (Att'y Gen.), [2009] O.J. No. 737 (Can. Ont. Sup. Ct. J.) (QL) (denying certification motion in action seeking declaration of constitutional invalidity).

[4] See, e.g., *Davis v. Canada (Att'y Gen.)*, 2007 NLTD 25.

[5] See, e.g., Class Proceedings Act [CPA], S.O. 1992, c. 6, ss. 23–24 (Can. Ont.).

[6] Ibid., at s. 25.

and for the distribution of judgments, including by a cy près method[1]. To date, less than twenty class actions have gone to trial, but the courts have found these provisions useful in determining whether to certify claims as class actions[2].

In recent years, a number of class action settlements have provided for cy près distribution of all or part of the award[3] because the cost of locating and compensating class members would exceed the amounts to be distributed. Critics have noted the lack of connection between the class and the cy près recipient in some cases[4], and the fact that the cost of locating and compensating class members, though significant, has not always exceeded the funds available under the award[5]. Some have argued that, where a cy près distribution is justified, the proceeds should be directed to charities or non-profit organizations whose works will indirectly benefit the class in order to promote the objectives of class proceedings[6].

Australia – In deciding class actions, judges may: determine issues of law and fact; make declarations of liability; grant equitable relief; make awards of damages for class members, sub-class members, or individual class members, consisting of specified amounts or amounts worked out as the court specifies; award damages in an aggregate amount without specifying amounts for individual class members; and make such other orders as they think just[7].

Damages in the aggregate may be awarded without specifying amounts for individual class members only where it is possible to make a reasonably accurate assessment of the total[8]. For example, in a class action in respect of a pyramid scheme, the ACCC sought an injunction and a declaration that the members were entitled to recover the money they had paid into the scheme[9] in the amount of $50 per class member for a total award of $600,000.

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[1] Class Proceedings Act [CPA], S.O. 1992, c. 6,, at s. 26.

[2] See, e.g., *Cassano v. TD Bank*, 2007 ONCA 781, [2007] 87 O.R. 3d 401 (Can. Ont. C.A.) (relying on section 24 of the CPA to find that establishing the extent of the bank's liability did not require making individual inquiries of cardholders; rather, the aggregate of the bank's liability could be determined by looking at its records of the amount of fee income collected over the class period); *Markson v. MBNA Canada Bank*, 2007 ONCA 334 para. 45, [2007] 85 O.R. 3d 321, para. 45 (Can. Ont. C.A.) («statistical sampling can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims.»).

[3] In Professor Kalaidzic's 2010 study of cy près awards, she estimated that 35 class actions involving fixed cy près awards had settled in the previous ten years. Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions*, 50 *Can. Bus. L.J.* 356, 371 n. 58 (2011).

[4] Jeff Berryman, *Class Actions and the Exercise of Cy près Doctrine: Time for Improved Scrutiny*, in J. Berryman & R. Bigwood (eds.), *The Law of Remedies: New Directions in the Common Law,* Irwin Law, 2009, ch. 22; Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy près Distributions and Class Actions*, 53 *Supreme Court L. Rev.* 2d 133 (2011) [hereinafter *Nudge, Nudge*]; Jasminka Kalajdzic, *Access to a Just Result: Revisiting Settlement Standards and Cy près Distributions*, 6 *Can. Class Action Rev.* 217, 246–247 (2010) [hereinafter Kalajdzic, *Access to a Just Result*].

[5] The OLRC adopted the same approach, stating that «all feasible efforts» must be made to compensate class members directly before making any cy près distribution. Ont. Law Report Comm'n, *Report on Class Actions*, at 581.

[6] Class Proceedings Act, R.S.O. 1992, at c. 26(4) (Can. Ont.) (courts can direct the payment of aggregate amounts in any manner that «may reasonably be expected to benefit the class members»); Kalajdzic, *Access to a Just Result*; Berryman, *Nudge, Nudge*.

[7] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(1); Supreme Court Act 1986 (Vic) pt 4A s 33Z(1) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(1) (Austl.).

[8] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(3); Supreme Court Act 1986 (Vic) pt 4A s 33Z(3) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(3) (Austl.).

[9] *Austl. Comp. & Consumer Comm'n v. Golden Sphere Int'l* [1998] 83 FCR 424, 424 (Austl.).

This was permitted because the respondents possessed the information to refute the claim if they wanted a substantially different result[1].

In making orders for damages awards, the court makes provision for the distribution to the class[2], including the manner for members to establish their entitlement to a share of the damages and the manner in which disputes over entitlement may be determined[3]; and for the constitution and administration of a fund, either through the payment of a fixed sum or instalments, and the terms of the fund, such as the entitlement to interest[4].

Unlike Canada's legislative class action regimes, Australian courts are not permitted to make cy près orders[5], because it has been thought that any money ordered to be paid by the respondent should be matched with an entitlement to compensation. Anything more would be in the nature of a penalty and this would go beyond the mandate for procedural reform underlying the class actions regime[6]. Where the cost of identifying class members and distributing the damages would be excessive, the court may order the termination of the proceeding[7].

The Victorian Law Reform Commission had recommended permitting cy près remedies in cases involving a proven contravention of the law creating a pecuniary advantage for the wrongdoer, where the loss suffered was quantifiable and it was not cost effective to identify and compensate some or all of the class members[8]. This recommendation was not implemented but it was endorsed by the New South Wales Government in its plans to introduce a legislative class action regime[9]. However, criticism by law firms, business groups and the Law Society caused this to be dropped from the Bill. As a result, for example in the vitamin price-fixing cases, class membership was limited to those who had purchased far larger quantities than the average consumers[10].

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[1] *Austl. Comp. & Consumer Comm'n v. Golden Sphere Int'l*, at 446–447.

[2] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(2); Supreme Court Act 1986 (Vic) pt 4A s 33Z(2) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(2) (Austl.).

[3] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Z(4); Supreme Court Act 1986 (Vic) pt 4A s 33Z(4) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 177(4) (Austl.).

[4] Federal Court of Australia Act 1976 (Cth) pt IVA s 33ZA(1); Supreme Court Act 1986 (Vic) pt 4A s 33ZA(1) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 178(1) (Austl.).

[5] See Rachael Mulheron, *The Modern Cy près Doctrine: Applications and Implications*, University College London Press, 2006.

[6] Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report no. 46, at 239.

[7] Federal Court of Australia Act 1976 (Cth) pt IVA s 33M; Supreme Court Act 1986 (Vic) pt 4A s 33M (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 165 (Austl.).

[8] Victorian Law Reform Comm'n, *Civil Justice Review*, Report No. 14, at 559–560, recommendation 101 (2008), available at http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf.

[9] Hon. John Hatzistergos, *NSW Set to Reform Class Action Laws*, *NSW Gov't, Media Release*, Aug. 6, 2010, http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwFiles/060810_NSW_reform_c_action_laws.pdf/$file/060810_NSW_reform_c_action_laws.pdf («[T]he NSW legislation will give the Supreme Court the power to order that unclaimed damages from a successful class action be distributed to a charity or public interest beneficiary»); *Explanatory Memorandum, Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill* 2010 (NSW) 3 (Austl.), available at http://www.legislation.nsw.gov.au /exposure/archive/b2010-108-d05.pdf («Section 178 [...] enables the court to make orders [...] establishing schemes for any money remaining in the fund [consisting of money to be distributed to group members] (or any part of it), that cannot practically be distributed to group members to be applied cy près»).

[10] *Bray v. F Hoffman-La Roche Ltd.* [2003] FCA 1505 9 (Austl.) ($2,000); *Jarra Creek Cent. Packing Shed Pty. Ltd. v. Amcor Ltd.* [2006] FCA 1802 (Austl.) ($100,000); *Auskay Int'l Mfg. & Trade Pty. Ltd. v. Qantas Air-*

England and Wales – The opt-in nature of group litigation in England, together with the absence of provision for aggregate assessment of damages have limited the relief available under Group Litigation Orders and the follow-on competition law regime under the Competition Act of 1998. Restitutionary damages and an accounting for profits are not available in competition infringement cases, and punitive damages cannot be claimed where the defendant has already been fined by a competition regulator[1]. Accordingly, in the only action to date under the Competition Act[2] recovery was limited to compensation for purchasers of the price-fixed football shirts who came forward during the take-up period.

The relief available under the English representative action has always proved difficult, since the decision a century ago[3] in which a representative action was not permitted on behalf of consignors of cargo lost at sea because proof of damage was personal to each consignor, and there was no possibility of any common fund being sought by the representative on behalf of the represented parties. A century later, the represented claimants in recent price fixing litigation[4] sought a declaration that damages were recoverable in principle in respect of three types of loss that they claimed to have suffered subject to individual assessment. This claim this was not accepted as having the requisite *same interest* for a representative proceeding.

While cy près damages distributions are not formally recognized in England, one price-fixing action in the automobile industry that settled before group litigation orders were available, involved a payment to the Consumers' Association for car safety research; and one representative action for pirated cassettes[5] resulted in payment to the British Phonographic Industry Ltd, to support the identification and suppression of counterfeit and piracy activities. The proposed Financial Services Bill 2010 reforms contemplated provision for cy près damages distributions[6].

Netherlands – Under the WCAM procedure, financial relief may be claimed by interested parties pursuant to an order prescribing the damages based on various categories of loss. In turn, interested parties who have not opted out are precluded from commencing separate claims for loss.

By contrast, under the collective right of action under the Dutch Civil Code almost every form of relief may be claimed other than monetary relief. Typically, claimants seek declaratory relief establishing liability and injunctive relief requiring the responsible party to perform or refrain from performing an act with respect to the parties. Interested parties must then commence individual actions to prove causation and loss in order to receive damages.

In this way, the two procedures support one another with the collective right of action being used to solve unanswered questions of law without financial risk to either the claimants or the responsible party, thereby facilitating negotiation of a settlement agreement. The absence of direct monetary consequences to the collective right of action may reduce

ways Ltd. [2010] FCA 1302 (Austl.) (a cartel in international air freight services $ 20,000); *Wright Rubber Prod. v. Bayer AG* [2011] FCA 1172 (Austl.) (a cartel in the rubber chemicals industry $ 50,000 for rubber chemicals and $ 10,000 for rubber compounds).

[1] *Devenish Nutrition Ltd. v. Sanofi-Aventis SA* (Fr.) [2007] EWHC (Ch) 2394 (Eng.), *aff'd*, [2008] EWCA (Civ) 1086 (Eng.).

[2] *Consumers Ass'n v. JJB Sports Plc.*, [2009] CAT 2, 2009 WL 364157 (Eng. & Wales).

[3] *Markt & Co., Ltd. v. Knight Steamship Co., Ltd*., [1910] 2 K.B. 1021 (A.C.) (Eng.).

[4] *Emerald Supplies Ltd. v. British Airways plc* [2010] EWCA Civ 1284.

[5] *EMI Records Ltd. v. Riley*, [1981] 1 W.L.R. 923 (Ch) (Eng.).

[6] Financial Services Bill, 2010, § 23(4)–(5) (U.K.).

the risk of «black mail settlements» and the absence of formal determinations of liability in the WCAM may permit responsible persons to obtain closure on claims without damage to their reputations. Nevertheless, the main Dutch consumer organization, the Consumentenbond, argues that there is no real incentive to settle without a collective proceeding that has financial consequences and when there is no interest in settling there is no way for interested parties to obtain financial compensation in individually, economically non-viable claims.

Italy – There now exists a *public* class action in addition to the collective actions created in the fields of consumer law, environmental protection, securities regulation, and anti-discrimination protection that were developed pursuant to EU Directives[1]. Public class actions may brought by qualified bodies or entities in the administrative courts and they may seek injunctive relief from the inertia of public administration. Damages are not available, but the courts may mandate the administration (as defendant) to fulfil its obligations. Interested persons may then seek damages in the civil courts in individual actions or *private* class actions under the Consumer Code.

Belgium – Currently, group litigation in Belgium can be used only to obtain injunctive or preventive relief, such as injunctions preventing environmental harm[2] or illegal canvassing practices[3], not compensation for those affected[4]. Each of the three current proposals for reform permits claims for monetary relief. The government's proposal also permits class settlements or court decisions to provide for amounts below a certain threshold not to be distributed if the costs are prohibitive and, instead, to be deposited into a government fund to finance future class actions. The Flemish Bar Council proposal would permit the judge to appoint a special master[5] to deal with the individual claims of class members out of court.

Sweden – The Swedish Act on Group Proceedings covers group actions in general courts and its use is not restricted to any particular area of law. In all three forms of group actions under the Act, the plaintiff can petition for injunctions and seek individual damages for injury suffered by individual members of the group. Actions for an order obliging the defendant to perform (e.g. pay damages or stop a certain activity) and/or petitions for declaratory judgments (see above) may be entertained as a group action. However, customary substantive rules on causation in tort law, calculation of damages, and evidence are applied. Post-trial calculation mechanisms, standardized computation of damages and cy près *solutions* are not available under the Swedish Act. Punitive damages do not exist in Sweden. This restrictive attitude reduces access to justice in group actions as well as in other forms of litigation.

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[1] See Council Directive 98/27/EC O.J. (L 166) 51 (EU); Council Directive 2009/22/EC *O.J.* (L 110) 30 (EU).

[2] Wet van betreffende een vorderingsrecht inzake bescherming van het leefmilieu [Federal Environmental Protection Act] of Jan. 12, 1993, [Belgisch Staatsblat] [B.S.] Feb. 19, 1993 (Belg.).

[3] Wet op de financiële transacties en de financiële markten, [Act on Financial Transactions and Financial Markets] of Dec. 4, 1990, [Belgisch Staatsblat] [B.S.] Dec. 22, 1990 (Belg.).

[4] Proposals to follow the 1994 Dutch initiative of combining these proceedings in a single transubstantive procedure (article 3:305a of the Dutch Civil Code) have not yet succeeded. Mathias E. Storme & Evelyne Terryn, *Belgian Report on Class Action,* 2 (2007), available at http://globalclassactions.stanford.edu/sites/default/files/documents/Belgium_National_Report.pdf. The most recent Belgian proposal, dating from February 2008, suggests supplementing article 18 of the Judicial Code with «the plaintiff is supposed to have an interest in commencing a group action, when he is an association (organization) that has legal capacity for a minimum period of one year, when he acts in accordance with his permissible statutory aim and when he shows a real activity in accordance with his statutory aim.»

[5] Called «a judicial claim settler.» See David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 *B.U. L. Rev.* 695 (1989); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 *U. Chi. L. Rev.* 394 (1986).

Brazil – All forms of relief are available in public class actions, including declaratory, constitutive and condemnatory awards in the form of orders for compensation and for injunctions. In popular class actions, the claimants generally seek an end to harmful actions and the awards take a condemnatory form.

Russian Federation – It would appear that there are no specific restrictions on the kinds of relief available, however, the uncertain arrangements for notifying the class may have implications for the relief that is received.

Court Involvement

The management of class actions creates new challenges for common law and civil law courts alike. On the one hand, common law courts must develop ways to address the adversarial void in which the interests of class counsel and defense counsel in gaining approval for settlements are aligned so that the court is deprived of the fundamental forensic benefits of the adversary system. On the other hand, in civil law jurisdictions, given the quantum of money at stake in an aggregated claim, the parties may insist on greater involvement in the process than might ordinarily be expected. The particular responsibilities assigned to the court reflect important assessments of judicial competence and the requirements for oversight of group litigation.

Canada – Under class proceedings legislation: matters must be certified in order to proceed as class actions; notices to the class must be approved by the court; each action is case managed by the judge assigned to it; and matters may be settled and counsel fees determined only with the approval of the court. This extensive court involvement is intended to ensure that the interests of absent class members are protected.

The supervisory role of judges is especially important in hearings held to determine the fairness of a settlement because the usual adversarial safeguards do not operate when plaintiff's counsel and defendants have a common interest in obtaining approval for the settlement that they have negotiated[1]. Until recently, Canadian courts did not welcome the involvement of non-parties in ensuring that the settlement is «fair, reasonable[,] and in the best interests of the class.» While their U.S. counterparts have long been encouraged to permit non-profit entities, government bodies, and state attorneys-general to participate actively in fairness hearings to provide assistance to the court[2], Canadian courts have only recently acknowledged in principle the value of a court-appointed monitors, amici curiae or guardians ad litem in assisting the judge in scrutinizing the proposed settlement or counsel fee[3].

Australia – It is well understood in Australia that grouped proceedings require greater judicial oversight than regular proceedings to protect the interests of unidentified parties, to administer arrangements for notice and the distribution of relief, and to determine sub-group issues and individual questions[4]. Accordingly, judges have been granted broad

[1] *Smith v. Nat'l Money Mart*, 2010 ONSC 1334 (Can. Ont. Sup. Ct. J.) («It is also well known that the court finds itself in a difficult position in carrying out its responsibilities of determining whether a settlement and class counsel's fee should be approved or rejected»).

[2] Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges,* 15 (2009).

[3] *Smith v. Nat'l Money Mart*, 2011 ONCA 233 (Can. Ont. CA). Since this decision was released, an amicus or guardian has not been appointed in any reported class action. It is difficult to predict how frequently such court-appointed assistance will be used.

[4] Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court*, Report no. 46, at 157.

powers to manage class proceedings[1] including: for the approval of notices to the class[2]; for creating sub-classes where necessary and appointing representatives for them[3]; for approving proposed settlements[4]; and for discontinuing the proceedings[5]. Settlement approval has been acknowledged to be particularly difficult because the application is based on a result negotiated between plaintiff's counsel and the defendant and it is not usually opposed[6]. Judges have rarely declined to approve the settlement agreements[7] despite criticism by some commentators[8], but there do not appear to have been any instances of «coupon settlements» or other potentially abusive results[9]. Nevertheless, with so many class actions ending in settlement, this will continue to be a matter of concern.

Unlike North American class action regimes, the Australian regimes do not provide for certification, but for a respondent's right to challenge the validity of a class proceeding at any time[10] where the requirements for class proceedings have not been satisfied[11] or where the court is of the view that it is inappropriate that the proceeding progress as a class proceeding[12]. While this approach was meant to streamline the progress of class actions, the routine practice of challenging the validity of the class proceeding has produced much the same result as exists in North America[13] and it has prompted commentators to recommend the introduction of a certification process[14].

[1] Federal Court of Australia Act 1976 (Cth) pt IVA s 33ZF; Supreme Court Act 1986 (Vic) pt 4A s 33ZF (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 183 (Austl.).

[2] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Y; Supreme Court Act 1986 (Vic) pt 4A s 33Y (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 176 (Austl.).

[3] Federal Court of Australia Act 1976 (Cth) pt IVA s 33Q; Supreme Court Act 1986 (Vic) pt 4A s 33Q (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 168 (Austl.).

[4] Federal Court of Australia Act 1976 (Cth) pt IVA s 33W; Supreme Court Act 1986 (Vic) pt 4A s 33W (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 174 (Austl.).

[5] Federal Court of Australia Act 1976 (Cth) pt IVA s 33V; Supreme Court Act 1986 (Vic) pt 4A s 33V (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 173 (Austl.).

[6] *Lopez v. Star World Enters. Pty. Ltd.* [1999] FCA 104 para 15–16 (Austl.).

[7] See generally Vince Morabito, *An Australian Perspective on Class Action Settlements*, 69 *Mod. L. Rev*. 347, 367–371 (2006).

[8] See, e.g., Marsha Jacobs, *Telstra Class Action Settled for Just $5m*, *Austl. Fin. Rev.,* Nov. 17, 2007, at 3; Vince Morabito, *Judicial Responses to Class Action Settlements that Provide no Benefits to some Class Members*, 32 *Monash U. L. Rev.* 75 (2006).

[9] In the United States, several class action settlements provided class members with coupons for discounts on future purchases from the defendants, in lieu of cash awards, whilst generous payments were made to the class representative's lawyers. See, e.g., *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

[10] Austl. Law Reform Comm'n, *Grouped Proceedings in the Federal Court.* Report no. 46, at 146.

[11] The first requirement is that seven or more persons have claims against the same person. The second requirement is that the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact. Federal Court of Australia Act 1976 (Cth) pt IVA s 33C1; Supreme Court Act 1986 (Vic) pt 4A s 33C1 (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 157(1) (Austl.).

[12] Federal Court of Australia Act 1976 (Cth) pt IVA s 33N(1)(d); Supreme Court Act 1986 (Vic) pt 4A s 33N(1)(d) (Austl.); Civil Procedure Act 2005 (NSW) pt 10 s 166(1)(e) (Austl.).

[13] *Bright v. Femcare Ltd.* [2002] 195 ALR 574, 607 (Austl.). A year later, Justice Finkelstein again indicated that «many class actions become bogged down by interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders.» *Bray v. F Hoffmann-La Roche Ltd.* [2003] 200 ALR 607, 660 (Austl.); see also [2004] FCA 1637 (Austl.).

[14] See, e.g., Mulheron, *Common Law Class Action*, at 27–29; see also *P Dawson Nominees Pty. Ltd. v. Multiplex Limited* [2007] FCA 1061 para 18 (Austl.) (where Justice Finkelstein noted that the «experience of class ac-

England and Wales – Case management is an essential part of group litigation in England and Wales[1] as a means of managing the complexity of the proceedings and as a way of ensuring that the approach taken is consistent with the overriding objective. The need for robust case management was highlighted by criticism of the procedures for managing group litigation in the period before group litigation orders became available, and it was recognized for complex litigation in the 2007 *Report and Recommendations of the Commercial Court Long Trials Working Party.* The Civil Justice Council's 2008 Report observed the similarities in nature between collective actions and complex commercial claims and, accordingly, the need for a similar approach to collective actions.

Specifically, in group litigation, five certification criteria must be met: *numerosity* (there must be a «number of claims»)[2]; *commonality* (these must give rise to «common or related issues of fact or law»)[3]; *suitability* (managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court «to deal with cases justly»)[4]; *preliminary merits* (the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whichever is appropriate), is required[5]; and *superiority* – a GLO will not be commenced if consolidation of the claims, or a representative proceeding, would be more appropriate[6]. Representative actions require that claimants have the same interest and that more than one person share the claim with the representative[7] and actions framed as such are routinely challenged by defendants on this basis.

The proposed Financial Services Bill contained several requirements for certification, including: commonality (the claim must raise the «same, similar or related issues of fact or law» among class members)[8]; a suitable representative (either an «ideological claimant» or a directly-affected class member may bring the claim, if an «appropriate person»)[9]; superiority (the collective proceedings for determining the claim must be the «most appropriate means for the fair and efficient resolution of the common issues» and must be «appropriate [to] further the overriding objective»)[10]; minimum class size (an identifiable class of persons)[11]; preliminary merits threshold (a claim that is weak, but not so weak

tions suggests that the absence of a certification process is itself the cause of numerous interlocutory applications with resultant expense and delay»). The situation might further be exacerbated by the introduction of pre-action protocols requiring parties to undertake genuine steps to resolve the dispute including the exploration of Alternative Dispute Resolution options before proceeding with litigation. Civil Dispute Resolution Act 2011 (Cth) (Austl.); Federal Court of Australia Act 1976 (Cth) Practice Note CM 17 (Austl.).

[1] Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.10 (U.K.) provides that a GLO «means an order [...] to provide for the case management of claims which give rise to common or related issues of fact or law (the «GLO issues')» with further extensive case management powers stipulated in CPR r. 19.13 (U.K.). See *Civil Justice Council Report, Improving Access to Justice through Collective Actions*, 161–162, available at http://www.americanbar.org /content/dam/aba/administrative/antitrust_law/at800175_improving_access.authcheckdam.pdf (recommending that «collective claims should be subject to an enhanced form of case management by specialist judges»).

[2] Civil Procedure Rules [CPR], 1998, S.I. 1998/3132, r. 19.11 (U.K.).

[3] Ibid., at r. 19.10, 19.11(1).

[4] Ibid., at 1.1(1).

[5] Ibid., at Practice Direction 19B, para. 3.3.

[6] Ibid., at Practice Direction 19B, para. 2.3.

[7] Ibid., at r. 19.6.

[8] See Financial Services Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing CPR 19.21(3)).

[9] Ibidem.

[10] Ibid. (proposing 19.20(2)(b)).

[11] Ibid. (proposing 19.20(2)(a)).

that it could be struck out, could fail certification because, «in all the circumstances,» it should not be certified)[1]; a statement of truth (the representative claimant is required to state in its application, verified by a statement of truth, that it believes that the claim has real prospects of success[2]; and cost–benefit test – the court must take into account «the costs and the benefits of the proposed collective proceeding» when deciding whether the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues[3]. The proposed Financial Services Bill 2010 also included provision for fairness hearings and judicial approval of any proposed compromise or discontinuance of a collective action[4].

Netherlands – To declare a WCAM settlement binding, the court must determine whether the representative foundation or association sufficiently represents the interests of the persons pursuant to its articles of association; whether the amount of compensation awarded in the settlement agreement is reasonable[5] (based on the extent and possible cause of the damages suffered, whether payment is sufficiently guaranteed, and the ease and speed with which compensation can be obtained); and whether interested parties have received adequate notification[6] (both for the purposes of objecting to a binding declaration and for deciding whether they wish to opt-out. The latter may be determined in a pre-trial hearing, during which the court may order the notification to be done in some other way, as long as it respects international instruments on notification[7].

The court must determine whether the agreement adequately describes the interested parties according to the nature and the seriousness of their loss; provides an accurate estimate of the number of interested parties; and indicates the amounts of compensation, the conditions to qualify for compensation, the procedure for establishing and obtaining payment and the name and place of residence of the interested parties for notification purposes. The court's authority to alter the content of the settlement is limited to addressing the fairness of the amount of compensation or the process of determining the compensation. The court is not allowed to exclude a portion of the interested parties.

Proposed reforms contemplate permitting the court to assist in pre-trial appearances to identify the main points of dispute and to encourage parties to seek assistance from mediators. Supplementary measures would stimulate the parties' willingness to negotiate, and facilitate the negotiation and the finalisation of settlement agreements. A further reform would introduce a procedure for requesting preliminary rulings from the Dutch Supreme Court to clarify the negotiating parties' legal positions.

Italy – Actions may be brought on a representative basis only if the court declares them admissible pursuant to the requirements of the Consumer Code. Admissibility may be denied if the action appears to be clearly groundless. The Italian legislation does not make provision for the court to review settlements in class actions for their fairness to the class members. It remains to be seen how the courts will address this concern.

[1] Ibid. (proposing 19.20(2)(c)).
[2] Ibid. (proposing 19.18(3)(c)).
[3] Bill, 2010, H.C. Bill 2010-12 (U.K.) (proposing 19.20(3)(a)).
[4] Ibid. (proposing 19.37).
[5] BW [Civil Code], bk. 7, art. 907(3)(b), 907(3)(f) (Neth.).
[6] Rv [Code of Civil Procedure], art. 1013 (Neth.).
[7] Rv [Code of Civil Procedure], art. 1013(5) (Neth.).

Belgium – The government proposal for class actions would confine them to the Brussels Court of First Instance and the Brussels Court of Appeals[1] to ensure that the necessary specialized expertise is developed in the courts that handle them[2]. This would promote efficient handling of cases, and the development of a uniform and predictable jurisprudence, particularly in view of the limited number of mass cases in European countries[3].

In terms of court involvement, it is important to note the adversarial character of Belgian civil procedure generally[4] with its respect for party autonomy in framing the proceedings in terms of the claims and parties, and the active role played by judges in case management[5] and, where the parties present insufficient evidence, in ordering a complementary inquiry[6]. Existing case management tools, such as the authority to impose a binding procedural calendar, to undertake ex officio a complementary inquiry, and to have an interactive debate with the parties, and to impose fines in cases of misuse or abuse of procedure, could be adapted for a group litigation procedure.

In addition, the court will need special powers, such as those for discontinuing proceedings, substituting representative plaintiffs who are not providing adequate representation, and establishing sub-groups[7]. Such tools are needed to ensure that the best interests of the parties, including absent group members and the public, are served and public confidence in group litigation is maintained[8]. The current proposals have yet to include procedures for matters such as additional notice, imposing additional conditions on the class representative or class attorney, and allowing individual class members to be involved in the procedure. These will be important features of a well-functioning group litigation regime.

Sweden – In Sweden, group actions may proceed as such only with the approval of a court, which is granted provided that: the action is based on one or more common or

[1] This reflects the approach in the Dutch Collective Settlements Acts, which makes the Amsterdam Court of Appeals exclusively competent to approve collective settlements. The government proposal also provides for a «class action training» for the Brussels judges, and the possibility that the court would travel as needed throughout the country. See Randall D. Lloyd, Leonard B. Weinberg & Elizabeth Francis, *An Exploration of State and Local Judge Mobility*, 22 *Just. Sys. J.* 19 (2001); George R. Pring & Catherine K. Pring, *Specialized Environment Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 *Or. Rev. Int'l L.* 301, 328 (2009).

[2] See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465, 1517–1518 (2004).

[3] To date, there were 75 GLO procedures in England and Wales. Since the introduction in 2005 of the Dutch Collective Settlements Acts, there were 6 procedures. In Sweden there were 11 class action procedures in between 2003 and 2007.

[4] See Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in Eric Dirix & Yves-Henri Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law,* Bruylant, 2011, 309–311; see also Gerald. J. Meijer, *Belgian Civil Procedure*, in Henk J. Snijders (ed.), *Access to Civil Procedure Abroad,* Kluwer Law International, 1996, 193–237; Jean Laenens & Georges Van Mellaert, *The Judicial System and Procedure*, in H. Bocken (ed.), *Introduction to Belgian Law,* Kluwer Law International, 2001, 83–110; *Paul Lefebvre*, *Belgium*, in Shelby R. Grubbs (ed.), *International Civil Procedure,* Kluwer Law International, 2003, 75–96.

[5] Benoît Allemeersch, *Civil Case Management: The Belgian Debate and Reforms*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Intersentia, 2008, 237.

[6] Consisting, for example, in the submission of certain documents, witness testimony, an official visit to the scene of the facts, the personal appearance of the parties in the court, etc.

[7] Vince Morabito, *Ideological Plaintiffs and Class Actions. An Australian Perspective*, 34 *U.B.C. L. Rev.* 459, 494–95 (2000–2001).

[8] See Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. Davis L. Rev.* 805 (1997); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 *Harv. L. Rev.* 747 (2002); Catherine Piché, *Judging Fairness in Class Action Settlements*, 28 *Windsor Y.B. Access to Just.* 111–112 (2010).

similar circumstances or matters of law among the claims of the group members; a group action is the best available procedure to litigate the majority of the claims (superiority); the group is adequately defined; that the financial affairs of the group representative are in good order and the representative is suitable; and, with few exceptions, that the plaintiffs are represented by a member of the bar[1]. The requirement of representation by a member of the bar is unique to class actions in Swedish civil procedure.

Notices to the group members[2] and appeals[3] are also subject to judicial approval to protect group members, the defendant, and the court from abuse, as are settlements in order for them to be binding on the group. Approval for settlements depends upon them not being discriminatory against some group members or otherwise obviously unreasonable[4]. In addition, costs shifting and the absence of contingency fees safeguard against abuse, and «*risk agreements*» (conditional fees) are binding only if approved as reasonable in view of the nature of the litigation.

Brazil – The parties' conduct in the group litigation, including the negotiation of settlements, is controlled by the Public Prosecutor's Department, an autonomous governmental department that is independent of the government and of the judiciary. If the Public Prosecutor is not the plaintiff, then it will oversee the proceedings. The judge has authority to impose heavy penalties for bad faith in conducting the litigation.

Russian Federation – In class actions, the court determines whether the matter is suitable for the class action procedure and it defines the membership in the class. However, unlike in ordinary litigation, where the court is responsible for notifying participants of the action, this responsibility is given to the initiator. The range of possible methods of notification suggests that there are limited means for ensuring that notice is adequate or that the initiator takes this responsibility seriously.

Compatibility with US-style Class Actions

Canada – Canadian class actions have been modelled on U.S. class actions, but it has been thought that some of the excesses of U.S.-style litigation have been avoided due to differences in the legal culture. Although many consumer and securities claims are follow-on actions to U.S. proceedings, counsel fees and settlement awards have been more restrained, in part due to the absence of jury trials, treble damages awards, and a more conservative judiciary. Owing to the extensive economic engagement between the two countries, as mentioned, there have been many parallel and overlapping claims, and a number of them have involved informal coordination either among counsel, or between courts. In 2011, the American Bar Association approved protocols for notice and for court-to-court communications to facilitate the process of coordinating parallel actions[5].

Australia – The government of Australia has acknowledged that class actions have become an important part of the Australian justice system[6] by enhancing the community's

[1] SGPA § 8 (SFS 2002:599) (Swed.).

[2] SGPA §§ 13, 24, 49, 59.

[3] SGPA §§ 42, 48.

[4] SGPA § 26.

[5] Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, online: http://www.cba.org/CBA/ClassActionsTaskForce/PDF/ Consultation_eng. pdf.

[6] Hon. Chris Bowen, Minister for Fin. Servs., *Superannuation & Corporate Law, Address to Shareholder Class Action Conference* (May 4, 2010) available at http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2010/005.htm&pageID=005&min=ceba&Year=&DocType=1.

access to justice[1]. Union-driven class actions have enabled thousands of workers to receive compensation[2], and Australia's two major regulators, ASIC and ACCC, have employed the Federal class action regime to fulfil their mandates[3]. In view of the fact that they are modelled on U.S.-style class actions, it would seem that, in principle, they are compatible with them.

England and Wales – To the extent that U.S.-style class actions are characterized by an opt-out regime, with the possibility of aggregate assessment of damages, a cy près damages distribution, with certification, and with a fairness hearing in the event of settlement, no such regime exists in England and Wales, although such a regime was contemplated in the previously proposed reforms to the Financial Services Act[4]. The considerable criticism that has been made of U.S.-style class actions has been decried by the Civil Justice Council as misplaced in that U.S. litigation operates on a different footing with limited cost-shifting, broad discovery rights, jury trials, percentage-based contingency fees, and punitive damages[5]. Whether a regime of collective redress similar to that found in the United States, Canada, and Australia can be introduced into the English civil justice system remains to be seen.

Netherlands – The WCAM does not create a U.S.-style class action, but a mechanism for approving settlements in collective actions that would bind potential claimants on an opt-out basis. It relies on the fact that most class actions in the U.S., Canada, and Australia are settled. To date, five such settlements have been approved and a sixth has sought approval. Several have involved foreign elements and, significantly, some have enabled European affected persons or interested parties who were excluded from U.S. class actions and settlements to obtain compensation[6]. While the WCAM is designed to be compatible with U.S.-style class actions and has brought the benefit of some class actions to Europe, the decision not to establish U.S.-style class actions is thought to reflect the culture of Dutch pragmatism favouring practical solution through harmonious negotiations rather than expensive confrontation in mass litigation in court proceedings.

Italy – Italian class actions differ from their American counterparts in a number of ways, including the requirement that class members opt in, the lack of specialized arrangements for funding and financing, and fairness hearings for settlements. However, any concern raised by the underdeveloped nature of class actions must be placed in the larger context of an inefficient civil justice system. Nevertheless, as indicated by an EU Commission working document, Toward a Coherent European Approach to Collective Redress[7], the challenges posed by the sheer variety of legal systems might best be addressed by a common approach to collective redress, one that might assist national legal systems in finding the way forward.

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[1] Hon. Chris Bowen, Minister for Fin. Servs., *Superannuation & Corporate Law, Address to Shareholder Class Action Conference*.

[2] See Jane Caruana & Vince Morabito, *Australian Unions – The Unknown Class Action Protagonists*, 30 *Civ. Just. Q.* (forthcoming 2011).

[3] E.g., *Australian Comp. & Consumer Comm'n v. Chats House Inv. Pty. Ltd.* (1998) 83 FCR 424 (Austl.).

[4] Financial Services Bill, 2010, H.C. Bill 2010-12 cl. 18-25 (U.K.).

[5] ohn Sorabji et al. (eds.), *Improving Access to Justice Through Collective Actions*, 2008, 38–41.

[6] See *In re Royal Dutch / Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 721 (D.N.J. 2007); Hof 29 mei 2009, NJ 2009, 506 m.nt. J.M.J. Chorus, M.P. van Achterberg en W.H.F.M. (*Shell Petroleum N.V./Dexia Bank Nederland N.V.*) (Neth.); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556 (S.D.N.Y. 2008).

[7] European Comm'n, *Towards a Coherent European Approach to Collective Redress* (2011), available at http://ec.europa.eu/justice/news/consulting_public/0054/sec_ 2011_173_en.pdf.

Belgium – Class actions are seen in Belgium as a supplement to existing methods of dealing with mass harms and are accepted only when they are superior to other available methods for adjudicating a controversy[1]. Their role must be understood in the context of the panoply of other public, private, and administrative resources[2] in the form of complaint boards, criminal prosecutions with the possibility of ancillary relief for victims, and governmental regulatory bodies, such as in the field of competition law. Belgian class actions, where they are necessary, would operate differently than U.S.-style class actions because they would be embedded in a different procedural culture, with different rules on standing, funding and financing litigation, and court involvement. They would be required to be initiated by an ideological plaintiff; they could not be funded on a contingency fee basis; and they would be required to be dealt with by one competent court. However, Belgian class actions would seek to achieve the same objectives as U.S.-style class actions and would offer claims for injunctive and monetary relief.

Sweden – In assessing the compatibility of the regimes, it must be borne in mind that the courts have played less of a role in the reform of legal rights than other means of dispute resolution and behavior modification. This may be partly due to a concern that litigation is not necessarily the most equitable means of determining the right of consumers and others and partly to a historical lack of confidence in the willingness of courts and judges to participate actively in building the welfare state based on the Social Democratic model. This coupled with a limited scope for judicial lawmaking and judicial review, has reduced the influence of Swedish courts in civil matters and limited the tendency to litigate. However, there are signs that this might be changing with an increased role for the courts and new functions for civil procedure ahead[3].

Differences between U.S.-style class actions and the Swedish group action, such as costs-shifting; the absence of contingency fees *strictu sensu* and state and private funding mechanisms; the opt-in requirement; the lack of pretrial discovery, post-trial calculation mechanisms, cy près awards, punitive damages, and standardized computation of damages have reduced the effectiveness of the group litigation procedure. Further constraints exist in the poor regard for the procedure among insurers, some groups in the bar, and some conservative judges and politicians. This poor regard has caused many to favour alternative dispute resolution as an easily accessible, flexible, fast, and low-cost way for parties to resolve disputes, as well as a means of reducing judicial workload. This is not without controversy. ADR is a valuable complement to civil

[1] See Fed. R. Civ. P. 23(b).

[2] See Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe,* Hart Publishing, 2008, 235 (suggesting a ranking of the different options: first voluntary settlement; then regulatory oversight; and finally judicial supervision (including private enforcement tools as class actions)); see also Willem H. Van Boom & Marco Loos, *Collective Enforcement of Consumer Law. Securing Compliance in Europe through Private Group Action and Public Authority Intervention*, Europa Law Publ'g, 2007. Also in the United States, some authors point out that there are public legal protection tools as valuable alternatives for class actions, especially in small claims cases. See Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 *Geo. J. Legal Ethics* 1419 (2005); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. *Chi. Legal F.* 71; see also Richard A. Nagareda, *Mass Torts in A World of Settlement*, Univ. of Chi. Press, 2007.

[3] See Per Henrik Lindblom, *The Growing Role of the Courts and the new Functions of Judicial Process – Fact or Flummery?*, 51 *Scandinavian Stud. L.* 281 (2007).

litigation (including group actions)[1], but some have expressed concern that in serving as a surrogate, ADR may diminish the role of the courts and threaten the functions of civil procedure[2].

Brazil – While the Brazilian system shares the objectives of US-style class actions, it follows its own model in which there is no certification and no discovery, and associations play an important role in representing the class. Moreover, in circumstances where there is no opportunity to opt-out, the result will not preclude further litigation by interested parties. Like other civil law jurisdictions, Brazil is unlikely to reform its procedure to become more like that in the US.

Russian Federation – Private class actions are still too recent an innovation to assess how they will function. Nevertheless, it seems likely that the issues of compatibility with U.S. style class actions experienced in other civil law jurisdictions will also be experienced in the Russian Federation.

Further Reflections: What Are We (They) Afraid of?

This study sought to go beyond a U.S. perspective on the differences in approaches to collective regimes by surveying comparatists from various legal systems about specific aspects of collective redress that might shape their perceptions of U.S. class actions. However, designing a survey of perceptions on the cultural dimensions of a controversial procedure such as class actions can be fraught with unexpected pitfalls. Among the more significant are those that can arise in tackling the challenge of sample selection. To receive pertinent and insightful responses in a comparative study of the specifics of complex procedural mechanisms, such as those comprising systems for collective redress, it is necessary to consult reporters with significant insight into the range of procedural options and configurations that exist across legal systems. Accordingly, the reports in this study were sought from knowledgeable comparatists.

On receiving the reports, it became apparent that the strong reaction that seemed routinely to be provoked by the discussion of U.S.-style class actions in many international settings was strangely muted. One explanation for this could be that the hostility and anxiety of those who would resist reforms that might bring a legal system closer to the U.S. model was borne largely of ignorance.

Writing more than a decade ago, Michele Taruffo, said that «the European rejection of class actions – essentially based upon ignorance – has usually been justified by the necessity of preventing such a monster from penetrating the quiet European legal

[1] Settlement and arbitration. In *Carl de Geer v. Luftfartsverket* [*Carl de Geer v. Swedish Airports & Air Navigation Serv.*] [Nacka District Court, Environmental Court Division] 2007 M1931(Swed.) residents of a community near Arlanda Airport, formed a non-profit organization called «Residents of Väsby Against Aviation Noise» to bring a *private* group action against the Swedish Airports and Air Navigation Service (LFV), seeking damages for injury caused by aviation noise on behalf of about 20,000 people, mainly residents of one neighbourhood adjacent to the airport. The District Court issued the summons and about 7,000 people have opted in so far. LFV moved to dismiss, arguing that the conditions of SGPA § 8 had not been met. The court denied the motion in January 2009. The parties subsequently commenced settlement negotiations, which are still ongoing (September 2011). Lindblom, *National Report: Group Litigation in Sweden*, at 7.

[2] See Per Henrik Lindblom, *ADR – the Opiate of the Legal System?*, 16 *European Rev. Private L.* 63 (2008). But see Bengt Lindell, *Alternative Dispute Resolution and the Administration of Justice - Basic Principles*, 51 *Scandinavian Stud. L.* 311, 322 (2007).

gardens»[1]. To varying degrees, the experience and insight that the reporters in this study have gained from their own work on class actions in comparative context seemed to have set them apart from other less informed members of their legal systems. Indeed, in the European Parliament Resolution of 2 February 2012 on «Towards a Coherent European Approach to Collective Redress»[2] «stresse[d] that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions»[3].

Even if these reporters' views were not developed in concert with one another, their views have been shaped by an appreciation of the range of options for the various features of collective redress regimes and the implications of the choices that might be made among these options. In contrast with other members of their legal communities, who have been reluctant to support reforms that might engender the entrepreneurial lawyering and other unwanted features associated with American civil litigation, these reporters seemed impatient with the slow progress of such reforms.

Despite this, these reporters were not naïve about the challenges of reform. The reporters in this study were sufficiently knowledgeable to appreciate that adapting class actions to fit the local legal culture (and yet to operate effectively) would require considerable ingenuity in process design – more than that required simply for implementation[4].

Perhaps, in the end, there remains a fundamental difference in views over the merits of commodifying of legal rights in the course of their vindication. In their incisive 2009 analysis of the concerns about U.S.-style class actions, Professors Issacharoff and Miller identified their core concern as follows: «that an apparent cultural revulsion at accepting the reality of legal enforcement as entrepreneurial activity may leave the reforms without the necessary agents of implementation»[5]. However, whether legal enforcement is ultimately an essentially entrepreneurial activity is far from clear to most observers outside the United States.

It is not clear that legal enforcement is ultimately an essentially entrepreneurial activity particularly in the civil law, where the development and resolution of civil disputes are placed primarily in the hands of the courts, who are viewed as public officials. In the civil law, cases are resolved when justice is dispensed by the state through the courts applying the laws that have been passed by the legislature. They are not resolved as a product of a monetary compromise negotiated between those responsible for the harm and class counsel seeking a substantial fee.

Neither is it clear that legal enforcement is ultimately an essentially entrepreneurial activity in other parts of the common law world. In other common law countries the principle of party prosecution is tempered, at least in the perception of the public, by the belief that even class actions operate primarily to promote access to *justice* as understood in the

[1] Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 *Duke J. Const. L & Pub. Pol'y* 405, 414 (2001).

[2] *European Parliament resolution of 2 February 2012 on «Towards a Coherent European Approach to Collective Redress'*, *European Parliament*, http://www.europarl.europa.eu/sides/ getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN (last visited Apr. 15, 2012).

[3] Ibidem.

[4] Cf. Christopher Smithka, *From Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence*, 27 *WIS. INT'L L.J.* 173 (advocating implementation of class actions confident that the absence of punitive damages and excessive attorneys fees would suffice to avert the abuses feared).

[5] Issacharoff & Miller, *Will Aggregate Litigation Come to Europe?,* at 181.

traditional sense, and that the monetary outcome of a civil dispute is not the only or best purpose or measure of its success.

Perhaps even more importantly are the two further questions raised by the question of whether litigation is really only about money. The first is whether, as Issacharoff and Miller suggest, introducing the kinds of economic incentives that drive U.S.-style class actions is an inevitable requirement for the effective functioning of a collective redress regime. The second is whether fashioning the legal enforcement of collective rights as an entrepreneurial activity necessarily reduces the sense of doing justice in resolving disputes through group litigation to what some have considered to be a bare knuckle negotiation between a business that has caused widespread harm and a team of avaricious lawyers.

Given the enormously complex matrix of procedural mechanisms and features of the economic and professional context in which class actions operate, it may well be that the only way to find the answers to these questions is to implement reform and observe the results. The difficulty is, as the American experience has demonstrated, this is a kind of learning that, like the knowledge in the Platonic dialogue, cannot be unlearned[1]. Indeed, a significant feature of the American comparative jurisprudence is the reflection on the many concerns arising from the excesses of U.S. class actions and the measures that have been taken to curb them.

Perhaps, then, the only prudent approach to reforms of collective redress regimes outside the United States is to take these two questions in that order, *i.e.,* by first testing for efficacy, and only then for suitability; and by testing for efficacy in the negative. In other words, if entrepreneurship is an inevitable reality for effective legal enforcement, there is no need to lunge forward to embrace it – its necessity will eventually become apparent. Instead, adopting reforms that are consistent with a country's legal culture, whether or not the reforms are effective, makes it possible to evaluate their efficacy and adjust the economic incentives as needed. This is arguably what has happened in Canada and Australia where attitudes to counsel fees and third party financing have gradually evolved as the justification for reform has been demonstrated on a case-by-case basis.

Approaching reform in this way eliminates the need to discover that certain reforms are unsuitable for a particular legal culture. Experimenting with potentially unsuitable transplants could leave a legal system with an unpopular procedure that harms the reputation of the administration of justice, but that has engaged an entrenched interest on the part of a sector of the legal profession that makes it difficult to withdraw.

On further reflection, there may be emerging another option: that of a companion procedure that does not seek to replicate U.S.-style class actions, but to provide the benefits of them to the would-be parties to matters that would otherwise be resolved in this way. With the recent settlement approval by the Amsterdam Court of Appeal in the *Converium* case, Europe has just witnessed its first opt-out multi-jurisdictional group litigation judgment. In principle, this judgment will enjoy recognition throughout Europe under the Brussels I Regulation.

Any analysis from a U.S. perspective of the WCAM procedure based on the checks and balances that have been developed for U.S. class actions would probably conclude that it is likely to fail. Reducing the entire collective redress process to a single procedure – that

[1] In *Protagoras,* Socrates warns Hippocrates about the teachings of Protagoras, which he says unlike fruit in the market, cannot be purchased and then examined before being consumed - once learned, the teachings become part of one. Plato, *Protagoras*, in W.C.K. Guthrie (trans.), *Protagoras and Meno*, Penguin Books, 1956.

of settlement approval – the procedure that is treated with the most circumspection in the United States, seems hardly a promising way to construct a regime that will operate with integrity. Add to that the requirement that the negotiation not be conducted with a lawyer whose economic interests likely coincide with those of the claimants, but with a nonprofit organization whose interests may reflect idiosyncratic ideological considerations, and the WCAM procedure seems, at least from a U.S. perspective, dubious at best.

And yet, as a purely derivative procedure – one that relies for its operation on the existence of parallel class litigation in the United States or elsewhere – the WCAM process may be a suitable way to localize the process of collective redress in a multijurisdictional claim. Whether it succeeds in providing closure for defendants remains to be seen. Whether it succeeds in providing claimants with a sense of vindication remains to be seen. Nevertheless, contrary to all the projections that might be constructed out of the U.S. class actions experience for a successful collective redress regime, the WCAM procedure seems to be one that promises to inspire the most confidence and, possibly, the least fear among those who seem most afraid of U.S.-style class actions.

Vicki Waye[1] **and Vincenzo Morabito**[2]

AUSTRALIAN NATIONAL REPORT

1. Objectives

Australia's group litigation framework presupposes that distributive inequities arising from the high ratio of litigation cost to claim size will be overcome by facilitating claims aggregation. By allowing claims based on a common substratum of fact to be joined in a single legal proceeding, small to medium sized claimholders are provided with access to justice that would otherwise be denied to them because of the disproportionately high cost of litigating their claims individually[3].

Australia's group litigation framework also advances a regulatory rationale[4]. While the framework is not solely the province of private attorneys-general[5], it aims to enhance other regulatory strategies that promote social ends such as consumer protection, efficient markets, a better environment, through the initiation of largely privately funded and privately driven litigation[6]. By reducing the cost of vindication through scale, plaintiffs, their legal representatives and litigation financiers are provided with economic incentive to respond to

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[3] Australia, Access to Justice Taskforce, A Strategic Framework for Access to Justice in the Federal Civil System (2009) at 114; Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174 (Mr Michael Duffy – Attorney-General); Australian Law Reform Commission, Report No. 46, *Group Proceedings in the Federal Court* (1988) at [13].

[4] Ibid.

[5] See discussion below under the heading «Representation.»

[6] Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia* (2006), 30 *Melbourne University Law Review* 399, 404.

the gaps which leave harm under compensated by regulatory action. Harm is thereby more successfully internalized to the wrongdoer and deterrence made more effective.

2. Outline of the Framework

There are broadly two forms of group litigation in Australia:

1. Class action proceedings where claim holders may opt in or opt out of the proceedings and/or settlement. These are available in the Federal Court[1] and the New South Wales[2] and Victorian Supreme Courts[3].

2. Representative proceedings available in other State Supreme Courts[4]. Although these procedures involve of claims based on «similar interests' they are differentiated from class actions by the fact that judgment or settlement does not bind all persons with similar claims.

As a result of the narrow construction given to the commonality requirement for non-class proceedings, most group litigation in Australia is initiated as class actions[5] and so this report will proceed with that focus.

3. Representation

Like their US counterparts, Australian class actions are heavily controlled by specialist class action law firms. However, there are few Australian law firms with the resources and expertise necessary to underwrite and manage large scale group proceedings[6]. An empirical study of class actions in Australia between 1992 and 2009 conducted by the second named author, found that approximately 33.9% of all proceedings filed in the Federal Court of Australia were filed by two law firms - Maurice Blackburn and Slater & Gordon. Both were the only law firms to have been involved in more than 10 representative proceedings. Otherwise a total of 95 other entities mostly consist of private law firms or sole practitioners represented class members[7].

To initiate proceedings the class action law firm must be instructed[8] by a minimum number of 7 class representatives[9]. Although they act on instructions from the class representatives, class lawyers owe fiduciary duties to all group members[10]. Consequently where conflicts of interest arise between group members or between group members and the law firm, for example,

[1] *Federal Court of Australia Act 1976* (Cth), Part IVA (Part IV)

[2] *Civil Procedure Act 2005* (NSW), Part 10 (Part 10).

[3] *Supreme Court Act 1986* (Vic), Part 4A (Part 4A)

[4] E.g. South Australia Supreme Court Rules 2006, R 80; Queensland Uniform Civil Procedure Rules 1999, R 75; Western Australia Rules of the Supreme Court 1971, O 18 r 12.

[5] Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 *Melbourne University Law Review* 399, 401.

[6] Vicki Waye & Vince Morabito, *The Dawning of the Age of the Litigation Entrepreneur* (2009), 28 *Civil Justice Quarterly* 389, 425.

[7] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, First Report: Class Action Facts and Figures* (2009) at 28.

[8] *Matthews v. SPI Electricity Pty Ltd (Ruling No. 1)* [2011] VSC 167.

[9] *Federal Court of Australia Act 1976* (Cth), s 33C (1) (a); *Supreme Court Act 1986* (Vic), s 33C (1) (a); *Civil Procedure Act 2005 (NSW)*, s 157 (1) (a).

[10] *Petrusevski v. Bulldogs Rugby League Club Ltd* [2003] FCA 1056 at [7]; *King v. AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480, 488–489; *Courtney v. Medtel Pty Ltd* (2002) 122 FCR 168, 182 and 184–185; *Mc Mullin v. ICI Australia Operations Pty Ltd* [1997] 1426 FCA at [3].

in a situation where the class representative seeks to narrow the criteria for class membership to secure settlement, the law firm must take steps to avoid or mitigate the situation.

Professor Morabito's study on Australian class actions records that the phenomenon of related class action proceedings is widespread[1]. According to Professor Morabito, close to half of the representative proceedings filed in the Federal Court of Australia were multiple suits on related matters[2]. Breaking that down further, Professor Morabito found that about one third of the disputes involving multiple proceedings between 1992 and 2009 were instituted by different law firms[3].

Kirby v. Centro Properties Ltd[4] canvassed a number of means for addressing multiple proceedings including the stay of some of the proceedings, consolidation of the actions, joint trials, and auctions. In this case, the Court directed that an independently selected litigation committee be formed to determine where the best interests of the group lay. Since that time all the proceedings have been heard together.

Class representatives comprise corporations, individuals, trade unions, incorporated associations and local government councils[5]. Under the threshold provisions for constituting a class there need not be complete congruence between the class representatives and class members. As long as there are substantial common issues of law and fact between them that will suffice to comprise a class that the nominal plaintiffs are qualified to represent[6]. Nonetheless, each class representative and each class member must have a claim against each of the defendants[7].

Apart from requiring that class representatives have standing to bring their own claims[8], legal regulation of class representatives in Australia is relatively minimal. This is not surprising as class representatives are neither agents nor fiduciaries of class members[9]. Rather it is the class lawyers who interact with class members. As a result some commentators have questioned the need for class representatives[10]. Even so, there are vestiges of consent between class representatives and class members as class representatives can be removed

[1] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010) at 21ff.

[2] Ibid., at 22.

[3] Ibid.

[4] (2008) 253 ALR 65.

[5] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010), at 45.

[6] E.g. *Williams v. FAI Home Security Pty Ltd (No 2)* [2000] FCA 726 at [12]; *Rod Investments (Vic) Pty Ltd v. Clark (No 2)* [2006] VSC 342 at [53]; *Woodcroft-Brown v. Timbercorp Securities Ltd (in liq)* [2010] VSC 68 at [14–17].

[7] *Philip Morris (Australia) Ltd v. Nixon* (2000) 170 ALR 487. However in *Bray v. F Hoffman-La Roche Ltd* (2003) 200 ALR 607, a majority of the Full Court of the Federal Court said (in obiter) (at 630–631, [122]–[130] per Carr J and at 657–659, [246]–[248] per Finkelstein J) that they considered *Philip Morris* was wrongly decided on this point. Nevertheless *Philip Morris* has been largely followed e.g. *Cook v. Pasminco* [2000] VSC 534; *Johnstone v. HIH Insurance Ltd* [2004] FCA 190 at [38] *Rod Investments (Vic) Pty Ltd v. Clark (No 2)* [2006] VSC 342; and *Kirby v. Centro Properties Ltd* (2010) 275 ALR 208.

[8] *Federal Court of Australia Act 1976* (Cth), s 33D; *Supreme Court Act 1986* (Vic), s 33D; *Civil Procedure Act 2005 (NSW)*, s 158. Moreover, these provisions allow a class representative who has commenced proceedings to maintain those proceedings even though he or she ceases to have a claim against the defendant.

[9] *Federal Court of Australia Act 1976* (Cth), s 33E; *Supreme Court Act 1986* (Vic), s 33E; *Civil Procedure Act 2005 (NSW)*, s 159.

[10] Damian Grave & Ken Adams, *Class Actions in Australia* (2005) at 131–132.

if they do not adequately represent group interests[1]. Alternately class members can «opt out»[2] if they are unhappy with the way in which the class representatives and their lawyers have conducted the proceedings.

While Australian group proceedings are largely driven by non-governmental agents, there are important exceptions. Australia's major regulators are the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC). The ACCC's public remit is to promote competition and fair trade in the market place for the benefit of consumers, business and the community[3]. ASIC has a similar role as Australia's corporate, markets and financial services regulator[4]. Both have been granted general statutory powers to commence proceedings on behalf of persons who have been harmed as a result of a breach of the laws which they administer, providing that the suit is in the public interest and that the parties on whose behalf the relevant regulator is acting provide written consent[5].

Recognition of the difficulty of mounting expensive and complicated litigation on a private basis was the chief justification for allowing Australia's regulators to act on behalf of others[6]. Still, the power has been infrequently invoked[7]. In his study, Professor Morabito found that 15 out of 241 applications commenced in the Federal Court of Australia were filed by the ACCC (6) and the ASIC (9)[8]. Both regulators have expressed reluctance to intervene in proceedings that are essentially commercial in character and where private parties are best able to assess the costs and benefits of litigation[9].

However, in 2010, signaling a greater role for regulators apropos collective consumer redress, the capacity of the regulators to act on behalf of consumers was extended to allow them to proceed unilaterally. The ACCC and the ASIC may now seek orders for non-party consumer redress following a judicial declaration that a respondent has engaged in breach of statutory prohibitions against unconscionable behaviour or misleading and deceptive conduct, or has taken advantage of consumers through use of an unfair contract term[10]. Unlike the general statutory power to initiate representative proceedings, these powers do not require the ACCC or the ASIC to obtain written consent from individuals harmed by the

[1] *Federal Court of Australia Act 1976* (Cth), s 33T; *Supreme Court Act 1986* (Vic), s 33T; *Civil Procedure Act 2005 (NSW)*, s 171.

[2] *Federal Court of Australia Act 1976* (Cth), s s33J; *Supreme Court Act 1986* (Vic), s 33J; *Civil Procedure Act 2005 (NSW)*, s 162.

[3] The ACCC carries out these broad functions using an array of statutory powers conferred by the *Competition and Consumer Act 2010* (Cth).

[4] *Australian Securities and Investment Commission Act 2001* (Cth), s 1 (2).

[5] See *Competition and Consumer Act 2010* (Cth), s 87 (1B); *Australian Securities and Investment Commission Act 2001* (Cth), s 50

[6] *Australian Securities Commission v. Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 115; *Somerville v. Australian Securities Commission* (1995) 60 FCR 319, 324.

[7] Janet Austin, *Does the Westpoint Litigation Signal a Revival of the ASIC s 50 Class Action* (2008), 22 *Australian Journal of Corporate Law* 8.

[8] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, First Report: Class Action Facts and Figures* (2009) at 28.

[9] ASIC Regulatory Guide 4, *Intervention*, 4.4; ACCC *Compliance and Enforcement Policy* at 2 outlining that the ACCC is more likely to act in cases of egregious breach, national and international significance, which involves important interpretations of law etc and is less likely to act in cases involving the private commercial rights of the parties.

[10] *Competition and Consumer Act 2010* (Cth), Sch 2 Part 5-2 s 239; *Australian Securities and Investment Commission Act 2001* (Cth), s 12GNB.

breach. Pursuant to the exercise of the powers the Courts may make orders: declaring a term of a contract or a whole contract void; varying standard form contracts; directing refunds or return of property; or mandating supply of services. Orders are binding on non-party consumers who accept the redress from the respondent acting at the direction of the Court.

Damages awards are specifically excluded from the armoury of remedies. While there was no explanation proffered in the Explanatory Memorandum accompanying the Bill introducing the powers[1], the exclusion may have been based upon constitutional grounds. In *Georgiadis v Australian and Overseas Telecommunications Corporation*[2], the High Court had previously determined that an action for damages constitutes a proprietary right, the extinguishment of which is protected by s 51 (xxxi) of the Constitution. Section 51 (xxxi) of the Constitution prohibits the acquisition of property other than on just terms.

An alternative explanation is that the power to recover non-compensatory remedies was introduced to fill the gap left where the economic incentive to commence group proceedings provided by a large pool of damages is absent. The latter explanation is consistent with ASIC's ability to recover compensation for aggrieved individuals without their consent as an adjunct to its power to seek civil penalties[3], as well as the regulators' power to seek compensation on behalf of consumers as a component of an enforceable undertaking.

Enforceable undertakings fall within an array of powers belonging to both regulators, which can lead to the imposition of other collective forms of redress[4]. In addition the regulators may issue public warning notices[5] and infringement notices[6].

Although these regulatory powers are not litigious in character, it is important to understand how their deployment can augment and or interact with group litigation. Privately initiated group proceedings for compensation relying upon a finding in an action taken by a regulator may follow, or may proceed in tandem with regulatory action. The interplay between actions undertaken by regulators and action undertaken by law firms sometimes in conjunction with litigation funders is illustrated by three iconic Australian disputes.

a) The Multiplex dispute

In February 2005 ASIC commenced investigation of allegations that the international construction company Multiplex had breached the Australian Securities Exchange (ASX) listing rules and engaged in misleading and deceptive conduct by failing to disclose material cost increases and delays that affected the construction of the Wembley National Stadium and a number of other Multiplex projects. In December 2006, ASIC's investigation culminated in an enforceable undertaking from Multiplex, where Multiplex agreed to: establish a $32 million compensation fund for investors; undertake an independent review of its disclosure policies and practices; and implement any recommendations of the independent review[7].

[1] *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, Ch. 7.

[2] (1993) 179 CLR 297.

[3] *Corporations Act 2001* (Cth), ss 1317H & 1317HA.

[4] *Competition and Consumer Act 2010* (Cth), s 87B; *Australian Securities and Investment Commission Act 2001* (Cth), s 93AA.

[5] *Competition and Consumer Act 2010* (Cth), s 51ADA; *Australian Securities and Investment Commission Act 2001* (Cth), s 12GLC.

[6] *Corporations Act 2001* (Cth), s 1317DAC; *Competition and Consumer Act 2010* (Cth), s 134A.

[7] ASIC Media Release 06-443 available at http://www.asic.gov.au/asic/asic.nsf/byheadline/06-443+ASIC+accepts+an+enforceable+undertaking+from+the+Multiplex+Group?openDocument [accessed 16th August 2011].

Around about the same time as ASIC extracted the enforceable undertaking, a suit was initiated against Multiplex by the law firm, Maurice Blackburn on behalf of 120 investors (including several large institutions) who decided to opt out of the ASIC settlement. The suit was funded by a Singaporean based litigation financier, International Litigation Funding Partners (ILF). Entering into a funding agreement with ILF was a pre-condition for class membership.

The suit generated a number of expensive and time consuming collateral actions including a dispute over the plaintiffs' access to documentation seeking to leverage from ASIC's previous investigations. Initially ASIC successfully resisted the plaintiffs' application on the ground that access would reveal the identity of whistleblowers and impede future ASIC investigations[1]. However the question was later re-opened when new material was submitted regarding the disclosure of the identity of the whistleblower on a televised current affairs program[2]. Other collateral disputes generated by the Multiplex case included a dispute regarding the validity of entry into the funding agreement as a pre-condition for class membership[3]; a dispute over whether the funding agreement was subject to Australia's managed investment scheme provisions;[4] a dispute regarding whether the matter fell within ASIC class orders that exempted application of the managed investment scheme provisions[5]; and a dispute as to indemnity costs on one of the collateral applications[6].

Forty two months later the suit was settled for $110 million inclusive of $11 million legal costs and a success fee for the litigation financier of approximately $35 million[7]. Court approval for the settlement was secured in September 2010[8].

According to a principal of Maurice Blackburn, the settlement attained by the firm netted the investors twenty times what they would have received if they had accepted the terms of the ASIC settlement[9]. The Court estimated that this would result in a return of approximately 62 cents in the dollar of Maurice Blackburn's estimate of the reasonable value of the investors' respective claims[10], a settlement which the Court characterized as «significant».

b) The Amcor/Visy settlement

Amcor and Visy are Australia's largest corrugated fibrebox packaging manufacturers. Between January 2000 and October 2004 they engaged in a price fixing and market sharing agreement which led to substantial diminution in competition contrary to s 45 *Trade Practices Act 1974* (Cth). In late 2004 Amcor decided to cease participating in the cartel and reported the matter to the ACCC. In exchange for its co-operation with the regulator, Amcor and its officers received immunity from prosecution.

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[1] *ASIC v. P Dawson Nominees Pty Ltd* [2008] FCAFC 123.

[2] *P Dawson Nominees Pty Ltd v. Australian Securities and Investments Commission (No 2)* [2009] FCA 413; *P Dawson Nominees Pty Ltd v. Australian Securities and Investments Commission (No. 3)* [2009] FCA 779.

[3] *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

[4] *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

[5] *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte* Ltd (No. 2) (2009) 76 ACSR 323.

[6] *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* (No. 4) [2009] FCA 803

[7] Ben Butler, *ASIC attacked on Multiplex deal*, *The Age Newspaper*, July 22, 2010.

[8] *P Dawson Nominees Pty Ltd v. Brookfield Multiplex Ltd (No. 4)* [2010] FCA 1029.

[9] Ben Butler, *ASIC attacked on Multiplex deal*, *The Age Newspaper*, July 22, 2010.

[10] *P Dawson Nominees Pty Ltd v. Brookfield Multiplex Ltd (No. 4)* [2010] FCA 1029 at [22].

On December 21 2005, the ACCC commenced an application for pecuniary penalties against Visy and its officers. For the next 2 years, Visy engaged in extensive negotiations with the ACCC. Eventually the matter was settled by Visy's agreement to a record $36 million fine which was imposed by the Federal Court in November 2007[1].

Meanwhile, in April 2006 a representative action against Amcor was commenced by law firm Maurice Blackburn on behalf of a large number of businesses that purchased cardboard packaging from Amcor or Visy between 2000 and 2005. Thereafter Amcor joined Visy as a third party. No litigation funder was involved.

The plaintiffs made a number of attempts to leverage off the ACCC proceedings, for example, unsuccessfully attempting to gain access to records and meta data that had been supplied by Visy and Amcor to the ACCC during the course of its investigations and negotiations[2]; later successfully obtaining access to documents held by the respondents in relation to the ACCC's investigations[3]; and attempting to gain access to documents used in the ACCC proceedings and another related proceeding including witness proofs[4].

Despite the earlier fine, the issues in the representative proceedings were «hotly contested»[5], particularly insofar as the impact of the cartel arrangement on the market was concerned. Questions related to the measure of the quantum of loss were also in play.

The representative proceedings eventually settled for $95 million plus $25 million for Maurice Blackburn's costs and expenses. Of the total $120 million, Amcor was required to pay $80 million and Visy, $40 million. Given the complexities associated with the case, the Court regarded the settlement as fair and reasonable.

c) The Opes Prime saga

Investors borrowed money from Opes Prime, a securities lending and stockbroking firm. The loans were secured by the investors transferring title in their shares to Opes Prime, which, in turn, transferred the shares to its chief financiers, the ANZ Bank and Merrill Lynch. Many of the investors transferred securities valued significantly more than the cash that they had borrowed, but appeared to be unaware that they had lost any interest in the shares as a result of their agreement with Opes Prime[6].

Opes Prime collapsed in March 2008 and an administrator and receiver were appointed. Exercising their rights as secured creditors, ANZ and Merrill Lynch then seized and sold the shares provided as collateral leaving the investors with huge losses.

ASIC launched an investigation into potential breaches of the *Corporations Act 2001* (Cth)[7], including an allegation that Opes Prime had been operating an unregistered management investment scheme. ASIC's investigation then broadened to encompass the ANZ Bank and Merrill Lynch on the basis that they had been party to promoting the unregistered management investment scheme and had been party to a breach of duty by Opes Prime's directors.

[1] *ACCC v. Visy Industry Holdings Pty Ltd & Ors (No. 3)* (2007) 244 ALR 673.

[2] *Jarra Creek Central Packing Shed Pty Ltd v. Amcor* [2006] FCA 1802.

[3] *Jarra Creek Central Packing Shed Pty Ltd v. Amcor* [2007] FCA 1559.

[4] *Jarra Creek Central Packing Shed Pty Ltd v. Amcor* [2008] FCA 391; [2008] FCA 554.

[5] *Jarra Creek Central Packing Shed Pty Ltd v. Amcor* [2011] FCA 671 at [6].

[6] See, e.g., *Beconwood Securities Pty Ltd v. Australian and New Zealand Banking Group Ltd* (2008) 246 ALR 361.

[7] ASIC Media Release 08-61, *ASIC launches investigation into Opes Prime* (28th March 2008).

In May 2008 the Australian law firm, Slater & Gordon commenced a class action on behalf of 50 investors against Opes Prime, ANZ Bank and Merrill Lynch. The suit was underwritten by Commonwealth Litigation Funding LLC, a US headquartered litigation financier and alleged that Opes Prime, ANZ Bank and Merrill Lynch had engaged (among other things) in misleading and deceptive conduct regarding the title to the shares in the so-called «stock lending' transactions.

ASIC then initiated a mediation between it, ANZ, Merrill Lynch, and the liquidator of Opes Prime with a view to obtaining a global settlement of all claims. The settlement resulted in a scheme of arrangement that required the ANZ Bank and Merrill Lynch to pay to pay $226 million to the Opes Prime liquidators. In exchange for accepting the scheme of arrangement the liquidator and creditors were required to release Merrill Lynch and ANZ from all claims and legal proceedings[1]. Under the scheme, creditors were expected to receive a return of 37c in the dollar.

Subsequently Opes Prime's directors were jailed for dishonestly breaching their directors' duties[2].

Professor Morabito's study confirms that privately driven proceedings generate substantial transaction costs in terms of legal fees and litigation financier premiums[3]. However despite a substantial report on Australia's Access to Justice Framework in 2009[4], to date there has been limited policy debate in Australia of the appropriate balance to be struck between privately driven and publicly driven group litigation[5]. Nor has there been much consideration of the appropriate balance between regulatory measures and other non-litigious dispute resolution mechanisms of the kind undertaken in Europe by DG SANCO[6], and in the United Kingdom by the Ministry of Justice[7]. Rather the position in Australia has been to defer examination of the place of group proceedings within the wider landscape of collective redress[8] and to continue to permit the relationship between public and private redress to evolve subject to some minor regulatory tinkering discussed in Section 4 below.

4. Funding Group litigation

Australia has generated a unique means of sharing the significant costs and risks associated with mounting group litigation without which there would be far fewer privately initiated class actions than is currently the case.

[1] *Fowler v. Lindholm: In Re Opes Prime Stockbroking Ltd* (2009) 178 FCR 563

[2] ASIC Media Release 11-150 *Opes Prime directors jailed* (27th July 2011).

[3] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010).

[4] Australia, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil System* (2009).

[5] See, however, Elizabeth Boros, *Public and Private Enforcement of Disclosure Breaches in Australia* (2009), 9 *Journal of Corporate Law Studies* 409 commenting on the incremental development of the remedial regime and its overlapping remedies, and arguing in favour of enforcement against individual defendants rather than «pocket shifting' compensation against entities.

[6] See European Commission, *DG Health and Consumers, Consumer Affairs, Collective Redress* available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm [accessed 18th August 2011].

[7] United Kingdom, Ministry of Justice, *The Government's Response to the Civil Justice Council's Report: Improving Access to Justice through Collective Actions* (July 2009).

[8] Australia, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil System* (2009), Recommendation 8.11.

Since the Australian High Court decision of *Campbells Cash & Carry Ltd v. Fostif Pty Ltd*[1], which determined that litigation financier underwriting and control of class proceedings did not constitute an abuse of process, Australia's class actions have typically been funded by conditional fee agreements or by a combination of conditional fee agreements and litigation financing.

Conditional fee agreements were introduced throughout Australia in the 1990s as a means of improving access to justice for risk averse plaintiffs that were put off pursuing their claims by Australia's cost shifting rule[2]. Conditional fee agreements or no win no fee agreements as they are colloquially called, permit lawyers to charge uplift fees of around 25–50% on their prescribed fees should the plaintiffs' claims be successfully prosecuted. Where the claim is not successful, the claim holder is not liable for solicitors' fees, although he or she will still liable for disbursements and adverse costs.

In exchange for a portion of the claim proceeds averaging around 30%[3], litigation funding of class actions in Australia, takes one of three forms: (1) funding of all legal costs and disbursements and provision of an indemnity for adverse costs orders; (2) funding of a percentage of legal costs and disbursements plus the provision of an indemnity for adverse costs orders; and (3) funding of disbursements plus the provision of an indemnity for adverse costs orders[4]. Although costly, litigation funding thus provides substantially more protection against litigation risk for claim holders than do conditional fee agreements alone. Further, while decried by many defendant corporations, litigation funding also provides insurance against the cost of having to defend unmeritorious claims.

Conditional fee agreements and litigation financing were substantially buttressed by the Full Federal Court decision of *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd*[5], which upheld the validity of a class criterion requiring entry into a litigation funding agreement. By closing the class to free riders, the task of attracting a sufficient critical mass of claim holders to enter financing arrangements or conditional fee agreements was thereby enhanced.

While the confluence of conditional fee agreements, litigation financing of class actions, and the acceptance of closed classes occurred incrementally, the trajectory has been firmly in favour of supporting privately led class actions. There are a number of reasons why this originated in Australia rather than elsewhere, although these reasons do not necessarily mean that the solution cannot work in other jurisdictions. First, all Australian States prohibit contingency fee agreements. Although lawyers are permitted to charge uplift fees, the uplift fees are not sufficient to off-set the sizeable risk of conducting class proceedings. Moreover, because the fees are only recoverable post disposition they cannot be applied to underwriting the carriage of the proceeding which is likely to be both prolix and expensive[6]. To grow and prosper as class action specialists, Australian law firms had little choice but

[1] (2006) 229 CLR 386.

[2] Vince Morabito, *Contingency Fee Agreements with Represented Persons in Class Actions - An Undesirable Australian Phenomenon* (2005), 34 *Common Law World Review* 201.

[3] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (2010), at 38–39.

[4] Ibidem.

[5] (2007) 164 FCR 275 at [141]–[142].

[6] Greg Houston, Svetlana Starykh, Astrid Dahl & Shane Anderson, *Trends in Australian Securities Class Action: 1 January 1993 – 31 December 2009,* at 2.

to seek financing through the capital markets. Litigation financiers provide a means of tapping those markets.

The development of litigation financing coincided with changes in the sociology and regulation of Australia's legal profession that occurred earlier than in some other common law jurisdictions[1]. Whereas historically lawyers could only practice individually or in partnership, the early 21st century heralded comprehensive de-regulation of the structure of legal practice including provision for multi-disciplinary practice and the ability for non-lawyers to own interests in law firms[2]. Slater & Gordon, one of Australia's two big class action specialists, became the first in the world to be listed on the Australian Securities Exchange[3]. Australia was thus something of a pioneer in transforming law firms into businesses more exposed to market forces, subject to management systems, and relatively free of capital constraint. Permitting access to capital markets to underwrite the expansion of legal practice dovetails neatly with accessing capital markets to underwrite litigation.

Changes in the sociology of law firms were simultaneously matched by intensification in corporate regulation, the creation of new causes of action sounding in damages, broader shareholder ownership, and the development of a sense of entitlement to monetary recompense for investment losses[4]. The increase in demand for class action relief that this created, in turn led to an increase in demand for finance to underwrite such actions.

Finally, prior to participating in class actions, the Australian litigation funding industry had been successfully established in the insolvency field without the consumer problems that were experienced in the sub-prime loan market in the United States or the claims management market in the United Kingdom[5]. The early acceptance of litigation financing in insolvency and in other commercial applications paved the way for its acceptance in class actions, albeit class actions which so far have eschewed personal injury claims.

Nonetheless, there has been considerable disquiet over the growth of litigation financing and the concomitant growth in class actions, particularly securities class actions[6]. Class action law firms and litigation financiers have been accused of opportunistically stirring up law claims for their own financial gain and for little social benefit[7]. Management of conflicts of interest between litigation financiers, law firms and claim holders and regulating the fairness of the terms of litigation financing agreements have also emerged as key areas of concern[8].

Yet the government and ASIC have not been persuaded by the naysayers and have insulated litigation financiers from the requirement of registering their underwriting of

[1] On the nature of this transformation see more generally Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (2010).

[2] Steven Mark & Tahlia Gordon, *Innovations in Regulation – Responding to a Changing Legal Services Market* (2009), 22 *Geo J Legal Ethics* 501.

[3] Ibid., at 515.

[4] Michael Legg, *Shareholder Class Actions in Australia – The Perfect Storm* (2008), 31 *UNSWLJ* 669, 671–674; Peta Spender, *After Fostif: Lingering Uncertainties and Controversies about Litigation Funding* (2008), 18 *JJA* 101, 102.

[5] Vicki Waye, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US* (2008).

[6] E.g. Kathy Merrick, *The Multiplex Class Action Settlement – Best and Fairest Outcome or Is There Room for Improvement?* (2010), 62 (9) *Keeping Good Companies* 542; Hon PA Keane, *Access to Justice and other Shibboleths*, JCA Colloquium in Melbourne, 10 October 2009; Peta Spender, *After Fostif: Lingering Uncertainties and Controversies about Litigation Funding*.

[7] See, for example, the dissenting judgment of Callinan and Heydon JJ in *Campbells Cash & Carry Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 487 ff.

[8] Law Council of Australia, Position Paper, *Regulation of Litigation Funding in Australia* (2011)

class actions as managed investment schemes[1] as well as the requirement of holding an Australian Financial Services License[2], by granting class order relief to litigation financiers and law firms until new regulations can be drafted addressing the management of conflicts of interest[3]. Early drafts of the regulations indicate that litigation financiers will be exempt from licensing and registration requirements provided they review their business operations to identify and assess potential conflicts of interest; there are written procedures for addressing conflicts of interest which are regularly reviewed; and that litigation funding agreements conform to the *Competition and Consumer Act 2010* (Cth).

5. Available Relief

Australia's three class action regimes provide that in determining a matter in a class proceeding, trial judges have the power to do any one or more of the following: (a) determine an issue of law; (b) determine an issue of fact; (c) make a declaration of liability; (d) grant any equitable relief; (e) make an award of damages for class members, sub-class members or individual class members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies; (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual class members; and (g) make such other order as the Court thinks just[4].

In making an order for an award of damages, the court is required to make provision for the payment or distribution of the money to the class members entitled[5]. The Court may not exercise the power to award «damages in an aggregate amount without specifying amounts awarded in respect of individual group members» unless a reasonably accurate assessment can be made of the total amount to which class members will be entitled under the judgment[6]. An example of the exercise of this judicial power to award damages in an aggregate amount is provided by *Australian Competition and Consumer Commission v Golden Sphere International*[7]. In this Federal class action, the three respondents were alleged to have promoted, or have taken part in the promotion of, a pyramid selling scheme to which s 61(2A) of the now repealed *Trade Practices Act 1974* (Cth)[8] applied. The ACCC instituted the proceeding on its own behalf but also on behalf of those persons who had participated in the pyramid selling scheme. The ACCC sought injunctive relief against the three re-

[1] *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd* (No. 3) (2009) 256 ALR 427 – a Full Federal Court decision determining that litigation funding of class actions was a managed investment scheme subject to Ch 5C *Corporations Act 2001* (Cth).

[2] *International Litigation Partners Pte Ltd v. Chameleon Mining NL* (2011) 276 ALR 138 - a New South Wales Court of Appeal decision determining that litigation funding was a financial product and that litigation financiers therefore required Australian Financial Services Licenses under Ch. 7 Corporations Act 2001 (Cth).

[3] ASIC Class Order [CO 10/333]. The class order is currently effective until 30 June 2011. See further Hon Chris Bowen, *Address to Shareholder Class Action Conference* (4 May 2010), www.chrisbowen.net.

[4] Part IVA, s 33Z(1); Part 4A, s 33Z(1); and Part 10, s 177(1).

[5] Part IVA, s 33Z(2); Part 4A, s 33Z(2); and Part 10, s 177(2).

[6] Part IVA, s 33Z(3); Part 4A, s 33Z(3); and Part 10, s 177(3).

[7] (1998) 83 FCR 424.

[8] Section 61(2A) prohibited the promotion by a company of a scheme under which a payment is made by a person who participates in a scheme to or for the benefit of, among others, the company and the inducement for making the payment is the holding out to the person who makes the payment the prospect of receiving payments from other persons who may participate in the scheme.

spondents. It also sought, on behalf of the group members, a declaratory order that those members who had participated in the scheme were entitled to be repaid any money that they had paid in respect of the scheme. The ACCC had proposed to O'Loughlin J that damages be based on the sum of $50 per class member which would have resulted in a total award of $ 600,000. His Honour awarded instead $ 550,000 after making the following comments:

If the respondents properly considered that the figure was excessive, the remedy was in their hands to submit the contradictory evidence; this is a case where it would be appropriate to place an evidentiary bonus on the respondents because of their possession of the information that would allegedly refute the applicant's claims. They have made no effort to do that[1].

The Court is empowered to give such directions as it thinks just in relation to: (a) the manner in which a class member is to establish his or her entitlement to share in the damages; and (b) the manner in which any dispute regarding the entitlement of a class member to share in the damages is to be determined[2]. The Court may provide for the constitution and administration of a fund consisting of the money to be distributed and either the payment by the defendant of a fixed sum of money into the fund or the payment by the defendant into the fund of such installments, on such terms, as the Court directs to meet the claims of the class members as well as entitlements to interest earned on the money in the fund[3].

Unlike Canada's legislative class action regimes, the three Australian regimes do not empower trial judges to make *cy-pres* orders[4]. In its 1988 report on grouped proceedings, the ALRC indicated that:

The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than that provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as is possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform[5].

Instead, Australian trial judges may order the termination of a class proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive, having regard to the likely total of those amounts[6].

A different approach was proposed by the Victorian Law Reform Commission («VLRC») in 2008. It recommended that Victorian trial judges be expressly empowered to grant *cy-pres* remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage has accrued to the person or entity contravening the law as a result of such contravention; (c) a loss suffered by others is able to be quantified; and

[1] (1998) 83 FCR 424, 428.

[2] Part IVA, s 33Z(4); Part 4A, s 33Z(4); and Part 10, s 177(4).

[3] Part IVA, s 33ZA(1); Part 4A, s 33ZA(1); and Part 10, s 178(1).

[4] An excellent and recent study of this complex and important area may be found in Rachael Mulheron, *The Modern Cy-pres Doctrine: Applications and Implications,* University College London Press, 2006.

[5] ALRC 1988 Report, para 239.

[6] Part IVA, s 33M; Part 4A, s 33M; and Part 10, s 165.

(d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss[1]. This recommendation has not been implemented by the Victorian Government but was endorsed by the New South Government in August 2010 when it announced its intention to introduce a legislative class action regime[2] and subsequently in October 2010 when it released publicly a draft of the proposed class actions Bill[3]. But following adverse submissions lodged by major law firms, business groups and the Law Society of NSW, the NSW Bill that was eventually unveiled in the NSW Parliament, in November 2010, did not contain any *cy-pres* provisions.

The practical effect of the unavailability of *cy-pres* remedies is vividly highlighted by four of the five anti-cartel class actions that have been brought in the Federal Court. Australia's first successful cartel class action, the so-called vitamins class action, was brought on behalf of a very limited group of claimants, described as follows by Justice Merkel of the Federal Court:

[m]anufacturers, distributors and suppliers of those vitamins or pre-mix or other health or nutrition products or food which contain the vitamins, and producers of livestock who purchased stock feed containing vitamins, provided those group members expended at least $ 2,000 in respect of the relevant products[4].

In the three subsequent cartel class actions the represented groups were restricted to those claimants whose purchases of the relevant products or services exceeded the following dollar amounts: $ 100,000[5]; $ 20,000[6]; $ 50,000 and $ 10,000[7].

6. Court Involvement

In its 1988 report, the ALRC noted that:

Grouped proceedings have a number of distinctive features which make the need for court management vital. Some of these features are

- the existence of unidentified parties whose interests need to be protected
- the need for administrative arrangements to be made for the giving of notice and the distribution of monetary relief
- the need for procedures for the determination of sub-group issues and individual questions.

[1] Victorian Law Reform Commission, *Civil Justice Review* (Report no. 14; 2008), 559–560 (recommendation 101).

[2] New South Wales Attorney General, *NSW Set To Reform Class Action Laws* (Media Release; 6 August 2010): «the NSW legislation will give the Supreme Court the power to order that unclaimed damages from a successful class action be distributed to a charity or public interest beneficiary».

[3] New South Wales Government, *Consultation Draft – Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010* (Discussion Paper; October 2010), 3 («proposed section 178 ... establishes a scheme for money remaining in the fund [consisting of money to be distributed to group members] (or any part of it), that cannot practically be distributed to group members to be applied cy pres»).

[4] *Bray v. F Hoffman-La Roche Ltd* [2003] FCA 1505, [9].

[5] This threshold was used in *Jarra Creek Central Packing Shed Pty Ltd v. Amcor Limited* NSD702/2006 (see infra section 3 of this article).

[6] This threshold was employed in *Auskay International Manufacturing & Trade Pty Ltd v. Qantas Airways Ltd* VID12/2007, a class action that challenged cartels with respect to international air freight services.

[7] These thresholds were employed in *Wright Rubber Products v. Bayer AG* VID882/2007, a class action with respect to cartels in the rubber chemicals industry. The figure of $ 50,000 was used with respect to rubber chemicals whilst $ 10,000 was applied to purchases of rubber compounds.

The aim of court management is to ensure that justice is achieved for both parties as quickly and inexpensively as possible. Unfettered party control does not facilitate this aim, first because legal representatives are not obliged to plan the management of the case and secondly because each acts in the interests of their own client. In some cases a party's interests may be served by delays and procedural disputes. Further, without active court management, the interests of unidentified parties may not be taken properly into account[1].

This philosophy underpins each of the country's three class action regimes. As a result, trial judges have been vested with the power to make any orders that they believe are appropriate or necessary to ensure that justice is done in the proceedings[2]. Notices which are required to be sent to class members must be approved by the Court[3] and the Court may establish, in the case of issues common to the claims of only some of the class members, a sub-group and appoint a person to be the sub-group representative party on behalf of the sub-group members[4].

The greater involvement of courts in class proceedings, when compared with traditional proceedings, is exemplified by the need for judicial approval of the settlement of the class representative's individual claim[5] and of the settlement or discontinuance of the class proceeding itself[6]. The importance of, and the difficulties associated with, the judicial scrutiny of the settlement of a class proceeding has been described as follows by Justice Finkelstein of the Federal Court of Australia:

My principal task is to assess whether the compromise is a fair and reasonable compromise of the claims made on behalf of the group members. I am not so much concerned with the position of [the class representative] who, after all, has solicitors and counsel to advise him as to how his interests will best be served in the litigation. The group members are not protected in this way. ... Accordingly, the task of the court in considering an application under s 33V is indeed an onerous one especially where the application is not opposed[7].

There have been very few instances of trial judges declining to approve the settlement agreements executed by the class representatives and their opponents[8]. Some commentators have claimed that several other settlements were judicially endorsed when they should have instead been rejected[9]. However, the second-named author's empirical study of the Federal and Victorian regimes has not revealed any instances of «coupon settlements»[10]. Given that close to half of Australia's Federal class proceedings have been resolved through

[1] ALRC 1988 Report, above n 1, para 157.

[2] Part IVA, s 33ZF; Part 4A, s 33ZF; and Part 10, s 183.

[3] Part IVA, s 33Y; Part 4A, s 33Y; and Part 10, s 176.

[4] Part IVA, s 33Q; Part 4A, s 33Q; and Part 10, s 168.

[5] Part IVA, s 33W; Part 4A, s 33W; and Part 10, s 174.

[6] Part IVA, s 33V; Part 4A, s 33V; and Part 10, s 173.

[7] *Lopez v. Star World Enterprises Pty Ltd* [1999] FCA 104, [15-16].

[8] See, generally, Vince Morabito, *An Australian Perspective on Class Action Settlements* (2006), 69 *Modern Law Review* 347, 367–371.

[9] See, for instance, Marsha Jacobs, *Telstra Class Action Settled for Just $5m*, *Australian Financial Review,* 13 November 2007, 3; and Vince Morabito, *Judicial Responses to Class Action Settlements that Provide no Benefits to some Class Members* (2006), 32 *Monash University Law Review* 75.

[10] In the US, several class action settlements provided class members with coupons for discounts on future purchases from the defendants, in lieu of cash awards, whilst generous payments were made to the class representative's lawyers. See, for instance, *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation* 55 F3d 768 (3rd Cir 1995).

settlement[1], the effectiveness of judicial oversight over class action settlements will no doubt be placed under even greater scrutiny in the future.

Unlike North America's class action regimes, Australia's class action regimes do not employ a certification device. Again, this unique feature of Australia's class action landscape is attributable to a 1988 recommendation of the ALRC. The ALRC closely considered how this device had worked in Quebec – the only Canadian jurisdiction that had in place a detailed class action regime in 1988 when the ALRC completed its report – and in the US. The ALRC's review of these regimes led it to conclude that:

The preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time[2].

The drafters of the Commonwealth, Victorian and NSW regimes implemented this recommendation. Nevertheless, trial judges can bring to an end class actions (as class actions), where they accept the arguments of the defendants that the three commencement prerequisites – which must be complied with in order to avail oneself of the class action device – have not been satisfied[3]. The three regimes also vest trial judges with broad powers to terminate proceedings which have adhered to the commencement prerequisites. In fact, these termination powers, unlike the power of US and Canadian Courts to decertify, are not dependent on a finding that the commencement prerequisites no longer exist or never existed. Instead, the powers are based on additional criteria, which confer on the Court a very broad power, including the ability to terminate a proceeding because the Court is of the view that it is «inappropriate» that the proceeding progress as a class proceeding[4].

Unfortunately, the desired scenario – of not expending excessive time and resources on deciding whether the use of the class action device was appropriate – which prompted the ALRC's rejection of the certification procedure, has not been attained. In many class proceedings, defendants have sought to persuade the Court that the proceedings should not proceed as class proceedings because of a failure to comply with the commencement criteria or, alternatively, because it was appropriate for the Court to exercise its power to terminate properly constituted class proceedings. This strategy, together with challenges to other aspects of class proceedings, such as pleadings, have been primarily responsible for an undesirable scenario which was described as follows by Justice Finkelstein, sitting as a member of the Full Federal Court:

(T)here is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. This case is a particularly

[1] See V. Morabito, *Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives*, Second Report, An Empirical Study of Australia's Class Action Regimes, September 2010, 5.

[2] ALRC 1988 Report, above n 1, para 146.

[3] The first requirement is that seven or more persons have claims against the same person. The second requirement is that the claims are in respect of, or arise out of, the same, similar or related circumstances. The final prerequisite is that the claims of the group give rise to a substantial common issue of law or fact: Part IVA, s 33C(1); Part 4A, s 33C(1); and Part 10, s 157(1).

[4] Part IVA, s 33N(1)(d); Part 4A, s 33N(1)(d); and Part 10, s 166(1)(e).

good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of $500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible[1].

The existence of this scenario has prompted several commentators to advocate the employment of the certification device[2]. It will be interesting to see whether the recent implementation at the federal level of pre-action protocols requiring the parties to undertake genuine steps to resolve the dispute including the exploration of Alternative Dispute Resolution options will reduce or exacerbate these problems[3].

7. Compatibility with Us-Style Class Actions

In May 2010 Australia's Minister for Financial Services, Superannuation & Corporate Law, Chris Bowen, noted that «there is no doubt that class actions have become an important part of the Australian justice system»[4]. Given that US-style class actions have been available in Australia's «national» court for almost 20 years, it is impossible to challenge the validity of Minister Bowen's comment. Minister Bowen also added that the «Australian Government sees class actions as an important part way of enhancing the community's access to justice»[5]. The empirical data that is beginning to emerge from the study mentioned above is consistent with the view that Federal class actions have enhanced access to justice for Australians with legal grievances. For instance, it has revealed that over 14,000 workers were eligible to receive settlement proceeds generated by union-driven class actions[6]. It has also revealed the extent to which Australia's two major regulators, ASIC and ACCC, have employed the Federal class action regime. In the first 17 years of the operation of the Federal regime, a total of nine class actions were filed by ASIC. Eight of them were settled generating compensation for aggrieved investors of more than $ 25.5 million. During the same period, a total of six Federal class actions were filed by ACCC. Reference has already been made to one of these ACCC class actions, *Golden Sphere*, where compensation of $ 550,000 was awarded to aggrieved consumers. In another class action, damages equal to $822,803 were awarded to the class represented by ACCC[7].

[1] *Bright v. Femcare Ltd* (2002) 195 ALR 574, 607. A year later, Finkelstein J again indicated that «many class actions become bogged down by interminable and expensive interlocutory applications and protracted and even more expensive appeals from interlocutory orders»: *Bray v. F Hoffmann-La Roche Ltd* (2003) 200 ALR 607, 660. See also *Milfull v. Terranora Lakes Country Club Limited (In Liquidation)* [2004] FCA 1637, paras 1 and 17 (per Kiefel J).

[2] See, for instance, Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective,* Oxford, Hart Publishing, 2004, 27–29. See also *P Dawson Nominees Pty Ltd v. Multiplex Limited* [2007] FCA 1061, para 18 where Justice Finkelstein noted that the «experience of class actions suggests that the absence of a certification process is itself the cause of numerous interlocutory applications with resultant expense and delay».

[3] *Civil Dispute Resolution Act 2011* (Cth); Federal Court of Australia Practice Note CM 17.

[4] The Hon Chris Bowen, *Address to Shareholder Class Action Conference*, Sydney, 4 May 2010, 2.

[5] Ibidem.

[6] See Jane Caruana and Vince Morabito, *Australian Unions – The Unknown Class Action Protagonists* (2011), 30 *Civil Justice Quarterly* (forthcoming).

[7] *Australian Competition and Consumer Commission v. Chats House Investment Pty Ltd* (1998) 83 FCR 424.

Ada Pellegrini Grinover[1]

BRAZILIAN NATIONAL REPORT

I. Introduction

The Brazilian Constitution of 1988 establishes the public civil action as a procedural tool for group litigation in order to protect any diffuse and collective interests, irrespective of the matter. The Law of the Public Action, 1985, extended, in 1990, the subject-matter of the action in accordance with the Constitution and the Consumer Defense Code (1990), whose procedural rules apply to the protection of any diffuse and collective interests (of indivisible nature), also irrespective of the matter, and recognized the category of the homogeneous individual interests, which correspond to the class actions for damages in the North American Law. The standing to sue is granted to the Public Prosecutor's Department, to the Public Defender's Office, to other public entities, to associations, but not to the individual.

On the other hand, the same Constitution provides for the popular action, whose standing to sue is granted to the citizen in order to protect several properties, including public property and cultural heritage.

Therefore, by means of both the public civil action and the popular action, a group is entitled to make and defend claims in a court of law, including the area of cultural property. The jurisprudence has plenty of examples of litigations for the solution of cross-cultural conflicts or about cultural heritage in which groups appear either as plaintiffs or as defendants.

II. Cross-Cultural Conflicts

The most striking example of group litigation to solve cross-cultural conflicts is the non-unanimous decision of the Brazilian Supreme Court in a popular action (Petition 3388 – Roraima, by Augusto Affonso Botelho Neto, which was joined by several indigenous communities, being Justice Carlos Ayres Britto, the Reporter), judged on March 29, 2009, which demarcated indigenous pieces of land. The Indians were given the possession and usufruct of a vast territory called «Raposa Serra do Sol», by applying the principle of the continuous land demarcation. The decision was based on the consideration of the indigenous land as an essential part of the Brazilian territory, on the demarcation of the indigenous land as an advanced chapter of the fraternal constitutionalism, on the timescale of the occupation, on the traditional landmark of the occupation and on the peculiar continuous model of the indigenous land demarcation.

The following safeguards were preserved in the decision:

- the usufruct of the riches of the soil, rivers and lakes should not overlap the relevant public interest of the federal government, which comes under the Constitution, or the interests of the national defense policy;
- the usufruct covers neither the commercial exploration of the water resources and electric power nor the prospecting and mining for the mineral wealth;

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• the installation and operation of military bases and the strategic expansion of the road network as well as the exploration of alternative sources of electric power will depend neither on the consultation with the indigenous communities involved nor with the governmental organization representing them;

• the usufruct shall not prevent the federal government from installing public facilities, especially for the health and education services;

• the conservation area unit created by the Chico Mendes Institute for Biodiversity Conservation shall be run by that Institute with the participation of the indigenous communities, which will have to be heard;

• the transit and stay of non-indigenous visitors and researchers will be allowed according to the schedule and conditions determined by the Chico Mendes Institute and shall not be charged; the use of the roads and public facilities cannot be charged, either;

• hunting, fishing or harvesting as well as any other agricultural activity or exploration is forbidden to those who are unfamiliar to the indigenous groups.

It happens that in the large area that was mentioned above there were long-existing crops, mainly rice. The owners or possessors of the crops, who should have been evicted at once and should have lost the harvest, made a strong protest against the immediate removal and claimed for compensation to the federal government. Those lawsuits, some of them filed by groups, are still in progress.

Other important cross-cultural conflicts arose and still arise throughout the Brazilian territory between rural landowners and squatters, who are members of the so-called MST (Movement of the Landless Rural Workers), who occupy productive rural areas often using violence. As a consequence, some of the leaders of the Movement have been convicted. However, what happens in terms of group litigation is that the possessory actions are not brought against the squatters, who are a shapeless crowd hard to be identified, but against the MST. It corresponds to typical examples of the North American defendant class actions. Although the Movement is not a legal entity, the Brazilian courts have understood that it has the appropriate standing to be sued – in some decisions they were referred to as «legal personalities» – in order to appear as a party defendant in a lawsuit, determining the intervention of the police force for the evacuation of the area. In the Brazilian jurisprudence there are numerous examples of those defendant class actions[1].

III. Protection of Cultural Heritage

There are countless cases of group litigations to protect the cultural heritage, often having as a consequence the implementation of public policies.

Thus, the Superior Court of Justice (a Summit Court in charge of protecting legality) sustained or reformed decisions in the appellate level, via the public civil action, brought by the Public Prosecutor's Department or by the IPHAN (Institute of National Historic and Artistic Heritage), ordering the removal of the fence that had been set up by the management in the columns of the residential buildings in a preserved area in Brasília, DF,

[1] Some decisions by the Court of Appeals are: TJRS, AI n. 70.000.186.833, 4th Chamber, j. 12/29/1999; TJRS, AI n. 70005527601, 17th Chamber, j. 02/11/2003; TJMG, AI 436.616-9, 7th Chamber, j. 04/29/2004; TJRS, Appeal n. 70040817066, 20th Chamber, j. 07/06/2011.

safeguarded by UNESCO as property of the world cultural heritage[1]; the restoration by the government of historic monuments in Serra do Mar, in the State of São Paulo[2]; the conservation of valuable historic real estate even though not safeguarded, in the State of Minas Gerais[3]; the stay of the expropriation proceedings aimed at the agrarian reform of a site called Kalunga, in the State of Goiás, and described as being of high historic value and cultural heritage for the black people[4]; the restoration and maintenance by the federal government of a preserved building (Dock Company in Santos) in the State of São Paulo[5]; obstruction to the demolition of a building of historic and cultural value, irrespective of being safeguarded, in the District of Maracatu, in the State of Minas Gerais[6].

IV. Answers to the Questionnaire

Objectives

The objectives are the same as the ones mentioned for the class actions in North America. To those objectives, it should be added the intention to avoid conflicting decisions, since Brazil does not follow the model of the binding precedent of the common law. The group litigation in Brazil has changed the face of justice, from an individual model to a social model. The protection of the rights in both the North American and the Brazilian systems may have differences in terminology but, substantially, there are no differences: the so-called diffuse or collective interests in Brazil are similar to those protected by Rules 23 (b) 1 and 23 (b) 2 and the homogeneous individual interests are correspondent with Rule 23 (b) 3.

1. Representation

In Brazil the adequacy of representation for the public civil actions is determined by law and certain requirements for the standing of the associations to sue are needed. However, the courts end up assessing the adequacy of representation by means of some tools such as the so-called «thematic relevance» and openly in the defendant class actions. In the popular actions there is not any control over the adequacy of representation. Someone's status of citizen is enough to grant the standing to sue. The reason is that although the popular action represents a group litigation it is mainly a means of control of the citizen over the «res publica».

2. Funding and financing

Counsel fees are not a problem in Brazil, since the standing to sue in a public civil action is not granted to the individual and the lawsuits are filed by public entities or associations that go to court with the assistance of their own attorneys. The associations are, by law, exempt from the payment of court costs and attorney fees to the opposing party, except in the case of bad faith.

[1] REsp. 840.918, j. on 10/14/2008.
[2] Ag 1319279, DJU 08/10/2010.
[3] Ag 125984, DJU 08/20/2010.
[4] REsp. 1.046.178, j.12/16/2010.
[5] REsp. 1219753, DJU 05/11/2011.
[6] REsp. 008924, DJU 06/26/2011.

3. Available relief

In Brazil, all types of provisions may be requested in the public civil action: judgments of declaratory, constitutive and condemnatory nature both as to compensation for damage and by means of injunctions. The popular action aims at discontinuing the act that was considered to be harmful and has condemnatory nature in both areas mentioned.

4. Court involvement

The control over the parties' performance in the group litigation, including the settlements, is exercised by the Public Prosecutor's Department (autonomous department, independent of the government and of the judiciary), which, if does not appear as a plaintiff in the public civil action, will act as an inspector of legality. The Code of Civil Procedure, which is a subsidiary instrument to the group litigations, provides for heavy penalties imposed by the judge in case of bad faith in the litigation.

5. Compatibility with the US style class actions

The Brazilian system of group litigations follows its own model, except for the fluid recovery, which was taken from the North American class actions. The civil law systems usually do not follow the North American model. There is no certification and no discovery, either. The standing to sue is very different and the associations play an important role in the proceedings. The most obvious difference concerns the effects over the «res judicata» considering that the opt-out principle is withdrawn mainly because of constitutional grounds (the «res judicata» cannot cause any harm to the one who was not a direct party in the adversarial proceeding). The objectives are the same but the techniques to achieve them are different. The objectives are compatible but the models are different. Not any civil law country is planning to adopt the US style class actions, much less Brazil.

Stefaan Voet[1]

BELGIUM NATIONAL REPORT

Introduction

De lege lata

In Belgium, there are currently two ways to deal with mass harms (or mass grievances).

On the one hand, the Belgian Judicial Code and Civil Code contain some procedural techniques that are traditionally used for multi party actions[2]. Joinder of claims allows several claims between two or more parties being filed together (in one writ of summons or petition) when they are connected[3]. Claims are connected when they should be tried

[1] Professor of Ghent University (Belgium).

[2] Piet Taelman & Emilie De Baere, *New Trends in Standing and Res Iudicata in Collective Suits (Belgium)*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Antwerp-Oxford-Portland, Intersentia, 2008, at 6–13.

[3] A distinction is made between objective accumulation (or joinder) (a party formulates different claims against another party in a single procedure), passive subjective accumulation (or joinder) (a plaintiff acts against

together in order to prevent contradictory decisions. The technique of claims in intervention makes it possible for third parties to intervene in pending proceedings. The intervention can take place voluntarily (by way of petition) or coercively (by way of writ of summons). A judge is not allowed to order *ex officio* the intervention of third parties (see *infra*, 3). The most used technique is party representation, which makes it possible for a (natural or legal) person (the representative) to represent a group of individuals if he or she received an explicit mandate (authority, proxy) from each individual member of the group[1]. Only the members who gave a mandate will be represented.

On the other hand, the Belgian legislator did create a series of specific acts in which collective actions, or group actions, are embedded. These have four common characteristics:

(a) they implement European directives[2],

(b) only private professional, inter-professional or public associations (or organizations), that satisfy certain legal criteria (e.g. having legal personality for some (mostly 3) years), have standing,

(c) these associations can only institute an injunctive action (i.e. the cessation of an illegal practice) or a preventive action, and

(d) the cause of action must correspond (overlap) with the statutory aim of the association (or organization). These kinds of group actions are provided with respect to consumer protection; misleading advertising, unfair contract terms and long distance agreements; the amicable recovery of consumer debts; the environment; discrimination and racism; copyright; etc.

The (traditional) procedural techniques, as well as the Belgian group actions, are deficient as adequate tools for collective redress[3]. The techniques remain embedded in an individualistic context because they are exclusively designed for small party litigation. Their only added value is that they allow the intervention of a limited number of people. Furthermore, these people have to intervene (opt-in) in the proceedings and just like the initial plaintiff and defendant, they have to become parties. This is also the case for party representation: the representative has to be authorised by each member of the class on an opt-in basis. Moreover, this technique involves a laborious administration since the representative has to obtain every member's written consent and authorisation. Group actions are rarely used, mainly because of limited funding and the impossibility of claiming damages. Furthermore, the decision to which they lead is not binding for the duped group members, and doesn't offer finality for the defendant (who still can be sued by hundreds of duped group members).

several defendants in a single procedure) and active subjective accumulation (or joinder) (several plaintiffs act against one or several defendants in a single procedure).

[1] Hubert Bocken & Bernadette Demeulenare, *The Defence of Collective Interests in Belgian Civil Procedure*, in X., *Effectiveness of judicial protection and the constitutional order. Belgian Report at the II International Congress of Procedural Law*, Deventer, Kluwer, 1983, at 161.

[2] For example, the 2002 Act on Cross Border Injunctions implements Directive 98/27/EC on injunctions for the protection of consumers' interests; the Belgian anti-discrimination acts implement Directives 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin; 2000/78/EC on equal treatment in employment and occupation, and 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services, etc.

[3] Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in E. Dirix & Y.-H. Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law*, Brussels, Bruylant, 2011 (forthcoming), at 305.

Currently, the Belgian rule of law does not allow a (damages) class action: a representative action in which one person represents an unknown number of (fellow-) sufferers (without these having to intervene as parties), hereby claiming monetary damages, and that leads to a decision that is binding on all who are represented.

De lege ferenda

In 2009 and 2010, three proposals were made public to introduce real class actions (in the aforementioned meaning) in Belgium[1]. The first proposal was made by the government (the minister of Consumer Affairs and the minister of Justice)[2]. The core of the proposal is a double pathway: a partially out of court settlement track (based on the Dutch Collective Settlements Act) and a court-based litigation track (based on the Quebecian class action). A second proposal was made by the two Green opposition parties (Ecolo & Groen!). The proposal suggests a collective procedure, consisting of two phases: a collective phase (during which the common issues are resolved) and an individual phase (during which the individual issues are dealt with). And finally, the Flemish Bar Council also proposed a class action bill.

It is important to emphasize that at the moment this report was finalized (October 2011), none of these proposals were submitted to Parliament.

The main characteristics of the three Belgian class action proposals are summarized in the table at the end of this Report.

Objectives

The traditional objectives of class actions are access to justice, judicial economy, and behaviour modification[3], which are all important: *«behaviour modification or deterrence (...) tend to be viewed as by-products of access to justice or as related to their effects on the ability to aggregate low-value claims. If you like, access to justice and judicial economy are the elder siblings; behaviour modification, the junior one – or even the poor cousin»*[4].

At first sight, the Belgian procedural techniques (joinder of claims, claims in intervention, and party representation) attempt to enhance judicial economy. This was surely the ambition of the Royal Commissioner Charles Van Reepinghen in 1967, when he drafted the Judicial Code: the techniques of joinder of claims and claims in intervention allow parties to deal with all of their claims in one single procedure[5], thereby avoiding multiple

[1] For a thorough analysis of these proposals see Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in E. Dirix & Y.-H. Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law*, Brussels, Bruylant, 2011 (forthcoming), at 305.

[2] For an analysis (by the authors of the proposal) see Hakim Boularbah, *Des «actions groupées» vers l'«action de groupe»: quelle valeur ajoutée pour l'avocat?*, in X., *La valeur ajoutée de l'avocat. Actes du Congrès de l'O.B.F.G. du 17 février 2011*, Limal, Anthemis, 2011, at 33–85 and Andrée Puttemans, *L'introduction d'une forme d'action collective en droit belge*, in A. Legendre, *L'action collective ou action de groupe. Se preparer à son introduction en droit français et en droit belge*, Brussels, Larcier, 2010, at 24–46.

[3] These objectives were saliently summarized in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at para. 27–29. They go back to the report of the OLRC (Ontario Law Reform Commission, *Report on Class Actions*, Toronto, Ministry of the Attorney General, 1982, at 117).

[4] John Kleefeld, *Homo Legislativus: Missing Link in the Evolution of 'Behaviour Modification'?*, in J. Kalajdzic (ed.), *Accessing Justice – Appraising Class Actions Ten Years After Dutton, Hollick and Rumley*, LexisNexis Canada, 2011 (forthcoming).

[5] Charles Van Reepinghen, *Verslag van de Gerechtelijke Hervorming I*, Brussels, Belgisch Staatsblad, 1968, at 327.

(and costly) procedures. Closer analysis reveals a more sober image. As mentioned before, the techniques require group members to actively intervene (opt-in) in the proceedings. Consequently, they don't work for small claims (or so called individually non recoverable claims or negative value claims, or even non viable claims). Because of the rational lack of interest, group members will not intervene. Therefore, these techniques will offer no (collective) redress at all. But also for individually recoverable claims the aforementioned techniques don't fully achieve their judicial economy objective. The fact that all group members have to intervene can lead to an uncoordinated and fragmented – and therefore inefficient and uneconomical – completion of the case. This can lead to an overloaded, even disrupted, judicial system. This analysis meshes with the arguments in class action law against an opt-in system[1].

Belgian group actions are injunctive or preventive actions. Only the cessation or prevention of an illegal practice can be claimed. It is not possible to claim damages for the group members. Therefore, the exclusive objective of these group actions is behaviour modification. An individual victim of the illegal practice is no party to the proceeding, and is in no way bound by the outcome of it. If the victim wants compensation, he or she must initiate individual proceedings.

What is clearly missing is (optimal) access to justice. Neither the traditional procedural techniques, neither the group actions create credible access to justice for a victim of a mass harm. Both the proposal of the government and the proposal of the Flemish Bar Council want to put this right by introducing an opt-out class action[2]. Only a (generic) opt-out class action optimally achieves access to justice.

1. Representation

As already mentioned, the existing (but limited) group actions can only be initiated by private professional, inter-professional or public associations (or organizations), that satisfy certain legal criteria (e.g. having legal personality for some (mostly 3) years). Moreover, the statutory aim of these associations (or organizations) must correspond (overlap) with the cause of action.

Contrary to the proposals of the two Green opposition parties and the Flemish Bar Council, the proposal of the Government only gives standing to associations or organizations to initiate a class action. This choice for an ideological plaintiff[3] is a good one, for three reasons.

When an ideological plaintiff (i.e. an association, organization or governmental body (e.g. an ombudsman)) initiates a class action, the focus will be, from the outset, on the

[1] See e.g. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *Harv. L. Rev.* 591, 397–398 (1967): *«requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people – especially small claims held by small people – who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable»*. In the same sense: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court, Report no. 46*, Sydney, Australian Law Reform Commission, 1988, at 107.

[2] The proposal of the Green opposition parties is based on an opt-in system.

[3] Rachel Mulheron, *The Class Action in Common Law Legal System: A Comparative Perspective*, Oxford-Portland Oregon: Hart Publishing, 2004, at 303.

class, and not on the claim of an individual class member[1]. The (collective) interests of the class members will always come first (and not the interests of the individual class member). Therefore, one may expect that ideological plaintiffs will pursue class actions with much more ardor, commitment and enthusiasm, which will be to the benefit of the class members. In other words: *«the interests of the class are here likely to be much better served by an ideological plaintiff»*[2]. Moreover, no procedural (and time-consuming) problems will occur when the individual claim of the class representative becomes moot or is settled by the defendant.

Secondly, when an ideological plaintiff initiates a class action, there is no individual class member that comes forward. Thus, there is no danger of stigmatization and possible retaliation by the defendant[3]. One may also not forget that a class action is a complex event, not only because it deals with large-scale (and mediatised) cases, but also because of the importance of the interests of the absent class members. These members have to rely on the class representative, who therefore has a burdensome task[4]. The complexity and psychological impact of a class action can easily scare off potential class representatives, or can hamper the procedure. This is especially the case when the class members are in a vulnerable position (e.g. employees, prisoners, asylum seekers, minors, victims of sexual abuse, etc.). All these problems are largely avoided (or can be more easily dealt with) when the class representative is an ideological plaintiff.

And finally, and this is probably the most important reason, when the class representative is an association or governmental body, it will be easier (less difficult) to finance class action litigation (see *infra*, 3).

2. Funding and Financing

With respect to the funding and financing of class action litigation, three options can be considered: funding by the class representative, funding by the class attorney, and funding by a third party. The three Belgian class action proposals ignore this issue, or deal with it in a fragmented (or unclear) manner. A clear and comprehensive vision is lacking. The only thing they all agree on is funding by a government fund.

When a class action will be introduced in Belgium, a first option is requiring the class representative to fund and finance the litigation (which is already the case with the existing group actions). When the class representative will be a class member, this means that

[1] This is the «class-entity» or «class-as-client» theory (see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 913 (1997–1998)).

[2] South African Law Commission, *The recognition of a class action in South African law, Working Paper no. 57*, Pretoria, South African Law Commission, 1995, at para 5.5. See also Vince Morabito, *Ideological Plaintiffs and Class Actions. An Australian Perspective*, 34 *U. Brit. Colum. L. Rev*. 459, 497 (2000–2001). Also Cooper emphasizes the advantages of an ideological plaintiff (Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 13, 26–32 (1996)).

[3] Ontario Law Reform Commission, *Report on Class Actions*, Toronto, Ministry of the Attorney General, 1982, at 128–132.

[4] Pierre-Claude Lafond, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 *Consumer Law Journal* 329, 332 (2000): *«the responsibility involved in carrying a class action is very heavy – inordinately heavy for an isolated individual. Alone against Goliath, the modern David of the judicial forum cannot share the burden he carries with anyone except his lawyer. This burden constitutes one of the factors underlying the difficulty in finding a representative»*.

there will be no funding at all. This will certainly be the case for small claims, but also for individually recoverable claims. In those cases, funding a class action will come down to a personal and unprofitable investment, which no one will want the make. If at the end of the procedure the class member runs the risk of also having to pay the costs of the defendant, there is *«a disincentive to bringing grouped proceedings and* [this] *might in fact create yet another barrier to access to legal remedies of the kind which the recommended procedure itself aims to overcome»*[1]. When the class representative will be an ideological plaintiff (an association or governmental body), funding by the class representative will be easier (less difficult)[2], because ideological plaintiffs have more financial means. Moreover, they don't pursue a personal interest, but only the interests of the class. Because these interests overlap with their statutory aim, the class action goes to the heart of their existence and being. They will therefore act as gatekeepers, because they will not invest in frivolous or meritless cases.

A second option is allowing the class attorney to fund and finance the litigation on the basis of a contingency fee agreement. Contingency fees are strictly prohibited in Belgium, because they violate the public order and are incompatible with the professional ethics of attorneys[3]. However, intermediate forms of contingency fee arrangements are likely in Belgium. An agreement, by which the attorneys' fees *partially* depend on the outcome of the case, is allowed. This comes down to a permissible success fee. The fundamental problem with contingency fees and success fees in a class action context is that the class attorney has a personal interest in the outcome of the case. This is problematic. The class members are absent in the procedure, but bound by the outcome of it. Therefore, the adequacy of the class attorney and the class representative is vital, because the class members completely rely on them. They depend on the way the class attorney administers the case. The class attorney also serves as a gatekeeper for the defendant, who has to be protected against frivolous claims. In other words, the class attorney serves a (semi-)public role. A personal financial interest in the case can hinder (even impede) his task.

Finally, third parties can finance and fund class action litigation. This is possible by legal expenses insurance («before the event insurance»)[4], legal aid, a government fund[5], or more recently third party funding[6]. If class actions are to be introduced in Belgium, it is highly uncertain if the Belgian government will be willing to provide funds for legal aid or a government fund. If so, this financial intervention by the government will work better with an ideological plaintiff as class representative. On the one hand, an ideological plaintiff

[1] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court, Report no. 46*, Sydney, Australian Law Reform Commission, 1988, at para 252.

[2] See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation come to Europe?*, 62 *Vand. L. Rev.* 179, 199 (2009).

[3] See article 446ter of the Belgian Judicial Code. For a general overview see Vincent Sagaert & Ilse Samoy, *Belgian Report*, in Ch. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation. A Comparative Perspective*, Oxford, Hart Publishing, 2010, at 217.

[4] In this context, one has to refer to the *Eschig* decision of the Court of Justice of the European Union (C-199/08, Eschig, 2010) in which the Court ruled that article 4(1)(a) of Council Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned.

[5] The best example can be found in Québec with the «Fonds d'aide aux recours collectifs» (www.farc.justice.gouv.qc.ca/). Also Ontario has a «Class Proceedings Fund» (www.lawfoundation.on.ca/cpcabout.php).

[6] See Rachel Mulheron & Peter Cashman, *Third Party Funding: A Changing Landscape*, 27 *C.J.Q.* 312 (2008).

doesn't pursue a personal interest. For a government fund or a third party funder this can be a decisive and legitimizing factor to intervene. On the other hand, and because of their experience and expertise with existing group actions, associations and governmental bodies have become serious interlocutors. Compared to individual class members, they will be in a much better position to monitor (and criticise) for example third party funders, in a way that will benefit all class members.

3. Available Relief

Belgian group actions can only be used to obtain injunctive or preventive relief. For example, the 1993 Act on the Protection of the Environment gives standing to non-profit organizations and local authorities to bring an action to stop acts that violate environmental regulations or that constitute a serious threat of violating such regulations. The 1990 Act on Financial Transactions and Financial Markets gives standing to certain consumer associations to initiate an action for the injunction of illegal canvassing practices. Contrary to a (US-style) class action, it is not possible to claim damages on behalf of the duped victims.

In the past, several proposals were submitted to Parliament to unify all these group actions[1]. The idea is to make a clean sweep with all statutory (and scattered) provisions and to create one standardized legal ground on the basis of which associations (or organizations), that satisfy certain legal criteria, have standing to initiate a group action, albeit limited to claims for injunctive of preventive relief. To date, this and all other similar proposals, remain dead[2].

The three Belgian class action proposals allow claims for monetary relief. The government proposal contains an interesting provision. The class settlement or court decision can stipulate that amounts under a certain threshold will not be distributed amongst the class members, due to the high distribution costs compared to the amount each class member is entitled to. The proposal suggests depositing the (non-distributed) money in a government fund to finance future class actions. This idea can be applauded. With respect to small claims, it allows taking away the illegal profit from the offender, and using the money efficiently to finance other class actions. The proposal of the Flemish Bar Council contains a provision on the basis of which the judge can appoint a special master[3] (called «a judicial claim settler») to deal with the individual claims of class members out of court.

4. Court Involvement

A preliminary question that arises concerning the involvement of the court in future Belgian class actions is which court should be made competent? According to the govern-

[1] The last proposal dates from February 2008. It suggests supplementing article 18 of the Judicial Code with this section: *«the plaintiff is supposed to have an interest in commencing a group action, when he is an association (organization) that has legal capacity for a minimum period of one year, when he acts in accordance with his permissible statutory aim and when he shows a real activity in accordance with his statutory aim»*.

[2] Contrary to Belgium, this unification process was done successfully in the Netherlands. In 1994, all statutory provisions were abolished and replaced by one uniform provision (article 3:305a of the Dutch Civil Code).

[3] See on the use of special masters in class actions David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 *B.U. L. Rev.* 695 (1989) and Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 *U. Chi. L. Rev*. 394 (1986).

ment proposal, the Brussels Court of First Instance and the Brussels Court of Appeals will have exclusive jurisdiction to deal with *all* Belgian class action(s) (settlements)[1]. This will lead to a specialized and experienced class action court[2], and will pave the way to an efficient resolution of class actions. On the one hand, a uniform and predictable (and therefore more stable) jurisprudence will be developed in a specialized area of the law (e.g. with respect to class action prerequisites). On the other hand, a specialized and more experienced court will be able to deal with these cases more efficiently and swiftly. Because the total number of mass cases in European countries seems to be fairly limited[3], it would be inefficient to give multiple courts' jurisdiction. One competent court also avoids time-consuming jurisdiction issues. This (exclusive) court can be made mobile (a sort of «travelling class action court»)[4].

In this context, the adversarial character of Belgian civil procedure is relevant[5]. The autonomous role of the parties in starting and ending a civil procedure on one hand, and the active role of the judge on the other, are two important facets of this principle. The parties autonomously set the limits of the dispute brought before the court. First of all, this implies that the plaintiff delimits the object of the proceedings. The judge is limited to, but at the same time obliged to, decide on the case as determined by the plaintiff. Furthermore, a judge is not allowed to involve *ex officio* parties in the proceedings other than those designated by the plaintiff. In this context this is important. When the judge sees that there are victims similarly situated to the plaintiff, he cannot instruct their intervention. The judge cannot even ask (or force) parties to do so, nor can he suspend the proceedings in this respect.

Another feature of the adversary procedure is the active role of the judge. Once the parties have delineated the contours of the proceedings, the judge first of all plays an active role with respect to the orderly evolution of the proceedings. This means that the procedural rules should be respected and that a judgment should be rendered within a reasonable time. Secondly, in case parties do not succeed in producing sufficient evidence, the judge is obliged to order a complementary inquiry consisting of, for example, the submission of certain documents, witness testimony, an official visit to the scene of the facts, the personal appearance of the parties in the court, etc.

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[1] The government proposal partially copies the Dutch Collective Settlements Acts which makes the Amsterdam Court of Appeals exclusively competent to approve (homologate) collective settlements.

The government proposal also provides for a «class action training» for the Brussels judges.

[2] This is also in the best interests of defendants (see Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465, 1517–1518 (2004): *«specialized judges may develop expertise in distinguishing between frivolous and meritorious claims and therefore become more willing to sanction frivolous suits»*).

[3] To date, there were 75 GLO procedures in England and Wales. Since the introduction in 2005 of the Dutch Collective Settlements Acts, there were 6 procedures. In Sweden there were 11 class action procedures in between 2003 and 2007.

[4] See on judge mobility: Randall D. Lloyd, Leonard B. Weinberg & Elizabeth Francis, *An Exploration of State and Local Judge Mobility*, 22 *Just. Sys. J.* 19 (2001) and George R. Pring & Catherine K. Pring, *Specialized Environment Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 *Or. Rev. Int'l L.* 301, 328 (2009) who suggest creating traveling courts and traveling judges to realize access to environmental justice.

[5] See Piet Taelman & Stefaan Voet, *Belgium and Collective Redress: the Last of the European Mohicans*, in E. Dirix & Y.-H. Leleu (eds.), *The Belgian reports at the Congress of Washington of the International Academy of Comparative Law*, Brussels, Bruylant, 2011 (forthcoming), at 305. See also Gerald. J. Meijer, *Belgian Civil Procedure*, in H. Snijders (ed.), *Access to Civil Procedure Abroad*, Kluwer Law International, 1996, at 193–237; Jean Laenens & Georges Van Mellaert, *The Judicial System and Procedure*, in H. Bocken (ed.), *Introduction to Belgian Law*, Kluwer Law International, 2001, at 83–110 and Paul Lefebvre, *Belgium*, in S.R. Grubbs (ed.), *International Civil Procedure*, Kluwer Law International, 2003, at 75–96.

As his common-law counterpart, the civil-law judge is becoming more and more like a case manager. This evolution is positive, because *«the procedural treatment of a case should not be driven by the parties' strategies, but should be taken in hand and controlled by the court. It is the court that bears responsibility for the swift and efficient administration of justice, and therefore has to steer to case through the procedure (...). The term* [case management] *suggests a new understanding of the judge's role in civil litigation, his mission being not only to decide the case as the parties present it to him, but also to manage the caseload that confronts his court in a way that every procedure is dealt with in the most efficient manner. It is clear that this implies a significant increase in the judge's powers (...)»*[1].

Even more than in one-to-one litigation, class actions needs judges as (real) case managers, for the simple reason that they have a public role in protecting the interests of absent class members and defendants: *«judges involved in class action cases have a tremendous responsibility toward class members and the public in general. They are asked to adjudicate the rights of numerous plaintiffs; importantly, the rights of absent or unnamed ones, according to their presumed interests»*[2]. Especially in the US, where class actions are «lawyer driven», the judge plays a crucial and supervisory role in the relation between the class and the class attorney[3]. If the judge, acting as an active case manager, can safeguard the interests of class members and defendants, he can create public confidence in the (proper) use of class actions.

To be able to act as case manager in dealing with class actions, the judge needs a whole range of management tools. On the one hand, the (Belgian) tools that are used for one-to-one litigation can be utilized in managing class actions: the possibility to impose a binding procedural calendar, the possibility to undertake (*ex officio*) a complementary inquiry, the opportunity to have an interactive debate with the parties, the possibility of imposing a fine in case of misuse (or abuse) of procedure, etc. When class actions are to be introduced in Belgium, the utility of those management tools will have to be verified. Possibly, they will have to be adopted to be properly used in a class action context. On the other hand, the Belgian judge will need new (made-to-measure) tools, like his common-law counterpart: *«the Court has been vested with the power to order the discontinuance of a class proceeding, to substitute a representative plaintiff who is not adequately representing the interests of the class members, and to establish (...) a sub-group and appoint a person to be the sub-group representative party on behalf of the sub-group members. The Court needs to give its approval before a class action can be settled or discontinued (...). Further examples of the interventionist role with the Federal Court are expected to assume are provided by section (...), which allows* [additional notice] *(...). But perhaps the most important provision is section (...) which empowers the Federal Court to make «any order ...* [it] *thinks appropriate or necessary to ensure that justice is done in the proceedings»*[4]. These tools are vital for the class action judge to actively steer and manage the procedure.

[1] Benoît Allemeersch, *Civil Case Management: The Belgian Debate and Reforms*, in A.W. Jongbloed (ed.), *The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports*, Antwerp-Oxford-Portland, Intersentia, 2008, at 237.

[2] Catherine Piché, *Judging Fairness in Class Action Settlements*, *Windsor Yearbook of Access to Justice 2010*, at 111–112.

[3] See Samuel Issacharoff, *Class Action Conflicts*, 30 *U.C. Davis L. Rev.* 805 (1997) and Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 *Harv. L. Rev*. 747 (2002).

[4] Vince Morabito, I*deological Plaintiffs and Class Actions. An Australian Perspective*, 34 *U. Brit. Colum. L. Rev.* 459, 494–495 (2000–2001).

The three Belgian class action proposals don't pay enough attention to the utility of existing management tools. Basically, they all start from the (rather naïve) idea that the existing management tools (for one-to-one litigation) can simply be transposed in a class action context. This is not the case. Besides, the proposals overlook specific (class action) management tools. None of the proposals pays attention to the possibility of additional notice, imposing additional conditions on the class representative or class attorney, and allowing individual class members to be involved in the procedure. Only the government proposal contains a (poorly) sub classing provision. The possibility of ordering the discontinuance of the class action can only be found in the proposal of the Green parties.

5. Compatibility with US-style Class Actions

Belgium needs class actions, not to replace existing tools to deal with mass harms (or mass grievances), but to complete them. Therefore, Belgian class actions must be regarded (and approached) as additional legal protection tools. This will particularly emerge in the superiority inquiry. Contrary to his common-law (US) colleague, a Belgian (and European civil-law) judge will accept more easily the presence of other available methods for adjudicating the controversy[1]. In this respect, the importance of Belgian (but sometimes from origin, European) private, public, and administrative (extra) judicial legal protection tools must be underlined[2]. This not only concerns the aforementioned group actions, but also the role of complaint boards, criminal prosecution (and the possibility for Belgian civil parties to «piggyback» on the criminal prosecution), the regulatory role of governmental bodies and their enforcement tools (e.g. in the field of competition law), etc. Contrary to common-law countries (and especially the US), and particularly with respect to small claims, priority must be given to these alternatives. But if they are absent, or fail, class actions must come to the forefront. The three Belgian class action proposals seem to depart from the same assumption.

Belgian class actions will be shaped differently, because they will be embedded in a different (procedural) culture, with different rules on standing, funding and financing litigation, and court involvement. Contrary to US-style class actions, Belgian class actions must be initiated by an ideological plaintiff (i.e. an association, organization or governmental body), cannot be funded on a contingency (or success) fee basis, and must be dealt with by one competent court. Nevertheless, Belgian class actions will achieve the same objectives as US-style class actions and will also offer claims for injunctive and monetary relief.

[1] See Rule 23(b) Fed.R.Civ.P.

[2] See especially Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Oxford-Portland, Oregon, Hart Publishing, 2008, at 235 who suggests a ranking of the different options (first voluntary settlement; then regulatory oversight; and finally judicial supervision (including private enforcement tools as class actions)). See also Willem H. Van Boom & Marco Loos (eds.), *Collective Enforcement of Consumer Law. Securing Compliance in Europe through Private Group Action and Public Authority Intervention*, Groningen, Europa Law Publishing, 2007. Also in the US, some authors point out that there are public legal protection tools as valuable alternatives for class actions, especially in small claims cases (see Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 *Geo. J. Legal Ethics* 1419 (2005) and especially Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 *U. Chi. Legal F.* 71 (2003)). See also (in the context of mass torts) Richard A. Nagareda, *Mass Torts in A World of Settlement*, Chicago, The University of Chicago Press, 2007.

Jasminka Kalajdzic[1]

CANADIAN NATIONAL REPORT

1. Objectives

In the 1970s and «80s, second wave access to justice initiatives in North America were characterized by a move toward public law litigation, concerned with important public policy issues involving large groups of people[2]. The public interest law movement fuelled the idea of the «private Attorney General who could provide access to justice for previously silent voices and thereby ensure public policy decisions were made in the context of balanced advocacy»[3]. Class actions were one means of achieving private enforcement of public law: these private Attorneys General would vindicate rights where regulatory enforcement was lacking.

The idea of the private Attorney General working in the public interest very much underscored the Quebec Legislature's enactment of class action legislation in 1978[4]. The advent of class actions, part and parcel of a more general social democratic reformist agenda, was designed expressly to «re-establish a balance between the isolated citizen and companies» and between «consumers and producers of goods»[5]. The Ontario Law Reform Commission echoed these same sentiments in its 1982 *Report on Class Actions*[6]. The Report opened with a description of modern society as highly complex and interdependent, characterized by «mass manufacturing, mass promotion, and mass consumption»; the activities of major corporations, international conglomerates and big government can affect, and possibly injure, large numbers of people[7]. In the wake of such misconduct, «the individual is very often unable or unwilling to stand alone in meaningful opposition»[8]. Class actions, the Report concluded, serve an important access function: «By affording «an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing «judicial» system», they may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis»[9].

The idea that class actions could overcome the various barriers that preclude potential claimants from pursuing remedies, and thus serve an important social function, pervaded

[1] Professor of University of Windsor (Canada).

[2] Mauro Cappelletti and Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, in M. Cappelletti and B. Garth (eds.), *Access to Justice*, Sijthoff and Noordhoff, 1979, Vol. I, 1 at 36. See also Abram Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 *Harv. L. Rev.* 1041.

[3] B. Garth, I.H. Nagel, & S.J. Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation* (1988), 61 *S. Cal. L. Rev.* 353, at 360. See also W.B. Rubenstein, *On What A «Private Attorney General' Is – And Why It Matters* (2004), 57 *Vand. L. Rev.* 2129, who defines a private attorney general as «a placeholder for any person who mixes private and public features in the adjudicative arena» (at 2131).

[4] W.A. Bogart, *Questioning Litigation's Role: Courts and Class Actions in Canada* (1986–1987), 62 *Ind. L.J.* 665; Catherine Piche, *The Cultural Analysis of Class Action Law* (2009), 102:2 *J. Civil Law Studies* 101, at 118.

[5] Shaun Finn, *In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission* (2005), 2(2) *Can. Class Action Rev.* 333, at 352–353.

[6] Ontario Law Reform Commission, *Report on Class Actions* (Ontario: 1982).

[7] Ibid., at 3.

[8] Ibidem.

[9] Ibid., at 130 [cit.om.].

the Report. Access to justice, along with judicial economy and behaviour modification, were the principal justifications animating the Report's ultimate conclusion that class proceedings legislation should be enacted. The Commission was of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights[1].

Several years later, Attorney General of Ontario Ian Scott, who oversaw the drafting of English Canada's first class action statute, expressed equally strong views about the capacity for class actions to enhance access to justice in a broader sense:

There is no doubt that this measure filled an important public need to address the myriad of relatively small claims that were going unremedied in the courts because the cost to each claimant wasn't worth the candle to litigate. In large part, the availability of class proceedings is an access-to-justice issue. But there is more to the innovation than that. Representative plaintiffs, empowered to litigate on behalf of a class, serve in effect as some sort of private attorneys general to attack what they consider to be shoddy workmanship, environmental banditry or corporate skullduggery. Through class actions, the government found a cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-restrained government ministries[2].

Scott's vision suggests that class actions serve a regulatory enforcement function not as a by-product of its compensatory function, but rather as its very purpose in a particular institutional arrangement.

The paradigm of the class action performing a social or regulatory function has been expressed only rarely in the last decade of intense class action growth[3]. Far more common is the three-part justification for class actions first articulated by McLachlin C.J. in *Western Canadian Shopping Centres* v. *Dutton*:

[B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied[4].

The extent to which these three objectives are realized is only recently the topic of academic inquiry, and few empirical studies are available to help evaluate class action outcomes[5].

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[1] Ontario Law Reform Commission, *Report on Class Actions*, at 139.

[2] I. Scott and N. McCormick, *To Make a Difference: A Memoir*, Stoddart, 2001, at 182, as cited in Hon. I. Binnie, *Mr. Attorney Ian Scott and the ghost of Sir Oliver Mowat* (Spring 2004), 22 *Advocates' Soc. J.* No. 4, 4.

[3] The Supreme Court of Canada referred to class actions as having a «social dimension» in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at para. 106. In *Alfresh Beverages Canada Corp. v Hoescht AG* (2002), 16 C.P.C. (5th) 301, the Ontario Superior Court stated at para. 16 that «the private class action litigation bar functions as a regulator in the public interest for public policy objectives.» Such explicit acknowledgments of the class action's broader public policy function, however, are more the exception than the rule.

[4] *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 [«*Dutton*»] at para. 28 [cit.om.].

[5] Jasminka Kalajdzic, *Introduction – Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 53 *S.C.L.R.* (2d) (forthcoming), at 2–3.

2. Representation

Ontario's *Class Proceedings Act* («CPA»)[1] and other provincial statutes require as a condition of certification that there be a representative plaintiff who is able to «fairly and adequately represent the interests of the class»[2]. The three usual factors considered when determining adequate representation are: the plaintiff's motivation to prosecute the claim; her ability to bear the costs of the litigation; and the competence of her counsel[3]. Any legal person with a direct cause of action may act as representative plaintiff. The majority of representative plaintiffs are individuals, though some jurisdictions impose limitations on corporations and other artificial entities[4]. In Quebec, consumer organizations have acted as the named plaintiff in many class proceedings, while in the rest of Canada such representation is rare or non-existent.

Although statistically significant data is not available, a small-scale survey conducted by the author in 2009 reveals that the majority of representative plaintiffs are recruited by plaintiffs' class action lawyers[5]. The ethical implications of client-recruitment are of a matter of debate; practitioners in the plaintiff bar have stated that the practice is both inevitable and desirable given the access to justice objective of class actions, while academics and some judges have expressed concern about the degree to which a recruited plaintiff will exercise effective oversight of her counsel or the litigation[6]. Whether recruited or self-identified, the representative plaintiff must be approved by the judge conducting the certification motion. Once appointed, the representative plaintiff is the client of class counsel with the power to instruct, hire and fire counsel, and the duty to act in the best interests of the class[7].

How active a role is played by the representative plaintiff is also empirically unknown but surely varies depending on the nature of the case. Judges interviewed by the author in 2010 and 2011 generally agree that some plaintiffs actively monitor their counsel and are regularly consulted throughout the action, while other representative plaintiffs are mere placeholders[8]. The CPA and other provincial statutes require that there be a representative

[1] *Class Proceedings Act, 1992*, R.O. 1992, c.6 [«CPA»].

[2] CPA, s. 5(1)(e)(i).

[3] *Dutton*, at para. 41.

[4] Quebec Arts. 999, 1048 C.C.P. Article 1048 provides a legal person established for a private interest, partnership or association may apply for the status of representative if:

(a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and

(b) the interest of that member is linked to the objects for which the legal person or association has been constituted.

[5] The survey data reflects the class action activity of approximately 77 class action lawyers, working in 13 firms, who reported between them a total of 332 class actions as at January 1, 2009. None of the four firms with the largest portfolio of class actions (over 40 cases each) attributed more than 25% of their cases as having been initiated by a client who sought legal advice from the firm. Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario, LL.M. Thesis*, University of Toronto, 2009 [unpublished]. The data will also be published in a forthcoming book by the author (UBC Press).

[6] Jasminka Kalajdzic, *Self-Interest, Public Interest and the Interests of the Absent Client: Legal Ethics and Class Action Praxis* (2011), *Osgoode Hall L.J.* (forthcoming) [hereafter *Legal Ethics and Class Action Praxis*]; Catherine Piche, *The Class Action Settlement Actors: Who protects whom?* (2011), 53 SCLR (2d) (forthcoming).

[7] *Fantl v. Transamerica Life Canada*, 2009 ONCA 377.

[8] Kalajdzic, *Legal Ethics and Class Action Praxis*.

plaintiff who is able to «fairly and adequately represent the interests of the class»[1]. The three usual factors considered when determining adequate representation are: the plaintiff's motivation to prosecute the claim; her ability to bear the costs of the litigation; and the competence of her counsel[2]. How a plaintiff's motivation is to be determined and what level of engagement is necessary to be an adequate representative plaintiff remains unresolved in the case law. At a minimum, a plaintiff must have «an interest the same as others in the class» and not be impecunious[3]. In both B.C. and Ontario, courts have held that recruitment of a representative plaintiff for an action that was the product of the lawyers' research strongly evidenced a lack of necessary interest, independence and incentive on the part of the plaintiff to fulfill her duties to the class[4]. In other cases, however, plaintiff recruitment and limited contact with counsel have not disqualified potential representative plaintiffs[5].

3. Funding and Financing

The vast majority of class actions are financed by class counsel, with a small but growing number financed by third party commercial funders. In all cases, counsel enters into a contingency fee agreement with the representative plaintiff pursuant to which class counsel agrees to be reimbursed for disbursements and paid for her legal services when and if the action settles or succeeds at trial. Generally, contingency fees fall within a range of 20–35% (when drafted on a percentage fee basis) or 2–4 times multiplier (when calculated as a lodestar or multiple of the base fee)[6]. The agreement must be approved by the court as fair and reasonable, and thereafter binds all members of the class. Judges vary as to the degree of deference they accord the contingency fee agreement, with some judges giving great weight to the terms of the contract signed by the representative plaintiff[7]. In other cases, however, judges place little weight on the fee agreements[8] – which entitle class counsel to the amounts requested – on the basis that in class actions there is an «absence of a client who will be directly affected and concerned with the level of fees claimed»[9].

In Ontario, contingency fees were permitted in class proceedings some years before they were universally approved by regulators for all other civil litigation retainers (with the exception of family law matters). There is no serious debate about the necessity of contin-

[1] CPA, s. 5(1)(e)(i).

[2] *Dutton*, at para. 41.

[3] *Smith v. Canadian Tire Acceptance Ltd.,* 1995 CanLII 7163 (ON S.C.) at para. 71.

[4] *Chartrand v. General Motors Corp*., 2008 BCSC 1781; *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42 (CanLII); *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264 (Ont.S.C.J.) [plaintiff described as a «pawn» by counsel who recruited him and ultimately found not to be an adequate representative plaintiff].

[5] *Fantl v. Transamerica Life Canada*, 2008 CanLII 17304 (ON S.C.).

[6] Benjamin Alarie, *Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions* (2007), 4:1 *Canadian Class Action Review* 15.

[7] See, e.g., *Cassano v. Toronto Dominion Bank* (2009), 98 *OR* (3d) 543 at para 63 (Sup Ct) («there was nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted»). See also *799376 Ontario Inc (Cob Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group* (2008), 173 ACWS (3d) 695 at paras 6 (Ont Sup Ct) [*Cascades*] (where Leitch J was «prepared to approve this fee request because it is consistent with the retainer agreement entered into with the representative plaintiff»).

[8] *Martin v. Barrett* (2008), 168 ACWS (3d) 643 at para 48 (Ont Sup Ct).

[9] Ibid., at para 52.

gency fees for the effective functioning of a class action regime. Such fees are intended to reward risk and success, and thereby provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. Judges have explicitly recognized that class actions are entrepreneurial, but with the caveat that «the entrepreneurial lawyer is a means to an end, not an end in and of itself»[1]. There is a general sentiment that counsel fees in Canada are not as generous as those awarded to counsel in the United States, although this has not been empirically verified.

In Quebec and Ontario, government-established class action funds are available to class counsel whose applications are accepted (based on a number of factors, including the likelihood of success and the public interest value of the case). In the case of Ontario, funding is for disbursements only; in the case of Québec, there may be funding for both disbursements and legal fees. The funding granted is often very modest, but in addition to the financial support, representative plaintiffs are indemnified by the fund against adverse costs orders[2]. In exchange, the fund collects a percentage of any judgment or settlement obtained in the class action[3]. The indemnity is an important feature of the financing of class actions in those Canadian jurisdictions where a two-way cost rule applies; without an indemnity, few if any representative plaintiffs would agree to act given that success in the action results in nominal compensation while defeat results in a significant exposure to costs. In those cases where an indemnity is not obtained from the government fund, class counsel will usually provide one.

Recently, third party financing arrangements have been approved under which the financier indemnifies the plaintiff in return for a levy on settlement or judgment proceeds of less than 10%[4]. If, as some predict, the commercial funding industry swells, there will likely be a comparable growth in the number of actions launched and a need for greater regulatory or judicial oversight of these commercial funding arrangements[5].

4. Available Relief

Monetary relief, specifically compensatory damages for pecuniary losses, is the predominant form of relief sought and obtained in class proceedings. Although declarations and injunctions are available to plaintiffs, courts have been hesitant to certify class proceedings

[1] *Fantl v. Transamerica Life Canada*, at para. 66 (per Winkler CJC).

[2] *Law Society Act*, R.S.O. 1990, c. L.8, as am. by *Law Society Amendment Act (Class Proceedings Funding)*, 1992, S.O. 1992, c. 7, s. 3. In Québec, if a cost award is made against the representative plaintiff and he or she is unable to pay, the defendant may then apply to the Québec Fund for payment. The Fund then becomes subrogated to the defendant's rights as against the unsuccessful representative: see *An Act Respecting the Class Action*, R.S.Q. c. R-21, s. 31

[3] In Ontario, the percentage recovery is 10 percent on top of the amount of funding previously paid by the Ontario Fund to the representative plaintiff: Class Proceedings, O. Reg. 771/92, s. 10(3)(b). In Québec, the amount collected by its Fund varies depending on the method of recovery by the class, and applies in every class action, not just those in which funding has been granted. See Regulation Respecting the Percentage Withheld by the Fonds d'aide aux recours collectifs, R.R.Q. c. R-21, r. 3.1.

[4] See *Metzler Investment GMBH v. Gildan Activewear Inc* (2009), 179 ACWS (3d) 765 (Ont Sup Ct); *MacQueen v. Sydney Steel Corp* (19 October 2010), Halifax 2004-Hfx No 218010 (NS SC); *Dugal v. Manulife Corporation* (2011), 105 OR (3d) 364 (Sup Ct).

[5] Sandra Rubin, *Enter the Silent Partner*, *Lexpert Magazine* (July/August 2011) 56–61; Luis Millan, *Why Class Actions Create Ethical Minefields*, *The Lawyers Weekly* (19 August 2011), pp. 4, 7.

for declarations of constitutional invalidity and of other legal rights, which can typically be more efficiently and cost-effectively resolved through a test case or an individual action for declaratory or injunctive relief and would achieve the same result as a class action or application[1]. For this reason, class actions against the government seeking declaratory relief and damages for breaches of aboriginal rights have been difficult to certify[2].

With regard to monetary relief, class action statutes contain detailed provisions facilitating the assessment and proof of damages:

- the assessment of aggregate awards, including sampling evidence, in appropriate circumstances and including shares of such awards to members of the class on an average or proportional application[3].
- participation of individual members of the class for determination of issues particular to them[4]; and
- distribution of judgments, including by a form of cy près[5].

Given that, to date, less than twenty class actions have gone to trial in Canada, the provisions regarding aggregate assessment of damages and statistical evidence have been infrequently used. Judges have relied on these provisions, however, to conclude that certain cases are amenable to certification[6].

In the past decade, many class actions have settled on the basis that a significant part or the entirety of the settlement proceeds be distributed cy près[7]. Such awards are usually justified on the basis that the cost of locating and directly compensating class members is prohibitive, if not in excess of the amounts to be distributed. These settlement schemes have not been without controversy. Commentators have observed that there is rarely a nexus between the class and the cy près recipient[8]. Many cy près awards have been permitted in cases where it is possible to identify class members, albeit by way of a robust notice program, and where the costs of distribution did not outweigh the amounts being compensated[9]. Commentators have argued that where the necessity of a fixed cy près is established, the proceeds should be directed to charities or non-profit organizations whose works will

[1] *Roach v. Canada (Attorney General),* [2009] OJ No. 737 (S.C.J.) [unsuccessful certification motion in action seeking declaration of constitutional invalidity].

[2] See, e.g., *Davis v. Canada (Attorney General)*, [2007] N.J. No. 42 (S.C. (T.D.).

[3] See, e.g., Ontario CPA, ss. 23, 24.

[4] Ibid., s. 25.

[5] Ibid., s. 26.

[6] See e.g. *Cassano v. TD Bank* (2007), 87 O.R. (3rd) 401 (C.A.) [Court of Appeal relied on section 24 of the CPA to find that establishing the extent of the bank's liability did not require making individual inquiries of cardholders; rather, the aggregate of the bank's liability could be determined by looking at its records of the amount of fee income collected over the class period]; and *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) [statistical sampling can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims].

[7] In my 2010 study of cy près awards, I estimated that 35 class actions involving fixed cy près awards had settled in the previous ten years: Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions* (2011), 50 Can. Bus. L.J. 356, at 371.

[8] Jeff Berryman, *Class Actions and the Exercise of Cy-Pres Doctrine: Time for Improved Scrutiny*, in J. Berryman & R. Bigwood, *The Law of Remedies: New Directions in the Common Law,* Toronto, Irwin Law, 2009, ch. 22; Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Pres Distributions and Class Actions* (2011), 53 *S.C.L.R.* (2d) [forthcoming] [«Nudge, Nudge»]; Jasminka Kalajdzic, *Access to a Just Result: Revisiting Settlement Standards and Cy Pres Distributions* (2010), 6:1 *Can. Class Action Review* 217, at 246–247.

[9] The OLRC adopted the same approach, stating that «all feasible efforts» must be made to compensate class members directly before making any *cy près* distribution*: OLRC Report*, at 581.

indirectly benefit the class, in conformity with the spirit and the letter of class proceedings legislation[1]. Unless a more principled approach to cy près is developed by the courts, such settlements will fail to fulfill both the access to justice and behavioural modification objectives of class actions[2].

5. Court Involvement

Like the U.S. Federal Rules, Canadian class action statutes mandate extensive court oversight of class actions, both in terms of case management and mandatory court approval at various stages of the litigation. In order for a lawsuit to proceed as a representative action, the plaintiff must succeed at the certification motion. A judge must also approve the settlement of the action, the form of notice to be disseminated to the class, and the counsel fee. These are not token, rubber-stamping exercises; under the CPA and other provincial statutes, the courts are entrusted with a critical supervisory role to ensure that the interests of absent class members are protected.

Nowhere is this supervisory function more important – and more challenging – than in the context of settlement. Judges readily acknowledge that there is an adversarial void at the settlement approval hearing, created by a negotiated settlement between plaintiffs and defendants who each have a vested interest in having their deal approved[3]. Faced with such a void, how is the judge able to fulfill her statutory obligation of ensuring that the settlement is «fair, reasonable and in the best interests of the class»[4]?

Until recently, American and Canadian judicial culture differed regarding the participation of non-parties at fairness hearings. In the US, the Federal Judicial Center's Handbook for judges entitled «Managing Class Action Litigation» advises judges to allow non-profit entities, government bodies, and state attorneys-general to actively participate in fairness hearings to provide assistance to the court[5]. In contrast, the Ontario Court of Appeal long held a restrictive view of the propriety of objectors who are not class members[6]. In a recent decision by the same appellate court, however, the participation of a court-appointed monitor, *amicus curiae* or guardian *ad litem* was welcome in principle, to assist the judge in scrutinizing the proposed settlement or counsel fee[7]. Whether such third party assistance becomes commonplace in Canadian class action settlements remains to be seen.

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[1] Section 26(4) of the CPA states that courts can direct the payment of aggregate amounts in any manner that «may reasonably be expected to benefit the class members»; Kalajdzic, *Access to a Just Result: Revisiting Settlement Standards and Cy Pres Distributions*.

[2] Berryman, *Nudge, Nudge*.

[3] *Smith v. National Money Mart*, 2010 ONSC 1334 at para. 27 [«It is also well known that the court finds itself in a difficult position in carrying out its responsibilities of determining whether a settlement and class counsel's fee should be approved or rejected»].

[4] *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9.

[5] Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges,* Washington DC, Federal Judicial Center, 2009, at 15.

[6] *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No. 372.

[7] *Smith v. National Money Mart*, 2011 ONCA 233. Since this decision was released, an *amicus* or guardian has not been appointed in any reported class action; it is difficult to predict how frequently such court-appointed assistance will be used.

Compatibility with US-style Class Actions

Canadian class actions are very much like US class actions, both in terms of the governing legislation and its praxis. It is generally believed, however, that some of the excesses of American litigation have been avoided in Canada. For example, both counsel fees and settlement awards have not been as «excessive» in Canada as has been reported in the United States. In part, this might be attributed to the unavailability of treble damages, infrequent use of juries in civil actions, and a more conservative bench, all of which impact the evaluation of each party's litigation risks.

Rachael Mulheron[1]

ENGLISH NATIONAL REPORT

1. Objectives

There are six key objectives of group litigation in England and Wales: proportionality; predictability; access to justice; judicial and wider economy; (to a lesser extent) deterrence; and fairness. Dealing with each of these in turn:

a) Proportionality

All provisions within the Civil Procedure Rules (CPR), including those that pertain to collective actions, are subject to the «overriding objective of dealing with cases justly»[2]. For present purposes, key elements of the overriding objective consist of «saving expense' and «allotting to [the case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases»[3].

This provision is oft-referred to in the collective actions context by English judges. For example, in *Emerald Supplies Ltd v British Airways plc*[4], Chancellor Morritt expressly held that the CPR's overriding objective of dealing with the price-fixed victims' litigation against the airlines justly would be best served by their having recourse to the opt-in Group Litigation Order regime rather than the representative action being sought in that case. More recently, in *Millharbour Management Ltd v Weston Homes Ltd.*[5], Akenhead J reiterated (in allowing a representative action) that «[t]he overriding objective must always play an important part in the exercise of the discretion. Thus the saving of cost and time to the parties, and indeed to the court, must be factors in appropriate cases to take into account».

The need to consider the effect of the CPR's overriding objective has also been referred to in the context of the Group Litigation Order[6].

[1] Professor of Queen Mary University of London (Great Britain).
[2] (CPR 1.1(1)).
[3] (CPR 1.1(2)(b)) (CPR 1.1(2)(e)).
[4] [2009] EWHC 741 (Ch), at para 38; aff'd [2010] EWCA Civ 1284.
[5] [2011] EWHC 661 (TCC) at para 22(6).
[6] E.g., *Taylor v. Nugent Care Society* [2004] EWCA Civ 51, para 22.

b) Predictability

One undesirable aspect of the notorious English bank charges litigation – in which over 53,000 claims were filed in the English County Courts between March 2006 and August 2007 – was the potential for unpredictability. There was inconsistency in the various litigation strategies which were developed to cope with the volume – from applications for stays, to the filing of holding defenses, to summary judgment applications. There was also uncertainty as to what could happen when some claimants, whose small individual actions were satisfied by the bank, sought to keep their actions on foot at all costs (by amending their pleadings to claim aggravated damages and the like) in order to «act as standard bearers for other customers» (as the court put it in *Brennan v National Westminster Bank plc*[1], in disallowing the amendments sought). There was also the ever-present risk of inconsistent judgments arising, mainly because English County Court judgments in these cases[2] were not binding upon other County Courts or upon the High Court. In the face of all this unpredictability and litigious «mess», a test case was filed[3], which was appealed to the Supreme Court, with the banks ultimately prevailing on the merits[4]. Unfortunately, given the nature of a test case, there were certain questions that the judgment did *not* answer and which left important decisions to the OFT, and the test case did not «cleanly» end the litigation which was already on foot.

The unpredictability and uncertainties surrounding this litigation appeared to be one of the political motivations for the proposed reform of collective actions via means of the introduction of a new collective action in the Financial Services Bill 2010[5]. This regime, intended to apply to financial services claims, contained an opt-in or opt-out class action (depending upon judicial choice). That proposed regime was ultimately «washed-up» just prior to the General Election in May 2010, and the supporting rules which were drafted for the CPR[6] have not been promulgated at the time of writing.

By way of further example of some unpredictability in English collective redress, the Group Litigation Order (GLO) demonstrates that two approaches, test cases **and** generic issues, both continue to be used, depending upon the circumstances. The options render the GLO regime rather more unpredictable than an opt-out collective action, which proceeds according to the procedure laid down in the relevant statute. For example, the test case approach was used in *Pirelli Cable Holding NV v. Revenue and Customs Commrs.*[7] while the generic issues approach was used in *Esso Petroleum Co Ltd v. Addison*[8]. In yet another approach, the device of trying a series of six preliminary issues, based upon a set of assumptions, was used in *Multiple Claimants v. Sanifo-Synthelabo Ltd.*[9]

c) Access to Justice

In 1996, Lord Woolf referred to access to justice as one of the three key principles which should underpin any new regime of collective redress for England and Wales. His Lordship

[1] [2007] EWHC 2759 (QB), para 42.
[2] *E.g.*, *Berwick v. Lloyds TSB Bank plc* (Birmingham CC, 15 May 2007).
[3] *OFT v. Abbey National plc* [2008] EWHC 875 (Comm).
[4] *OFT v. Abbey National plc* [2009] UKSC 6.
[5] Cll 18–25.
[6] As proposed CPR 19.IV.
[7] [2007] EWHC 583 (Ch).
[8] [2003] EWHC 1730 (Comm).
[9] [2007] EWHC 1860 (QB) (re the use of the anti-epileptic drug Epilim by pregnant women).

noted that any new procedure should «provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable»[1].

The continuing importance of this principle to English group litigation is best illustrated, perhaps, by the comments made by the Civil Justice Council of England and Wales (CJC), when summarizing the state of collective redress in England and Wales in 2008, and when suggesting the principles which should underpin the introduction of an opt-in/opt-out collective action:

A civil justice system:

1. should be just in the results it and they deliver;

2. should be fair and be seen to be fair;

3. should ensure litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;

4. should ensure that every litigant has an adequate opportunity to state his or her own case and answer their opponent's;

5. should treat like cases alike (and conversely treat different cases differently);

6. should deal with cases efficiently and economically, in a way which is comprehensible to those using the civil justice system and which provides litigants with as much certainty as the litigation permits; and do so within a system best organised to realise these principles;

It is these principles, which reflect Lord Woolf's commitment to procedural justice now being as important as substantive justice, which guide the Civil Justice Council in making its recommendations [for collective redress reform].

(CJC, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (Dec 2008), pp. 12–13.)

This principle has been ratified judicially too, e.g., in *Afrika v. Cape plc*[2] where Longmore LJ remarked that:

[m]ulti-party actions are a comparatively novel feature of English litigation and the courts have attempted over recent years to fashion new types of order to enable viable actions to be brought in situations where a single individual would find it prohibitively expensive to bring proceedings on his or her own. ... These actions are difficult, as well as expensive, to run and impose great burdens on the practitioners who conduct them and judges who try them. They can, however, be a service to many who suffer severe injuries and it is the policy of the courts to facilitate such actions in appropriate cases and adapt traditional procedures accordingly.

d) Judicial, and wider, economy

In his review of English civil procedure in 1996, Lord Woolf identified this principle too as being important, when he stated that any new procedure should «provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure»[3].

[1] *Access to Justice: Final Report* (1996), ch. 17, para 2.

[2] [2001] EWCA Civ 2017, para 1.

[3] *Access to Justice: Final Report*, ch. 17, para 2.

As noted above, the need for efficient and economical use of court resources is explicitly part of the CPR's overriding objective. A recent judicial reference to the importance of this objective occurred in the representative action in *Emerald Supplies Ltd v British Airways plc*[1], where it was said that whether there was the requisite «same interest» in that litigation «is determined with a view to promoting the litigation objectives of justice, economy, efficiency and expedition» (at para 4). Ultimately, the representative action there was held to be procedurally incompetent.

However, it is also worth reiterating that, insofar as reform of English collective redress is concerned, economy and efficiency are relevant in a much **wider** context too. The Civil Justice Council had some of these broader aims in mind, when it made the following «key findings» #5 and #6 in its December 2008 report, *Improving Access to Justice through Collective Actions*:

«Effective collective actions promote competition and market efficiency, consistent with the Government's economic principles and objectives, benefiting individual citizens, businesses and society as a whole. Equally they are effective mechanisms through which individual rights can be upheld.

Collective claims can benefit defendants in resolving disputes more economically and efficiently, with greater conclusive certainty than can arise through unitary claims».

These wider principles were taken into consideration by the CJC, in proposing a new generic collective action for England and Wales in 2008, which recommendation was adopted for the sectoral reform proposed in the Financial Services Bill 2010.

e) Deterrence

The principal aim of an effective collective actions regime in English law is to achieve *compensation* for adversely-affected class members. However, it is acknowledged that an improved procedural landscape for the achievement of compensatory awards would have a consequence, or effect, of *deterring* culpable conduct. The CJC had noted that deterrence is an important ancillary consequence of effective private enforcement (*Improved Access to Justice through Collective Actions*, pp. 78–79, footnotes omitted):

«Effective [private] enforcement would involve compensatory damage awards, which were appropriate according to established substantive law principles disgorgement of profits. It is as a consequence of its primarily compensatory function that effective private enforcement arises, through which it provides a real deterrent effect that such actions are said to have on unlawful conduct. In this context both the OFT and the European Commission have publicly stated that they see private actions by victims in competition law as a necessary complement to their own public enforcement efforts».

The-then Chancellor of the Exchequer, the Rt Hon Gordon Brown MP, in Her Majesty's Treasury Budget 2007, also demonstrated a political intention that, at least in the competition law sector, deterrence via means of improved collective redress was a meritorious objective:

Private actions are an important aspect of a well-functioning competition regime. An effective regime would allow those affected by anti-competitive behaviour to receive redress for harm suffered and broaden the scope of cases that can be investigated, promoting a greater awareness of competition law and reinforcing deterrence, without encouraging ill-founded litigation[2].

[1] [2010] EWCA Civ 1284.

[2] per HC Hansard 342, para 3.45, emphasis added (and cited in the CJC's December 2008 report at p 58).

f) Fairness

In his review of civil procedure in England, Lord Woolf also emphasised that fairness and balance between litigants was essential, such that collective redress should «achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner»[1].

This philosophy was translated in 1998 as part of the overriding objective of the CPR, which expressly requires that, when dealing with cases justly, that should include, «as far as is practicable», both «ensuring that the parties are on an equal footing' (CPR 1.1(2) (a)) and «ensuring that [the case] is dealt with expeditiously and fairly» (CPR 1.1(2) (d)). As stated previously, the CPR applies to **all** litigation, including collective redress litigation, conducted in England and Wales.

The Civil Justice Council emphasised, in its December 2008 report, that fairness «remains a valid benchmark» when considering any collective actions reform and design for the jurisdiction[2].

2. Representation

a) The kind of representative for a group

The kind of persons or organisations which are, or which may be considered, eligible in group litigation in England and Wales, has been defined by three legal dilemmas: whether to allow an «ideological claimant» to act as representative claimant at all: under the generic English collective action regimes, ideological claimants cannot be used – a litigant with a direct cause of action, and not some entity assuming conduct of the class members» actions in a representative capacity, must commence and conduct the proceedings. Under the GLO regime, Practice Direction 19B, para 3.1, an application for a GLO «may be made either by a claimant or by a defendant», and any test claimant obviously must comply with that requirement. Under the representative action, some sort of «nominal» representative seemed to be countenanced in the early case of *Duke of Bedford v. Ellis* [1901] AC 1 (HL) 7, but since then, trade associations, for example, have not had any success in attempting to sue on behalf of their members under the representative action, e.g., *Consorzio del Prosciutto de Parma v. Marks & Spencer plc* [1990] FSR 530 (Ch), aff'd [1991] RPC 351 (CA); *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd* [1998] RPC 117 (Ch), aff'd [1999] RPC 826 (CA).

Contrary to this practice, in the more recently-enacted sectoral representative action for follow-on actions in the competition law sector – in s 47B of the Competition Law 1998 – an ideological claimant *was* specified (i.e., the English Consumers' Association, Which?).

Moreover, in the reforms contemplated for the Financial Services Bill 2010's collective actions regime, the use of an ideological claimant was also countenanced (proposed CPR 19.21(3)). whether only pre-designated organisations, or any that satisfy specified criteria, can act as representative: where an ideological claimant is proposed, a debate has arisen from time to time among English law-reformers and law-makers as to whether only pre-designated entities should fulfill the capacity of representative claimant (pre-designated via some form of statutory instrument), or whether *any* ideological claimant which meets the «adequacy» criterion should be permitted to so act.

[1] *Access to Justice: Final report*, ch.17, para 2.

[2] *Improving Access to Justice through Collective Actions*, p. 51.

In the s 47B regime referred to above, the former option was selected (and no entity, other than Which?, has yet been statutorily authorised to act in that capacity). On the other hand, the approach adopted by English law reformers under the proposed class actions reforms in the Financial Services Bill 2010 was the opposite – that any suitable entity which met the adequacy requirements as an «appropriate person» could be utilised as a representative claimant under that regime (proposed CPR 19.21) should an ideological claimant be the sole option, or an addition to an actual class member, as representative claimant: under the s 47B competition law regime, a directly-affected price-fixed victim **cannot** bring a follow-on action under that regime. Contrast the regime proposed for the Financial Services Bill 2010, where that regime proposed that either an ideological claimant **or** a directly-affected class member could bring the financial services claim, if an «appropriate person».

b) Selection/authorization/role

Representative claimants under the various collective redress regimes operating in England have different certification criteria to negotiate.

Under the representative action, the representative has to prove that he/she/it had the «same interest» with the rest of the class members. This is a short phrase which carries with it considerable judicial «baggage», some of which was evident in the procedurally-incompetent action in *Emerald Supplies Ltd v. British Airways plc*[1].

Under the Group Litigation Order, the court may adopt a test case approach, whereby the management court may «provid[e] for one or more claims on the group register to proceed as test claims» (CPR 19.13(b)). The Group Litigation Order is not a representative action *per se*, and hence, it would not be correct to view the test claimant in precisely that role. However, any test case may set up a valuable precedential effect for other claimants whose claims are entered on the group register.

Similarly, under the proposed reforms in the Financial Services Bill 2010, that regime provided for a number of «adequacy» criteria (proposed CPR 19.21(2), (4)). In addition, it was proposed that the representative claimant would have to satisfy the court that he/she/it would be able to pay the defendant's recoverable costs if ordered to do so (proposed CPR 19.21(2) (b) (iv)) – thereby indicating the emphasis placed by the rules-drafters upon the capacity of the representative claimant both to fund the collective action and to cover the relevant costs exposure of any winning defendant.

3. Funding and Financing

Cost-shifting applies in English civil procedure, and as a result, the representative claimant must be able to fund the class's side of the litigation (including any security for costs which may be ordered), **and** any adverse costs, should the representative claimant lose.

a) Funding mechanisms

A variety of funding mechanisms have been used, to date, in English collective actions:

(a) a claimant law firm may fund the litigation under a conditional fee agreement, which will permit the law firm to recover a modest maximum multiplier of 2 (i.e., a 100% uplift)

[1] [2009] EWHC 741 (Ch), aff'd [2010] EWCA Civ 1284.

in the event of success in the collective action. However, a law firm may not fund the collective action on a contingency basis, at least at present;

(b) a third party funder may undertake to fund the collective action, and to indemnify the funded client against any adverse costs awards – third party funding was used, for example, in the *Emerald* litigation. The circumstances under which third party funders may fund litigation of any type is currently under review, in that a voluntary Code of Conduct is being drafted at the time of writing (the author is a member of that Working Group);

(c) an ATE (after-the-event) insurer may underwrite a policy to cover adverse costs, at the request of the representative claimant, in the event that the representative claimant loses a collective action. ATE insurance is commonly used as part of a funding package for collective actions, as a means of laying off the risk of adverse costs (often for a sizable premium, which may itself be deferred);

(d) a grouping of BTE (before-the-event) insurance policies may be used, in theory, by joining up the cover offered under separate policies held by class members;

(e) the class members themselves may contribute towards a «common fund» to both fund the class's costs and to protect the representative claimant against an adverse costs award – this approach has some precedent under English opt-in group litigation to date. Note, e.g., the arrangements to this effect in the *Equitable Life Group Litigation*, and in the *Railtrack Private Shareholders Action Group Litigation*;

(f) the Legal Services Commission (LSC) has been active in funding English collective actions by means of legal aid. If legal-aid funding is provided by the LSC, then the funded litigant will be indemnified against any adverse costs award. Although the LSC has funded a large amount of major and medium group actions over the past decade or so, in monetary terms, consumer-type claims have not largely featured as funded group actions (apart from pharmaceutical/medical claims, one of which was the Benzodiazepine funding disaster, which cost the LSC approximately £ 30–40 million).

Other funding mechanisms – e.g., a Supplementary Legal Aid Scheme, or via an Access to Justice Fund set up under statute[1] – are possibilities which have also been considered to date.

b) Other points

The costs landscape in England and Wales is currently undergoing considerable review and change, in light of the Jackson Costs Enquiry. That enquiry included, within its remit, a consideration of costs and funding for collective redress, both presently-available and proposed[2].

Although contingency fees are not presently permitted in England for «contentious business», this may be about to change. The CJC has recommended, in the past, that, for collective redress, regulated contingency fees should be available «where no other form of funding is available ... to provide access to justice»[3]. The prohibition on contingency fees is presently under review, in that (at the time of writing) a proposal for «damages-based agreements» is contained in Part II of the Legal Aid, Sentencing and Punishment of Offenders Bill (Session 2010–11), and is under Parliamentary scrutiny.

[1] *Viz* s 194 of the Legal Services Act 1997.

[2] See Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (Dec 2009), ch. 33.

[3] CJC, *Improved Access to Justice: Funding Options and Proportionate Costs: The Future Funding of Litigation: Alternative Funding Structures* (2007), p. 68.

The funding landscape is inevitably complicated in England by claimants seeking to ameliorate the effects of costs-shifting in collective actions, by means of costs-capping orders, as discussed in, e.g., *AB v. Leeds Teaching Hospitals NHS Trust*[1]. Due to the dangers of the costs of group litigation spiraling out of control, the CJC has recommended that there should be a rebuttable presumption for costs-capping in group litigation[2]. The practice of costs-capping is likely to continue, when any new collective action is implemented in England and Wales.

4. Available Relief

a) Certain restrictions and difficulties apparent under presently-existing regimes

A combination of opt-in group litigation, plus no provision for aggregate assessment of damages there under, inevitably limits the amount of compensation which is obtainable by representative claimants under either the Group Litigation Order or the competition law sectoral regime contained in s 47B of the Competition Act 1998.

For example, in the sole piece of litigation which has been pursued under s 47B to date – *The Consumers Association v. JJB Sports plc*[3] – the remedies available for Which? to seek were complicated by a number of circumstances. As an opt-in regime, there was a complete absence of any availability of aggregate class-wide assessment of damages or any *cy-près* order for damages distribution. Moreover, the decision in *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France)*[4] – that restitutionary damages and an account of profits were not available in competition infringement cases, nor could punitive damages be claimed where the defendant had already been fined by a competition regulator – severely hampered the prospect of worthwhile damages being recovered in any representative action instituted by Which? under that regime. The case settled on 9 January 2008, for a sum that will ultimately depend largely on how many purchasers of the price-fixed football shirts come forward during the take-up period.

The recovery of individual damages per class member has always proven difficult under the English representative action, since the seminal decision in *Markt & Co Ltd v. Knight Steamship Co Ltd*.[5] One of the reasons given in *Markt* for the defeat of any «same interest» was that each of the class members there (consignors of cargo lost at sea) had several measures of damages (the value of their lost cargos), with none having any interest in the damages recoverable by the representative claimant, nor did the representative claimant have any claim for some collective damages fund in which all class members would share an interest. Proof of damage was personal to each consignor, and the facts underlying the measure of damages would differ. In the recent price-fixing litigation in *Emerald*, the purchasers/class members claimed that they had suffered individual losses (three different heads of damage were specified); and sought, as the relief, «a declaration that damages are recoverable in principle from the [defendant airlines] by those purchasers in respect of each of those three types of loss» (at para 2). However, in answer to the crucial question as to whether those class members had the «same interest» at the outset of the action, Chancellor Morritt said they did not, which the Court of Appeal upheld.

[1] [2003] EWHC 1034 (QB).

[2] *Improved Access to Justice: Funding Options and Proportionate Costs* (2005), p. 26, recommendation #7.

[3] Case number: 1078/7/9/07.

[4] [2007] EWHC 2394, aff'd [2008] EWCA 1086.

[5] [1910] 2 KB 1021 (CA).

***b) Some observations on cy-près* damages distributions**

Cy-près damages distributions are not entirely unknown in the existing collective redress landscape in England.

In a pre-GLO case, in which the Consumers' Association, Which?, brought a representative action against Rover car company for alleged breach of competition laws, the action was settled, in part, with an agreement that Rover would pay £1 million, not to the victims of the price-fixing directly, but to the Consumers' Association for the purposes of car safety research.

Under the representative action, something akin to a *cy-près* distribution was ordered in *EMI Records Ltd v. Riley*[1], where financial recovery was paid, not to the victims of pirated cassettes, but to the British Phonographic Industry Ltd, in order to defray that organisation's expenses in identifying and suppressing counterfeit and piracy activities. However, such instances are rare, under presently-existing collective actions regimes.

In the reforms proposed for 2010, *cy-près* damages distributions were specifically contemplated in the Financial Services Bill 2010, in that cl 23(4) and (5) provided that Regulations enacted there under would make suitable provisions with respect to any residual amounts of damages which were not claimed by individual class members from an aggregate fund (options which could have encompassed, e.g., *cy-près* damages distributions, escheat to the Crown, *pro rata* distributions to claiming class members, reversions to defendants, distributions to a SLAS-type legal aid fund, or any combination of the aforementioned). Given the «wash-up» of that Bill, the Regulations themselves remain to be drafted.

5. Court Involvement

a) The general importance of case management

Case management is an essential part of group litigation in England and Wales. Indeed, in its December 2008 report, the Civil Justice Council recommended (as #6) that «collective claims should be subject to an enhanced form of case management by specialist judges». It proposed this for three key reasons[2].

First, given that collective actions «are by their very nature complex and tend to take up a considerable amount of court time', then it is important to ensure that they are «properly and robustly case managed under the existing case management powers set out in CPR 3.1, applied consistently with the overriding objective.» Secondly, certain very complex and difficult group litigation in pre-GLO times in England (i.e., the *BCCI* and *Equitable Life* cases) «lead to well publicised criticism of the procedures for managing such litigation.» Thirdly, in July 2007, a working party of judges and Commercial Court users, chaired by Mr. Justice Aikens, examined the court's approach to the case management of complex cases, and produced a report, *Report and Recommendations of the Commercial Court Long Trials Working Party*. Many of the recommendations of that report sought to give specific guidance to judges and parties to ensure that case management powers were being used effectively. This report (and the pilot scheme which followed it) emphasised the importance of proactive judicial intervention in complex cases in English civil procedure. The CJC concluded (at p 162) that: Given the similarities in nature between collective actions and

[1] [1981] 1 WLR 923 (Ch).

[2] *Improving Access to Justice through Collective Actions*, pp. 161–162.

complex commercial claims it is recommended that they be managed consistently with the recommendations set out in the Aikens J Working Party's report. This recommendation is made because the Civil Justice Council concludes that it is absolutely essential for the court to exercise such rigorous case management at all stages of a collective action to ensure that the efficiency and economy benefits which arise from such actions are not lost.

Case management is expressly countenanced by the terms of the GLO regime itself, wherein CPR 19.10 provides that a GLO «means an order ... to provide for the case management of claims which give rise to common or related issues of fact or law (the «GLO issues»)», with further extensive case management powers stipulated in CPR 19.13. These are in addition to the general provisions relating to case management which are stipulated in CPR Pt 3.

b) Court involvement via certification/authorisation

Insofar as certification/authorisation is concerned, the Group Litigation Order provides for the following five certification criteria:

- numerosity – there must be a «number of claims» (CPR 19.11(1));
- commonality – these must give rise to «common or related issues of fact or law» (CPR 19.10 and 19.11(1));
- suitability – managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court «to deal with cases justly» (CPR 1.1(1));
- preliminary merits – the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice (whichever is appropriate), is required before a GLO is possible (Practice Direction 19B, para 3.3); and
- superiority – a GLO will not be commenced if consolidation of the claims, or a representative proceeding, would be more appropriate (PD 19B, para 2.3).

Insofar as the representative action is concerned, CPR 19.6 provides for two certification criteria: «the same interest»; and «more than one person» share the claim with the representative. These are not determined by virtue of a formal certification hearing, but inevitably arise by virtue of a defendant's interlocutory challenge to the competency of the representative proceedings.

Interestingly, under the Financial Services Bill 2010, the generic rules underpinning that proposed reform expressly countenanced certification, requiring that «permission of the court must be obtained ... to bring a claim in collective proceedings» (proposed CPR 19.17(2)) – unless a specific regime for, say, employment claims before the Employment Tribunal, was drafted instead. Certification of any collective action was considered mandatory by English law reformers, who expressly eschewed the no-formal-certification approach which had been preferred by the drafters of Australia's class actions regime[1]. Several certification criteria were included in the proposed rules in the CPR:

- commonality – the claim must raise the «same, similar or related issues of fact or law» among class members (proposed CPR 19.16, definitions);
- a suitable representative – either an «ideological claimant» or a directly-affected class member may bring the claim, if an «appropriate person» (proposed CPR 19.21(3));

[1] Contained in Pt IVA of the Federal Court of Australia Act 1976.

• superiority – the collective proceedings for determining the claim must be the «most appropriate means for the fair and efficient resolution of the common issues», and must be «appropriate [to] further the overriding objective» (proposed CPR 19.20(2)(b));

• minimum class size – a minimum number of class members must allege a common grievance in the claim («an identifiable class of persons») (proposed CPR 19.20(2)(a));

• preliminary merits threshold – a claim which is weak, but not so weak that it could be struck out, could fail certification because, «in all the circumstances», it should not be certified (proposed CPR 19.20(2)(c));

• a statement of truth – the representative claimant is required to state in its application, verified by a statement of truth, that it believes that the claim has real prospects of success (proposed CPR 19.18(3)(c)); and

• cost–benefit test – the court must take into account «the costs and the benefits of the proposed collective proceeding» when deciding whether the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues (proposed CPR 19.20(3) (a)).

c) Court involvement in certain other respects

Two further points should be noted. First of all, English judges tend to take quite an active role in costs-management in complex litigation. This is typified by the comment by Brooke LJ in *Adam Musa King v. Telegraph Group Ltd*[1] that costs-capping was desirable, because it is «very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed».

Secondly, although judicial sanction of a settlement achieved under either the Group Litigation Order or the representative action is not required or indeed permitted, that type of judicial scrutiny was certainly contemplated under the 2010 reforms which lead to the promulgation of the Financial Services Bill 2010. It was proposed that any compromise or discontinuance of a collective action under that regime would require permission of the court[2] – the drafters of the rules believing that a US-style «fairness hearing» was soundly based in logic and fairness.

6. Compatibility with US-style Class Actions

The jurisdiction of England and Wales does not presently have a US-style class action – i.e., characterised by an opt-out regime, with the possibility of aggregate assessment of damages, a *cy-près* damages distribution, with certification, and with a fairness hearing in the event of settlement. A regime which encompassed these aspects was proposed for the Financial Services Bill 2010, cll 18–25, for financial services claims, but was «washed up», and since the election and change of government, that initiative has not, as yet, been reinvigorated.

However, in its December 2008 report, the Civil Justice Council noted that the «actual and perceived excesses of the United States» class action model have attracted much adverse comment in England', but that such comments must be addressed against a backdrop whereby «the differences between the two jurisdictions are both numerous and significant»[3]. Summarising these, as noted by the CJC:

[1] [2004] EWCA Civ 613, para 92.

[2] Proposed CPR 19.37.

[3] *Improving Access to Justice through Collective Actions*, pp. 38–41.

• although some costs-shifting does occur in US litigation under certain statutes, the normal US costs rule is that each party bears its own legal costs; whereas in England, costs-shifting is the norm – and that feature of costs-shifting, with the consequent prospect of an adverse costs award and a possible security for costs application, is a significant disincentive to unmeritorious litigation in England;

• the disclosure requirements in the US, when coupled with the use of oral interrogatories (depositions), are much wider and more onerous than in England, and hence, considerably more expensive;

• jury trials in the US, constitutionally enshrined in respect of federal trials, are far more common than they are in England, where they are confined to, e.g., deceit, defamation, malicious falsehood and false imprisonment. Hence, the uncertainties of how a jury would view the merits of a class action and assess damages are significant factors in US litigation, which do not apply to in English civil trials;

• as mentioned previously, case management is widely-adopted for complex litigation in England; whereas, by comparison, some US judges prefer a system whereby courts respond to parties' requests for judicial hearings, but do not otherwise involve themselves in the litigation, thereby adopting a less proactive approach to the case's progress;

• percentage-based contingency fee agreements are not available for «contentious business «in England, which covers most actions brought before courts (but not necessarily before Tribunals), whereas contingency fees are a common feature of US litigation – and even if contingency fees were to become permissible in England (as discussed above), the prospect of large contingency fee awards becoming a feature of English litigation seems remote;

• the availability of punitive damages is severely restricted in England under the *Rookes v. Barnard* principle (and treble damages are unavailable too), whereas in the US, punitive and treble damages are available somewhat more frequently.

These various differences will not, of course, preclude the introduction of an effective opt-out class action regime in England and Wales. Rather, that will depend upon proof of need; careful and measured design; and workable costs and funding rules. However, the introduction of such a regime requires a political impetus, and for that, the wait continues.

Notes

1. While the author is a member of the Civil Justice Council of England and Wales, the views expressed in this article are written in a personal capacity, and should not be taken to necessarily represent the views of that body.

2. The topics covered in this National Report are further discussed in some of the author's selected materials noted below:

Recent Milestones in Class Actions Reform in England: A Critique and a Proposal (2011), 127 *Law Quarterly Rev* 288–315.

Costs and Funding of Collective Actions: Realities and Possibilities (A Research Paper for submission to the European Consumers' Organisation (BEUC)), Brussels, Feb 2011, vii + 133 pp.

Inaugural Presentation (Feb 2011) available at: http://www.law.qmul.ac.uk/events/podcasts/mulheron2011/index.html.

Civil Justice Council of England and Wales, ***Draft Court Rules for Collective Proceedings (Covering Note and Rules)*** (2 Feb 2010) (the author was a member of the CJC/MOJ/CPRC Working Group which drafted the relevant rules).

Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Actions Law-Makers (2010), 5 *Canadian Business LJ* 376–408.

Costs Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere, in D. Dwyer (ed.), *The Tenth Anniversary of the Civil Procedure Rules,* OUP, Oxford, 2010, ch. 10, 183–228.

The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis (2009), 15 *Columbia J of European Law* 419–462.

Cy-Près Damages Distributions in England: A New Era for Consumer Redress (2009), 20 *European Business L Rev* 307–342.

Civil Justice Council of England and Wales, ***Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*** (Dec 2008) (the author was a contributing author to that report).

Reform of Collective Redress in England and Wales: A Perspective of Need (Research Paper for Submission to the Civil Justice Council), Feb 2008, ix + 161 pp.

Justice Enhanced: Framing an Opt-out Class Action for England (2007), 70 *Modern Law Review* 550–580.

The Modern Cy-près Doctrine: Applications and Implications, Routledge Cavendish, London, 2006.

Some Difficulties with Group Litigation Orders – and Why a Class Action is Superior (2005), 24 *Civil Justice Quarterly* 40–68.

From Representative Rule to Class Action: Steps Rather than Leaps (2005), 24 *Civil Justice Quarterly* 424–449.

The Class Action in Common Law Legal Systems: A Comparative Perspective, Hart Publishing, Oxford, 2004.

Elisabetta Silvestri[1]

ITALIAN NATIONAL REPORT

Introduction

Before addressing the questions prepared by the General Reporter, it appears necessary to make some preliminary statements that will provide the background to the Italian Report, and hopefully will help in understanding the reasons why some issues concerning group litigation in Italy cannot be expanded upon.

Even though the scholarly debate on collective redress in Italy dates back to the 1970s, the first attempts at enacting a form of class action for damages were made only toward the end of 2007 under the pressure of a few financial failures involving Italian corporations (such as Parmalat, Cirio and Giacometti) and affecting thousands of investors. In the previous

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years, the lack of any forms of group actions available to those who had suffered damages arising from the same tortious actions had caused the Italian courts to be literally flooded with individual civil suits and bankruptcy proceedings; the wave of Italian financial scandals even hit other countries, such as the United States, where some class actions were filed and maintained successfully.

The rule adopted in 2007 and inserted into the Consumer Code as a new article (Article 140*bis*) never went into effect since its entry into force was postponed several times. Eventually, in 2009, the rule was amended and virtually rewritten: it went into effect on 1 January 2010, but – due to some legislative mechanisms too complex to be explained here – the new «class action» (*Azione di classe*) was made available only to claim damages sustained as a result of acts (or failures to act) perpetrated by the defendant after 15 August 2009. This date is very important because it prevents the use of class action in the very cases that motivated Italian lawmakers to turn their attention to collective redress: in other words, the investors crushed by the financial scandals mentioned above, as well as those individuals who were enticed by many Italian banks into buying the infamous Tango (that is, Argentinean) bonds, will never be able to aggregate their claims into a single class action, since the events took place long before the fateful date of 15 August 2009.

As of June 2011, only six class actions had been brought nationwide. Out of these six actions, only one has been declared admissible (that is, in the language of American-style class actions, certified to proceed as a class action). The hearing at which the court was supposed to decide how to manage the case was scheduled for mid-June, but this Reporter was not able to collect information as to what happened at the hearing: maybe it was adjourned, or the court reserved its decision on the motions presented by the parties. In any event, it is foreseeable that quite a long time will go by before the case comes to an end, whether by virtue of a collective settlement or a court judgment.

In light of the above and the obvious lack of «black letter law» on the many issues raised by the rule governing Italian class actions, essentially this Report sets forth some theoretical observations on group actions in Italy. Most observations are not original ideas of the Reporter, but are borrowed from a rich harvest of academic writings on the subject matter. Actually, the interests scholars have shown in dissecting Article 140*bis* of the Consumer Code has been – at least so far – in reverse relation to its application in practice: that must be taken into account, since it contributes to shaping the cultural dimensions of Italian class actions.

Something else can cast light upon such cultural dimensions: the Italian legal system provides for not only class actions for damages, but also for a variety of collective actions, and – since 2009 – for a brand new «public» class action.

Collective actions were initially devised in the field of consumer law according to the model laid down by several EU Directives (from Directive 98/27/CE to the more recent Directive 2009/22/CE) Italy had the duty to implement; later these actions became available in other fields such as environmental protection, securities regulation and anti-discrimination protection. In spite of the disparate areas of law these collective actions affect, they all share at least two common features: first, they can be brought only by «qualified» bodies or entities (for instance, consumer associations accredited by the Government); and second, the remedy sought can only be an injunction issued against the defendant.

The so-called «public» class action is a special action that both individuals and groups can bring to the administrative courts with the goal of attacking the inertia of the public administration when it has failed to act in spite of a specific obligation to do so (e.g. the

administration did not comply with the rule setting a deadline for the enactment of certain provisions). Courts cannot award any damages, but only issue orders mandating the administration (as defendant) to fulfil its obligations. Those who want to claim damages will have to turn to the civil courts and bring either individual suits or, if the appropriate requirements are met, a «private» class action (the one governed by Article 140*bis* of the Consumer Code).

The diverse landscape described above could foster the idea that Italy has a legal system highly committed to the protection of group rights and to the cause of collective redress: unfortunately, though, the assortment of legal instruments available «on paper» is met by a disheartening lack of efficiency of these very legal instruments. This depends on a variety of reasons that cannot be analysed in this Report: suffice it to say that the shortcomings of collective redress are just symptoms (and probably not even the most serious ones) of the «disease» impairing the Italian system of justice at large. And that does have a bearing on the cultural dimensions of the level of judicial protection granted to the rights of citizens, whether these rights are strictly individual or belong to a group.

1. Objectives

The main purpose attached to class actions for damages provided for by Article 140*bis* of the Consumer Code is to enhance access to justice. According to the Italian Constitution, «Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law» (Article 24, sec. 1): the right of judicial protection before the courts is predicated on the principle of equality, which is one of the fundamental tenets of the Italian Constitution, whose Article 3 provides that «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions'.

For a long time, scholars argued that the implementation of these constitutional guarantees was incomplete since group rights had no avenues to claim judicial protection. The legal system seemed to care only about individual rights, as did the Code of Civil Procedure, which made perfect sense, considering that it dates back to 1942, a time when the awareness of collective, «diffuse» and transindividual rights was unheard of. But in contemporary society it cannot be ignored that the frequency of multiple claimants suffering an identical loss as a consequence of the same tortuous conduct is growing fast and, therefore, the meaning of the guarantee of access to justice had to be updated so as to include mechanisms of collective redress, too.

The advent of class actions has apparently filled the gap; just apparently, though, because class actions are available only to «consumers and users', and even though one may argue that, one way or another, we all are both consumers and users, it would have been better if lawmakers had framed the action in broader terms, so as to make it a general tool, accessible to any group of individuals, provided that some requirements are met. For instance, the numerosity of the prospective plaintiffs and the commonality of factual or legal issues – that is, some of the prerequisites of American class actions set forth by Fed. R. Civ. P. 23 (a) – could have been adopted by Italian lawmakers as requirements if they had really pursued in good faith the goal of conceiving an effective legal means by which mass claims (affecting groups of individuals other than consumers or users) could be aggregated.

As to the other objectives conventionally assigned to class actions, that is, behavioral modification and deterrence, since in Italy no class actions have been settled or decided

yet, any forecasts are premature. Recalling how the enactment of the rule on class actions was opposed by the Italian business community, one may assume that both behavioral modification and deterrence are highly feared. It is reasonable to say, though, that both by-products of class actions should not be overestimated in a legal system that – like most continental European legal systems – does not allow courts to impose punitive damages.

2. Representation

In the Italian class action for damages the role of plaintiff can be played by each member of a class, either personally or through a consumer association of his or her choice. It is important to underscore that even if Article 140 *bis* grants standing to sue to «each component of the class', at the initial stage of the proceeding there is only a putative class: at its inception, the action is conceived as a strictly individual one. It is only in the development of the procedure that the «class» (that is, a group of individuals who claim to be the bearers of «homogenous rights» and, more precisely, of rights that are «identical» to the one for which the leading plaintiff is seeking financial redress) takes shape through the mechanics of an opt-in procedure. If the action is declared admissible, an order is issued by the court as to the «appropriate notice» to the class members; with the same order the court sets the deadline for opting-in. The class members who opt-in are bound by the outcome of the action, even though they are not considered parties to the suit, which – from a strictly procedural point of view – goes on between the leading plaintiff and the defendant.

Notoriously, opt-in procedures are not very user-friendly, and that is even more so for Italian class actions, since the opt-in period can be relatively short and, in any event, cannot exceed one hundred and twenty days. On the other side, opt-in can be made more attractive by the rule according to which, once the opt-in period has expired, no other class actions can be brought against the same defendant on the same set of issues.

Lawmakers did not pay any particular attention to the issue concerning how fairly the plaintiff is able to represent the interests of the class. It is true that the court can refuse to declare the action admissible «if the plaintiff seems unable to afford adequate protection to the interests of the class», but this is the only reference to the problem of adequacy of representation, and no case law elucidates the issue. Since Italy adopts an opt-in mechanism, the problem could be seen as less serious than it is in those legal systems where opt-out is the rule and the rights of absent members can be jeopardised by a careless leading plaintiff. At the same time, opt-in procedures are, to a certain extent, a leap in the dark, most of all if – as in Italy – those who opt-in do not become parties to the case and, therefore, not only lack any powers of initiative as to the conduct of the suit, but also cannot control whether the plaintiff acts in their best interests.

3. Funding and financing

It is claimed that the little success met by class actions in Italy is due to the lack of financial incentives. As a matter of fact, among the many questionable aspects of Italian class actions there is the lack of any special provisions concerning their funding and financing. Class actions are subject to the same rules that apply in any civil and commercial case. Among these rules, two are worth mentioning, meaning, first, the rule according to which each party is responsible for the expenses the party is expected to advance as the initial

funding of the action the party brings, and, second, the so-called «loser-pays» rule, a rule the court may disregard by ordering each party to bear his or her own costs and expenses only when certain conditions occur.

The handful of class actions Italian courts have entertained so far were all commenced by consumer associations, as representatives of individual claimants: probably, the activism of consumer associations had more to do with aspiring to gain a higher level of visibility than with the hope of receiving any financial benefits from a victory in court.

The image of aggressive «Kings of Torts», meaning entrepreneurial attorneys acting as the driving force of class actions, does not suit the Italian Bar. American lawyers can provide the funding of class actions because they can rely on contingency fee agreements. In Italy, these agreements are forbidden; what Italian attorneys can do is to reach an agreement with their clients according to which they are entitled to receive not a percentage of the damages awarded to their client, but only a success fee on top of their regular fees (calculated according to a mandatory rate, approved by the Government) if they win the case. Probably, that is not enough to make class actions a profitable business. But even if contingency fee agreements were legal, the appeal of class actions for attorneys would not increase: the damages Italian courts can award are strictly compensatory, since – as mentioned earlier – punitive damages are not allowed. And speaking of the damages class members can recover, one cannot help underscoring that even for class members the recovery of the damages awarded by the court could be a stressful high-hurdles race: not only do they have to opt-in, but they also face the possibility that the court, when it finds for the plaintiff, will restrict itself to setting the criteria according to which the damages suffered by each class member must be calculated. Too bad that, in this event, each class member will have to start his or her own individual civil action in order to have a court apply those criteria and finally be awarded the damages he or she is entitled to recover.

To wrap up the issue of financing class actions, one more point is worth mentioning. Third-party funding is possible, since it is not openly forbidden by any legal rules. In spite of that, the lack of statutory regulations and, even more, of any case law on the matter, puts third-party funding of litigation in a sort of «twilight zone» nobody seems willing to explore.

4. Available relief

The issue has been addressed in the introductory part of this Report.

5. Court Involvement

The involvement of the court at the initial stage of an Italian class action has been described already: the action can proceed only if the court declares it admissible (that is, certifies it as a class action), having found that the requirements laid down by Article 140*bis* of the Consumer Code have been met. Among the elements the court is supposed to evaluate, one, in particular, enables the court to «filter» prospective class actions according to a prognostic evaluation of their merits: as a matter of fact, certification can be denied if the action appears to be «clearly groundless».

As far as the control of the court over the settlement is concerned, the situation is not satisfactory at all. Italy has no rule equivalent to Fed. R. Civ. P. 23 (e): the problem of empowering the court so that it can act as the advocate of the fairness, reasonableness and

adequacy of settlements in class actions has not been addressed by Italian lawmakers. The law governing class actions for damages intersects – to a certain extent – the law governing mediation in civil and commercial cases: scholars have tried to make sense of rules that are sometimes conflicting, sometimes overlapping, but their efforts have been to no avail. One must be patient and wait to see whether courts will be inclined to find a way out of the legislative conundrum so as to play a decisive role in preventing abuse in settlements.

6. Compatibility with US-style Class Actions

The Italian «class action» is anything but an American-style class action. Certainly, the opt-in mechanism is the major departure from the American model, but other aspects, too, of both Italian collective actions and the «class action» for damages do not have much in common with the way collective redress is dealt with in the United States. Besides problems such as the lack of specific regulations addressing the issues of funding and financing of group actions, as well as the fairness of collective settlements and even more technical issues concerning procedural aspects of both collective and class actions, what marks the distance from the American experience is most of all a different «culture of litigation»: that – in its turn – shows how the so-called private enforcement (by way of group actions) is still underdeveloped even as regards matters in which either individual actions would take the plaintiff nowhere (for instance, because the costs of litigation would exceed the value of his or her claim) or public enforcement has proven to be weak and ineffective. In the case of Italy, also, the issue of collective redress cannot be isolated from a wider context, that is, the general situation of civil justice. It is well known (even at the international level) that Italy is not a «beacon of civilisation» as far as its administration of justice is concerned: one should acclaim the miracle if group actions were working as perfectly as a Swiss clock in a country in which even a minuscule «small claim» brought to court can last years to be defined by a judgment.

Looking at things in a less pessimistic way, it must be conceded that Italy is not the only country of continental Europe that has found it hard to devise efficient and workable forms of collective redress. In a working document issued last February with the view to opening a public consultation on the topic «Toward a Coherent European Approach to Collective Redress»[1], the EU Commission noted that in the field of existing models of collective redress in the European Union, «every national system of compensatory redress is unique and there are no two national systems that are alike in this area». The obvious problems brought about by such a variety of national systems could be reduced if a European framework of collective redress, based on common principles, were set forth. As it did on several other occasions, the Commission made clear that «any European approach to collective redress (injunctive and/or compensatory) would have to avoid from the outset the risk of abusive litigation», since «many stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the US with its «class actions» system». Therefore, according to the Commission, the evil American-style class actions are to be kept away from European shores: unfortunately, the Commission did not show the same resolve in advancing a model of group actions alternative to class actions. Maybe in the future the Commission will make up its mind and design an original pan-European form

[1] The document is available at http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf.

of collective redress, laying down some common principles to be enforced by national legislatures: hopefully, that will help the Italian legal system – or, more likely, will force it – to change its attitude toward group actions.

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The Italian literature on collective actions and class actions is very rich. Since this Report is intended for an international congress, the Reporter has decided to provide the readers only with a few bibliographical references concerning the Italian experience, but written in the new «*lingua franca*» of the scientific community, that is, English.

1. N. Calcagno, «*Italian Class Action*»*: The Beginning* (March 15, 2011), available at SSRN: http://ssrn.com/abstract=1875424.

2. R. Comolli, M. De Santis and F. Lo Passo, *Italian Class Actions Eight Months In: The Driving Forces* (16 September 2010), available at http://globalclassactions.stanford.edu/.

3. C. Hodges, *Collective Redress in Europe: The New Model*, 29 *Civil Justice Q.*, 2010, 370.

4. R. Nashi, NOTE: Italy's Class Action Experiment, 43 Cornell Int'l L.J., 2010, 147.

5. E. Silvestri, *Italy*, in D.H. Hensler, C. Hodges and M. Tulibacka (spec. eds.), *The Globalization of Class Actions*, *The ANNALS of the American Academy of Political and Social Science*, vol. 622 (1), 2009, 138.

6. E. Silvestri, *The Difficult Art of Legal Transplants: The Case of Class Actions*, 35 *Revista de Processo*, 2010, 99.

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Hélène van Lith[1]

DUTCH NATIONAL REPORT

Introduction

There are two collective redress regimes for mass damage in most areas of law available in The Netherlands:

1. The first one is the Dutch Act on the Collective Settlement of Mass Damage Claims, also called the «WCAM», which entered into force in July 2005.

2. The second was introduced in 1994 and consists in a collective right for action in mass damage cases under Article 3:305a-c Dutch Civil Code [hereafter DCC].

In view of Professor Walker's Questionnaire for National Reporters on Cultural Dimensions of Group Litigation that focuses on the compatibility of opt-out or «US-style» group litigation, the Dutch Collective Settlements Act or WCAM is significantly more important

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while the Act was inspired by the US class settlements. The WCAM has proven to be an efficient, simple and relatively cheap mechanism of group litigation. In the recent and famous *Shell* and *Converium* cases[1], the WCAM was chosen as a complimentary instrument to U.S. class actions and class settlements excluding foreigners. The WCAM will therefore be the main focus of this National Report for The Netherlands. The report attempts to answer the questions by providing brief comments without entering into detail. References to authority will be avoided as far as possible.

Ad 1

The WCAM is laid down in Articles 907-910 of Book 7 of the Dutch Civil Code and Article 1013 of the Dutch Code of Civil Procedure [hereafter DCCP]. In essence, the WCAM provides for collective redress on the basis of a **collective settlement** agreement concluded between one or more **representative organisations** representing a group of interested persons to whom damage was allegedly caused and one or more **allegedly liable parties**. Once a settlement agreement is concluded by the parties, they may then **jointly request** the Amsterdam Court of Appeal [hereafter the Court] for a **binding declaration** of the collective settlement. Modeled on the U.S. legal system for class settlements, the WCAM is based on the opt-out mechanism. If the Court grants the request, the agreement binds all persons covered by its terms and represented by the representative organisation, except for those persons who notified that they do not wish to be bound by the agreement. When too many injured parties have notified that they do not wish to be bound, the agreement may provide that the responsible party may cancel the settlement agreement. Additionally, as long as the proceedings regarding the binding declaration are pending, other ongoing (individual) proceedings concerning claims in which the agreement provides for compensation shall be suspended at the request of the alleged liable party[2].

Ad 2

The collective right of action under Article 3:305a-c DCC authorises a foundation or association incorporated under Dutch law to initiate proceedings to protect the common interests of a group of persons provided that this organisation represents the group's interests pursuant to its articles of association. A predominant feature of this Dutch regime for collective action is that any monetary compensation is excluded and thereby this action does not provide for a representative organisation to claim compensation on behalf of the persons it represents. The available remedies are therefore mainly limited to declaratory judgments for the benefit of interested persons or injunctions. Furthermore, the representative organisations are themselves parties to proceedings, as they bring the action in their own name. As a consequence, the judgment binds only the organisation and the defendant, but not the individual represented parties. Interested parties or victims still need to initiate separate and individual proceedings for questions of liability to compensate, questions of causality and the amount of damage to be awarded in individual cases. For this reason and the absence of monetary relief, this Dutch collective right of action is considerably less popular as a mean for collective redress, especially in transnational mass damage cases.

[1] *Shell*, Court of Appeal Amsterdam of 29 May 2009, NJ (2009), 506. *Converium,* Preliminary Ruling Court of Appeal of 12 November 2010, LJN BO3908.

[2] Article 1015 DCCP.

1. Objectives

The **main objectives** of the WCAM are similar to the main objectives in North America and relate to access to justice and judicial economy. Another additional objective of the WCAM is finality or legal certainty.

In relation to **access to justice and judicial economy,** the WCAM intends to provide for an effective and efficient mechanism for collective redress in mass damage cases. It offers collective redress in a relatively simple, fair and fast way and avoids multiple individual procedures. This counts for «both sides».

With respect to the interesting parties or victims in mass damage cases, it obtains financial compensation within a relatively short period of time within the standards of fairness and reasonableness. This is thought to be of crucial importance and characteristic for the WCAM. It is based on the assumption that traditional litigation on an individual basis entails high costs and may take many years. As a consequence – and especially for small damage claims – interested parties give up starting individual proceedings. The WCAM offers a chance for realistic compensation at relatively low costs and does not require significant effort from interested parties.

A similar reasoning can be held for the relief provided for the alleged responsible parties. Without having to face lengthy and multiple proceedings, they can find closure in a mass damage dispute by agreeing on a collective settlement with representative organisations, which will bind a significant number of interested parties once the settlement is declared binding by the Court.

The principal purpose of the Court's binding declaration is to give **finality** to the dispute as a whole and therefore to provide closure to all parties in the event of a mass damage case. Interested parties are bound by the agreement, except if they have opted out. In practice most interested persons are satisfied by the compensation provided for under the settlement, which they would otherwise not have obtained in individual proceedings at least not against the same low costs or no costs at all. Under those circumstances, it is often said that the WCAM provides for compensation as if it was «found money». Among the WCAM settlement concluded, very few or none of the interested parties for whose benefit the settlement agreement was concluded has opted out. Furthermore, little problems have been encountered at the stage of the execution of the settlement and the payment of the compensation. The effect of the binding declaration together with the fact that the interested parties are generally satisfied by the WCAM settlement and very few to no «opt outs» results in a certain **degree of legal certainty**. This is an important incentive for alleged responsible parties to settle mass claim damages under the WCAM as it offers them a significant degree of certainty concerning the financial obligations they have under the settlement in relation to the interested parties.

With respect to **behaviour modification**, it is important to stress that the WCAM was enacted to answer the demands in the field and not the other way around. Behaviour modification should therefore not be considered as one of the main objectives of the WCAM. Nonetheless, it is important to note that the WCAM settlements reached until now have been negotiated in harmony and have avoided confrontation of the parties. The WCAM is based on the idea of collective negotiation instead of confrontation in a collective litigation procedure. It encourages and facilitates parties to solve their disputes their way and through negotiations. Only at a later stage, the outcome of these negotiations is subject to

endorsement of the Amsterdam Court provided that the outcome is fair and reasonable. It is believed that this approach **enhances the Dutch civil justice system** and is less common in other legal systems.

How does this compare with the role played by US-style class actions, and to what qualities of your civil justice system do you attribute the similarities or differences?

The WCAM was inspired by the fact that the collective settlements were successfully used to provide for collective redress in mass damage cases in the U.S. However this pragmatic (Dutch) approach of the WCAM differs in one aspect: If a settlement agreement is reached, it is reached without the intervention of a court and not during any pending class action brought to the court. As a consequence, there are no (initial) «plaintiffs» or «defendants», merely applicants who jointly request the binding effect of a settlement for an entire group of affected persons. The procedure is based on the idea of ***representative litigation*** involving ***representative applicants*** instead of «*lead plaintiffs*'. Foundations and associations representing the interested parties do not conclude the settlement agreement in order to bind them, but in order to bind the group of affected persons which it represents. This makes a difference as to the way the negotiations are carried out. Again, the WCAM is based on the idea of dialogue instead of confrontation in court proceedings.

2. Representation

The **role of the representative organizations** in the WCAM procedures is crucial since they are negotiating and concluding the settlement agreement. It is important to stress that the representation – or support – of representative organisations for the interested parties is necessary to conclude the settlement agreement. Without sufficient critical mass and strong support the «deal» would not be sealed and no settlement agreement would be concluded.

The rules of standing under the WCAM are relatively easy to satisfy: **The WCAM requires** that the representative organisation's **statutory objectives are to represent the interests of the persons for whose interests it concluded the settlement**. This particular importance given to the articles of association resulted in the court's refusal to accept an institutional investor – a pension fund– as a «representative organisation'.

Two types of representative organizations should be distinguished:

1. *generic* representative organisations representing the interests of a particular group, such as the Consumers' Association or the Investors' Association; and

2. *ad hoc* representative foundations which according to their by-laws promote the interests of persons for the benefit of whom a specific settlement agreement has been concluded, such as the *Shell Reserves Compensation Foundation* and the *Stichting Converium Securities Compensation Foundation* in respectively the Shell Settlement and the Converium Settlement.

The representative organisations are not **selected or authorized** to represent beforehand but the Amsterdam Court will *a posteriori* assess on a case-by-case basis whether they are **sufficiently** representative of the interests of persons on whose behalf the agreement was concluded.

The requirement of **sufficient – or adequate- representation** is a legal requirement which needs to be fulfilled in order for the Court to declare the settlement binding and is giving considerable weight in the Court's assessment. This is particularly important because of

the fact that representative organisation may also represent **unknown interested parties** and that the system is based on the opt-out mechanism.

The Court has to either declare the settlement binding or reject the request. In contrast to the U.S. certification procedure where a U.S. court is allowed to exclude certain class members from a class or settlement, the Amsterdam Court is not allowed to partially declare the settlement agreement binding, when the representation requirement is only met in relation to a certain category of persons. The Court could nevertheless suggest to the parties to modify the petition and limit the binding effect of the settlement agreement to those interested parties who are sufficiently represented by the foundations and associations. Obviously, if a settlement agreement is agreed for the benefit of only a limited number of interested parties and not for the whole group, it becomes considerably less attractive for the alleged responsible party to conclude a settlement agreement; it would still be subjected to individual proceedings and finality would not be provided.

The requirement of sufficient representation should not be defined by one conclusive criterion; instead, the association or foundation's adequate representation stems from several criteria or a combination of criteria, such as the activities undertaken by the representative association to defend the interests of its members, the number of interested parties which are member of the association, and the general acceptance of the association's representation by the interested parties. The representation can also be deduced from the role the association has played in representing the interested parties in the media or from the fact that the association has acted on their behalf.

The success of the WCAM as a mean to settle cross border mass damage cases has raised the question whether and in what way representative organisation can represent foreign interested parties. The WCAM itself does not explicitly require that representative organization should be incorporated under Dutch law. In practice, the representative organizations which have so far negotiated, concluded and will execute WCAM settlements have been either generic Dutch associations representing the interests of a particular group, such as the Consumers' Association («*Consumentenbond*») or the Investors' Association («*Vereniging van Effectenbezitters – VEB*») or *ad hoc* representative foundations incorporated under Dutch Law. Again, the practical experience with the sufficient representation requirement has been that several practical solutions have been found and used to satisfy the requirement of sufficient representation of foreign interested parties.

• The first solution involved a written expression of support given by representative associations from other countries. In the *Shell* settlement, the English Investor's Association gave such a support letter to express its support for the *Shell* settlement agreement with respect to English interested parties.

• The second method is that national representative organisations or other countries representing interested persons established in those countries becomes a *participant* to the Dutch representative organisation negotiating and concluding the Settlement agreement. This way, each national group of interested persons is represented by the (Dutch) representative foundation. In *Shell*, the *ad hoc* Shell Foundation concluded a participation agreement with other national representative groups or «*sister associations*» promoting the interests of the interested parties from other European countries and thereby joined the *Shell* foundation as participants. This was important to convince the Amsterdam Court that the *Shell* Foundation adequately represented foreign interested parties for a binding declaration of the collective settlement.

• Another option is that these foreign representative organisations become – either individually or in the form of an *ad hoc* foundation – a party to the settlement agreement and requests its binding declaration jointly with the other representative organisations and the alleged liable party/ies.

The WCAM does not require that each of the applicants' representative associations has provided in its by-laws to represent the interests of all interested persons for whom the settlement agreement is concluded. Nor is it required that each of the applicant associations is separately sufficiently representative in relation to the entire group of interested persons, as long as each of them is sufficiently representative for a sufficiently large portion of the represented persons. It merely comes down to the question whether the representative associations and foundations are *jointly* sufficiently representative with regard to the interests of the persons for the benefit of whom the settlement has been concluded.

3. Funding and Financing

There are no specific rules regulating the funding and financing of group litigation in The Netherlands. Group litigation is therefore principally funded and financed by private funding and support. Generic representative associations such as the Dutch Consumer Organisation are considered as «professional funders', but they are still depending on the contribution of their members and their funds are therefore limited. Other – *ad hoc* – representative organizations are depending on voluntary donations advanced by interested parties in which lies the risk of «free riders» and may cause logistic problems.

Lawyers – members of the Dutch Bar – are not allowed to apply the «no cure no pay» rule or contingency fees. But some entrepreneurial foundations – or special purpose vehicles – do apply some kind of contingency arrangements with interested parties, since the prohibition only applies to bar members. Although the debate on the introduction of a weak form of contingency fees «US Style» is starting to open up and finds increasing support, the Dutch perception of funding and financing in the U.S. is that it leads to extreme high costs and that it is too much lawyer-focused.

There is no special (state) policy for public funding of representative organizations whether they are recognized professional or «qualified» entities[1] or *ad hoc* organizations. Public funding is therefore done on an *ad hoc* basis, for instance through legal aid and/or legal insurance. Yet, problems are encountered when the traditional rules of legal aid and legal insurance to resolve mass claims are applied. Moreover, it has been questioned by some whether this lack of policy and strategy for public financial support in this field guarantees efficient access to justice.

In practice, however, the funding and financing of the WCAM procedure does not cause major problems and even seems to be self-sufficient once a settlement has been concluded by the parties. Parties – the alleged responsible parties and the representative organization – bear the costs for negotiating, realizing and executing a settlement agreement. When a settlement is concluded, the agreement generally stipulates that the alleged responsible party compensates the costs to the representative organisations. This also includes the finance and

[1] Such as the Dutch Consumers Organisation (Consumentenbond). for As established by the Injunctions Directive 98/27/EC (Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests *OJ L* 166, 11.6.1998, at 51–55).

compensation of other costs which the *ad hoc* representative organizations had to pay for adequate worldwide representation. In the *Shell* case, Shell itself – the alleged responsible party – paid the considerable costs of proper notification and contracted the bailiffs for that purpose. This self-sufficient way of financing collective settlements under the WCAM is another important reason for its success.

4. Available Relief

a) The WCAM relief

The first relief sought under the WCAM is to provide financial compensation for the interested parties. The method usually chosen in the collective settlement is the «damage scheduling» approach based on the categorization of loss of interested parties. This approach enables a settlement agreement to differentiate between different groups or categories of interested parties entitled to different amounts of compensation depending on the nature of their (alleged) claim. The WCAM does not pretend to make the interested parties «whole again', but rather to provide some form of financial relief depending on the characteristics of the group or category to which the party belongs.

In exchange for this financial relief, the interested parties are no longer entitled to initiate individual proceedings (unless they have opted out of the agreement). This relief should be understood as the second relief sought under the WCAM which provides closure for the alleged responsible party on the basis of the preclusive effect of the binding declaration of the settlement agreement. This preclusive effect is one of the primary reasons to enter into negotiations and an important incentive to settle.

b) The Collective Right of Action

Almost all forms of relief are available under the collective right of action, except the very important monetary relief. The reasons given by the legislator to exclude monetary relief was that actions for damages would lead to problematic assessments of individual claims. The most commonly relief sought is a declaratory judgment establishing the liability for the damage caused and declaring that the alleged responsible party acted unlawfully against interested parties and an injunctive relief ordering the alleged responsible party to perform or refrain to perform an act with respect to the parties. These judicial pronouncements do not establish causation or damages and the interested parties will have to initiate individual procedure in order to obtain damages.

c) Interaction WCAM and Collective Right of Action

The fact that monetary relief is not available under article 305a-c DCC leads to an interesting interaction between the two procedures. The collective right of action can play an important preliminary role if it is used to solve unanswered questions of law, especially without the risk for the alleged responsible party to have to pay financial compensation. A declaratory judgment in a mass damage case pronounced by a Court by virtue of Article 305a-c DCC may help parties to clarify matters, facilitate negotiations towards a settlement agreement and induce parties to settle. In other words the possibility of obtaining judicial decisions on a question of law in a mass damage cases could be an important incentive to settle and the alleged responsible party avoids facing multiple individual procedures.

Because the alleged responsible party is not threatened with financial compensation in a the collective right of action, the risk of «black mail» settlements is said to be considerably reduced as there is less pressure to settle the mass claim. Conversely, one important incentive for alleged responsible parties to settle under the WCAM is that settling under the WCAM leaves the question of responsibility in the open and does therefore not negatively affect his reputation.

The Dutch system on group litigation seems to put emphasis on the collective settlement for financial compensation of interested parties by giving preclusive effect of a collective settlement by a binding declaration of the Court on the one hand and by refusing the availability of monetary compensation under the collective right of action on the other.

The main Dutch consumer organisation, the Consumentenbond has frequently argued that the fact that the WCAM exclusively relies on the willingness to settle, constitutes the downside of the WCAM or of the Dutch procedure on group litigation as a whole. It states that in the absence of a real collective action with the possibility of financial compensation, there is no real incentive to settle. When the alleged liable parties is not prepared to settle, there is no procedure available for interested parties to obtain financial compensation collectively except by initiating individual proceedings. In mass damage cases involving small amount of financial compensation, it is very unlikely that interested parties or consumers will *en masse* initiate expensive and time consuming proceedings to obtain small compensations.

5. Court Involvement

In order to declare the settlement binding, the Amsterdam Court needs to evaluate three main aspects as important safeguard against abuse:

1. The ***representation*** of the foundation(s) and association(s), as the Court will examine whether the representative foundation or association sufficiently represents the interests of the persons pursuant to its articles of association;

2. The ***reasonableness*** of the settlement, as the Court will reject the request for binding effect if the amount of compensation awarded in the settlement agreement is not reasonable[1]. This means that the Court needs to assess whether the amounts awarded (in the damage scheduling) is reasonable in relation to the extent and possible cause of the damages allegedly suffered, whether payment is sufficiently guaranteed by the alleged responsible party and the Court will assess the ease and speed with which the compensation can be obtained.

3. During the proceedings, the represented affected persons are given the opportunity to be heard on the settlement. This entails the third crucial aspect of the WCAM settlement procedure, namely the ***proper notification*** of «interested persons» – i.e. persons for whose benefit the settlement agreement was concluded[2]. Notification is required at two stages: first, interested injured persons need to be notified that proceedings for the binding declaration have been initiated in order to give them the opportunity to object to a binding declaration; and second, once the Court declares the settlement binding, the interested persons need to be informed about the declaration in order for them to decide whether or not they wish to opt out. The Court's approval as to whether the notification at both stages was done prop-

[1] Article 907(3) under (f) and (b) DCC, respectively.

[2] Article 1013 DCCP.

erly is therefore crucial. In practice, the Court assesses whether the notification methods during a pre-trial hearing. The Court is even allowed to order that the notification should be done in *some other way*, as long as it respects international instruments on notification[1].

The Court is also required to scrutinize whether the agreement describes (a) the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss, (b) give a most accurate estimation of the number of interested parties, (c) indicate the amounts of compensation, (d) the conditions to qualify for compensation, (e) the procedure for establishing and obtaining payment and (f) the name and place of residence of the interested parties for notification purposes.

The Court's power to interfere with the content of the settlement is limited: it can only do so if the amount of compensation awarded under the agreement or the process of determining the compensation is unfair. As stated above in relation to representation, the Court is not allowed to exclude (a certain group of) interested parties.

Recent proposed modifications to the WCAM contemplate more court involvement by allowing the Court to assist in pre-trial appearances to identify the main points of dispute and encourage parties to seek assistance from mediators. Supplementary measures are also proposed to stimulate the parties' willingness to negotiate, to facilitate the negotiation and to facilitate the finalisation of settlement agreements. Another proposition is to allow the Court to introduce a procedure for requesting preliminary rulings from the Dutch Supreme Court («*Hoge Raad*») in WCAM cases which would clarify the negotiating parties' legal positions.

6. Compatibility with US-style Class Actions

The WCAM does not provide for an «American style» class action, but provides for a type of «American style» court approved collective settlements equally based on a opt out system. As stated above, the WCAM is modeled on U.S. class settlement and on the fact that many – or most – class actions in the U.S., Canada and Australia are settled. So far, the Amsterdam Court of Appeal has declared binding five settlement agreements under the WCAM, and the binding declaration of a sixth one – the *Converium* settlement – was requested on 9 July 2010 and an oral hearing on the substance of this petition is planned for 3 October 2011. Among the six settlement agreements reached under the WCAM several involved foreign elements, but the *Shell* settlement declared binding on 29 May 2009[2] and the *Converium* settlement reached on 8 July 2010 have both been reached in order to obtain relief of mainly European affected persons or interested parties who were excluded from U.S. class actions and settlements[3]. The need to provide relief for non-U.S. *class members* was the main purpose to settle under the WCAM while The Netherlands is the only Member State with the possibility of providing relief by way of a collective settlement which would be complimentary to U.S. settlements. The WCAM is therefore considered by some to be the new export product of The Netherlands to provide relief for European and other non-U.S. interested parties or victims in mass damage cases.

[1] Article 1013(5) DCCP.

[2] *Shell*, Court of Appeal Amsterdam of 29 May 2009, *NJ* (2009), 506.

[3] For *Shell:* see *In re Royal Dutch Shell Transport Securities Litigation*, U.S. District Court, District of New Jersey, 522 F.Supp.2d 712 (2007), 721. For *Converium: In re Converium Holding AG Securities Litigation,* U.S. District Court Southern District of New York, 537 F. Supp. 2d 556 (2008).

The main challenge to integrating «US- Style» class actions in The Netherlands would be to make financial compensation available to the collective right of action. The Dutch legislator has explicitly not chosen for this type of group litigation, but has instead privileged US-Style class settlement. The culture of Dutch pragmatism favours practical solution found in a sphere of harmonious negotiations instead of expensive confrontation in mass litigation in court proceedings. The **empowerment** of the parties in solving their disputes is strongly rooted in the WCAM-culture, but also in Dutch culture.

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RUSSIAN NATIONAL REPORT

Introduction

Development of economic and legal relations has caused a pressing of need for defense of a group of persons with common (similar) matters of law and (or) matters in deed in modern Russia, as well as in other countries. Due to an increased number of potential legal procedure participants, classical procedural institutions such as joinder of parties have been proven to be inefficient in the aforementioned situation. In this regard, scientific literature

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stresses the need for development of steps that would allow defense of multiple persons in the optimal way.

To date, one may say that the «class» defense institution is at the early stage of its formation in Russia.

In our legislation two forms of such defense are given. They refer to:

a) defense of the rights and interests of an indefinite range of persons, i.e. persons that cannot be personified during consideration of specific proceedings. Oftentimes, such actions are referred to as public class actions;

b) defense of the rights and interests of a large group of people, each of whom can be personified. Such actions are often referred to as private class actions.

In this case it is important to stress on the fact that in the Russian law civil suits are considered within two relatively independent procedures:

1) arbitrazh (commercial) proceedings, where usually resolved conflicts between business persons and (or) legal entities. Such suits are considered by arbitrazh courts, and the order of proceedings is governed by the Arbitrazh Procedure Code (hereinafter referred to as the APC RF);

2) civil procedures, in accordance with which usually any other types of civil actions are considered. In this case justice is administered by courts of general jurisdiction, and the proceedings are governed by the Civil Procedural Code of the Russian Federation (hereinafter referred to as the CPC RF).

In their turn, the aforementioned class defense forms (public and private class actions) are unevenly governed by the APC RF and the CPC RF.

Thus, the private class action institution is currently reflected only in the APC RF. However, defense of an indefinite range of persons predominantly takes place during civil procedures, although it may be also employed during arbitrazh proceedings. Let us consider the problematic issues of these institutions.

Defense of an indefinite range of persons (Public class actions)

It is believed that public interests are defended through defense of an indefinite range of persons.

It seems that public interests mean the presence of a certain good that is of importance to the society as a whole or to its' part, and therefore also to a specific member of such society.

Currently, in order for such interest to become a possible object of judicial defense it must: a) represent a good of legal importance; b) be not excluded from judicial defense.

The possibility for defense of an indefinite range of persons was first introduced in the Consumer Protection Act of 1992. Currently this institution is rather widely applied.

It should be taken into account that the Russian law stating possibility of defense for an indefinite group of persons and may directly refer to such group, i.e. «an indefinite group of consumers»[1]. Or such group may be derived based on the law logics and the nature of the legal relationship. Thus, for example, the preamble of Law No. 73-FZ dd. June 25,

[1] Articles 45, 46 of the RF Law dd. February 7, 1992, No. 2300-I «On Consumer Protection», in Legal reference system «Consultant-Plus».

2002, states that «the objects of the cultural heritage (historic and cultural monuments) of the peoples of the Russian Federation are of unique value for the whole multinational population of the Russian Federation and represent an integral part of the world cultural heritage»[1], therefore, if issues related to such monuments are reviewed in court, it is the public interest that should be defended.

The law does not stipulate for any special rules for consideration of suits related to defense of the rights and interests of an indefinite range of persons, however, special conditions for initiation of such proceedings are provided. Persons included into the indefinite range, whose interests are subject to defense, are not regarded as participants of the proceedings; however, some aspects of the legal force attributed to the judgment are applicable to them.

As a rule, when an indefinite range of persons is defended, the proceedings may be initiated not by persons included into such range but by special entities, as a rule, by governmental authorities or other persons, for which the powers to act in such a way are directly defined in the federal law (article 45 of the CPC RF) (such persons include e.g. consumer protection societies), as well as public prosecutors (article 45 of the CPC RF). There are few exceptions from this rule. Examples may be found in cases related to contestation of regulatory legal acts and compensation of harm caused to the environment[2].

The issue of legal expenses is resolved as follows: according to articles 45 and 46 of the CPC RF, if a specially empowered person or a public prosecutor files a lawsuit in court, they are exempted from payment of the related legal expenses. If the case is lost by the defendant, such expenses are charged to it/him/her.

In the meantime, legislative solution for defense of an indefinite range of persons has certain drawbacks:

A) As indicated above, lawsuits may be filed in court in such cases only by persons specified in the legislation. If a person not specified in the law attempts to take legal action, it is foredoomed to failure, since its statement of claim shall be rejected pursuant to item 1, part 1 of article 134 of the CPC RF as a claim filed by a person on behalf of other persons, such person not being entitled to such filing.

We find such state of affairs not fully correct.

It should be taken into account that oftentimes specially empowered persons that are entitled to initiate the proceedings fail to perform their function. This may be caused by a number of different reasons, ranging from simple overload and impatience of officials to deliberate unwillingness to interfere in an illegal situation. The result is the same irrespective of the reason: in some situations there is no actual chance to defend personal and public goods. Moreover, since the person concerned must file a request to a specially empowered person instead of taking legal action, their right to judicial protection is limited, as the initial legal judgment is passed by some specially empowered person instead of the court.

In this case the question of prompt legal proceedings is also of high importance, since slow reaction of specially empowered persons may simply lead to extermination of the good that the interested person is concerned about.

[1] On Objects of the Cultural Heritage (Historic and Cultural Monuments) of the Peoples of the Russian Federation.

[2] Part 2, article 11 of the Federal Law «On Protection of the Environment» dd. January 10, 2002, No. 7-FZ, in Legal reference system «Consultant-Plus»

Therefore, we assume that in the future the situations should be extended for persons to independently initiate and support proceedings in defense of the goods that belong *inter alia* to such persons.

B) Another issue is that not all actual public interests are taken into account as such by the law or in the court practice.

Thus, it is obvious that the actual nature of the interest is opposed to the way it is reflected in the law or is implemented in practice. As a rule, such situations take place when the law gives a too narrow definition for a range of persons that own the protected good.

For example, class proceedings are employed also to protect copyright and name of a deceased author (article 1267 of the Civil Code of the Russian Federation[1]) (hereinafter referred to as «CC PF»). One may easily notice that in this case it is not the rights of a specific person that are defended, since there are no rights attributed to a deceased person. This case is also not concerned with defense of the rights attributed to the deceased person's heirs, since no legal succession is allowed in this case. Therefore, defended shall be protected by the law that is stated as an objective of the need to obtain reliable knowledge with respect to the creator of a specific work. It is obvious that such interest stands against the duty of any persons to not to distort such knowledge. The CC RF stipulates that protection of copyright, the author's name and work inviolability in such cases is undertaken by the author's heirs, their legal successors, and other persons concerned. There are other persons concerned according to the principles and practice of law that do not mean any member of the society but matter-of-fact possessors of right or special-purpose entities[2]. Similarly, one may consider defense of a citizen's honor and dignity after his or her death as defense of public interest. This primarily refers to well-known public figures of historical importance. At the same time, the right to judicial defense is attached to the persons concerned, the list of which is interpreted in a limited manner, as in the previous situation. For example, such persons shall include the deceased person's relatives and heirs[3].

As already mentioned above, in the Russian law the interest is often allocated to an extremely small group of persons, thus it is not recognized that if such interest is owned by a specific person, it may also refer to other persons. The fact that one and the same legal object may serve as an object of legal relationship is not taken into account for certain judicial entities and a specific good for the other entities. The legal authorities shall most probably consider only the first judicial entities as interest carriers. For example, if public entities are referred to (the state, state entities, municipal units) and it is not taken into account that although such entities act independently, in fact their actions may interfere with interests of the society or its part[4]. Public interest is also referred to when a claim related to electoral rights. Although the regulations related to initiation of the corresponding proceedings are clearly differentiated

[1] Hereinafter referred to as the CC RF.

[2] E.P. Gavrilov, V.I. Eremenko, *Comments to part four of the Civil Code of the Russian Federation (article-by-article)*, Moscow, 2009; E.A. Pavlova, O.Yu. Shilokhvost (eds.), *Current Issues of Russian Private Law: Collected Works Dedicated to the 80th Anniversary of Professor V.A. Dozortsev*, 2008 (author: E.I. Kaminskaya); S.P. Grishayev, *Copyright Defense and Protection*, prepared for «Consultant-Plus» system, in Consultant Plus, 2008.

[3] Decree of the Plenum of the RF Supreme Court dd. February 24, 2005, No. 3 «On judicial practice on proceedings related to defense of citizens' honor and dignity, as well as reputation and goodwill of persons and legal entities», in Legal reference system «Consultant-Plus».

[4] Thereat it is important to take into account for which purposes such entities have actually been established. For example, part 2, article 1 of the RF Federal Law dd. October 6, 2003, No. 131-FZ «On General Principles of Local Administration in the Russian Federation» states that «local administration in ... is a form of power exer-

in the Russian law, i.e. a member of the public may file a claim only if he or she believes that his or her specific electoral right has been breached, in other situations related to breach of the law the initiating entities are clearly defined in the legislation. However, it is obvious that any violation of the electoral legislation and, therefore, also correction of such breach is of importance both for the specific person and for the society in general or in part. At the same time, practical activities of the Russian courts indicate that if, for example, a voter files a claim requesting cancellation of a deputy registration since a candidate for deputy «undertakes election campaign utilizing advantages granted by his or her employment status, as well as mass treating of the voters», such claim shall be rejected.

C) Defense of public interest should also be considered in complex situations, when such good is reflected in the law indirectly rather than clearly.

Thus, for example, in many civilized countries animal protection is one of the forms of public interest defense. In Russia this issue is controversial, since currently there are no federal acts that stipulate legal regime for animals and their defense procedure. An exception is the CC RF; in article 137 it is stated that abusive treatment of animals while exercising the rights that contravenes the principles of humanity is not allowed. In its turn, article 241 sets forth that if an owner of pets treats them in clear violation of the rules prescribed by the law and the humane animal treatment standards assumed by the society, such animals may be withdrawn from the owner through their repurchase by the person that filed the corresponding claim in court.

Humane treatment of neglected animals remains an issue under discussion[1]. However, some entities of the Russian Federation have adopted certain regulations of human nature. For example, there are a number of regulations in Moscow that govern the rules for trapping, transportation and sterilization of neglected cats and dogs. Such documents describe activities of animal trapping service in detail, as well as the rules for animal shelters. However, in this case it is unclear who has the right to file a lawsuit in court if it is revealed that such rules and requirements are violated, e.g. through inhumane animal treatment. Currently it seems that this question cannot be answered unambiguously. The fact is that if a member of the public attempts to file a lawsuit in court, he or she may either be requested to clarify the specific breach of his or her interest, which is understood too literally in practice, as it has been already mentioned above. If such citizen refers to defense of public interests, he or she shall either be referred to the absence of a valid legal confirmation of such interest, or his or her statement of claim shall be rejected, since he or she files a lawsuit to defend a right of other persons rather than his or her personal rights; as already mentioned above, according to the Russian law a person may file a lawsuit in court for such purposes only in situations prescribed by the law.

Therefore, we may conclude that currently defense of the rights and interests of an indefinite range of persons in Russia (i.e. non-personified holders of rights) requires essential modernization.

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cise by the public, that ensures... independent resolution of local issues by the public at its own risk directly and (or) through local authorities, based on the interests of the population...»

[1] Sanctions for abusive animal treatment are stipulated in the Criminal Code of the Russian Federation (article 245). At the same time, such abusive treatment shall be considered as a crime only if it caused death or permanent injury of the animal, provided that such act was undertaken based on hooligan motives or for financial gain, or using sadistic approaches, or in the presence of minors. It is easy to notice that the aforementioned includes only a small part of possible situations.

Class defense (private class actions)

Private class actions represent a new institution for Russia. Its legal regulation was introduced only in 2009. Legal regulation of such type of claims is currently undertaken pursuant to chapter 28.2 of the APC RF, «Consideration of cases on defense of the rights and legal interests of a group of persons».

The law provides for specific rules of procedure for consideration of such claims. For example, the consideration term is five months, whereas the general consideration term for arbitrazh courts is three months. The law also provides for specific conditions to be met for initiation of such proceedings, their preparation and consideration.

Although the aforementioned institution has been in force for several years, few proceedings have been considered. Such state of things is caused mainly by an obvious deficiency of the regulations forming this institution.

The framework of this report does not allow considering all of the existing problems, therefore let us discuss several examples.

a) Conditions for initiation of proceedings related to defense of the rights and interests of a group of persons

The APC RF specifies general criteria for such legal action. They are: a) existence of multiple entities within the legal relationship, if such action is filed in defense of the relationship participants; b) at least five members of the class must support the proceedings initiator as of the filing day (article 225.10 of the APC RF).

Article 225.11 of the APC RF particularizes the situations in which a class action may be filed by referring to: 1) corporate disputes; 2) disputes related to professional participants of the securities market. The same article states that the class action rules may be applied to any claims that meet the above-mentioned general criteria.

Such provision of the law appears to be puzzling. If the general criterion is «existence of multiple entities within the legal relationship», it remains unclear what the developers actually mean.

It may seem that of key importance in this case is division of legal relationships by types, since specific connections between the entities may be identified depending on the type of the legal relationship. Thus, for example, if legal relations are divided into absolute and relative, then in the first type the entities interact via a «one to everyone» model, whereas in the second type the model is a «one to one» interaction. However, closer consideration reveals that in every type of relationships the connection exists only between the holder of right and the counteracting entity, but not between the entities that oppose the holder of rights. In its turn, the presence of a legal relation between such entities indicates existence of an independent legal relationship.

Based on the general theory of law, it turns out that a legal relationship with multiple entities is a rather rare situation, which may exist in common law alone, for example, when each of co-owners is legally bound to another co-owner, but it seems unlikely that multiple entities may be a «typical case» for obligations-related legal relationship.

It may be the case that developers of the class action chapters for the APC RF had a somewhat different situation in mind, namely, complex legal constructions that are often observed in the civil turnover, in which individual legal relationships, although being independent, still influence each other in a certain way. This conclusion is mainly based on

the fact that corporate disputes were referred to as class actions. The fact is that although certain consonance exists in corporations, it may hardly be stated that all existing relations inside of the corporations represent a unified legal relationship. For example, although there are often multiple shareholders, each of them has an independent obligations-related legal relationship with a joint-stock company, but they have no relationships between each other.

Based on the aforesaid, one may conclude that the general conditions for filing a class action contained in the APC RF is incorrect, it provides ground for multiple interpretation, and therefore causes essential practical issues.

b) The main feature of the Russian model for private class actions

One may file a lawsuit in court to protect interests of a group of persons; however, one may not file a suit against multiple violators. Therefore, let us describe the persons initiating such proceedings, as well as the legal status of the entities in defense of which such class action may be filed. Thus, the law identifies the following participants: a) the person initiating the class proceedings. This is the only person that has the rights and responsibilities of the plaintiff, including those related to payment of judicial expenses (as it follows from the implications of the APC RF, it seems that in class proceedings only the initiator participates in the proceedings); this person participates without any power of attorney based on the documents related to concurrence in the request (part 1, article 225.12 of the APC RF). In the course of the proceedings, this person is vested with rather important authorities related to the fullest identification of the whole class of the parties concerned. It is easy to notice that the court resolves the issue as to whether a certain person shall be treated as a class member based on the information provided by such person (part 1, article 225.14). b) Persons concurring in the initiator's request. These are the persons that participate in the disputable legal relationship and agree with the initiator's demands and adhere to them. Such persons have almost no procedural rights and duties, except for the right to demand substitution of the person initiating the proceedings; satisfaction of such demand requires initiative of the majority, as well as serious grounds for termination of powers (part 8, article 225.15 of the APC RF). The aforementioned persons may also familiarize themselves with the case files, make excerpts and copy them (part 3, article 225.16 of the APC RF); c) the third group of persons includes all other participants of the multiple-entity legal relationship, whose rights and interests served as a ground for the proceedings initiation. In substance, such persons have only one identified right, namely, to adhere to the initiator's demands, i.e. the right to join the second group.

In this case it is of importance that in countries where a class defense institution exists, the class members participate in accordance with one of the two possible models: «opt-in» or «opt-out», where the difference between the models lies in the fact that in the first one the class members accrue certain rights and duties as a results of the proceedings only if they agree to participate. The second model, vice versa, assumes automatic inclusion of the persons concerned into the list of the class members; however, they have the right to abandon the proceedings.

The Russian option can be hardly related to any of the aforementioned models, since the class members are defined against their own free will by the proceedings initiator, and later on they are certified by the court. As a result, free will of the class members is not taken into account in any way when deciding as to whether they would like to participate in the class. Thus, after being included into the class at the initiator's direction, they have

no actual option to abandon such class. Moreover, any attempts of such persons to initiate individual proceedings either while the class action is considered, or after its consideration is foredoomed to failure. At the same time, the legal force of the judgment is fully applicable to such persons deprived of their rights. In addition, the letter of law does not give a clear answer as to whether such class members are entitled to lodge a complaint on the class proceedings.

c) The role of the court in proceedings related to class defense

The role of the court in class actions is rather specific. On the one hand, it is the court that defines whether the proceedings may be considered according to the class action rules; in addition, the court also certifies the class members within the framework of the pre-trial case examination. Certainly, the court considers the proceedings and passes a judgment. On the other hand, by implication of law the court is deprived of the functions that it has been originally vested within the Russian law. Thus, the court has always been responsible for notifying the participants of the proceedings. Such traditional approach seems to be absolutely justified, as it distinctly complies with the procedural form. However, for class proceedings such responsibility is fully withdrawn from the arbitration court and is imposed onto the initiator of the class action.

The form of such notification is actually undefined. Notification may be made by placing a note in mass media or by sending notes by registered mail, return receipt requested, or in any other form. Therefore, if the aforementioned provision is interpreted literally, in principle it may mean any form of notification, e.g. by telephone. There at the law maker does not stipulate any additional requirements that such form of notification should meet.

Such approach provides grounds for abusive practice, first of all, by initiators of class actions, who may improperly treat their responsibility to notify all of the persons concerned that are included into the class; such persons, therefore, shall not be informed of the fact that proceedings affecting their interests are considered by an arbitration court.

It is clear that the procedural legislation evolves in such a way as to withdraw from arbitration courts the responsibilities that must be imposed exceptionally on the state courts, and shift them to participants of the proceedings, which is certainly incorrect taking into account the existing serious abusive practice in the Russian law enforcement.

As a conclusion of this review on some of the existing issues, we must say that, on the one hand, it is absolutely necessary to establish a specific procedure that would allow defending interests of a class of persons within a single procedure. On the other hand, the existing legislative resolution for this issue requires major revision.

As to public class actions, the range of entities that may initiate judicial proceedings of such cases independently, without applying to special-purpose entities, should be expanded. In addition, it is necessary to adjust the approach as to which interests are of public importance both from the legal and the practical perspectives.

Legislative regulation of private class actions should also be adjusted. It is necessary to modify criteria for initiation of class proceedings, as well as the status of persons whose interests serve as a ground for such initiation, and the court functions. It is possible to transfer this institution also to the Russian civil proceedings by adding the corresponding chapters to the CPC RF, however, this may only be done after the corresponding provisions of the APC RF are revised.

Per Henrik Lindblom[1]

SWEDISH REPORT

1. Objectives

The Swedish Group Proceedings Act of 2002 (SGPA) may be seen as the initial breakthrough of a full-scale law on group actions in a civil law system. Group actions can be litigated in all types of cases in the general courts; all three types of group action (private, organizational and public group actions) are permitted; claims for injunctions and individual damages for group members may be brought; and group members who have opted in are bound by the judgment, win or lose.

However, the total number of group actions under the Swedish Act has so far been lower than expected. But even if we are dealing with «only» twelve commenced (and probably more planned) group actions, a great many Swedish citizens have been directly affected, considerably more than the number who typically appear as plaintiffs in ordinary civil litigation in a Swedish court during an equivalent period. A single successful group action can have considerable *reparative* impact and the mechanism inarguably improves *access to justice* in Swedish society. I have been told that the alternative to a group action in several relevant cases would have been no action at all[2]. In addition, we can be sure potential defendants will often make amends voluntarily and compensate potential group members as soon as it appears the complaint by the group seeking damages is based on solid grounds in substantive law and that the group intends to take advantage of the new procedural avenue if necessary.

[1] Professor Emeritus of Uppsala University (Sweden).

[2] See Hensler, p. 467 f. and Watson, p. 269 et seq. In *Grupptalan mot Skandia v. Försäkringsaktiebolaget Skandia* (*«Skandia»*, Stockholm District Court, case number T 6341, 2003) a non-profit organization (*«Group Action against Skandia»)* was formed in October 2003. In an action for declaratory judgment, the organization claimed a right to compensation (about € 200 million) for 1.2 million policyholders of *Skandia Liv*, a subsidiary of the insurance company *Försäkringsaktiebolaget Skandia*. The plaintiffs averred that the subsidiary, and thus its policyholders, had suffered injury when proceeds of the sale of the subsidiary's asset management business were transferred to the parent company. In short order, more than 15,000 people joined the *«Grupptalan mot Skandia»* organization. Each paid membership dues of about € 15 and the organization rapidly amassed capital of about € 200,000, which was considered more than adequate to cover running litigation expenses and demonstrate to the court that the organization's finances were in good order. One board member transferred his claim for compensation to the organization, which thus became a group member and gained standing to initiate the action for the entire group affected (that is, not only the members of the organization but 1.2 million (!) policyholders). Consequently, the action was brought as a private group action, not an organization action. The media covered the case extensively. However, the organization dropped the suit after an agreement was made to resolve the matter of the capital transfer between the parent and subsidiary in arbitration between the two companies. The organization was permitted to attend the arbitration proceedings in the capacity of reporter (arbitration proceedings and awards are generally not public in Sweden). The stated reasons for choosing arbitration included that the case would be resolved sooner than if the claims were litigated in a general court. As well, the policyholders and the organization did not have to pay for the arbitration proceedings between the companies. The organization was free to initiate a new group action if it felt the need. It is commonly believed, and the non-profit organization *«Group Action against Skandia»* has publicly declared, that the insurance companies' inside agreement over the heads of policyholders would never have been tried in court or arbitration proceedings if a group action on the matter had not been possible. The arbitration was protracted and an award was handed down in October 2008, when the arbitrators ordered Skandia AB to pay SEK 1.4 billion (about € 145 million) to the subsidiary, thus indirectly compensating policyholders.

Arguably the most important function of group actions – especially concerning individually non-recoverable claims – is *preventive*, i.e., *behavior modification*. Hopefully, the very existence of the law will curb potential defendants' impulses to commit unlawful acts and promote voluntary settlements when they have. As with an effective military defense, the functional paradox of civil litigation is that the mechanism most perfectly serves its purpose when it does not have to be used. Citizens must be persuaded, either voluntarily or by the financial fear factor (deterrence/cost-internalization) to comply with laws and contracts through compliance or settlement, without the opponent having to litigate. But this is conditional upon realistic opportunities to take legal action.

Hence, to a noteworthy extent, the Group Proceedings Act is already serving its two main purposes: access to justice and behavior modification. Avid media coverage of ongoing and planned trials is furthering that end. The same applies to the other aims of all civil litigation, including group actions[1]. *Judicial lawmaking and precedent-building*, as well as *political control*[2], will perhaps mainly appear in connection with public and organization group actions brought by strong and established agencies and non-profit organizations. But some cases show that private group actions may be relevant in these contexts.

Group actions may also be a means to fulfill the «new» functions of civil procedure: to provide a *forum for legal policy debate*, and an *arena for ethical/moral discourse*. Incentives to sue in court are not always solely financial.

Naturally, many potential defendants would prefer it if disputes were never litigated. But if action is nevertheless taken, the knee-jerk response is to try and head off a group action, perhaps mainly due to the media coverage and equalization of strength between the parties to which this procedural mechanism often leads. But group actions make *defendants more secure*, since a judgment in favor of the defendant is binding on every member of the group. Group actions also have a potential to contribute to *judicial economy* for both parties, especially in individually recoverable cases. The possibility to initiate a group action reduces the risk of repeated litigation (and expensive joinder, forcing group members to be present and take part in the litigation)[3]. It also strengthens *protection against frivolous and unethical lawsuits* since the cost risk is substantial and there is a strong court involvement (see *infra* under 3 and 5).

2. Representation

The Swedish Act contains three forms of group action: private, organization, and public group actions.

[1] Re the role of courts and functions of civil procedure in Sweden, see Lindblom, 2007 (in English).

[2] This refers to judicial review and judicial control of whether a national law is consistent with EU law.

[3] See *Olivia Ozum v. Sweden* (Uppsala District Court, case number T 3897, 2008). A quota rule was applied to admissions to the veterinary medicine program at the Swedish University of Agricultural Sciences in Uppsala that gave the underrepresented gender among applicants (currently male students) a better chance of being admitted to the program. In a private group action in July 2008, the plaintiff claimed damages in total of 4.6 million Swedish kronor (about € 500,000) for herself and 46 other female students who were not admitted. The plaintiff was represented by the Centre for Justice Foundation (*Centrum för rättvisa*), which had undertaken to pay the plaintiff's litigation costs. Through the Office of the Chancellor of Justice, the State declared that it had no objections to trying the case as a group action. The Uppsala District Court decided in September 2008 to hear the case as a group action and ordered the Swedish state in a final judgment to pay 35,000 Swedish kronor (about € 3,500) to the plaintiff and each member of the group, for a total of 1.6 million Swedish kronor (€ 160,000). The decision was affirmed by the court of appeal (Svea Hovrätt).

Private group (class) actions may be initiated by a *member of the group*, who may be a natural or legal person. The plaintiff must have standing to be a party to the proceedings with respect to at least one of the causes of action.

Organization group actions are restricted to two areas of law: consumer law and environmental law. In consumer law, group actions may be instituted by non-profit organizations of consumers or wage-earners in disputes with business operators concerning goods, services, or other utilities offered in the course of business to consumers, primarily for personal use. In environmental law, non-profit organizations dedicated to nature conservation and environmental protection (and professional federations in the fishing, farming, reindeer husbandry, and forestry industries) has the right to initiate actions for injunctions and/or damages for environmental impairment. All non-profit organizations with the stated objectives have the right to initiate organization group actions. There are no restrictions concerning authorization by the government or the size, age, etc., of the organization. A new organization with only a few members can be set up one day and sue the next, provided the organization's financial affairs are in good order and the court thinks the organization is a good representative of the group. The organization may petition for injunctions and damages for the members of the organization as well as for all other members of the group concerned.

Finally, any public authority stipulated by the government, such as the Consumer Ombudsman or the Swedish Environmental Protection Agency, may initiate public group actions[1].

The plaintiff in organization and public group actions is *not* a member of the group. If an organization or public authority has a claim of its own and consequently is a member of the group, the action is treated as a private group action, not an organization or public group action.

The right to represent the group does not end if there is a change to the circumstances on which the right to institute the action has been founded. (*SGPA §7*)

A group action may only be considered if the plaintiff, taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action (see infra under 3 and 5), and the circumstances generally, is appropriate to represent the members of the group in the case. (*SGPA §8 para 5*)

The role of the representative is to act as a plaintiff, represented by an attorney who is an advocate (member of the Bar). If there are special reasons, the court may allow the action to be brought without an attorney or through an attorney who is not an advocate. (*SGPA §11*)

When conducting the action, the plaintiff shall protect the interests of the members of the group. On important issues, the plaintiff shall afford the members of the group an opportunity to express their views, if this can be done without great inconvenience. If a

[1] In *The Consumer Ombudsman v. Kraftkommission i Sverige AB* (Umeå District Court, case number T 5416, 2004) the Consumer Ombudsman sought damages on behalf of about 7,000 people in compensation for the defendant's failure to supply electricity as agreed under a fixed price contract. The defendant moved for dismissal on the grounds that the conditions provided in SGPA *§8* had not been met. The District Court denied the motion, a decision later affirmed by the Court of Appeal. In January 2006, the defendant applied for leave to appeal to the Supreme Court, which declined to hear the appeal in September 2007. About 2,300 people have opted in to the group action. In a declaratory judgment, the District Court ruled in January 2010 that the defendant was obliged to compensate group members for the injury they had suffered. The compensation award will be determined in a later ruling. The defendant has appealed against the declaratory judgment to the Court of Appeal, which will be hearing the case in September 2011.

member of the group so requests, the plaintiff shall provide such information as is of importance for the rights of the member. (*SGPA §17*)

If the plaintiff is no longer considered to be appropriate to represent the members of the group in the case, the court shall appoint someone else who is entitled to bring action in accordance with *§§4-6* to conduct the group's action as plaintiff. If no new plaintiff can be appointed the group action shall be dismissed. If the plaintiff is the appellant's counterparty in a superior court, the court may appoint someone else who is considered appropriate to conduct the group's action as plaintiff. (*SGPA §21*)

3. Funding and financing

Liability for costs

The English rule on costs is normally applied in Swedish general courts except in small claims cases, when the parties must either represent themselves or pay their own attorney's fees, regardless of the outcome. In group actions, the English rule applies regardless of the value of the case, and counsel is required. Thus, the group representative (the *plaintiff*) assumes the risk of being ordered to pay the opponent's costs, including attorney's fees, if the group loses the case. In contrast, a *group member* bears customary liability for the opponent's litigation costs only if she has intervened as a *party* to the action. Normally, group members opting in are *not* parties and *not* liable for any costs at all (and are not supposed to appear personally in the group proceedings).

Risk agreements

To reduce plaintiffs' cost risks under the English rule, it is explicitly permitted for group representatives and attorneys to reach fee agreements, meaning that the attorney's fees are based on the extent to which group members' claims are satisfied. Under these «risk agreements,» fees are *conditional* on liability but are not primarily *contingency* fees, e.g., one-third of the recovery, as is customary (if accepted by the court) in class actions in the United States. Fees are based on a customary hourly rate and a set formula; for example, the attorney will be paid double or triple the normal rate if the action is successful and half the rate – or nothing – if the group action fails.

The risk agreement is not binding on the defendant. A losing defendant cannot be ordered to pay fees for the plaintiff's counsel that are higher than the customary hourly rate, possibly adjusted on the basis of the attorney's special qualifications, the scope of the action, or the difficulty of the case. If the defendant has been ordered to compensate the plaintiff for litigation costs and if the defendant cannot pay, the members of the group affected are liable to pay these costs. The same applies to additional costs in connection with risk agreements. Each member of the group is liable for their share of the extra costs but is not liable to pay more than he or she has gained through the proceedings.

Group members are bound by a risk agreement only if it is approved by the court (*SGPA §38*). Risk agreements may only be approved if they are reasonable in view of the nature of the substantive matter. The agreement must be made in writing and specify how fees will depart from customary fees if the claims of the members of the group are granted or dismissed completely. As noted, risk agreements cannot be approved if fees are based *solely* on the value of the case.

Financing and funds

Under the Group Proceedings Act, the plaintiff must meet conditions for adequacy of representation to be accepted as a group representative (see *supra* under 2.). The requirements include having the «financial capacity» to prosecute a group action. The rule was designed to protect group members and defendants, as well as the court to a certain extent. In order to prosecute an acceptable case, the plaintiff must be able to pay the ongoing costs of litigation in advance (e.g. for investigations and counsel, if the plaintiffs´ attorney requires a retainer)[1]. But the plaintiff is not required to prove full capacity to pay the other side's costs, such as attorney's fees, if the defendant wins. It is a general rule in Swedish law that plaintiffs cannot be required to provide surety for the opponent's litigation costs. The *travaux préparatoires* of the Group Proceedings Act presume that it should suffice that the plaintiff's financial affairs are «in order», which is understood to mean e.g. that the plaintiff has a reasonable annual income and access to public legal aid[2] or private legal insurance, although both are usually limited to an amount equal to customary attorney's fees for less than 100 hours of work or € 10,000.

Unless the plaintiff is absolutely sure of winning the case, the risk of having to pay both parties' costs (including attorneys' fees) in a losing action is a strong deterrent for anyone thinking about prosecuting a group action. The possible exception would be potential plaintiffs who are unusually affluent or can rely on funding from other sources. But in contrast to the situation in e.g. some Canadian provinces, there are as yet no state or private funds to which plaintiffs can apply for reimbursement of ongoing and final legal expenses in group actions.

Based on these considerations, it was presumed when the legislation was drafted that private group actions would be rare and confined mainly to cases involving large individual damages. Accordingly, the drafters presumed that the majority of the ten or so group actions they estimated would be initiated every year would be public and organization group actions. Plaintiffs in such actions have no personal pecuniary interests to initiate proceedings and the drafters assumed the main aims would be to achieve better behavior modification on the general level (prevention) and legal development. These predictions did not pan out. The total number of Swedish group actions has been considerably lower than presumed: twelve over the course of six years. The distribution among the categories of group actions is also completely contrary to expectations. Not one organization group action has been initiated so far, despite very liberal rules on standing in organization actions (even small and recently formed, perhaps with the sole reason to go to court in a specific case, non-profit organizations with an acceptable purpose have standing in organization actions). Only one public group action has been brought, by the Consumer Ombudsman[3]. The other eleven cases were all private group actions. Thus, there have been more private group actions and considerably fewer organization and public group actions than estimated.

How then were the eleven private group actions financed? I do not have enough information to fully answer that question. But it is noteworthy that non-profit organizations have

[1] Note however that, unlike in the United States, the court both issues and pays for notice to group members in group actions under the Swedish Act (*SGPA §50*).

[2] Public legal aid is available only to plaintiffs who do not have and should not be expected to have private legal insurance (due to poverty or comparable circumstances).

[3] See above.

both appeared as plaintiffs and provided other support, even in proceedings that were not organization group actions in the strict sense. Instead, claims have been litigated as private group actions as a sort of «false» organization action with a member of the group acting as plaintiff, backed up by the organization or its members.

The explanation is that in «true» organization actions, the organization cannot also be a group member (have an interest of its own); if the organization is a group member, the lawsuit is treated as a private group action (see under 2 supra). Legal persons, such as non-profit organizations, may initiate private group actions. A group of people who want to initiate a group action may form an organization or foundation solely for the purpose. By transferring one of the members' claims for damages, or only part of it, to the legal person (the organization) becomes a member of the group. By this means, the organization gains standing to initiate a private group action (but not an organization action) on behalf of everyone who opts in, whether or not they are members of the organization. While the organization's finances must be «in order» according to *§8 para 5* of the Act for the organization to be accepted as a plaintiff, this can be arranged by collecting dues or other funding from the association's members (such as a limited guaranty). By this means, the members can limit their financial risk. Nor do members run any risk of being required to pay the opponent's costs. The named plaintiff – the organization – bears the entire risk. This «transfer method» is also open to already existing organizations, foundations, and other legal persons not formed solely for the purpose of litigating a claim.

Organizations and other legal persons are not eligible for public legal aid or private legal insurance. But private fundraising may be arranged among group members or in public appeals to fund both «true» and «false» organization actions, as well as «normal» private group actions. In one case (*Arlanda*[1]), a municipality close to an airport contributed by awarding a (small) «grant» to the organization formed to support a group action. Plaintiffs planning to initiate a group action under consumer or environmental law may also approach relevant large and established private organizations with appeals for funding or assistance with the action, e.g., by providing pro bono trial counsel (see above). However, no organizations of that type have so far initiated organization group actions of their own, which may indicate anemic interest in contributing. I have been told that the assumption of financial risk, exacerbated by the loser's liability for the opponent's costs under the English Rule, is also a crucial factor in connection with public and organization group actions. A major trial devours time and money. As neither the Consumer Ombudsman, the Environmental Protection Agency, nor any established consumer or environmental organizations have resources in their budgets for such purposes, legal expenses would be «unforeseen expenditures» that must compete with the organization's other needs when the budget is made. So far, allocating resources to initiate an organization or public group action has not been awarded high priority in that competition[2].

A funding method that has been used in one case is to prosecute a private group action but with multiple (six) named plaintiffs, who thus share the financial risk (*Arlanda*). This is probably acceptable because the defendant also benefits if the plaintiff's finances are sound. The approach may also make it possible for the plaintiff group to utilize coverage under

[1] See below.

[2] But see below.

multiple legal insurance policies. However, insurers are entitled to refuse legal insurance benefits for more than one plaintiff in cases involving trial of similar claims.

So far, it is more accurate to say the Swedish insurance companies have thwarted rather than supported the group action mechanism and their policyholders interested in using the new option for litigation. When the law was being drafted, the primary insurance industry organization was among the most active and antagonistic referral bodies. When the law went into force, one of the biggest insurance companies (*Trygg-Hansa*) immediately excluded coverage for plaintiffs (but not defendants) in group actions! It is highly uncertain whether companies that have not introduced similar exclusions would allow policyholders who are plaintiffs in a group action to exhaust not only their own benefits, but also those of one or more other group members, even though by opting in to the group action, they waived the right to litigate personal claims in the matter, and thus will never otherwise make claims against the policy. The ruling in the group action case will naturally constitute res judicata in later actions. On the other hand, the insurance companies often allow multiple policies to be utilized in connection with joinder of claims, as well as in ordinary individual actions if the case can be regarded as a test case for other policyholders who do not want to sue personally, but are willing to put their legal insurance at the disposal of the plaintiffs. Insurance companies can take this route to force unmanageable and costly mass litigation involving a large number of plaintiffs, despite that a group action would have been preferable for both parties and the court from the cost standpoint and to facilitate management of all similar claims. Worse still: the insurance companies' stance is an obstacle to justice that may head off litigation altogether[1].

4. Available relief

The Swedish Act on Group Proceedings covers group actions in general courts and its use is not restricted to any particular areas of law. In all three forms of group actions under the Act, the plaintiff can petition for injunctions as well as individual damages for injury suffered by individual members of the group. Actions for an order obliging the defendant to perform (e.g. pay damages or stop a certain activity) and/or petitions for declaratory judgments (see above) may be entertained as a group action. However, customary substantive rules on causation in tort law, calculation of damages, and evidence are applied. Post-trial calculation mechanisms, standardized computation of damages and *«cy-pres» solutions* are not available under the Swedish Act. Punitive damages do not exist in Sweden. This restrictive attitude is of course negative from an access to justice perspective, in group actions as well as in other forms of litigation.

5. Court involvement

The Act contains (*SGPA §8*) certain special preconditions for cases when group actions should be permitted:

- The action must be based on one or more circumstances or matters of law that are common or similar with respect to the claims of the members of the group, and group proceedings must not appear inappropriate because the grounds for some group members' claims differ materially from other claims.

[1] See above.

• A group action should be the best available procedural alternative to litigate the majority of the claims in court («superiority»).

• The group must be adequately defined with regard to the circumstances in the case.

• The financial affairs of the group representative must be judged in good order and the representative considered suitable to represent the group (adequacy of representation).

• As a further guarantee of protection of group members in private actions and organization actions, plaintiffs must be represented by an admitted member of the Bar. This is the only situation in Swedish civil procedure when plaintiffs are not allowed to represent themselves and attorneys must (with some exceptions) be members of the Bar.

The preconditions are tried by the court *ex officio*. The same goes for rules regarding notice (*SGPA §§13, 24, 49–59)* and appeals (*§§ 42–48)*, thus protecting group members, the defendant and the court from abuse.

Although the authority of group representatives to act on behalf of group members is strictly procedural, the plaintiff is empowered to settle on behalf of the group. However, group members are not bound by the *settlement* unless it is approved by the court. The court is not permitted to approve the settlement if it can be considered discriminatory against some group members or is otherwise obviously unreasonable. (*SGPA §26*)

The cost rules (the English Rule and some special rules in the Code of Judicial Procedure) and the absence of contingency fees *strictu sensu* are important safeguards against abuse. Group members are bound by a «risk agreement» (see under 3 supra) only if it is approved by the court. Risk agreements may only be approved if they are reasonable in view of the nature of the substantive matter.

6. Compatibility with US-style class actions

From a comparative perspective, the position of the courts in Scandinavia has been constrained, especially in the east-Scandinavian countries (Finland and Sweden). The historical fetters have been a mixture of political arguments for democracy and principles of equality, a firm belief in state supervision and control instead of court actions, the existence of a great variety of alternative mechanisms for dispute resolution and behavior modification, and, in Sweden in the first half of the 20th century, a strong position for the labor unions and well-founded suspicion regarding the willingness of courts and judges to participate actively in building the welfare state based on the Social Democratic model. All this, and likely a great deal more (such as a strict positivistic attitude with only limited scope for judicial lawmaking and judicial review), has contributed to making the Swedish courts less influential in civil matters than courts in many other countries, despite the comparatively high number of judges. The tendency to litigate is low. However, during the last decades a growing role for the courts and some «new» functions of civil procedure can be discerned[1].

There are many differences between US-style class actions and the Swedish group action that might contribute to the lower than expected number of actions in Sweden so far. One is the retreats designed to keep a lid on litigation that occurred towards the end of the legislative process and the strong antipathy that still exists in some quarters. There are deterrents both inside and outside the regulatory system. Of particular significance here is the plaintiff's cost liability (the English Rule) – which also applies to public and organiza-

[1] See Lindblom 2007. But see below.

tion actions – the absence of contingency fees *strictu sensu,* the lack of state and private funds that support litigation, the absolute opt-in requirement, the lack of pretrial discovery, post-trial calculation mechanisms, «*cy-pres*» solutions, punitive damages and standardized computation of damages, the negative attitude among insurance companies and certain members of the Swedish Bar Association (most likely dominated by defense lawyers in this legislative matter), resistance among certain judges and (conservative) politicians, as well as the general problems – primarily slowness, costs, and lack of expertise – which make it hard for even ordinary litigation to compete against arbitration and other forms of alternative dispute resolution in a free market.

There is a strong tendency, not only in Sweden but in the European Union as a whole, to favor alternative dispute resolution (ADR). ADR – the third wave, or rather tsunami, in the Access to Justice movement – has lately gained widespread interest and support as an easily accessible, flexible, fast, and low-cost way for parties to resolve disputes, as well as a means of reducing judicial workload. However, the risk and downsides of ADR are seldom discussed. ADR is sometimes a valuable complement to civil litigation, group actions included[1], but may also function as a surrogate that diminishes the role of the courts and threatens the functions of civil procedure[2].

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[1] E.g. settlement and arbitration. In *Carl de Geer et al v. The Swedish Airports and Air Navigation Service* (Nacka District Court, Environmental Court division, case number M 1931, 2007) residents of Upplands Väsby, a community near Arlanda Airport, formed a non-profit organization called «Residents of Väsby Against Aviation Noise.» Some members brought a *private* group action against the Swedish Airports and Air Navigation Service (LFV), seeking damages for injury caused by aviation noise on behalf of about 20,000 people, mainly residents of one neighbourhood adjacent to the airport. The District Court issued the summons and about 7,000 people have opted in so far. LFV moved to dismiss, arguing that the conditions of SGPA §8 had not been met. The court denied the motion in January 2009. The parties subsequently commenced settlement negotiations, which are still ongoing (September 2011).

[2] See Lindblom, *ADR – the Opiate of the Legal System?*, 2008. For a diverging opinion, see Lindell, 2007, p. 322.

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DISCUSSION PANEL

Javier López Sánchez[1]

SPAIN

GROUP LITIGATION: EVOLUTION FROM CLASS ACTIONS TO THE COLLECTIVIZATION OF THE ACTIONS

In the last decades, we are witnessing the progressive development of class judicial protection systems in the countries of old Europe.

We have become conscious of the need to adapt the general procedural concepts to the requirements of the mass jurisdictional protection. In this adaptation, we must bear in mind the determination of how the actions of the interest of all those affected parties will be coordinated to achieve their fulfilled satisfaction. The class action, since it reduces the

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litigation costs, arouses the lethargic interest of litigants. From this point of view, class actions are presented as an instrument that restores in the proceedings the equality existing among the combination of many small claims and the actual scope of the unlawful action that has originated them.

The analysis of this situation leads us to consider that the organized Administration of Justice requires not only that the possibility of class protection is afforded, but also the imposition of the protection aggregation. Such aggregation would offer protection to whom has not or even would not urge it, conferring or rejecting this protection after consideration of the pleadings and even the claims filed by the person who acts as representative of the affected parties without having an effective representation, as in such cases the representative nature of all affected parties' interests is considered as sufficient. In this transfer of representation to representativeness we come across the principal contribution of the US class action system.

Evolution of this system has occurred in a relatively brief period. Although historical-legal research can track down the origins of this institution in the English Law[1], we must not forget that the US procedural regulations, particularly in the Federal jurisdiction scope, has undergone a prompt evolution from a clear decision to be emancipated from its historical background by giving birth to new institutions and, all of this, turning its back on the origin, development and systematization of the European procedural science. A certain attitude of arrogance leads the US jurists to overestimate the virtues and advantages of their Law. On the other hand, we must remark the flexibility of the US court system, where the judge is vested with wide discretional authority to conduct the proceedings, the parties must act under a procedural good faith principle by providing the evidence in the discovery stage and where search for an arranged settlement is the usual outcome of the proceedings.

Free from the civil law dogmatic premises, the US courts have shown incredible celerity in resolving cases of extremely high amounts and thousands of affected parties. However, we must note that these results are still controversial even in the United States.

The class action system is not born, although otherwise could be deduced, as a procedural technical instrument designed to achieve an expeditious remedy of the mass damage caused. Such use of the class action mechanism is the finishing line of an evolution of the institution whose principal lever was achievement of the civil rights effectiveness and eradication of unlawful behaviors by using the civil justice as an instrument of social change[2]. Nevertheless, this finishing line has aroused prejudices from those who deem the class actions as a barrier to economic development and productivity. Detractors denounce the degeneration of the institution to a system of social blackmail to companies.[3] For many others, however, the institution still arouses enthusiasm for considering it as the principal instrument to attain deterrence of unlawful conducts. The intense discussion aroused for the reform of the federal legislation on class actions in 2005 is, to a great extent, an example of this controversy.

In the last stage of their evolution, class actions have gone from being the instrument authorized in 1966 to achieve effectiveness of civil rights – particularly in the racial segre-

[1] Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, 1987.

[2] Hensler, Pace, Dombey-Moore, Giddens, Gross & Moller, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, Santa Mónica, California, Rand Institute for Civil Justice, 2000.

[3] Hay & Rosenberg, *«Sweetheart» and «Blackmail» Settlements In Class Actions: Reality And Remedy*, 75 *Notre Dame L. Rev.* (1999–2000), pp. 1377–1408; Silver, *«We're Scared to Death»: Class Certification and Blackmail*, *N.Y.U. L. Rev.* (2003), pp. 1357–1430.

gation scope – (*cfr. Fed. R. Civ. P. 23 Advisory Committee's Note to the 1966 Amendments*), to become a mechanism that has allowed protection of mass damages. In this process there is an evolution from protection of a real common interest to protection of individual subjective rights.

In relation to protection of a common interest, in the cases covered by Rule 23 (b) (2) FRCP, the imposition of fulfillment of a legal duty of behavior, both of individuals and public bodies, is intended, thus the class action providing a protection that reacts when faced with an unlawful behavior that indifferently affects a plurality of persons.

Perimeters of this form of protection are, to a great extent, due to the inexistence of a specific jurisdictional proceeding for the revision of administrative decisions. Jurisdictional claims of an administrative nature are substantiated through the same procedural rules that channel litigation between individuals.

In countries of a civil-law legal culture, civil actions have merely demanded effectiveness of obligations, while effectiveness of duties incumbent upon individuals in their actions in the market –or other sectors– has been demanded through administrative control measures and, temporarily, by means of the jurisdictional revision of decisions adopted by regulatory administrative bodies. In the common-law scope, such duties have been demanded from individuals through the exercise of civil actions directed towards obtaining a specific conduct of act or default. Here lies in the distinction of the private enforcement and public enforcement a system. Proliferation in legal systems of the civil law tradition, of actions of default as a consequence of the transposition of EC Directives admitting this orientation of the common-law legal systems has imposed the introduction of forms of class protection, which imply a «de-administrationalisation» or deregulation of the market to then assign enforcement to the market agents themselves.

If we focus again our attention in the US class actions, actions aimed at protection declaring the unlawfulness of the defendant's behavior which, although possibly with a strictly individual impact, responds to reasons generally affecting the class, must be fit into the second subtype of Rule 23(b) (2) FRCP. Tried behaviors may be both positive actions of infringement of the law and failures of fulfillment of that provided by the Law. Protection claimed may be extended not only to the declaration of the unlawfulness of the behavior, but also to an injunction directed towards a rectification of the defendant's rules of behavior. Therefore, they are actions that even being settled in favor of one single member of the class, they will mandatorily have a supra-individual significance, since the defendant's act or default is deemed as affecting the whole class.

Certification of class actions under this number has not only occurred in cases of civil rights, but also in cases of antitrust together with, when appropriate, along with a monetary conviction that would grant an economic benefit to the specific member of the class – some kind of protection of a specific nature – which is usually referred to as an equitable remedy or equitable relief. All in all, the purpose was fulfillment of the duties corresponding to the defendant rather that the remedy.

But in 1966, the possibility of exercising a class action to aggregate the claims of its different members when they imply common issues in fact and by right was also introduced in the Federal regulation of class actions. Protection of any of the class members' right may be achieved on an individualized basis, without affecting the other acting plaintiffs' rights or creating any problem for the defendants. For the authors of the reform, the resolution of the different issues put forward through a class action did not respond to a reason of

necessity, but a reason of convenience according to the circumstances of the case. Such reason of convenience would apply for saving time, effort and resources, as well as a uniform solution for persons under a similar situation. Reference to the prevailing character of common issues is the factor that revealed the convenience of the mechanism for procedural economy that the class action instrument seems to offer.

This economic reason has acted as a pressure factor towards the class action expansion. The class action paradigm in the United States consisted of the action which, having infringed a rule had caused economic damage to a great number of persons. Given that the damage could be small, nobody would probably file the action individually. The class action was presented as an appropriate mechanism to urge fulfillment of the law and repair the equity damage on a global basis. In this evolution, the configuration of the class as a fluid class was admitted, underlining the importance of the class action instrument to attain effectiveness of the Law enforcement and deterrence of unlawful behaviors rather than the repair of the equity damage suffered. However, the authors of the reform in 1966 of the Federal Rules of Civil Procedure had expressly excluded the applicability of the class action mechanisms to mass-accident cases or, more generally speaking, mass torts. The reason then adduced was the probability of the existence of relevant circumstances that would affect differently the different injured parties. Nevertheless, pressure derived from the multiplication and avalanche of consumers' lawsuits for liability of the manufacturer or workers' lawsuits for exposure to toxic substances – the case of intoxications and damages for asbestos exposure is particularly characteristic – would finally allow tort actions to access the class actions, especially as of the 1980s.

We have mentioned above that justification of the class actions in these cases responds to a convenience reason of procedural economy. This assertion is true to such a great extent that the US authors do not hesitate to invoke criteria of cost reduction to legitimize the solution of the class actions and exclude the possibility of opting out from class protection. In this sense, Rosenberg[1] defends the configuration of class actions as mandatory class actions with respect to mass torts because greater cost reduction and accomplishment of the deterrence and insurance purposes would be attained. Defense of the damage repair aggregation reaches the point where Rosenberg[2] asserts that courts should distribute compensations among the injured parties according to the severity of the damages undergone, regardless of the relative soundness of their claims, to the extent that the mass torts cases will not normally be the same. Rosenberg[3] upholds the superiority of his proposal from an ethical point of view because it is founded on the universal acceptance of a cost-reducing system and refuses a solution that prioritizes individual over common interest. Similarly, Rubenstein[4] states that the way lawsuits on mass torts are attempted to be resolved reveals that the model of adversarial proceedings no longer explains the courts' way of action, for which reason he proposes a new model that justifies the way of action of courts in this case, the transactional model or the negotiation model before a judge. Nagareda[5] highlights that

[1] *Mandatory-Litigation Class Action: The Only Option For Mass Tort Cases*, in 115 *Harv. L. Rev*. (2001–2002), pp. 832–833.

[2] Rosenberg, op. cit., p. 834.

[3] Ibid., p. 841.

[4] Rubenstein, *A Transactional Model of Adjudication*, 89 *Geo. L. J.* (2000–2001), p. 372.

[5] Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, *75 U. Chi. L. Rev.* (2008), p. 617.

there is an unbroken line from the private scope of contracts to the public scope of legislation and that problems of the class actions should not be considered merely as class-action issues, but as a challenge to reach arrangements harmonizing effectiveness with lawfulness[1] and he defends its dissociation from concepts such as due process and autonomous exercise of rights, in order to pay more attention to the management rules of class interests[2]. In this regard, Issacharoff & Witt[3] warn that lack of controls on the adequacy of representation and the insistence on the binding character of the decision or agreement for all the group members place class actions in a position closer to administrative models.

It's hardly surprising that Redish & Kastanek[4], from a critical point of view, denounce the transformation of the contradictory proceeding into a proceeding of an administrative nature.

If we focus again on the civil-law system, we will realize that in the old Europe countries, the possibility of class protection is linked to the existence of class interests. From this point of view, the Spanish Law approach that introduced in the year 2000 a regulation on class actions in Article 11 of its Civil Procedure Law restricting their possibility to the prior existence of a common interest, sometimes defined as class interests, sometimes as diffuse interests, is worth mentioning.

Our legislation ignores the category of homogeneous individual interests, which appears, however, in Article 81 of the Brazilian Consumer Code. However, such interests are encompassed within, in their application before courts, the cases of class interests or diffuse interests. It is true that in these cases there is not a real class interest in the court protection targets, but in all case an interest of the court system itself in reducing costs. For this reason, we uphold that we must not talk about cases of class protection, but about cases of collectivization of the protection.

Assertions of US authors are particularly symptomatic of this evolution from class protection of true class interests to the imposition of class protection of individual interest. Therefore, we must talk about a collectivization of the protection applied in the Civil Law systems without, at least in Spain, a discussion having arisen on the limits where such collectivization is appropriate and lawful and which is concealed under the assertion of the class nature of the interests at stake. The situation results paradoxical because while class actions serve the administrative deregulation, as mentioned above, collectivization of actions is aimed at formulae of collective management of individual interests and, in the United States of America, even at formulae of administrationalisation of the court protection, to the extent that in cases of mass torts, the denial of the opt-out possibility is considered as more effective[5].

We propose that in the categories describing the different cases which refer to the existence of class actions, such expression is reserved for referring to such cases where a real class interest is protected. Otherwise, when protection is projected on individual rights that are

[1] Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, p. 635.

[2] Ibid., p. 644.

[3] Issacharoff & Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, *57 Van. L. Rev.* (2004), p. 1632.

[4] Redish & Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 *U. Chi. L. Rev* (2006), pp. 607 y ss.

[5] Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 *Harv. L. Rev.* (2001–2002), pp. 831–897.

jointly treated, we must not talk about class protection, but rather a collectivization of the protection because it does not respond to the convenience of citizens, but to the interests of the court system itself in achieving an effective management. This effective management can redound, but not necessarily, to the benefit of citizens. In all case, interests that are truly at stake must be brought up so that discussion on the limits within which this form of aggregation must be developed will become much clearer.

Dmitry Magonya[1]

RUSSIA

The Horizons of Class Action Development in the Russian civil procedural law system

Despite the special Chapter of the Arbitrazh (Commercial) Procedure Code of Russia (hereinafter referred to as the «APC») introduced in 2009, class action institution being actively developed in the western legal systems over the recent decades remains in the Russian civil procedural law system in its embryonic stage.

It is evident that one of the principal reasons for absence of demand for this institution in our country is insufficient legal and regulatory framework. At the same time the experience of foreign countries has amply demonstrated the need to reform the class action institution. The use of class actions in such countries has raised a number of fundamental challenges at the legal and social levels. Should the Russian legislation draw on this experience in order to cause the precedents? Or should it establish such a developmental model that will take into account the ways to solve the above said contradictions and will procure smooth integration in the Russian civil procedural law system?

We have no doubts that class actions due to consolidation of an unboundedly large number of claims into a single trial makes the court proceedings economic as for claimants as for the court, more completely comprising the interests of persons whose rights have been infringed by the defendant's illegitimate conduct and allowing even chances for every class member to receive a fair compensation. Claims that are the subject of class actions would not be otherwise brought before the court, and management of a number of individual trials would be too expensive for claimants in every respect. This is the public benefit of class actions, since it makes it possible to put into force a mechanism to protect violated rights and legitimate interests of a large range of persons.

In connection with the above the national legal regulation should meet that purpose. Thus, **the guaranteed right of access to courts** becomes the main factor of efficient use of class actions in any legal system.

It should be pointed out that Russian civil procedural law system admits only some forms of class actions that should be recognized as an independent type of civil action[2]. The

[1] Managing Partner for Art de Lex Law firm (Russia).

[2] G.O. Abolonin, *Class Actions in Civil Proceedings*, *Ph.D Dissertation*, Ekaterinburg, 1999.

APC and the Civil Procedural Code of Russia provides so called in the theory of Russian procedural law public and organizational (or institutional) class actions[1] and only APC provides limited categories of private class actions (see below). It is worth saying that the rules of Chapter 28.2 of the APC do not provide the absolute jurisdiction of commercial courts to hear the private class action cases, but only those that are in competence of commercial courts[2]. The implementation of measures to address that indisputable deficiency should be the next step of the Russian legislator.

At the same time, the APC is not free from imperfections. Sec. 225.16 (4) of the APC provides that commercial court should decline to consider a claim filed by a person who had not exercised his right to join a class action to the same defendant and having the same subject, being trialed by the same court. The court should explain to the claimant his right to join the class action in accordance with the procedure provided by sec. 225.10 of the APC. If a court had already decided the class action and the decision came into force, proceedings initiated by such person shall be terminated.

It is evident, that there is a collision with sec. 225.17 (2) of the APC providing that the facts substantiated by the court's decision on the previously decided class action case, which have come into force, should not be proved again during the other court proceedings commenced on the action of the other member of that class against the same defendant.

Besides, the person could fail to exercise his right to join the class action by reason of lack of information in relation to those court proceedings. In that case the absolute grounds for repealing the judgment provided by the procedural codes in fact are not taken into account.

In the fair opinion of lawyers, this rule is contrary to the principle of a class action that can be defined as freedom to choose by every class member whether or not to participate in the class action[3].

In the western legal systems that use the class action institution, class members are granted the right of choice by their exercise of subjective civil and procedural rights (optation). A class member has the right to opt out or to opt in a class action depending on each model implemented in national law. Each of these two models has its own benefits and limitations. In any way a class member has the right to bring an independent claim against the defendant if it refuses to join the group proceedings. It is important to note that none of the European countries currently has true US-style class actions[4].

Sec. 225.16 of the APC (even though it is slightly similar to the opt-out model) provides to a person who failed to exercise his right to join the class action with no right of access to courts. So the provisions of that section force every class member to participate in class proceedings while the relief in court is a right, but not a duty (that is stated in article 46 of the Constitution of the Russian Federation, sec. 4 of the APC, sec. 3 of the Civil Procedural Code of Russia). Such a defect is the starting point for the improvement of Russian procedural legislation.

Considering the conditions for filing a class action, referred to in sec. 225.10 of the APC, other problem of the procedural law reveals. The whole point is that the Russian

[1] D.Y. Maleshin, *Russian Civil Procedural Law System*, *Doctor of Law Dissertation Abstract*, Moscow, 2011.

[2] See, for example, the legal views of the commercial courts in case No. A45-18716/2010.

[3] See, for example, G.O. Abolonin, *Class Actions in Russian State Arbitration Procedure – Perspectives of Development*, *Commercial and Civil Proceedings*, 2001, No. 3.

[4] *Collective Actions in Europe*, *Clifford Chance LLP*, July 2010, available at http://www.cliffordchance.com/content/dam/cliffordchance/PDF/collective_actions_europe_2010.pdf.

legislation has the unreasonably narrowed **fields of application of class actions**. The APC provides the requirement of class members to be connected by the common legal relationship (the objective criterion of a class action). The legal relationship theory is one of the most complicated and debatable questions not only in the Russian law, say nothing about the law enforcement practice. Nevertheless, for the purposes of effective right of access to courts the requirement referred to in sec. 225.10 of the APC in fact does not allow the use of class actions. For example, private property class actions seem to be not allowed under the Russian law due to the fact that each member of a group has the right in personam against the defendant derived from breach of contract or civil injury[1]. Thus, no private damages class actions de jure and de facto may be brought before the court[2].

It seems that the approach established in the US Federal Rules of Civil Procedure 1938 may be applied in the Russian legislation[3]. In particular the presence of questions of law or fact common to the class, typicality of the claims or objections presented by representatives of the class seems to be sufficient grounds to commence the class action proceeding. There is no doubt that it should be taken into account, that the participation of all class members can be ineffective and unpractical because of the great number of class members.

Also experts noted long ago that the relevant Chapter of the APC was designed to consider of the corporate disputes, though it contains not exhaustive list of claims that can be the subject matter of a class action (sec. 225.11 of the APC)[4].

Since class actions are mostly aimed at consolidation of claims of private individuals, the appropriate amendments to the civil procedure legislation seem to be the urgent need.

The **effective representation of interests of the class** is a question that offers points for active discussions about class actions in the countries, where that institution is widely used.

The current Russian legislation grants representation powers only to the class members. Whilst the associations incorporated in order to protect the rights and legitimate interests of such classes in most cases have no such opportunity either because of a lack of the specific rules provided by the Federal laws, neither due to poor regulation which does not stipulate the details of class actions procedure.

This is the matter of special legislation. Some Russian Federal laws provide declaration rules with respect to the representative actions in defense of an indefinite group of persons. For example, such rights are granted to consumer rights protection associations and Federal Supervision Agency for Customer Protection and Human Welfare[5], associations of investors[6], public and noncommercial associations dealing with the environmental protection

[1] See additionally the legal views of the Federal Commercial Court for Moscow District in case No. A65-2305/2011 regarding to qualification of legal relationships in transactions (resolution dated 21.12.2011).

[2] These legal views have been confirmed by the appellation commercial court in case No. A40-106587/11-6-913 (the cassation appeal is still pending).

[3] The Federal Rules of Civil Procedure. 28 U.S.C. Rule 23.

[4] See the explanatory notes of the Economic Development and Trade Ministry for the Federal Law of 19.07.2009 No. 205-FZ «Concerning the Amendment of Certain Legislative Acts of the Russian Federation». The subject of a great part of a few number of successful class action cases is a claim seeking a declaration of title to the joint shared property (see, for example, cases No.No. A46-5540/2010, A40-107502/10-85-954, A40-26092/10-155-207, A40-152425/10-155-1237).

[5] In accordance with the Federal Law «On funds investment of the funded part of labor pensions in the Russian Federation» dated 24.07.2002 No. 111-FZ.

[6] In accordance with the Federal Law «On protection of rights and legal interests on the securities market» dated 05.03.1999 No. 46-FZ.

matters[1], the authorised Federal agency for protection of the personal data subjects[2], the authorized Federal executive body for the regulation, control and supervision in the field of formation and investment of pension savings. However, that rules are only declarative in nature referring to the procedural laws.

The APC itself contains a blanket legal rule providing the right of other bodies and organizations to file in court a class action (sec. 225.10 (1) of the APC). In the theory of Russian civil procedural law such actions may be classified as organizational and public class actions. However, by implication of law the question is not about the official authorities for the same reason, as far as the relevant Chapter of the APC is emphasized on corporate disputes.

Sec. 4 (2) and sec. 46 of the Civil procedural code allow in the cases provided for in the federal legislation a person acting on behalf of himself to bring an action in defense of the rights, freedoms and legitimate interests of the other person or of indefinite group of persons. A public prosecutor in accordance with sec. 45 of the Civil procedural code is allowed to file an action in defense of rights, freedoms and legitimate interests of citizens (subject to certain restrictions) or indefinite group of persons, or the Russian Federation, or the subjects of the Russian Federation, or local authorities. Such representative actions are admitted, if an individual is not able to apply to the court by himself for health reasons or on the grounds of age, incapacity or for other reasonable excuse. It should be pointed out that the exceptions made to the rule apply to the most significant areas of social life, in which mostly there is a need, in practice of foreign states, of class actions, (in the area of labor (employment) relationship; protection of family, motherhood, fatherhood and childhood; social protection; ensuring the right to housing in the state and municipal housing stock; health protection; ensuring the right for favourable environment; education).

However, as above mentioned most claims on class actions, in particular claims of material character, cannot be applied in practice due to the absence of special rules governing civil proceedings on such actions.

In the USA and in several Western Europe countries has recently emerged a sharp criticism of the representation in class actions. It is connected with the activity of the representatives (attorneys and law firms) who, in most cases, initiate such actions against major corporations, and, according to the opinion of experts supporting the reform of class actions institution, considering such actions as a financial opportunity to benefit themselves from the awarded sums.

In accordance with the July 2008 report of US Institute for Legal Reform, working under the auspices of the US Chamber of Commerce, during the previous decade law firms earned about $ 17 billion only due to the class actions in securities market. It was noted that 9 of 10 public companies delisted on US stock exchange confirmed that class actions problem they faced had played some role in that decision.

The greater part of the considerations awarded on class actions is spent on the legal firms' services payment, whilst their principals received considerably less. It must be admitted that any class action is a quite costly activity for law firms and sometimes requires huge budgets. Nevertheless when multi-million and billions actions are constituted out of hundreds of thousands or even millions of claims for several dollars per one class member, the question of real restoration of rights of those persons becomes important.

[1] In accordance with the Federal Law «On protection of the environment» dated 10.01.2002 No. 7-FZ.

[2] In accordance with the Federal Law «On personal data» dated 27.07.2006 No. 152-FZ.

The professional community speaks about the crisis of class actions system in the USA underlining the need for particular changes[1]. Though it seems that this trend may be not without the corporation lobby.

On the one hand, such problems are still theoretical for Russia. It is not only because the practice has not been formed yet, but also because until now the defense of law firms' fees in court remains to be a significant problem. Russian courts are not ready to admit the fees that are ordinary to the developed US and European legal markets. The latter emphasis is mostly connected with the absence of uniform standards of legal practice the compliance of which could be ensured by the professional community itself as it is realized in European countries or in the USA. This problem is also important within the aspects of lawyer's remuneration only in case the plaintiff's claim is satisfied.

On the other hand, it seems to be logic to develop Russian legal system with the purposes to prevent ungrounded class actions that have commission fees as the only aim, for example, abuse of rights institution which provides the court's power to deny a relief for a claimant's right.

In our opinion it is necessary to extend the presumption of representation in order to provide with the court relief an indefinite range of persons. Consumer rights protection associations and consumer unions could efficiently protect the interests of the citizens, suffered from the violations of corporations, as, for example, in cases of violation of the competition law. At the same time the legislator should resolve the issues concerning the mechanisms of accumulation and distribution of the compensations awarded, for example, by establishment of the special money funds and instruments to procure the use of such funds (including the regulations to manage the funds and liability of the authorised entities for inappropriate use etc). Without these instruments the real protection of violated rights will be impossible.

There is an opinion among Russian lawyers that a class (group) itself should be endowed with a procedural status[2]. But the problem of representation of such class in court will not be solved in such way. Still more important is the regulation of the relations among the class members with the purpose of solving possible conflicts within the class.

The suggestion of some lawyers about the use of mechanisms worked out by the legislation and case law for insolvency disputes, in particular, to amend the procedural codes with a provision establishing the procedural status of a «class meeting» (similar to the «meeting of creditors» in insolvency proceedings) should be treated critically[3].

As opposed to the group of creditors whose interests are not and cannot be common to all the members of such group (as far as each of them is interested in priority consideration of his own claims against the defendant), introducing a meeting of the class, where the number of members can be significant, may cause a substantial delay in court proceedings (beginning with the notice of the meeting, its conduction (even through absent voting) and concluding with making decisions on controversial issues).

The other important issue is **a «linkage» of the procedural codes rules on class actions with the system of civil and commercial procedure** at whole. So, Chapter 28.2 of the APC

[1] See, for example, Lisa Rickard, *The Class Action Debate in Europe: Lessons from the U.S. experience*, in *The World Financial Review*.

[2] B. Zhurbin, *The Class Meeting as an Expression of Optionality Principle in Determining of Class Actions by Commercial Courts*, *Commercial and Civil Proceeding*, 2011, No. 10.

[3] The same source.

does not govern the question, whether or not the case commenced on the action filed by several persons can then be considered in the way of a «class action proceedings».

Not the least topical is the **issue of notification** of class members about the proceedings on class action, which in the Russian civil law procedure system is traditionally a duty of the court. The form of such notice should become uniform, and not to be defined at court's discretion in every particular case. In our opinion, application for accession to the claims on class action should be addressed by the class member directly to the court, which will consider such member among the others. That will allow avoiding an abuse on the side of the class representative, who initiated an action.

The other controversial issue is **a conflict of several class actions**. Western case law knows numerous examples when defendants through their attorneys intentionally initiate the formation of a class in order to get the right to file such action. For example, the rule 23(g) (2)(B) of the US Code allows the court to appoint the applicant, who is able to fairly and adequately represent the interests of the class. The Russian legislation should also be amended with the provisions empowering the court to confirm a claimant's appointment as a class representative. Moreover, it should also be completed with the forms of conflict resolution provisions when several class actions are brought before the court.

Summing up the problems described above, for most of which Russian legislator will have to find solutions in order to upgrade the civil procedural law system and create conditions for development and active application of class actions, it should be pointed out that efficient development of one institution is impossible without adequate development of the whole civil procedural law system and other related spheres. Russia has an opportunity to create such class actions system that wouldn't have those defects, that the other countries have already faced, considering distinctive features of the Russian legal culture and legal system.

SESSION 6. COMMERCIAL ARBITRATION IN EURASIA

General Reporter –
Prof. **Ivan Marisin**, Quinn Emanuel Urguhart and Sullivan LLP, Russia

Eurasia is an attractive market in different fields. How does commercial arbitration works there?

National Reporters:
Russian National Report: Prof. **Eugeny Sukhanov**, Chairman of the Court of Arbitration for Resolution of Economic Disputes at the Chamber of Commerce and Industry, Russia
C.I.S. National Report: **Prof. Valery Musin**, Chairman of the Presidium of the International center for adjustment of disputes at the Economic court of the Commonwealth of Independent States, Russia

Eugeny Sukhanov[1]

RUSSIAN NATIONAL REPORT

COMMERCIAL ARBITRATION IN RUSSIA[2]

An arbitration proceeding of property disputes of entrepreneurs is a direct and inevitable consequence of development of market relations in economics and legally executes their private law principles, first of all – a fundamental principle of freedom (the initiative and discretionary) in implementation of private owners of their property rights. It objectively follows from recognition of freedom of contracts and the right of the private proprietor independently dispose property belonging to it. Therefore possibility of arbitration proceeding of commercial disputes became one of fundamental principles of the legal business organization both in national legal systems and in the foreign trade turnover.

As in Soviet times in Russia, the planned organization of the economy based on state-controlled economy dominated, there was excluded a private ownership on the most important kinds of property (land, the durable means of production and the most valuable objects of social and cultural character were in a exceptional state property), there was neither private enterprise nor independent of state arbitration proceeding of property disputes.

[1] Professor of Moscow State Lomonosov University (Russia).
[2] The translation from Russian into English was done by Yanis Vafin.

This proceeding was used only as necessary in a foreign trade relations of the state (state foreign trade organizations) and foreign counterparts, i.e. in the international legal sphere. At the All-Union Chamber of Commerce (later – the USSR Chamber of Commerce and Industry, and now – RF CCI) since 1930 operated the Maritime Arbitration Commission (MAC), and from 1932 – Foreign Trade Arbitration Commission (FTAC transformed in the early eighties in the Court of Arbitration at the USSR CCI, and after about a decade – into the current International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation). These organizations represent a permanent (institutional) arbitration, and the MAC was the first institutional international commercial institutional arbitration in Russia and one of the oldest maritime arbitrations in the world[1].

Thus, the commercial arbitration in modern Russia was initially formed as the *international* and *institutional arbitration* at association of the enterprise organizations (chamber of commerce) that essential impact on formation and development of all system subsequently has made of modern Russian commercial arbitration (arbitral tribunals).

Thus it is necessary to note the other important circumstance: in the conditions of state-controlled economy property disputes between state enterprises and organizations who are not the owners of their property (therefore, who had no real economic interest in protecting their property rights), were considered and resolved not by ordinary state courts and special jurisdictional authorities – *the state arbitration*, and in particular procedural order partly reminding a traditional arbitration procedure (and in most cases – actually even on the basis of the special rules of law that were adopted by the State Arbitration of the USSR headed this state authorities system).

At transition to a market economy in the early nineties of the last century the system of the state arbitration has been transformed into an independent branch of judicial system – *the state commercial (arbitrazh) courts* isolated from the state courts of general jurisdiction and consider property disputes of legal entities under special procedural rules established by Arbitrazh Procedural Code of the Russian Federation. As a result in Russia not only appeared two systems independent of each other state courts in civil (property) disputes, but also the notion of «arbitration» in the Russian law is now commonly associated with state commercial («arbitration») court whereas arbitration in traditional understanding began to be called as «*arbitral tribunals*»[2].

As a consequence of these circumstances, commercial arbitration in Russia, intended for proceedings of «internal» disputes between the Russian businessmen, has received the name of «arbitral proceedings» whereas at the resolution of international enterprise disputes («with foreign participation») often used the term «arbitrazh» («commercial court») in the conventional sense. Currently, the terms «arbitral tribunals» in the Russian legal doctrine are covered both international and the «sub-national» commercial arbitration (institutional and «ad hoc arbitrations»).

This position is legislatively reflected and in two operating Russian laws devoted to arbitral proceeding: in the Law of the Russian Federation of 1993 «On International Commercial Arbitration» and in the Federal Law of 2002 «On Courts of Arbitration in the Rus-

[1] For details, see: *Treteisky sud*, No. 1, at 8 et seq. (2011) (a special issue dedicated to the 80th anniversary of the MAC at RF CCI).

[2] It is necessary to notice that the arbitral tribunals on disputes between the citizens did not get the real distribution neither in Soviet, nor during post-Soviet time, which has been provided by the Appendix № 3 of the Civil Procedural Code of RSFSR 1964.

sian Federation». Moreover, before acceptance of the current Arbitrazh Procedural Code of the Russian Federation contest of decisions of the international arbitration and issuance of documents on their enforcement were carried out by state courts of general jurisdiction (usually – the Moscow City Court), whereas contest of decisions of the «internal» arbitral tribunals and issuance of documents on their enforcement (since 1992) were carried out by the state commercial courts. Since 2002 these procedures concerning decisions of all arbitral tribunals are carried out only by the state commercial courts.

All this allows us to talk about the actual existence of *two systems of commercial arbitration* (or «arbitral proceedings») in Russia: in the form of the international arbitration (institutional and/or ad hoc) and in the form of «domestic» arbitral tribunals (also institutional or ad hoc). Organizationally they can be expressed differently: for example, at Chamber of Commerce and Industry of Russia there are two different institutional arbitral tribunals (the list of composition of arbitrators in a certain measure coincides): International Commercial Arbitration Court (ICAC) and the Court of Arbitration (arbitral tribunal) for Resolution of Economic Disputes whereas the Arbitration court at St. Petersburg Chamber of Commerce and Industry is considering an enterprise disputes between the Russian businessmen, and their disputes with foreign businessmen (accordingly being guided thus by one of two specified above the Russian laws).

At the same time, such artificial «doubling» of commercial arbitration in a certain measure generates some practical problems. So, disputes of the companies with foreign investments and the Russian companies usually are within the competence of the international arbitration but as both those, and others are legal entities of the Russian law, consideration of their disputes in the arbitral tribunals (certainly, in the presence of the corresponding arbitration agreement of the parties of dispute) is not excluded.

The question on harmonization of the Russian laws on the international commercial arbitration and on the courts of arbitration (arbitral tribunals) yet is not actual, requirements which were established by the first of these laws (which reproduces almost verbatim the contents of a UNCITRAL Model Law 1985), are not achievable in that part that many «internal» Russian arbitral tribunals do not correspond to the given requirements, and theoretically possible harmonization of the Russian legislation on commercial arbitration, according to the most authoritative experts, should be carried out on the basis of the Law on the international commercial arbitration.

This situation is explained by the fact that from the date of appearance of the arbitral tribunals has taken place only about 20 years (as a whole from the beginning of market transformations to Russia). Formation of the arbitral tribunals in modern Russia has begun with the Interim Provision concerning arbitral tribunals for the resolution of economic disputes 1992 (although, for example, stock exchange arbitration occurred before this time, actually – from the moment of occurrence of mercantile and exchanges in the late eighties – the beginning of 90th years and acted on the basis of the exchange legislation). On the basis of this Interim Provision within ten years prior to the adoption in 2002 of the current Law on the arbitral tribunals in Russia it has been created nearby 450 institutional arbitral tribunals, from which approximately the fifth part – on regional commercial and industrial chambers.

As the coordinator of the given process was the Chamber of Commerce and Industry of Russia where the first (the autumn of 1992) Court of Arbitration (arbitral tribunal) for Resolution of Economic Disputes was created. It was supposed that along with property

disputes of Russian businessmen this arbitral tribunal will also consider their disputes with businessmen from the CIS countries (the former union republics), retained economic relations with the Russian partners (actually it annually considers a small amount of such disputes). The creation of this institutional arbitration initially was aimed at not only the trial of particular enterprise property disputes, but also the formation of key structures, an example of which would be to study the specific experience of arbitration with all its problems and further to promote its achievements.

At creation of this institutional commercial arbitration has been widely considered a rich experience of FTAC (ICAC) and MAC, which operated for many decades: their internal documents (statutes, regulations, provisions of the arbitration fees and costs) were taken example by drafting of similar documents for the new Court of Arbitration, composition of its judges appreciably coincided with the list of arbitrators of FTAC and MAC. Chamber of Commerce and Industry of the Russian Federation has provided all the necessary organizational and property framework for its successful operation.

Moreover, basically on the basis of the Court of Arbitration for Resolution of Economic Disputes at the Chamber of Commerce and Industry of the Russian Federation had soon been created social Council for operation of arbitral tribunals which has begun coordination and promotion of work of the arbitral tribunals, mainly, created at regional commercial and industrial chambers. In 2001 it has been transformed to the Russian Center for Assistance to Arbitration. Called the Council, and then the Center have rendered the considerable methodical help newly organized to the arbitral tribunals in drafting of their internal documents, training and advising of the arbitrators; held numerous practice seminars, public accreditation and certification of institutional arbitral tribunals and their judges and by means of Chamber of Commerce and Industry of the Russian Federation even have spent two All-Russia congresses of the arbitral tribunals. The issuance of the journal entitled «Treteisky sud» was organized in which in addition to numerous theoretical and informational publications became widely publicized law enforcement practice of the best arbitral tribunals constituting a specific point of departure for other commercial arbitrations, and held discussions on various debating points of a practical nature.

For the purpose of development of commercial arbitration in Russia, to ensure the unity law enforcement practice and enhance of protection of legitimate rights and interests of entrepreneurs in 2003 the Chamber of Commerce and Industry of the Russian Federation had been concluded the Agreement on cooperation with the Supreme Commercial Court of the Russian Federation which has played a certain role in strengthening of their interaction in development of arbitral proceedings of disputes and has served as the sample for the conclusion of several tens similar agreements under the maintenance between regional chambers of commerce and the state arbitrazh (commercial) courts of some Russian regions. Russian Center for Assistance to Arbitration have been prepared and approved Conciliation Rules and Regulations to support in the consideration of a particular dispute (ad hoc), designed to promote the development of various alternative dispute resolutions; together with presidium ICAC at RF CCI are developed Rules on the independence and impartiality of arbitration judges, and also other methodological and recommendatory documents.

All this work has appeared the extremely necessary and useful in conditions of market relations anew formed in Russia and their legal formation, absence of generally accepted traditions and customs of self-resolution of property disputes, a huge variety of numerous Russian regions. The work of the Court of Arbitration at RF CCI and other

arbitral tribunals with chambers of commerce has shown that creation of commercial arbitration at such associations of businessmen commonly answers the purposes of arbitral proceedings of commercial disputes (though now in Russia is successfully operating and arbitral courts in several other organizations uniting professional lawyers, and also at large enterprise associations of holding type).

The practice also confirmed the necessity of creation of voluntary public associations of the arbitral tribunals, allowing carrying out self-regulation of their activity. Not casually along with the Russian Center for Assistance to Arbitration, about 10 years functioning at Chamber of Commerce and Industry of Russia, the National Arbitration Chamber in Novosibirsk has recently been established, joining about ten institutional regional arbitration and put to one of the main tasks working out of some standards of activity of institutional arbitral tribunal[1].

It is possible to tell that at the time of the adoption in 2002, the current Law on court of arbitration in Russia *completed the initial stage of their creation* and formation, the new stage of their further development has begun. Today in Russia some hundreds courts which annually consider some thousand enterprise disputes (that at the same time makes less than one percent from total number of such disputes considered by state commercial court). In the business community has been an increase of confidence in the non-state arbitral tribunals as one of the main forms of alternative dispute resolution, especially given deficiency of the trust to the state courts. All of this suggests a large untapped potential of commercial arbitration in Russia, and about existence in its activity of some difficulties and problems in its activity.

Among the priority issues should be attributed not fully clarify the theoretical nature of the arbitral proceedings (commercial arbitration), which allows individual scientists and judges to deny a binding nature of arbitral awards and consider them as some «recommendations to the conflict parties» or «preliminary (pre-judicial) procedures» or even to declare a version of «paid legal services» similar to lawyers' advice. This position creates an inconsistency in law enforcement practice and in some cases it is the theoretical basis for the guidelines state courts on the admissibility of substantive decisions rendered by arbitral tribunals (commercial arbitration), including a new evaluation of the available evidence in the case (which is directly contrary to paragraph 1 of Article 46 Law on court of arbitration), and also about possibility of arbitrary restriction of competence at the expense of arbitration of disputes from the «private-law relationships with the public element» (e.g., disputes on immoveable property, the rights on which are subject to the state registration, or some corporate disputes relating to controlled by public authorities equity issue[2]).

Meanwhile, according to to paragraph 1 of Article 11 of the Russian Civil Code devoted to the judicial defense of civil rights, defense of violated or contested civil rights shall effectuate »the state court, arbitrazh (commercial) court or the arbitral tribunal (hereinafter – the Court»). In accordance with Article 40 of the Law on the court of arbitration in the presence of an arbitration agreement recording the final nature of the award of the arbitral tribunal is not subject to contestation in state court, and in accordance with paragraph 1 of Article 45 the voluntary non-enforcement award of the arbitral tribunal is enforceable pur-

[1] See *Treteisky sud*, No. 5, at 9 (2011).

[2] Critical evaluation of these approaches, see: Alexander S. Komarov, *Nekotorye zamechaniya po povodu treteiskogo razbiratel'stva korporativnykh sporov*, in *Osnovnye problemy chastnogo prava*, at 544 et seq. (2010).

suant to a order of enforcement issued by a state court. The arbitral tribunal by rules of Article 40 of the Law has the right to dispose also about acceptance interim measures in respect of the subject-matter of the dispute, and the competent national court can accept interim measures covered by the arbitral tribunal. These provisions of the law leave no doubt as to the jurisdictional nature of arbitration and binding on the parties to the dispute, to voluntarily subordinate him to the jurisdiction of commercial arbitration (arbitral tribunal).

Concerning the competence of the arbitral tribunal it is necessary to notice that according with paragraph 2 of Article 1 Law on court of arbitration in them can be considerate the civil legal disputes, unless established otherwise by a federal law (as, for example, provided by paragraph 3 of Article 33 of the Federal Law «On Insolvency (Bankruptcy directly excluding possibility of transfer of disputes on bankruptcy on consideration of the arbitral tribunals), but not by decisions of judicial interpretation of the rules of the Arbitrazh Procedural Code of the Russian Federation as it quite often took place until recently in domestic law enforcement practice.

Recently in science and practice there were also attempts to treat arbitral proceedings as unreasonable restriction of a constitutional right on judicial protection, and impossibility of consideration in the state court of commercial dispute in the presence of the agreement of its parties – as an unreasonable denial of justice, despite of the fact that the Constitutional Court of the Russian Federation in its decision has repeatedly held that mandatory of arbitral proceedings and the arbitral awards for parties which have voluntary chosen its jurisdiction should be considered as *voluntary self-restriction* in exercising of their right to judicial protection, an independent choice of one of its forms provided by the law, instead of as a waiver of justice. One of the reasons for the actual counteraction of development of arbitral proceedings became the request of The Presidium of the Supreme Commercial Court of the Russian Federation in the Constitutional Court of the Russian Federation about check of constitutionality of the provisions of paragraph 1 of Article 11 of the Civil Code of the Russian Federation and also laws on international commercial arbitration and on the arbitral tribunals regarding determination of the jurisdiction of disputes by them to the arbitral tribunals, in particular, property disputes concerning property connected with the state registration of rights to it, which caused a negative reaction from almost all serious specialists[1].

The Constitutional Court of the Russian Federation in its Resolution on May 26, 2011 № 10-P on the request of The Presidium of the Supreme Commercial Court of the Russian Federation not only has not supported an unreasonable position of the last, but also has directly specified as in conformity of the Constitution of the Russian Federation challenged legislative norms, and on illegality of some the provisions which have developed in law enforcement practice. He also noted that the arbitral tribunals operate «as the institutes of a civil society allocated with publicly significant functions», and such conventional alternative form of protection of the rights as arbitral proceedings, «expands possibilities of a resolution of disputes in sphere of a civil turn» by means of «public self-regulation», not turning «in actually judicial form of protection of the right», but expressing «a tendency to strengthen of democratic principles of justice»[2].

With respect to the competence consideration by arbitral tribunals of disputes «with the public law element» the Constitutional Court of the Russian Federation pointed out

[1] See *Treteisky sud*, No. 2, at 21 et seq. (2011); No. 4, at 125 et seq. (2011); No. 5, at 9 et seq. (2011).

[2] *Vestnik Konstitutsionnogo suda Rossiiskoi Federatsii*, No. 4 (2011).

that the state registration of property rights does not mention the content of the civil law and does not affect the legal nature of such private-legal dispute as a whole. That is why «it cannot be considered as the circumstance excluding possibility of transfer of disputes concerning real estate on consideration of the arbitral tribunals»[1]. Such position of the Constitutional Court of the Russian Federation became huge stimulus and the major mark on a way of the development of commercial arbitration to modern Russia, having received public approval even from the most critically-minded specialists[2].

The other group of problems of the development of commercial arbitration is connected with enforcement of arbitral awards, first of all, with the frequent refusals in issuance of documents on enforcement because of infringement of «a public order» or «fundamental principles of the Russian right» (with which in law enforcement practice at one time, for example, were considered arbitral awards on collecting from the defendant excessively considerable, according to the state court, the penalty[3]) which instead of exclusive character in practice of some state arbitrazh (commercial) courts began to get value hardly probable not the general rule.

On the other hand, the defeated parties quite often evade from voluntary execution of decisions of the arbitral tribunals, unfairly using for this purpose possibility of challenge of arbitral awards in all instances of the state courts, up to the Supreme Commercial Court of the Russian Federation. Such tightening of execution of the awards accepted by the arbitral tribunals deprives itself of arbitration procedure of one of its basic advantages and seriously reduces its attractiveness in the opinion of participants of an business turnover. In this regard, proposals changing the rules of procedural law on challenging arbitration awards by limiting the possibility of appeal to only one of the state courts are prepared and discussed.

Serious problems have developed with application by court-ordered interim measures. It is obvious that application of such measures is almost impossible without participation of the state courts (especially since in many cases, it affects the interests of third parties, for example, the defendant›s creditors), but the total exclusion of such opportunities for commercial arbitration, which tend to Russian state courts, as well seems unreasonable and inconsistent with modern trends of development of legislation on arbitration. Legislative resolution of this dispute can be expected during the discussion of the State Duma the draft amendments to the Law on International Commercial Arbitration, which is contained in the original version changes prepared by UNCITRAL to Model Law of 1985, including concerning expansions of possibilities of application by arbitral tribunals interim measures.

As a whole it is represented that many of the listed problems are not substantial and largely organizational in nature and, undoubtedly, will be successfully resolved during the further development of the Russian legislation on commercial arbitration and corresponding law enforcement practice. For the most part it is – certainly, «growth issues», some of which are to some extent inevitable in a rapidly formed in modern Russia market turnover and private-legal forms corresponding to it.

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[1] *Vestnik Konstitutsionnogo suda Rossiiskoi Federatsii*, No.4 (2011).

[2] Boris R. Karabelnikov, *Konstitutsionnyi Sud ob'yasnil, chto takoe arbitrabel'nost' i publichnyi poryadok. No arbitrazhnye sudy etogo poka ne uslyshali, Vestnik mezhdunarodnogo kommercheskogo arbitrazha*, No. 2(4), at 249 et seq. (2011).

[3] See Oleg U. Skvortsov, *Vnov o primenenii tretyeiskim sudom stat'i 333 Grazhdanskogo kodeksa Rossiiskoi Federatsii, Treteisky sud*, No. 2, at 75–57 (2006).

Valery Musin[1]

C.I.S. NATIONAL REPORT:

On methods of alternative economic dispute resolution in frames of the CIS

Transition of Russia and other States – CIS Participants to market economy, their integration into worldwide economic system in combination with globalization process typical for modern stage of the world history naturally result in progressing development of foreign economic activity accompanied by increase number of commercial disputes and diversification of their contents.

Interests of business community on such disputes resolved promptly and efficiently precondition growing demand for methods of settlement of disagreements arising in the course of international trade which may serve as an alternative to consideration of cases in state courts where proceedings are formalized, long term and multi-level.

It contributes in active use of voluntary arbitration (including international commercial arbitration) and mediation.

Advantages of arbitration forums as compared with state courts emanate from the fact that litigants in arbitration enjoy much stronger possibility (than in state courts) directly to influence both formation the arbitral panel by appointment (or at least recommendation) of arbitrators and the very proceedings.

It is well-known that one should distinguish ad hoc arbitration and permanent (institutional) arbitration.

In ad hoc arbitration it is up to the litigants to determine the course of proceedings. Permanent arbitration forums have rules of their own consisting almost completely of optional provisions observance of which depends upon the litigants' discretion.

Proceedings in state courts are open for public (unless there are issues relating to state, commercial or other secrets protected by law), meanwhile arbitration's activity is based upon confidentiality principle, and it is very substantial for commercial turnover since disclosure of some details being discussed in the course of proceedings may produce negative impact upon business reputation of the plaintiff and/or respondent.

Although enforcement of an arbitral award (since it is issued by a voluntary forum) is impossible without assistance of a state court, the latter, first, is only entitled to refuse issuance a writ of execution in a very limited number of situations exhaustively listed in the norms of international and national law, and, secondly, the arbitral award is in any way not subject to review on the merits of the case.

As for mediation, it has some advantages as compared both with state courts and with arbitration forums since both court judgment and arbitral award are issued in favor of one (and, accordingly, against another) litigant whose cooperation often terminates after proceedings. Meanwhile mediation is aimed to assist the conflicting parties to find a mutually acceptable solution with help of a mediator, so that, in case of successful outcome of negotiations, they remain to be partners.

[1] Professor of Saint Petersburg State University (Russia).

Among permanent international commercial arbitration forums the most authoritative are, e.g., Arbitration Institute of the Stockholm Chamber of Commerce, London Commercial International Arbitration, International Commercial Arbitration of the International Chamber of Commerce (Paris) etc. These (as well as other) international forums rather often deal with disputes between commercial organizations located in countries belonging to different law families.

Meanwhile legal systems of CIS countries, certainly, not being identical, are similar to each other to a substantial extent, which circumstance undoubtedly simplifies both dispute resolution and meditative settlement of disagreements between businesses of those countries.

With due consideration of these ideas the CIS Economic Court initiated creation of relevant structures by the Ordinance of the Plenum of 22nd July 2007. International Center for adjustment of disputes at the Economic court of the Commonwealth of Independent States was established 4th April 2008 whose founders were the CIS Economic Court, the Secretariat of the Inter-Parliamentary Assembly Council, and International Union of Lawyers' social associations «International Union of Lawyers».

The International centre consists of the permanent Arbitration court and Chamber of mediators whose activities are regulated respectively by the Arbitration Rules and Conciliations Rules, prepared on the basis of provisions as formed in the practice of international commercial proceedings and meditative activity.

With regard to the Arbitration court of the International center it is necessary first of all to determine the kinds and personal complement of disputes within its jurisdiction.

In doing so the following questions should be answered.

1) Whether the Arbitration court's jurisdiction embraces only international disputes or internal ones as well?

E.g. according to the RF Law «On International Commercial Arbitration» of 7th July 1993 it is possible, upon agreement of the parties, to refer to international commercial arbitration contractual or other civil law disputes arising in the course of performance of foreign trade and other kinds of foreign economic liaisons if a commercial enterprise at least of one party is located abroad[1], as well as disputes of businesses with foreign investments and international associations and organizations established in the territory of the Russian Federation, between themselves, disputes between their participants, as well as their disputes with other subjects of law of the Russian Federation»[2]. Ergo: this Law admits resolution by international commercial arbitration (such as ICAC of the RF Chamber of Commerce and Industry[3]) both international disputes and – upon some preconditions – also internal ones.

2) Whether the Arbitration court may only consider disputes between commercial organizations or also disputes with involvement of public bodies (such as states)?

E.g. UNCITRAL Model Law «On International Commercial Arbitration», having included in the jurisdiction of the arbitration any disputes of commercial nature regardless

[1] What is meant here are disputes between parties belonging to different states, therefore such disputes shall be qualified as international ones.

[2] Businesses with foreign investments (regardless of the amount of a foreign share in their chartered capital) shall acquire a status of Russian legal entities (see Article 1214 of the RF Civil Code). Therefore disputes between them and their participants or between them and other Russian persons shall be deemed internal ones since among participants to such disputes there are no persons belonging to other states.

[3] See § 2 (Section 1) of the ICAC Rules.

of their contractual or non-contractual origin, does not introduce any restriction with regard to their personal complement. There are no such restrictions on the RF Law of 7th July 1993 as well.

According to the RF Civil Code the Russian Federation, subjects of the Russian Federation, as well as municipalities «act in relations regulated by civil legislation, on equal bases with other participants of these relations – citizens and legal entities» (Article 124, Section 1), and activities of such subjects shall be governed by «norms determining participation of legal entities in relations regulated by civil legislation unless otherwise emanates from law or peculiarities of those subjects» (Article 124, Section 2).

Civil law relations between a state, on the one hand, and a natural person or legal entity, on the other (they are sometimes called «diagonal» relations due to involvement of a public body, such as a state) are of civil law nature, and therefore disputes connected with them may be (if relevant agreement is in place) referred to arbitration.

However peculiarities of such relations were a background for creation of specific legal mechanism for arbitral resolution of commercial disagreements between states and private persons, as provided in Washington Convention 1965 «On the Settlement of Investment Disputes between States and Nationals of other States»[1].

3) Whether the jurisdiction of the Arbitration court is limited with resolution of civil law disputes between businesses of CIS countries or it may also consider disputes with involvement of persons belonging to other states?

E.g. the complement of participants to the European Convention on International Commercial Arbitration (Geneva, 1961) includes, in addition to countries located in Europe, also Burkina Faso and Cuba.

According to Article 1 (Section 1) of the Arbitration rules of the International center for adjustment of disputes at the Economic Court of the CIS «the Arbitration court shall, upon the arbitration agreements of the parties, consider concrete disputes arising:

out of international economic liaisons between States – participants to CIS and businesses of those States;

out of performance of international economic liaisons between businesses of States – participants to CIS;

other disputes of economic character if agreement of the parties provides to refer such a dispute to its consideration».

As it appears from the quoted legend:

1) the Arbitration court's jurisdiction is specifically designated to deal with disputes between persons belonging to different states, so it is not extended to internal disputes (see: paragraph 3);

2) the Arbitration court's jurisdiction embraces foreign economic disputes both between businesses of different CIS countries on both sides, as well as those between a business, on the one side, and a State – CIS participant on the other (see: paragraph 2). In other words, the Arbitration court's jurisdiction includes also disputes arising out of «diagonal» relations;

[1] This mechanism (International Centre for the settlement of Investment disputes) is binding for the States – participants to this Convention. Commercial disputes between private persons and states not participating in the Convention (such as the Russian Federation), in case they are referred to arbitration, shall be considered according to the rules as contained in other international treaties (such as, e.g., New-York Convention 1959 «On Recognition and Enforcement of Foreign Arbitral Awards»).

3) the wording «other disputes of economic character if agreement by the parties provides to refer such a dispute to the Arbitration court for resolution» indicates that the Arbitration court's jurisdiction is not limited with disputes within CIS. Foreign economic disputes with involvement (on both or at least one sides) of persons belonging to other states may be referred for resolution the Arbitration court subject to relevant arbitration agreements.

Requirements concerning written form of an arbitration agreement shall be deemed complied with «if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract».

One cannot but note complete identity of this rule with the norm of Article 7 (Section 2) of the UNCITRAL Model Law «On International Commercial Arbitration» (in its original version).

The Arbitration Rules reflect also a lot of other Model Law norms, such as those on a procedure of formation of a collective arbitral panel, on preconditions and procedure of challenge of arbitrators, on identification of governing law, on security measures etc.

Meanwhile the Arbitration Rules give answers to certain questions not touched in the Model Law. E.g. this Law provides that when a case is considered by an arbitral panel (usually consisting of three persons) an award shall be taken by majority of votes.

However generally speaking one cannot exclude a situation when each arbitrator will have his own opinion (different from those of other arbitrators), and none of them will be supported by majority of votes.

Such situations are dealt with in a provision as contained in § 38 (Section 2) of the ICAC's Rules according to which «an award shall be taken by majority of arbitral panel's votes. If an award cannot be taken by majority of votes, it shall be taken by the chairman of the arbitral panel».

Similar (albeit not identical) approach is adopted by the Arbitration Rules of the International center for adjustment of disputes at the Economic Court of the CIS. According to Article 27 (Section 1) of the Rules «upon consideration of the case by three arbitrator panel an award or other arbitral ruling shall be taken by majority of arbitrators. If an award cannot be taken by majority of votes, the parties shall appoint other arbitrators. If newly appointed arbitrators fail to take an award, it shall be taken by the chairman of the panel».

It is worthwhile to pay specific attention to the Arbitration Rules provisions concerning the procedure of enforcement of arbitral awards.

Article 37 of the Rules reads: «Arbitral award shall be final and subject to voluntary execution according to the procedure and within the term as established in the award. If an award does not indicate the term for its execution, it shall be executed forthwith.

In case of refusal or refraining from voluntary execution of an award its enforcement shall be performed in accordance with rules of international law and procedural legislation of the place of enforcement».

Arbitral award enforcement proceedings are regulated by several international treaties. It is first of all the New-York Convention 1958 «On Recognition and Enforcement of Foreign Arbitral Awards» determining both the procedure of lodging of relevant motion (see:

Article IV) and the grounds for refusal recognition and enforcement of a foreign arbitral award (see: Article V).

The rules of the Convention are reflected in Article 239 of the RF Arbitration Procedure Code.

This Convention is universal as concerns the number of its participants. Meanwhile in frames of the CIS there is an Agreement «On the Procedure of Resolution of Disputes connected with Performance of Business Activity» (Kiev, 1992) regulating abovementioned issues with regard to foreign court decisions (including arbitral awards) in substantially different way (see: Articles 8 and 9).

There is no contradiction between these international treaties since according to direct indication as contained in Article VII (Section 1) of the New-York Convention its provisions «shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States».

Accordingly, enforcement of arbitral awards in disputes whose parties belong to the states participating in Kiev Agreement shall be performed under the norms of this Agreement[1], meanwhile if at least one of the parties to a dispute resolved by the Arbitration court is an organization belonging to other state, enforcement of such an award shall be subject to the rules of the New-York Convention.

Arbitration court shall in any way assist the parties to conclude an amicable agreement; however if they failed to reach such an agreement, the court shall issue an award whereby claims of one litigant are satisfied (and those of another one are rejected).

Meanwhile mediation is aimed to assist the conflicting parties to find (with involvement of a mediator) a fair and mutually acceptable balance of conflicting interests so as to settle their disagreements without litigation proceedings (both in state court and in arbitration forum) and on this basis to maintain continuation (and in optimal variation – even further development) of their partnership relations. This is actually the main advantage of the mediation as compared with judicial dispute resolution.

Mediative proceedings in case of successful outcome are ended in an agreement on settlement of the dispute to be made in writing and signed by the parties and the mediators (see: Article 11, Section 1 of the Reconciliation Rules of the International center for adjustment of disputes at the Economic Court of the CIS).

«An agreement shall contain an information of the parties to the dispute, on the obligation out of which the dispute arose, on conciliation procedure performed, on the mediator, as well as on the conditions agreed by the parties, on amount and term of performance of the obligations... of one party towards the other» (Article 11, Section 2).

Mediative agreement, as it appears from the quoted legend, is aimed to restructuring civil law relations between the parties to the dispute, and results in arising, amendment or termination of their civil law rights and duties. In other words, such an agreement, as concerns its legal nature, is a kind of a transaction (see: Article 153 of the RF Civil Code), and in case of its non-performance «the parties are entitled to approach a court of law or

[1] When comparing norms of the Agreement with relevant (albeit to some extent different) rules of the RF Arbitration Procedure Code it is necessary to take into consideration Article 15 (Part 4) of the Constitution of the Russian Federation according to which «generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation provides other rules than those provided for by law, the rules of the international treaty shall apply».

arbitration forum for protection of their rights» (Article 12, Section 3 of the Reconciliation Rules).

If a mediation agreement is entered into when the dispute between the parties is already a subject matter of judicial proceedings, then such an agreement, having been approved by court, shall obtain a character of an amicable agreement and shall be subject to enforcement under the same rules as those regulating enforcement of a court judgment (or, respectively, arbitral award).

To sum up, it should be noted that the International center for adjustment of disputes at the Economic Court of the CIS provides methods of alternative economic dispute resolution (such as the Arbitration court and the Chamber of mediators) designated to facilitate efficient settlement of disagreements and in perspective – further development of foreign economic cooperation both in frames of the CIS and beyond it.

APPENDICES

Federico Carpi[1]

HISTORY OF INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW[2]

1. Europe and the whole world has only recently emerged from the madness of Nazism and Fascism, causes of death and destruction. From 30th September to 3rd October 1950, the Italian Association of Civil Procedure scholars held, in Florence, the first international congress of civil procedure law: as Enrico Redenti said, with detached restraint «in this way we reassert to the world our desire to live and to rise again, and 'the need for us, before all else, to establish wider ties with all the scholars of our discipline. The practical application is essentially technical. But even technicality benefits from different and apparently distant types of experience and from studies made in very different settings».

Study, seen as a mission, as human collaboration – said Piero Calamandrei passionately in his closing speech – brings great comfort, and we have seen proof of this at this congress: this continuity, this link which continues unremarked amongst men, even at times when arms set up barriers between them. Even when war seems to divide peoples in the most inhuman way, above the fray books go on unremarked with their communication at a distance; this fraternity, this solidarity holds fast in spite of everything, in the regions of the spirit.

And it was as a token of that spirit, that, after the last of the free congresses, (Vienna 1928), there met together the Italian scholars and others of various provenance, from Rene Morel to Hans Schima, from Adolf Schönke, Rudolf Pohle, Ernest Heinitz, and Thedor Süss, to Jaime Guasp, Victor Fairén- Guillen, Niceto Alcalà Zamora and Oscar de Cunha.

One question weighed heavily on everyone: how could we speak of procedure and its purpose, of abstract, theoretical constructs, when the judgement had been used all over the world to give an official form of legality to murder? *Ya-t-il une justice politique?* asks Meaunier.

In the courts where we used to respect serene and impartial judges, murderers and plunderers in the guise of judges sat on these seats and gave to their misdeeds Calamandrei goes on – the rules and seal of judgements; special courts, extraordinary courts, military courts, party courts, where under the usurper's robes was visible the black garb of the hired assassin who did not judge but stabbed; and then there were the persecutory laws aimed at the extermination of a whole people, and then the judgement made into a tame instrument of these laws of extermination; and then, when it seemed that the hour of justice had come, a new and inevitable outburst of reprisals and vendetta.

[1] IAPL Honorary President, Professor of University of Bologna (Italy).

[2] Based on the article F. Carpi, *History of the International Association of Procedural Law*, *Teka Kom. Praw., OL PAN*, 2008, 16–21.

The optimism of will prevailed, however, over the pessimism of reason, and in order to reassert the universal values of procedural culture, the foundation was laid of what was then called the international Institute of civil procedural law, and an organising committee appointed, in the persons of professors Enrico Redenti (Italy), Hans Schima (Austria), Adolf Schönke (Germany), Victor Fairén-Guillen (Spain), Robert Wyness Millar (USA and the Anglo-Saxon countries in general), Niceto Alcalà Zamora (Mexico), Oscar de Cunha (Brazil), Eduardo Couture (Uruguay and the Spanish speaking countries of South America in general). Prof. Tito Carnacini was secretary and the headquarters were established in Bologna, in recognition of its status as oldest university in the world.

2. The organising committee's work was hindered by communications and postal delays: letters from that time often contain complaints about missing or late answers (although this can still happen today, in the era of e-mail!).

But the work went ahead : first there was a meeting in April 1951, during the Weinheim *Tagung,* then a second internationa1 congress in Vienna (5th to 8th October 1953), against the difficult background of the Allied occupation of the Austrian capital, with topics of great interest and wide scope, such as *Le garanzie costituzionali del processo* from Eduardo Couture, *L'esecuzione forzata delle sentenze negli USA* from Arthur Lenhoff, *La competenza internazionale* from Riccardo Monaco, and many others.

The committee that had been appointed in Florence was reconfirmed, and met in Bologna on 19th December 1955, in the office of the President Prof. Redenti, with professors Schima, Pohle, Fairén-Guillen, and Carnacini the secretary, present. The minutes, which I still have, note the support of professors Henry Solus, Niceto Alcalà Zamora and Eduardo Couture.

A statute was drawn up and, among other things, it was established that the international Association of procedural law (note that they abandoned the term 'Institute' and the limitation to civil procedure) should be free of any influence, that members would be appointed by the council from among scholars of any branch of procedural law, including criminal, administrative and financial law, that the aim of the Association should be to foster procedural studies with an exchange of information and publications, the organisation of international conferences and the publication of an annual bulletin.

The maximum number of members was set at 300, with fixed quotas for each country of the world.

The official languages are French, English, German, Italian and Spanish. The next conference was to be in Munich in April 1957, and topics and speakers were decided.

But for various reasons it did not take place, and several years passed before the third international congress, again at the insistence of the Italian Association of civil procedure scholars, was held on 12–15 April 1962. It took place in Venice, on the beautiful island of S. Giorgio, at the Cini Foundation whose president was Francesco Carnelutti.

3. The congress was well-attended and papers were given by renowned scholars from all over the world. It is impossible to list them all. I mention only, Charles Van Reepinghen and Ernest Krings on *La jurisdiction gracieuse en droit belge,* and the general papers from Niceto A1calà Zamora on *Eficacia de las providencias de jurisdicción voluntaria* and Giorgio Balladore Pallieri on *L 'ammissibilità dei mezzi di prova nel diritto internazionale privato.* For the Soviet Union Marc Gurvitch made a report.

For my own part, this was my first encounter with the international Association, as I edited the congress proceedings for publication.

The fourth congress took place in Athens in 1967, and the fifth in Ciudad de Mexico (12–18 March 1972, organised and directed by Prof. Niceto Alcala Zamora y Castillo). On this occasion new appointments were made to the board, with Niceto A1calà Zamora as president and Prof. Vittorio Denti as secretary general. The headquarters were still in Bologna and the statute was definitively approved by the first forty five ordinary members.

As well as the two already mentioned, the board of directors consisted of Professors Baur, Carnacini, Devis Echandia, Fairén-Guillén, Fasching, Fix Zamudio, Jolowicz, Perrot and Stalev.

Again, they spoke of an international Institute of procedural law.

The various ideas and initiatives only took concrete shape when Marcel Storme organised the Ghent congress in 1977, «Towards a Justice with a human face», the sixth congress held since 1950, but the first in terms of worldwide participation with representatives from every continent, including for the first time, Asia, Australia and Africa.

This globalisation of the international Association was consolidated by the Würzburg congress in 1983 on «Effectiveness of Judicial Protection and Constitutional Order», which Prof. Walter Habscheid organised so remarkably well. At Würzburg, the members' meeting decided to abandon the name «Institute», and appointed Mauro Cappelletti president, Marcel Storme executive secretary general and Walter Habscheid and Vittorio Denti secretaries general. There were now some one hundred and twenty members; the headquarters were transferred to Ghent.

These board members, and especially Mauro Cappelletti and Marcel Storme, worked with a renewed energy, and at last the «Procedural Reporter» was published, which came out in alternate years, and which was to be an extremely valuable link and means of information.

In 1985 a successful new initiative was launched, a series of single-theme colloquiums, starting with Ulla Jacobsson in Lund on «Trends in the Enforcement of Non-money Judgments and Orders».

In 1987 Prof. Wedekind organised the eighth Congress in Utrecht, on «Justice and efficiency»; in 1988, on the occasion of the nine-hundredth anniversary of Bologna University, there was an extraordinary congress on «The judicial Protection of Human Rights at the National and Intemational level» organised by myself; in 1991 the ninth World Congress took place in Coimbra- Lisbon organised by Prof. Pessoa Vaz on «Role and organization of Judges and Lawyers in Contemporary Societies»; in 1992 the Japanese Association, together with ourselves, organised the big Tokyo congress; in 1993 Mieczyslaw Sawczuk organised a colloquium in Lublin on «Unity of Civil Procedural Law and its National Divergencies»; the tenth World Congress, in 1995, was held in Taormina on «Trans-national Aspects of Procedural Law», organised with great enthusiasm by Italo Andolina; then there was the most enjoyable colloquium at Salonika, in 1997 on «The Role of the Supreme Courts at the National and Intemational level», the work of Prof. Pelaya Yessiou-Faltsi; in 1998, thanks to Dean Sherman and Prof. Yannopoulos, the Association held its first meeting in the USA, in New Orleans with a colloquium on «Abuse of Procedural Rights»; the eleventh World Congress in Vienna in 1999, had as its theme «Procedural Law on the Threshold of a New Millennium» impeccably organised by Walter Rechberger. Then there was Ghent in 2000, Brussels in 2001, and the twelfth World Congress in September 2003 in Mexico City, excellently organised by Prof. Cipriano Gomez Lara on «Civil Procedure and Legal Culture».

At Taormina, the members appointed Marcel Storme president, and three vice presidents to cover different geographical areas – José Carlo Barbosa Moreira, Yashuei Taniguchi, Bryant Garth – and three secretaries general – Keith Uff, Peter Gottwald and myself.

Membership now stood at 310 ordinary and 9 extraordinary members, with a notable increase in North America, South America, Japan, China, Australia, New Zealand and Africa. The headquarters moved back to Bologna.

In September 2003 during the XII World Congress in Mexico City, the members' meeting appointed to the board of directors professors Italo Andolina (Italy); Elio Fazzalari (Italy); Héctor Fix Zamudio (Mexico); Peter Gilles (Germany); Stephen Goldstein (Israel); Wouter De Vos (South Africa); Cipriano Gomez Lata (Mexico); Loïc Cadiet (France); Konstantinos Kerameus (Greece); Per Henrick Lindblom (Sweden); Augusto Mario Morello (Argentina); Ada Pellegrini Grinover (Brazil); Francisco Ramos Mendez (Spain); Walter Rechberger (Austria); Gerhard Walter (Switzerland); Garry Watson (Canada); Pelaya Yessiou-Faltsi (Greece); Neil Andrews (England); Giuseppe Tarzia (Italy).

Prof. Marcel Storme was reconfirmed as president, professors Federico Carpi, Peter Gottwald and Keith Uff as secretaries general, and professors José Barbosa Moreira, Jashuei Taniguchi and Oscar Chase as vice-presidents.

Membership had grown to 350 scholars from a11 over the world.

There continued to be a great number of very interesting events, including a number of colloquiums: in 2004, Paris-Dijon on «Alternative Dispute Resolution» organised by Prof. Loïc Cadiet; in 2005, Vienna-Budapest on «European Civil Procedural Law. Review and Future Prospects After the Enlargement of the EU», organised by Professors Walter Rechberger and Miklós Kengyel; in September 2006, Kyoto on «The Reception and Trasmission of Civil Procedural Law in the global Society» organised by Prof. Masahisa Deguchi; in April 2007, Vilnius on «The Recent Tendencies of Development in Civil Procedure Law Between East and West», organized by Prof. Vytautas Nekrošius.

Most of the papers given have been published.

In September 2007 the excellent XIII World Congress took place in Salvador de Bahia on «New trend s in Procedural Law», so admirably organised by professors Ada Pellegrini Grinover and Petronio Calmon. The scientific discussions, on various subjects, were of particular interest, thanks to the publication and distribution of a large volume containing all the papers.

At the opening of the Congress, there was particular mention of Prof. Mauro Cappelletti, for many years president of the Association, in whose memory the Association, in the persons of Marcel Storme and Federico Carpi, had published a book, which was presented at the Vienna colloquium in 2005.

At the Salvador de Bahia congress, the members' meeting feted Professor Marcel Storme, and when he announced that he would step down as president, the meeting appointed him Honorary President.

Appointments were also made to the governing bodies; Presidium Federico Carpi (President); Ada Pellegrini Grinover (Vice-President); Oscar Chase (Vice- President); Masahisa Deguchi (Vice-President); Peter Gottwald (Secretary- General); Michele Taruffo (Secretary-General); Loïc Cadiet (Executive Secretary- General).

Council Neil Andrews (United Kingdom); Stephen Goldstein (Israel); Walter Rechberger (Austria); Miklós Kengyel (Hungary); Gary Watson (Canada); Manuel Ortells Ramos (Spain); Sakari Laukkanen (Finland); Dmitry Maleshin (Russia); Eduardo Oteiza (Argentina); Piet Taelman (Belgium); Janet Walker (Canada); José Roberto Dos Santos Bedaque (Brazil); Rolf Stürner (Germany); Burkhard Hess (Germany); Edoardo Ricci (Italy); Frédérique Ferrand (France); Vytautas Nekrošius (Lithuania); Moon- hyuk Ho (Korea); Alan Uzelac (Croatia)

Our programme of events inc1udes: 6–8 November 2008, in Valencia (Spain), there have been a colloquium on «Oral and written proceeding: efficiency in procedure», organised by Prof. Manuel Ortells Ramos; 3–5 June 2009, in Toronto (Canada), there have been a colloquium on «Neither Common nor Civil: Procedural Reform and the Need for New Categories», organised by Prof. Janet Walker, together with vice-president Oscar Chase; then a colloquium in september 2010 in Pecs (Hungary), organized by prof. Miklós Kengyel, where Peter Gottwald began president of the Association.

Between July 25 and July 30 2011 in Heidelberg it was held the XIV World Congress on «Procedural Justice in a Globalised World», during which many papers were presented. Prof. Burkhard Hess was in charge of the organisation.

During the above mentioned Congress the General Assembly of the members took place and a number of amendments of the statute were approved in that circumstance. The Assembly renewed the social offices. The Presidium is formed as follows: Loïc Cadiet (president), Oscar Chase (vice-president for North America), Mashaisa Deguchi (vice-president for East Asia), Eduardo Oteiza (vice-president for South America), Michele Taruffo (vice-president for Europe), Manuel Ortells Ramos (executive secretary general), Neil Andrews (secretary general), Burkhard Hess (secretary general).

The members of the Council are the following: Teresa Armenta Deu (Spain); Teresa Arruda Alvim Wambier (Brazil): Paolo Biavati (Italy); Remo Caponi (Italy); José Roberto Dos Santos Bedaque (Brazil); Laura Ervo (Sweden); Frédérique Ferrand (France); Fernando Gascon Inchausti (Spain); Moon-hyuck Ho (Korea); Miklós Kengyel (Hungary); Angela Ester Ledesma (Argentina); Dmitry Maleshin (Russia); Richard L. Marcus (U.S.A.); Vytautas Nekrošius (Lithuania); Walter H. Rechberger (Austria); C.H. (Remco) Van Rhee (Holland); Michael Stürner (Germany); Rolf Stürner (Germany); Piet Taelman (Belgium); Alan Uzelac (Croatia); Garry D. Watson (Canada).

Finally, two Honorary Presidents, Peter Gottwald and myself, were appointed.

During the same Congress a very important event took place: the first issue of the International Journal of Procedural Law, sponsored by the Association, was presented. The review is edited in the five official languages of the Association: English, French, Spanish, Italian and German). Is now available the second issue. It is a very important initiative for the scientific development of procedural law, made possible by the impulse of Loïc Cadiet and an International Selection Committee. This initiative needs the help and support of all members and scholar through the annual subscription (for further information see the web site www.intersentia.com).

While I am updating this few pages (March 2012), two important events are organised: between June 6 and June 9 2012 a Colloquium in Buenos Aires, in partnership with the Iberoamerican Institute of Procedural Law, with the direction of Eduardo Oteiza, on the topic «Collective Proceedings/Class Actions» and between September 18 and September 21

2012 a Colloquium in Moscow on the topic «Civil Procedure in Cross-cultural Dialogue: Eurasia Context», with the direction of Dmitry Maleshin.

Other initiatives are in progress of organisation, even if details are not outlined yet: Seoul (Corea) in 2014 and for the XV World Congress in 2015 Istanbul is a concrete option.

To look up all the news and dates of the oncoming events and in order to promote closer relations amongst members and friends, a new website has been set up: «http.// www-iaplaw.org/index».

So it is with satisfaction that we look to a future rich in commitment to an ever greater mutual knowledge, in the interests of a proficuous scientific and human exchange.

BY-LAW
OF THE INTERNATIONAL ASSOCIATION
OF PROCEDURAL LAW

As Amended 25 July 2011

Article 1

There is established by those who have voluntarily adopted these Rules later modified by the members at the 14th International Congress of the Association at Heidelberg, Germany in 2011, an association known as the International Association of Procedural Law, in accordance with the principles laid down by the organising committee at the 5th International Congress in Mexico in 1972.

Article 2

The Association's object is to promote the development of the study of procedural law by encouraging collaboration among lawyers and academics in different countries and the exchange of information on sources, publications, practice and adjudication. Further, to participate with other juridical experts to promote the study of procedural matters in national and international research institutions.

Article 3

To achieve these objects the Association will in particular:

(a) Organise world congresses and international colloquia, decide where they are to be held and indicate the subjects for discussion. World congresses will be held at least every four years and colloquia at least every two years. Guidelines for the congresses and colloquia setting forth the conditions to be met by these events will be promulgated in order to advance the mission of the Association;

(b) Cooperate with national and multinational associations of procedural law with the goal of advancing the study of justice and procedure;

(c) Provide for the publication of an information bulletin concerning the activities of the Association, for the publication of an international journal, and any other publications authorized by the Council to further the objectives of the Association, including the papers presented at the world congresses and international colloquia.

(d) Maintain an official web-site and use other social media as will best enable the accomplishment of the Association goals.

(e) Engage in such other activities as will advance the goals of the Association.

Article 4

The Association is composed of individual members who have been chosen by the Presidium. With the aim of ensuring the highest degree of international representation, the number of members may be increased by the Presidium, but not by more than thirty per cent above the previous number. The Council may nominate honorary members from among the most eminent jurists in each of the different families of legal systems. Between world congresses these powers are delegated to the Presidium, pending confirmation by the Council.

In addition, any individual member may propose candidates by sending their *curricula vitae* to the Secretariat-General of the Association.

Article 5

The organs of the Association are:

(a) A general assembly of members;

(b) The Council;

(c) The President;

(d) The Secretariat-General;

(e) Four Vice-Presidents.

The President, the four Vice-Presidents and the Secretariat-General shall constitute the Presidium.

The members of the Presidium are elected for a period of four years to any of the above-listed offices, immediately renewable for one additional term in their current position.

The members of the Coucil are elected for a period of four years, immediately renewable for two additional terms.

The President may not serve as the president of a national or regional association of procedural law while President of the Association.

Article 6

A general assembly of the members shall be convened by the President on the occasion of World Congresses. The general assembly shall elect the Council and may adopt and modify these Rules in accordance with recommendations of the Council upon the initiative of the Presidium. Its decisions are taken by a majority of the votes cast.

Article 7

The Council is comprised of the Presidium, the honorary members, and other members chosen from different countries in such a way as to ensure representation from the various families of legal systems. The total number of the members of the Council shall not exceed twenty-five members, excluding the honorary members and the Presidium. The Council has the power to consider the organisation and scientific activities of the Association, to elect the President, the three Vice-Presidents and the Secretariat-General and the honorary members, and to make recommendations for the organisation of world congresses and international colloquia as described in Article 3(a).

The Council shall meet at the world congresses and international colloquia.

The quorum for meeting of the Council is eight members. Decisions are taken by a majority of votes cast. If the vote is tied, the President has a casting vote. The honorary members do not

count as part of the quorum. The President may submit the Council's deliberations to a postal or electronic vote of the members of Council. Voting by proxy or delegation is not permitted.

Article 8

The President is the representative of the Association in all its external relations and gives effect to the decisions of the general assembly and the Council. It is the President's duty to maintain contact with national and international associations having the same objects as the Association. The President convenes meeting of the Council and, in cases of emergency, may adopt, with the consent of the Presidium, appropriate measures, subject to ratification by the Council at its next meeting. The President remains in office until the conclusion of the congress following the President's election or until the term for which elected if that does not extend to the conclusion of the congress.

Article 9

The Secretariat-General is appointed by the Council. It comprises a maximum of four members, one of whom is designated the Executive Secretary-General and another to serve as the Treasurer of the association.

The Secretariat-General collaborates with the President in carrying out the functions of the office. The Secretary-General replaces the President in the event of incapacity. If the incapacity lasts more than six months the Secretary-General shall convene the Council with a view to replacing the President.

The Secretariat-General remains in office until the conclusion of the Congress following its appointment.

Article 10

The domicile (*siège*) of the Association is that of the Executive Secretary General.

Article 11

The official languages of the Association are English, French, German, Italian, and Spanish.

Article 12

The funds of the Association comprise the subscriptions of members and gifts from organizations and national and international organizations or from private persons. Subscriptions are fixed by the Council.

Article 13

The Association has three categories of membership which vary in their rights and responsibilities as set forth in these By-laws:

– Honorary members
– Benefactor members
– Ordinary members

Honorary, benefactor and ordinary members enjoy all of the rights of membership. Honorary members are excused from the payment of dues.

Article 14

The status of ordinary members of the Association can be terminated by resignation or removal. Removal can be announced by the Presidium for serious cause. The affected member may, prior to removal, appeal to the Council.

LIST OF PRESIDIUM, COUNCIL AND MEMBERS OF THE INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW

(as of July 2011)

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Ecole de droit de la Sorbonne – Université Paris 1 Panthéon-Sorbonne
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Professor Oscar G. **Chase**
New York University School of Law
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Professor Masahisa **DEGUCHI**
Ritsumeikan University Faculty of Law, Japan
Vice president (Asia)

Professor Eduardo **OTEIZA**
Argentina
Vice president (South America)

Professor Michele **TARUFFO**
Istituto di diritto privato e processuale, Pavia, Italy
Vice President (Europe)

Professor Neil H. **Andrews**
Clare College, Cambridge, United Kingdom
Secretary General

Professor Burkhard **HESS**
Ruprecht-Karls-Universität Heidelberg
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Professor Manuel **ORTELLS RAMOS**
Universitat de València, Facultad de derecho, Spain
Executive Secretary General

ProfessorJanet **WALKER**
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Professor of City University of Hong Kong. Prof. Chan is a solicitor in Hong Kong and England. Before entering academia, he was a litigation lawyer at a leading international firm in Hong Kong. His main research interests are comparative civil procedure and Chinese legal history. Professor Chan currently teaches the Postgraduate Certificate in Laws program at the School of Law, City University of Hong Kong.

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Professor David Chan is a solicitor in Hong Kong, member of the Bar. Professor Chan teaches civil procedure, advocacy and presentation of procedural documents at the School of Law, City University of Hong Kong. His main research interests are labor law, corporate law, treaty law, family law and civil procedure.

Ass. Prof. Fu Yulin

Associate Professor in Peking University School of Law, teaches courses of Civil Procedure, Arbitration, Legal Practice, Resolution of Civil and Commercial Disputes in China. Former judge in Maritime Court (1987–1994) and a current arbitrator in CIETAC and BAC (partime, 1999–). Visit scholar in Yale University Law School(2006), Montreal University Law School(2005–2006), Tübingen University Law School(2001), and Northeastern University Law School(2001). Member of IAPL (2006–). More than 40 published articles on Chinese/comparative civil justice and 10 translated books on civil procedure.

C.I.S. countries

Prof. Vechiaslav Komarov (Ukraine)

Professor, Vice-Rector and Head of Department of Civil Procedure of the National University «Yaroslav the Wise Law Academy of Ukraine». Doctor of Legal Sciences. Field of scientific interests: problems of the civil procedure, economic and administrative legal proceedings, notary, international commercial arbitration, higher legal education. Member of the academic councils of the Supreme Court of Ukraine and Ministry of justice. Author of more than 150 academic publications. Member of the editorial board of a number of legal journals.

Ass. prof. Azamat Saliev (Kyrgyzstan)

Ass. professor of the department of civil law and procedure of the Kyrgyz-Russian Slav University.

Prof. Maydan Suleymenov (Kazakhstan)

Maydan Suleimenov PhD, professor, member of the National Academy of Science of the Kazakhstan Republic, head of the Kaspian social university, head of the Kazakhstan international arbitration court. Professor Suleimenov specializes in civil law, international private law and commercial arbitration. He is author of more than 470 books and articles, including 50 works on international arbitration. He is co-author of more than 70 laws of Kazakhstan republic. He took part in international arbitration in Paris, London, Stockholm, Washington and Moscow as expert and arbiter.

CROATIA

Prof. Alan Uzelac

IAPL Council member. Professor of Law at the University of Zagreb. His main areas of interest include comparative civil procedure, evidence and alternative dispute resolution. He has been engaged as the member of the Council of the International Association of Procedural Law; founding member of the European Commission for the Efficiency of Justice (CEPEJ) in Strasbourg and delegate in the UNCITRAL Working Group on Arbitration. In addition to a large number of published or edited publications, Professor Uzelac also participated in the drafting of a number of legislative acts. He was educated at Universities at Zagreb, Mainz and Harvard.

ENGLAND

Prof. Neil Andrews

IAPL Secretary General. Professor of Cambridge University. MA, BCL (Oxon). He is Director of Studies in Law, and Fellow at Clare College, Cambridge, and is also a qualified barrister. He specializes in English Civil Procedure, Transnational Civil Procedure, Obligations, Equity and Roman Law. He has written widely on the subject of procedure, including authoring or co-authoring English Civil Procedure: Fundamentals of the New Civil Justice, The Future of Transnational Litigation, and Commercial Arbitration (3rd ed).

Prof. Rachael Mulheron

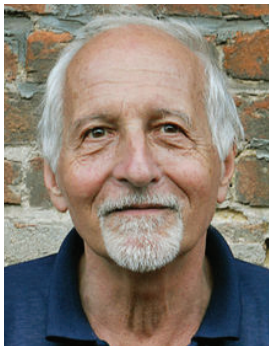
Professor at the Department of Law of Queen Mary University of London. Her principal fields of academic research concern class actions jurisprudence and tort law. In 2009, she was appointed as a member of the Civil Justice Council of England and Wales. Prior to her academic career, Rachael practiced as a litigation solicitor in Brisbane, Australia.

FRANCE

Prof. Loïc Cadiet

IAPL President. Professor of University of Paris 1 Pantheon-Sorbonne. Senior member of the Institute Universitaire de France. Co-President of the Section on Procedural Law of the Association of Comparative Law. He teaches General Theory of Litigation, Judicial Systems, Civil Procedure and ADR. He is the co-editor-in-chief of the International Journal of Procedural Law and member of editorial board of a number of legal journals. Professor Cadiet is the author or co-author of a range of works on procedure and on alternative dispute resolution and he is the founder and director of «Dictionnaire de la justice».

GERMANY



Prof. Peter Gilles

IAPL Council Honorary member. German scientist and honored professor of Johann-Wolfgang-Goethe-Universität Frankfurt am Main. From 1972 to 1975 Gilles was a professor of Civil Law, Civil Procedure Law, General Litigation and process theory at the Faculty of Law. At the same time, he became Professor at the Universities of Cologne and Freiburg, from 1975 to 1979 Professor of Civil Law and Procedural Law at the Faculty of Law at the University of Hanover. In 1979 he was appointed professor and co-director of the Institute of Comparative Law at the Faculty of Law at the University of Frankfurt. From 1991 to 1992 Gilles was retired dean of the Faculty of Law at the University of Frankfurt. Since 1975, Gilles had numerous visiting professorships, guest lecturers and lecturestays in Western and Eastern Europe, North, Central and South America, but especially in North and Southeast Asia. In 2004 he received an honorary doctorate at the University of Vilnius and in 2007 an Honorary Doctorate from the Aristotle University of Thessalonikihas been awarded.

HUNGARY

Prof. Miklós Kengyel

Prof. Miklós Kengyel is full professor (1994), chair of the Department of Civil Procedure Law and Legal Sociology at the University of Pécs and part time professor on Comparative Civil Procedure at the Andrássy Gyula German Speaking University in Budapest (2003). Former Dean of the Law Faculty at the University of Pécs (1993–1999), and former Rector of the Andrássy University (2003–2007). His main fields of research include European, international and comparative civil procedure, evidence and legal culture. He has been engaged as the member of the Council of the International Association of Procedural Law. In 2010 he was the Conference Chair of the IAPL-Colloquium in Pécs.

Prof. Viktória Harsági

Associate professor, Chair of the Department of Civil Procedure Law at the Pázmány Péter Catholic University in Budapest since 2006, lecturer at the Andrássy Gyula German Speaking University in Budapest. Prior to that, she was assistant at the University of Miskolc (1999–2004) and assistant professor at the Pázmány Péter Catholic University(2005–2006). As a visiting research fellow at predoctoral level she spent a full academic year at the Johannes Gutenberg Universität Mainz (2002–2003, DAAD-scholarship), at postdoctoral level two months at the Universität Basel (2011, von Caemmerer scholarship). She is editor of the Pázmány Law Review.

INDIA

Prof. Krishna B. Agrawal

Director of the Indian Institute of Comparative Law. Former, Dean Faculty of Law, University of Rajasthan, India. Author of the books «Civil procedure in India», «Family law in India» and coauthor of the book «Private International law in India». He specializes in civil procedure and international arbitration.

ITALY

Prof. Chiara Besso

Professor of the University of Turin. She has taught at the Center of Transnational Legal Studies (London), and has been visiting fellow at the Italian Academy at Columbia University, at the Institute of Advanced Legal Studies of London, and at the University College of Oxford. An expert in the law of evidence, transnational dimensions of civil procedure, and alternatives to adjudication, Professor Besso has written and lectured in these fields.

Prof. Alessandro Simoni

Professor of comparative law at the University of Florence. His research interests and teaching activity are primarily focused on legal anthropology and the interaction between state institutions and autonomous social groups. He acted as consultant and adviser for international organizations in several non-Western contexts. He published extensively on the condition of Romani communities.

Prof. Elisabetta Silvestri

Professor of the University of Pavia. She is graduated from the University of Pavia, has earned the title of Master of Laws (LL.M.) from Cornell Law School (United States). Senior researcher at the Department of Law (Section of Civil Procedure). She was a visiting scholar at Yale Law School (United States) and participated in summer schools at the University of Bologna. She was appointed a manager of the project called «Rules for Transnational Arbitration» organized by the American Law Institute in Philadelphia (USA).

Prof. Vincenzo Varano

Professor of comparative law at the University of Florence, where he served as Dean of the Law Faculty and Director of the Department of comparative and criminal law, and a member of the Global Faculty at NYU. Vincenzo Varano published extensively in the field of comparative civil procedure and judicial organization. He is co-author of «Civil Litigation in Comparative Context» (2007).

NETHERLANDS

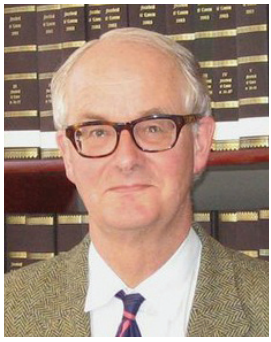
Prof. Remco van Rhee

IAPL Council member. Professor of Maastricht University. He was appointed to the Chair of European Legal History and Comparative Civil Procedure at Maastricht University (NL) in 1998.Van Rhee is director of the research programme «Foundations and Principles of Civil Procedure in Europe» of the Ius Commune Research School. He is general editor of the Civil Procedure Casebook of the Ius Commune Casebooks for the Common Law of Europe (www.casebooks.eu/procedural) and a member of the board of editors of the series Studies in the History of Private Law. Van Rhee is co-director of an annual course on Public and Private Justice organized at the Inter-University Centre Dubrovnik (Croatia).

Dr. Hélène van Lith

Ms Helen Van Lith is a legal consultant in international litigation based in Paris and an expert in private international law. She led the «The Dutch Collective Settlements Act and Private International Law» research project for the Dutch Ministry of Justice with Erasmus University Rotterdam, where she was previously a Senior Lecturer and Assistant Professor of Private International Law & Comparative Law. She holds a PhD on International Jurisdiction in Commercial Litigation from Erasmus University and has published numerous articles on cross border (group) litigation. She was visiting scholar at Melbourne Law School, the Max Plank Institute for Comparative and International Private Law in Hamburg and the Swiss Institute of Comparative Law in Lausanne.

NORWAY



Prof. Inge Lorange Backer

Professor of University of Oslo. He was awarded an Honorary Doctor's Degree in Law (jur. dr. h.c.) from Uppsala University in 2006. In 1995–2008 he was Director General and head of the Legislation Department of the Ministry of Justice. In 1973–1974 he was assistant judge in Romsdal District Court (with leave from the Ministry of Justice). He was professor of law 1987–1994 (University of Oslo) and director of its Department for Public and International Law 1989–1992. He is professor at the Department for Public and International Law from November 2008.

ROMANIA

Dr. Serban Vacarelu

B.A., University of Oradea (Romania); LL.B., Babes-Bolyai University (Romania); LL.M., Louisiana State University). Dr. Vacarelu is an associate researcher and a Ph.D. candidate at Maastricht University, Faculty of Law (The Netherlands). Prior to joining Maastricht University, Dr. Vacarelu served as a judicial law clerk and research attorney for the Louisiana Supreme Court, engaged in private practice with Forrester, Jordan & Dick L.L.C., Baton Rouge, Louisiana, and served as a research assistant for Professor Alain Levasseur at Louisiana State University.

RUSSIA

Prof. Victor Blazheev

Professor, Rector and Head of Civil procedure department of the Moscow Law State Academy. President of the Association of Legal education, member of the Presidium of the Association of Russian Lawyers, member of the Academic council of the Russian Parliament, member of the academic council of the Supreme Court of Russian Federation. Member of the editorial board of a number of legal journals.

Prof. Nataliya Bocharova

Associate Professor of Moscow State Lomonosov University. Graduated from Moscow State University. 2002–2006 – taking post-graduate course in MSU. Member of International Association of Procedural Law.

Dmitry Magonya

Managing Partner of Art de Lex law firm. He graduated from the Krasnoyarsk State University in 1999. Dmitry has a comprehensive experience in legal advising on complex multijurisdictional transactions, mergers and acquisitions, corporate financing. Before Dmitry leaded Art de Lex law firm in 2005 he was the Director of Corporate Finance Department and Vice-President of ATON Group of companies. Dmitry has a great recognition in outstanding Pro Bono activity. He is a member of the International Bar Association.

Prof. Dmitry Maleshin

IAPL Council member. Vice-Dean and Associate Professor of Civil Procedural Law at Moscow State Lomonosov University. He has been a Visiting Scholar at Yale Law School (2004) and Harvard Law School (2008). He is a member of the International Law Association Civil Litigation Committee; International Society of Legal Scholars; Russian Association of International Law; Russian Law Schools Association Presidium, etc. Member of a number of official drafting groups concerning civil procedure and education legislation. Member of Academic council of Federal Bailiff Service, Federal Notary Public Chamber, Moscow Arbitrazh Court, etc. Member of the editorial board of a number of legal journals. Author of more than 100 academic publications in Russian, English and French. He has written on Russian civil procedure, comparative civil procedure, law and culture.

Ivan Marisin

Managing partner at the Moscow office of Quinn Emanuel Urguhart and Sullivan LLP. Arbitrator of the Moscow International Commercial Arbitration Court and Vienna International Arbitral Center and other leading centers for arbitration. «Universally respected» (Chambers Global) and «a widely recognized expert and a very good litigator who generates great respect for his practice» (Chambers Europe), Ivan Marisin has represented domestic and international clients in more than 100 major litigations and arbitrations worldwide, and has acted for Russian and foreign clients on corporate, banking and foreign investment matters over the last 20 years. He has also advised on numerous commercial cases involving the recognition and enforcement in Russia of foreign judgments and awards.

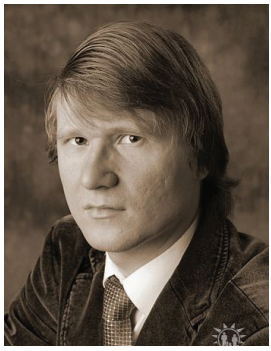
Before joining Quinn Emanuel, Mr. Marisin was the head of Dechert's dispute resolution team in Russia, the CIS, and Eastern Europe. Previously, he was head of the litigation and arbitration practice of Clifford Chance's Moscow office, which he joined in 1992, acting as Senior and Managing Partner from 2000 through 2010. He is listed as a top-tier dispute resolution practitioner in Russia by Chambers Global, Chambers Europe, Legal 500 EMEA and PLC Which Lawyer?

Prof. Valery Musin

Professor and Head of civil procedure department of Saint Petersburg State University Law Faculty. Chairman of the Centre for Dispute Resolution (Arbitration) at the Economic Court for the CIS countries Chairman of the Arbitration Court at the St. Petersburg Chamber of Commerce and Industry, arbitrator of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow and of the Arbitration Institute of the Stockholm Chamber of Commerce, expert to a number of governmental and judiciary institutions of the Russian Federation. Member of the Russian Academy of science. Senior partner at Musin, Ibragimov and partners law firm. Author of more than 180 academic publications. Member of the editorial board of a number of legal journals.

Prof. Tatyana Neshataeva

Professor Neshataeva was graduated from Perm State University. Continued postgraduate studies at Moscow State University. From 1985 till 1990 was assistant, associate professor in public law and Soviet construction at Perm State University. From 1990 till 1993 worked for Doctorate at the Moscow Academy of Law. Since 1993 associate professor, professor in constitutional and financial law at Perm State University. In 1995 appointed as judge of the Supreme Arbitration Court of the Russian Federation. Since 1998 headed the International Law Sector at the Supreme Arbitration Court of the Russian Federation. Since 2000 was the head of the International Law Chair at the Russian Academy of Justice. Since 2005 – curator of the International Law Board at the Supreme Arbitration Court of the Russian Federation. In December 2011 appointed as judge of the Court of the Eurasian Economic Community acting on behalf of the Russian Federation.



Dmitry Nokhrin

Advisor of the vice-chairman of the Constitutional Court of the Russian Federation. Graduated from Khabarovsk State Academy of Economics and Law in 2003. During the period of 2003–2006 was taking a post-graduate course in Lomonosov Moscow State University, after completion of which and successful defense of the dissertation on compulsory mechanisms in civil process was conferred a degree of Candidate in Legal Science. Later worked as a consultant in the Law Department of the Federal Assembly' State Duma.

Prof. Tsisana Shamlikashvili

Founder and Head of the Center for Mediation and Law. She is Executive director for the United Mediation Services at the Russian Union of Industrialists and Entrepreneurs; Panel mediator at the Chamber of Commerce and Industry of the Russian Federation; CEDR-accredited mediator; JAMS fellow; Certified mediator for water diplomacy cases; Chair of the Subcommittee on ADR and mediation in the Russian Association of Lawyers; Regional mediator in World Bank Group Office of Mediation Services (MEF STC); Member of the Association of Integrated Mediation; Board Member of the European Mediation Network Initiative (EMNI); Council Member of Straus Institute for Dispute Resolution of Pepperdine University School of Law (USA); Editor-in-chief, Mediacia i pravo («Mediation and Law») magazine. She has More than 100 cases resolved by mediation in a wide range of spheres, including commercial mediation in corporative relations including banking, construction, healthcare, and insurance industries, as well as family business mediation.

Prof. Eugeny Sukhanov

Professor and Head of Civil Law Department of Moscow State Lomonosov University Law Faculty. Doctor of Law, Honored Worker of Science of the Russian Federation, Chairman of the Court of Arbitration for Resolution of Economic Disputes at the Chamber of Commerce and Industry of the Russian Federation and Deputy Chairman of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. Former dean of the Moscow State Lomonosov University Law Faculty. Author of more than 350 academic publications. Editor-in-Chief of the journal Bulletin of Civil Law (Vestnik grazhdanskogo prava) and a member of the editorial boards of a number of scientific and legal journals, including member of the editorial board of the journal Zeitschrift für das Europäisches Recht (Germany).
In 1992–2006 was a member of the main working group responsible for the drafting of Part One, Part Two, Part Three and Part Four of the RF Civil Code and was one of the official representatives of the Russian President at the time of the consideration by the Russian Parliament of the drafts of Part One, Part Two, Part Three and Part Four of the RF Civil Code. He is currently Deputy Chairman of the Board under the President of the Russian Federation for the codification and introduction of improvements to civil legislation.

Ass. Prof. Yuliy Tay

Assistant Professor of civil, arbitral and administrative procedure, Russian Academy of Justice. He is a managing partner of Bartolius Law Firm. Yuliy has a seven years of teaching experience, he deals with the state judges advanced trainings, reads lectures at the Law Institute «M-Logos». Being a Chairman of the Council of Young Lawyers Bar Association of Moscow, member of the Board of the International Union (Commonweakth) of Lawyers, an Arbitrator of the Arbirtation Court at the OJSC «Gazprom», at the same time Yuliy has a rich practical experience in the legal representation in the courts of general jurisdiction and arbitration courts. He makes a speciality of corporate law, insolvency, antitrust law, problems of the judicial decision's review on newly discovered evidence.

Prof. Michail Treushnikov

Professor and Head of the civil procedure department of the Moscow State Lomonosov University Law Faculty. Former Vice-Dean of Moscow State Lomonosov University Law Faculty. He is the member of academic councils of the Supreme Court of Russian Federation and the High Commercial Court of Russian Federation. Author of more than 100 academic publications. Member of the editorial board of a number of legal journals. In 1993–2003 has been co-chief of the working group for drafting Russian Civil Procedural Code.

Ass. Prof. Dmitry Tumanov

Assistant Professor of the Moscow State Law Academy. Dmitry's area of expertise includes a number of issues related to gaps in the civil procedural law and the optimal ways to overcome them; identification of the necessary limits for judicial interference into public relations; and defense of a group of persons. He has published numerous papers on the aforementioned issues, as well as a monograph on gaps in the Russian civil procedural law.

Prof. Vladimir Yarkov

Professor and Head of civil procedure department of the Ural State Law Academy. Professor at the Nanterre University Paris X. Vice-president of the Federal Notary Public. Member of the Conseil Scientifique de l'Union Internationale des Huissiers de Justice et Officiers Judiciaires, International Association of Procedural Law. Author of more than 500 academic works. Member of the editorial board of a number of legal journals. He is the member of academic council of the High Commercial Court of Russian Federation. Co-chair of the working group on drafting the Execution Code of Russia.

SLOVENIA

Prof. Aleš Galič

Professor of the University of Ljubljana. His major interests are in teaching and research on Civil Procedure, International and European Civil Procedure, Arbitration Law and Alternative Dispute Resolution. He has also been a legal advisor to the Constitutional court of Slovenia since 1996. Prof. Galič is a member of the Presidency of the Permanent Court of Arbitration attached to the Slovenian Chamber of Commerce and Industry.

SOUTH AFRICA

Professor André Boraine

Dean and Professor of the Faculty of Law University of Pretoria (South Africa). He formerly served as the Head of the Department of Procedural Law, and he also served as Deputy-Dean of the Faculty from 1999 to 2006. He is also a co-director of the Centre for Advanced Corporate and Insolvency Law based at the UP Faculty of Law. His research interests include insolvency law, with a particular focus on international insolvency, civil procedural law and aspects of property law. In 2011, the World Bank has commissioned him as a consultant on South African insolvency law concerning a diagnostic analysis of the legal framework in place in South Africa for regulating insolvency law and creditor/debtor rights.

Prof. Daniël Elhardus Van Loggerenberg

Extraordinary professor of Law, University of Pretoria. Member of the Pretoria Society of Advocates since 1 February 1990. Acted as arbitrator and acting judge of the North Gauteng High Court, Pretoria.

SPAIN

Prof. Javier López Sánchez

Vice-Dean and Full Professor of Procedural Law at the University of Zaragoza. He has been a Visiting Scholar at Bolonia Law School (2005) and Houston Law School (2009). He has written on Spanish civil procedure, bankruptcy procedures in Spain and class actions in the USA and group litigation in Spain.

SWEDEN

Prof. Per Henrik Lindbloom

IAPL Council Honorary member. Professor emeritus and a former dean of the Faculty of Law, Uppsala University. He has been Visiting scholar at Harvard Law School, San Diego Law School and Honolulu Law School. He lectured at several European universities, has been

General, regional and national reporter at numerous congresses, colloquiums etc. His research interests are: the role and functions of courts; general principles of civil and criminal procedure; comparative civil procedure; access to Justice; class actions and other forms of group actions in civil procedure; environmental litigation.

TURKEY

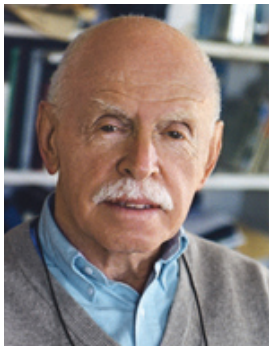
Murat R. Ozsunay

Member of the Istanbul and Frankfurt/M bars, is also a European & Turkish Patent & TM Attorney (epi, TPE), and ICC arbitrator based in Istanbul. He has an international practice and teaches contracts, civil procedure, arbitration, and ECHR litigation at Goethe and Bahcesehir Universities, Istanbul Bar Apprentice Training Center, Georgia State U.A graduate of Istanbul U. Law (1985), Academy of American & Int'l Law (Dallas) and U.T. Austin (M.C.J.), he worked at the Registry of the ECHR in Strasbourg. He publishes in English and Turkish on arbitration, civil procedure and IP. He is a member of the IBA, AIPPI, ICC, IACL, D-TR JurV, and Austrian Arbitration Association. Attorney at Ozsunay law office.

USA

Prof. Oscar Chase

IAPL Vice-President. Professor and former Vice Dean of New York University School of Law, Co-Faculty Director, Institute of Judicial Administration. A graduate of NYU and Yale Law School. He has written on comparative procedure, law and culture, and American civil procedure, recently authoring or co-authoring «Law, Culture, and Ritual: Disputing Processes in Cross-Cultural Context»; «Civil Litigation in Comparative Context»; and «Civil Litigation in New York», 5th ed. His articles has been translated into Italian, Russian and Portuguese. He serves on the Civil Advisory Committee of the Federal District Court, E.D.N.Y. and the Civil Practice Law and Rules Committee of the New York State Bar Association, and is a member of the American Law Institute.

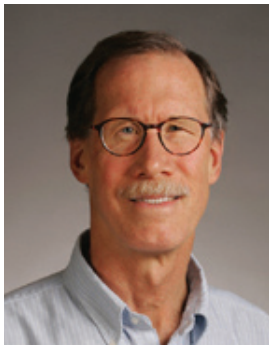


Prof. Jerome Cohen

Professor of law at New York University School of Law, an expert in Chinese law, a senior fellow for Asia Studies at the Council on Foreign Relations, and serves as «of counsel» at the international law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Cohen was a Fulbright scholar in France from 1951 to 1952. He served as editor in chief of the Yale Law Journal. Following graduation, he served as an assistant U.S. attorney for the District of Columbia and was a consultant to the U.S. Senate Committee on Foreign Relations before beginning an academic career at the University of California School of Law at Berkeley. Mr. Cohen joined the faculty of Harvard Law School in 1964 where he served as director of East Asian Legal Studies and Associate Dean.

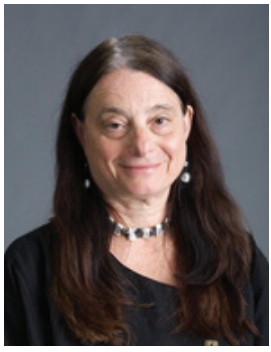
Prof. Jeffrey Thomas

Associate Dean for International Programs, Professor of Law, and the Daniel L. Brenner Faculty Scholar at University of Missouri – Kansas City School of Law. He is a two-time Fulbright Fellow to Russia (2010) and China (1999–2000), and was a Bigelow Teaching Fellow at University of Chicago early in his career (1991–1992). His research focuses on the interaction between law and culture, the rule of law, and insurance law. His work has been presented and published in the U.S., Europe, China, India, Russia, Thailand and Turkey. He earned his J.D. degree from University of California – Berkeley in 1986, and served as a law clerk to a U.S. Federal District Court and worked as a lawyer for five years prior to joining the UMKC law faculty.



Prof. Richard Marcus

IAPL Council member. Professor and the Horace O. Coil Chair in Litigation at California's Hastings College of the Law, San Francisco. Previously, he was a litigation partner in a San Francisco firm and then taught at the University of Illinois. He is co-author of leading American casebooks on Complex Litigation and Civil Procedure, and author of the discovery volumes of the leading U.S treatise Federal Practice and Procedure. Since 1996, he has served as Associate Reporter of the Advisory Committee on Civil Rules of the U.S. Judicial Conference, and he was a primary drafter of the rules for electronic discovery adopted for U.S. federal courts in 2006, and revisions of the U.S. federal court class action rule in 2003.



Prof. Carrie Menkel-Meadow

Professor of Dispute Resolution and Civil Procedure at Georgetown University Law Center.
She joined Georgetown University from UCLA where she had been a professor of law since 1979, serving as well as a professor in the Women's Studies program, Acting Director of the Center for the Study of Women, and Co-Director of UCLA's Center on Conflict Resolution. She has taught as a Distinguished Visiting Professor of Legal Theory at the University of Toronto, a visiting professor at Harvard Law School, Stanford Law School, and as a clinical professor at the University of Pennsylvania. As a Fulbright scholar in 2007, Professor Menkel-Meadow taught and conducted research in Chile, Argentina and China. A national expert in alternative dispute resolution, the legal profession, and legal ethics, clinical legal education, feminist legal theory, and women in the legal profession, Professor Menkel-Meadow has written and lectured extensively in these fields.

She is the author of over 100 academic publications. She served on the Executive Committee of the Board of Directors of the American Bar Foundation and on the Research Grants Committee of the Law School Admissions Council. She also sits on numerous boards of public interest organizations and the editorial boards of journals in dispute resolution, law and social science and feminism. She has chaired the AALS Sections on Law and Social Science, Alternative Dispute Resolution, Women in Legal Education, and has been on the Executive Committee of the Section on Clinical Education. She is currently the director of the Georgetown Hewlett Fellowship Program in Conflict Resolution and Problem-Solving, and the co-editor of the «Journal of Legal Education», and the «Interactive Journal of Law in Context».

Prof. Margaret Woo

Professor of Northeastern University, Boston. She teaches civil procedure, administrative law and comparative law. In 1997, she was named the law school's Distinguished Professor of Public Policy. She is also a faculty director for the law school's Program on Human Rights and the Global Economy.

Prof. Edward F. Sherman

Professor of law and former dean of Tulane Law School. A graduate of Georgetown University (A.B., 1959) and Harvard Law School (J.D., 1962; S.J.D., 1981), he clerked for a federal judge and practiced law for five years before entering teaching. He is co-author of widely-used casebooks on Civil Procedure, Complex Litigation, and Alternative Dispute Resolution and has published a large number of articles in these fields. He has served as counsel, consultant, or expert witness in a large number of class actions.

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