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Party Autonomy, Court Control and the Mutual Responsibility for the Management of Civil Litigation in Slovenia

1 Historical overview

The Civil Procedure Act (*Zakon o pravdnem postopku*) of Slovenia is closely related to the Austrian Code of Civil Procedure (ZPO). This is not surprising for the time period before 1918 since the territory of what is nowadays Slovenia was until then a part of Austria. 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 (in some areas, such as the law of obligations, unified laws were not enacted at all) decided to transplant Austrian laws because they 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. The introduction of socialism in Yugoslavia after the Second World War brought of course 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 drastic in comparison to the other communist states. At least after late fifties' Yugoslavia opted for what could most easily be described as a "softer version of socialism" which distinguished it from the states of the so called "Soviet block".

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For example, companies, although in “social property», retained a considerable degree of independence at the making of commercial decisions (the system of “self-management») – the system of “central planning” did not apply in Yugoslavia.¹ Thus, real commercial disputes, decided in regular course of litigation were common, unlike in other socialist countries where tools of a more administrative nature were used for deciding disputes (as much as genuine disputes could at all occur in a system of centrally planned economy).² Besides, the degree of allowed private businesses was considerably higher than in any other socialist state. A concept of real commercial arbitration was also retained – also for disputes between domestic companies. Bankruptcies (a concept, unthinkable of in other socialist states) could occur. Also in the field of respect (or violations) of human rights the Yugoslav version of socialism was more bearable than in the countries of the soviet block. For example, traveling to western countries was unrestricted and visa-free, contacts (also concerning studies, study literature and contacts in the academic sphere) with the “western Europe” remained unbroken. It is logical that these characteristics also influenced the development of civil procedural law. Precisely this is namely a field of law that very clearly shows what concept – authoritarian or liberal – of relations between the state and the individual prevails in a certain political system and which also very clearly shows whether a state is willing to respect the autonomy as an expression of a broader notion of freedom of an individual. In this regard it can be established that the civil procedural law did not suffer such a degradation and distortion in Yugoslavia as it did in the countries of the Soviet block. The principles of party autonomy and disposition 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. True, on the other hand, it established the possibility for a court to take evidence

¹ About features of the socialist system in former Yugoslavia before democratic changes see, for example M. Cerar, From elite consensus to democratic consolidation in: G. Zielonka (Ed.), *Democratic consolidation in Eastern Europe*, Oxford University Press, 2001, L. Ude, *Entwicklung der demokratischen Institutionen und Geltendmachung von Menschenrechten und Grundfreiheiten*, in: D. Pfaff (Ed.), *Zehn Jahre Danach*, Muenchen, Suedosteuropa-Gesellschaft, 2000, p. 195–214.

² Compare R. Stuermer, *The Principles of Transnational Civil Procedure*, *RabelsZ*, 2005 (69), p. 201–254, p. 222.

ex officio and there were no time limits for the parties for ascertaining new facts and evidence, but even that didn't make it much different from the old version of the Austrian ZPO.

2 The independence of Slovenia, the debate about a passive or active judge and the new Civil Procedure Act (1999)

In 1991 Slovenia became an independent state and at the same time this meant a shift to a parliamentary democratic system and a market economy. The above mentioned findings that Yugoslav Civil Procedure Act remained closely linked to its Austrian predecessor could implicit that this act was not unsuitable for the new conditions. There was nevertheless a general consent that a reform was needed. The main reason was a great public dissatisfaction with the functioning of civil justice – predominantly caused by the excessive length of proceedings. The reasons for this condition are numerous, but the old Civil Procedure Act was perceived as one of the factors that cause the inability of civil justice in Slovenia to respect the right to a trial within a reasonable time. At that time it was perceived by many that the goal of acceleration of proceedings should be achieved through a more passive position of a judge.³ The heated discussion – often burdened by excessive amount of ideology – regarding the passive or active role of a judge developed. There were numerous proposals (many given by judges) that the court should remain absolutely passive in the litigation, that the rules regarding case management («substantive procedural guidance», *materielle Prozessleitung*) should be abolished and that a strict and rigid system of time-limits should be introduced. These proposals were often based on a lack of knowledge of comparative procedural law. Many of those who advocated the idea of a passive judge have perceived the concept of an active judge as an expression of the soviet law, characteristic only for socialist states and introduced after the socialist revolution, and thus unsuitable for a new political and legal order. Simplifications in the sense that a judge has an active role in the “east” (that is: in the soviet sys-

³ See P. Oberhammer, Richterbild im Zivilprozess, Zwischenbilanz eines Jahrhunderts der Reformen in Mitteleuropa in: P. Oberhammer et al., Richterbild und Rechtsreform in Mitteleuropa, Wien, 2001, p. 132.

tem) but remains passive in the “west” were common.⁴ It is superfluous to say that these were serious misconceptions, since the concept of an active judge in the Yugoslav Civil procedure Act in fact derived from the Austrian (*Franz Klein's*) ZPO and was not a result of legislative changes after the introduction of socialism. The advocates of a concept of a passive judge also totally neglected the modern trends and developments in comparative procedural law, which undoubtedly speak in favour of a more active role of a judge in the field of case management (for example the new English Civil Procedure Rules following the Woolf's report⁵). However, the same reproach of ignorance of comparative civil procedure can also be addressed to at least some of the proponents of retaining an active role of a judge. These were obviously not familiar with the recent trends, for example in German and Austrian law, where the obligation of parties to contribute to concentration and acceleration of procedure is being stressed out and the system of procedural sanctions strengthened.⁶

Nevertheless, the warnings of the legal science that – it goes without saying, within the limits of respect of a party's autonomy and free disposition – an active case management by the judge can contribute not only to the substantive quality of civil justice, but also to the concentration and acceleration of litigations, finally prevailed.⁷ The new (actually the first) Slovenian Civil Procedure Act⁸ (hereinafter: CPA), which came into force in 1999 (i.e. eight years after the proclamation of independence) did not radically depart from the Yugoslav CPA-1976. For example, the principle of substantive material guidance (*materielle Prozessleitung*) was

⁴ Typically M. Šipeč, Med liberalnim in socialnim civilnim procesom [Between liberal and social civil procedure], *Podjetje in delo*, 1999, No. 6–7, p. 1201 ff, L. Koman-Perenič, Izpeljava ustavnih določil v civilnih procesnih zakonih [Application of constitutional norms in Civil procedural Laws], *Podjetje in delo*, 1997, No. 6–7, p. 801.

⁵ See, e.g., S. Sime, A PRACTICAL APPROACH TO CIVIL PROCEDURE, 6th Ed., Oxford University Press, 2002, p. 286.

⁶ See, e.g., P. Oberhammer, Die Aufgabenverteilung zwischen Gericht und Parteien, v: Ingelse, Goslings (Ed.), Commentaren op fundamentele herbezinning, Prinsengrachtreeks, 2004, No. 1., p. 88 ff, E. Schilken, Die Rolle des Richters im deutschen Zivilprozess, *Waseda proceedings of comparative law*, Tokyo, 2000, No. 3, p. 18.

⁷ 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], *Podjetje in delo*, 1998, No. 6–7, p. 985, L. Ude, Reforma civilnega pravnega postopka z vidika ustavnih pravic [The reform of civil procedure from the viewpoint of constitutional rights], *Podjetje in delo*, 1998, No. 6–7, p. 971.

⁸ Zakon o pravdnem postopku (ZPP); Official gazette No. 26/99.

retained. On the other hand, some important novelties were introduced. One of most important changes is that a restriction is now imposed with regard to until when a party is allowed to assert new facts and evidence (preclusions) – see *infra*. Also – and this is one result of the heated proposals for a more passive role of a judge – the power of a court to take evidence not proposed by parties was abolished.

Although the new CPA from 1999 brought some improvements it can be realistically assessed that the crisis of the civil justice in Slovenia continues. Slovenia is still hampered by excessive duration of civil litigations and by huge backlogs in courts. This seriously undermines the reputation of the courts in public opinion as well as the legal certainty. Not long ago, both The European Court of Human Rights⁹ as well as the Constitutional Court of Slovenia¹⁰ delivered influential judgments stating that there is a structural defect in the functioning of Slovenian civil justice and that the right to trial within a reasonable time is too often violated. Although addressing the problem of excessive length of proceedings is not solely the responsibility of the legislative branch (additional steps should also be taken by the executive branch as well as by the judiciary itself), there certainly are fields where improvements are possible and desirable in the CPA.

3 Principle of free disposition and adversarial principle

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 Act (Art. 2 and 3). Without an action, there can be no judgment and when deciding a dispute (except in some cases in family matters), the court is bound by the claim, as determined by the claimant (a court may not decide either *extra* or *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 claim. When, for example, demanding damages, the claim-

⁹ ECHR Judgment, *Lukenda v. Slovenia* (no. 23032/02), 4.10.2005

¹⁰ Decision of the Constitutional Court of Slovenia No. U-I-65/05, 5.10.2005.

ant must always state a concrete amount of money which he or she is requesting from the defendant. The court is not authorized to impose on the defendant to pay a higher amount, even if it finds that the plaintiff would be entitled to it according to substantive law. The same strict rules apply in the case when the court finds that the plaintiff is not entitled to the sanction which they have stated in their claim (for example, the damages in amount of money), but they are entitled to another sanction (for example, a specific performance – *restitutio in integrum*). The court must in such case (if the claim is not amended) simply dismiss action for the amount of money and is not authorized to impose another sanction, although such would be proper according to substantive law applied to the facts which the court has established.¹¹

Parties are also free to dispose of their claim and defenses 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 court is not authorized to prevent parties from the mentioned acts of disposition with a claim – except if it finds out that they are conducted in a field where the principle of free disposition is revoked also in substantive law or if it finds out that the parties use these procedural acts of free disposition in an abusive way with a goal to fraudulently avoid (*in fraudem legis agere*) certain compulsory norms of substantive law (Art. 3.3 CPA).¹² The above-stated does not at all mean that, for example, a court would not allow a defendant to admit a claim which has no foundation in substantive law or that a court would not allow a claimant to voluntarily dismiss a claim although it is founded in substantive law. It just means that court can prevent parties from abuse of proceedings.¹³

¹¹ 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. 1, 2005, p. 41.

¹² If, for example, there is a compulsory norm in substantive law, that a person who does not have a status of a farmer, may not buy real estate in a certain protected area, the parties are not able to avoid this prohibition in such a way, that a buyer would sue a farmer for a transfer of the land, and a farmer would then admit the claim. In such a case (and only in such a case) a court may refuse to accept the admission of a claim because the aim of the parties was to abuse the process.

¹³ See, e.g. Judgment of the Supreme Court, II Ips 217/87, 15.10.1987.

Besides the voluntary dismissal of a claim (which results in effect of finality) there is also a possibility of a withdrawal of a claim (Art. 188 CPA). This however does not have an effect of *ne bis in idem*. In order to protect legitimate interests of the defendant, their consent is necessary for the latter. Admission of a claim refers to the claim as a whole. It needs to be differentiated from admission of facts. The admission of facts also has binding effects and the court is obliged to consider the facts which were admitted to be established as true which makes the evidence superfluous (Art. 214 CPA). However, even if a defendant admits all facts, the court still has the duty to check whether the claim is founded in substantive law.

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). The court is not permitted to introduce new facts and take evidence not previously advanced by the parties. The same applies with regard to evidence. 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 facts, which are not relevant for the case. On the other hand, it is the responsibility of the court for determination of issues of law (which covers not only domestic but also foreign law). The rule *iura novit curia* applies (Art. 180 CPA). Parties may of course present their contentions of law but they are not obliged to. If they do, the court is not bound by them and has a responsibility to find and apply the norms of substantive law, which correspond to the factual situation. As stated above, the court is bound to the factual frame given by the parties when considering the legal basis of the dispute.

4 Active case management

Strict rules regarding the respect of the initiative of the parties are significantly softened by the rules on active case management.¹⁴ Following the well known patterns of Austrian and German law, the Slovenian CPA provides for the so called “substantive procedural guidance” (*materielle Prozessleitung und Aufklaerungspflicht*) of a judge (Art. 285 CPA): “*The judge must ask questions, and shall in other appropriate manner see that all ultimate facts be stated during the hearing, that incomplete statements*

¹⁴ See e.g. D. Wedam-Lukić Dragica., *Vloga strank ...*, op. cit., p. 984–990.

concerning important facts be supplemented, that means of evidence relating to the parties' statements be adduced or supplemented, and that all necessary explanations be given in order to establish the facts and legal relation in dispute." The judge, as explained above, is bound by factual assertions and evidence, offered by parties, but has a right and a duty to stimulate parties (with questions, hints and observations) to amend and clarify their assertions of facts. The judge also needs to warn the parties if he or she considered the evidence which they offered as insufficient and warn them on the distribution of the burden of proof.¹⁵ The judge also needs to openly consult with parties the legal viewpoints which the parties have neglected. The latter is also a consequence of the constitutional right to be heard and an integral part of a guarantee to a fair trial.¹⁶ Thus, the court must drive the attention of the parties to legal grounds which it intends to use when solving the dispute and which the parties did not rely on. As already mentioned, the rule of *iura novit curia* applies in Slovenian law and thus, a court may use a legal norm, which none of the parties has relied on. However, if a court decides to do so, a court should drive the parties' attention to the possibility of relying on such a norm and thereby enable the parties to comment on it and to adjust their factual assertion to facts, relevant from the viewpoint of such a norm.¹⁷ This obligation of a court should, however, not mean that parties are free from obligation to diligently prepare their case, in order to determine what the proper legal basis of the dispute is.¹⁸ A party or her attorney should not get an impression that an improper preparation of the case from her side shall always be remedied by additional activities of the court.¹⁹ With

¹⁵ Judgment of the Ljubljana Court of Appeals, II Cp 942/2001.

¹⁶ See the decisions of the Constitutional Court Nos. Up 130/04 (24.11.2005) and Up 133/04 (1.12.2005).

¹⁷ Decision of the Constitutional Court, Up 130/04, 24.11.2005.

¹⁸ See e.g. M. Dolenc, Materialno procesno vodstvo v luči odločb Ustavnega sodišča [Material procedural guidance in the light of jurisprudence of the Constitutional Court], *Pravosodni bilten*, 2007, no. 1, p. 70, L. Ude et al., op. cit., Vol. 2., p. 592. For that reason, a restriction is imposed that a court should warn parties of possible legal grounds, for which also a *sufficiently diligent* party could not have foreseen that a court would rely upon. See Judgment of the Supreme Court II Ips 127/2005 and J. Zobec, Reforma pritožbenega postopka [The reform of appellate proceedings], in: *Izbrane teme civilnega prava II*, Ljubljana, 2007, p. 65–70.

¹⁹ Compare A. Slivnik, Materialno procesno vodstvo z vidika odvetnika – spodbuda za boljše ali za slabše delo [Material procedural guidance from the viewpoint of an attorney – an incentive for a better or a worse work?], *Podjetje in delo*, 2008, No. 6–7, p. 1611.

all of these measures, a judge can influence the proper factual basis and evidence to be determined, which is relevant from the point of view of applicable substantive law. It is also beneficial for the ensuring of the effective right to be heard that a judge discloses to the parties his or her legal positions (which are also decisive according to the rule of *iura novit curia*) and thereby encourages them to state the facts that are legally relevant from a legal perspective that they would have otherwise overlooked.²⁰ If a judge carries out his or her powers of case management in a proper way, this can largely contribute to the rationalization of the proceedings. Besides, it can also encourage in-court settlements.²¹ Moreover, 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 really relevant for the case which is extremely important for the rationalization of the taking of evidence. Not only academics, but also experienced judges²² today stress out positive effects of active case management. 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 (Art. 286a, CPA) – *see infra*.

It needs to be stressed out that the duty of material procedural guidance covers just one part of a broader notion of case management. It concerns the substantive part of adjudication. Of course, also in this regard, a judge's activity can contribute to the concentration of proceedings – it can assure that factual assertions and proposed evidence will be narrowed

²⁰ See J. Juhart, Zbiranje procesnega gradiva [Production of facts, evidence and legal basis], *Pravnik*, 1957, No. 5–8, p. 45–68. S. Triva, Esej o otvorenom pravosudjenju [An essay on open adjudication], *Godišnjak PF u Sarajevu*, 1973, pp. 343–364. Z. Trampuš, Metode racionalnega vodenja postopka [Methods of rational case-management], *Pravosodni bilten*, 1999, No. 2, p. 49. L. Ude et al., op. cit., Vol. 1, p. 73–76.

²¹ Z. Trampuš, Materialno procesno vodstvo in sodna poravnava [Substantive procedural guidance and court settlement], *Podjetje in delo*, 2002, No. 6–7, p. 1549.

²² E.g. Z. Trampuš, Metode ..., op. cit., p. 49. N. Betetto, Odprto sojenje [An “open” case management], *Pravosodni bilten*, 2003, Vol 2, p. 35. M. Dolenc, 2007, op. cit., p. 72., J. Zobec, Nesklepčnost in zamudna sodba [Il-founded claims and judgment by default], *Pravna praksa*, 2002, No. 18, p. 19.

to the extent that is really relevant for the case and that all the activity of the court and the parties shall concentrate on relevant points. But on the other hand, a judge in Slovenia, especially before the latest reform of the CPA in 2008, lacked certain other powers of case-management, namely those which would enable a judge to assure a timely presentation of facts and evidence and a preparation of a case for a trial.²³ There were (and to some extent still are) deficiencies in the system of procedural sanctions and in the proper organization of the preparatory stage of litigation in general.

5 Judge's powers to disregard belated new facts and evidence

A distribution of roles between judge and parties in civil procedure also concerns the question, whether the judge has any efficient tools to disregard statements of fact and evidence that were not given on time without a proper excuse or whether it is left entirely to the parties in what stage of proceedings shall they present relevant facts and evidence. A certain system of preclusions was introduced in Slovenia by the CPA-1999.²⁴ 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. A notion of "reasons beyond their control" should be interpreted with a degree of flexibility.²⁵ A proper excuse is not only a

²³ N. Betetto, "Pospešeni pravdni postopek" [An accelerated litigation], *Pravna praksa*, 2004, No. 37, p. 3 *et seq.*

²⁴ Of course, preclusion of new facts and evidence is not the only sanction for default and inactivity. A judgement by default can be entered in case of total passivity of the defendant (Art. 318, CPA) and an action can be dismissed if the claimant fails to attend the main hearing (Art. 282, CPA). Furthermore, the facts that were not explicitly denied or were denied in an unsubstantiated manner will be presumed to be admitted (Art. 214, CPA).

²⁵ See, e.g., A. Butala, *Pravdni postopek brez nepotrebnega odlašanja* [A litigation without unnecessary delay], *Podjetje in delo*, 1999, No. 6–7, p. 1160, N. Betetto, *Ustavna*

circumstance that a party only subsequently got knowledge of certain fact or evidence, but also a circumstance that it was only after the course of foregoing proceedings that certain facts and evidence appeared relevant for the case.²⁶ A too restrictive approach to preclusions can namely constitute a breach of the right of the parties to be heard in litigation.²⁷ Besides, a system of preclusions ought not to be too rigid also in order to avoid a reintroduction of “*Eventualmaxime*”. If a party is already in the first stage of proceedings rigidly demanded to state all facts and evidence, even those which could only eventually become relevant if the legal evaluation of the case goes into a certain direction, the pleadings of parties would become too complex and unclear.²⁸ Precisely this was the reason, why the so called “*Eventualmaxime*” was abolished in the past.²⁹

The described system of preclusions imposes an additional burden on parties for a diligent preparation of their case. It does however not mean that the activities of the court are diminished. On the contrary, precisely because a court may disregard facts and evidence, which are not submitted on the first session of the main hearing, the proper and active material procedural guidance (as explained above) on this hearing is gaining on importance. Precisely because the court will be able to refuse new statements of facts and new evidence, submitted in the later stages of proceedings, it is becoming more important that the court properly fulfills its obligations of stimulating parties to supplement and to clarify their submissions and, if necessary state new facts and offer new evidence already in the first session of the main hearing.³⁰ If the court did not pose questions and give hints and in this manner did not stimulate parties to state new facts and evidence on the first session of the main hearing, this might, at least in some cases, represent a proper excuse for the parties to state such facts and evidence in the later stage of proceedings.³¹ Thus,

procesna jamstva v dokaznem postopku [Constitutional procedural guarantees concerning evidence], *Pravna praksa*, 2003, No. 21, p. 18.

²⁶ M. Šipeč, op. cit., p. 1206, N. Betetto, *Ustavna ...*, op. cit., p. 18, L. Ude et al., op. cit., Vol. 2, p. 600.

²⁷ Z. Trampuš, *Materialno ...*, op. cit., p. 1549.

²⁸ D. Wedam Lukić, *Vloga ...*, op. cit., p. 990.

²⁹ On this topic see e.g. J. Juhart, *CIVIL PROCEDURE*, Ljubljana, 1956, p. 75,

³⁰ Z. Trampuš, *Materialno ...*, op. cit., p. 585.

³¹ See e.g. judgment of the Ljubljana Court of Appeals, I Cp 1107/2004, dated 13.10.2004.

the introduction of a system of preclusions in fact imposes an additional burden for a diligent preparation for the first session of the main hearing for both – for the parties and for the judge as well.³²

6 Deficiencies in the preparatory stage of civil litigation and the problem of preparatory written submissions

Art. 298/2 of the Slovenian CPA provides that litigation, whenever possible, should be terminated in one single main hearing (trial). In this provision a principle of concentration is envisaged. However, this provision remains rather a “dead letter” and the practice of litigation in Slovenia clearly shows that the termination after only one session of a main hearing is just an exception. In reality, litigation usually consists of a number of consecutive (“piecemeal”) hearings, many of which are empty in substance; the time intervals between sessions are often long; the date of a new hearing is much to often not determined at the end of the previous one (which means that it must again come to a service of court writs – which often causes problems in Slovenia). During the time period between consecutive hearings parties often file preparatory submissions. The goal of the concentration of litigation is predominantly frustrated due to the circumstance that the CPA does not provide for an adequate preparatory stage of litigation. The situation in Slovenian law is in this regard a way behind comparable legislations (for example German), which, especially through the latest reforms of civil procedure emphasize the importance of preparatory stage of litigation.³³ The introduction of a settlement hearing through the amendment to the CPA in

³² D. Wedam Lukić, *Vloga in odgovornost sodnika v civilnem pravdnem postopku*, [The role and responsibilities of the judge in litigation], *Podjetje in delo*, 2003, No. 6–7, p. 1671.

³³ General overview: N. Trocker, V. Varano, Concluding remarks, v: N. Trocker, V. Varano, *The reforms of civil procedure in comparative perspective*, Torino, 2005, pp. 243–266, M. Storme, *Tommorow’s civil trial*, v: M. Storme et. al., *The recent tendencies of development in civil procedure law*, Vilnius, 2007, str. 14–25, R. Stürner, *The principles of transnational civil procedure*, Rabats, 2005, pp. 223–230), P. Oberhammer, *Zivilprozessgesetzgebung: Content follows method*, v: Honsell et al. (Ur.), *Festschrift für Ernst A. Krammer*, Basel, 2004, pp. 1039–1046), H. Van Rhee, *History of civil litigation in Europe*, Seminar materials for Public and Private Justice – dispute resolution in modern

2002 was only a partial improvement.³⁴ This novelty did not prove to be particularly successful in practice, besides, a settlement hearing cannot take the role of a preparatory hearing anyway, if the court, as the Art. 305.c CPA suggests, continues with the main hearing immediately after the (unsuccessful) settlement hearing.

The experience of Slovenian courts shows that acceleration or delaying of litigation strongly depends on the fact whether the parties file their preparatory submissions (in which they assert new facts or evidence or just comment on evidence, already taken or express their legal opinions or drive attention to the case law in similar matters) on time or with delay.³⁵ In practice, written preparatory submissions of the parties play a very important role in litigations in Slovenian courts – from the viewpoint of collection of procedural material as well as from the viewpoint of causing excessive length of proceedings. A preparatory submission which is filed just a short time before a hearing or even at the hearing itself (whereby the situation is the same if a party reads this written submission at a hearing) in practice very often results in an adjournment of a hearing. Sometimes this is justified as the principle of equality of arms and the right to be heard demand that the opposing party should be given time to prepare an answer or comment, but sometimes an adjournment is not really justified if a preparatory submission does not contain anything that the other party could not comment immediately.³⁶

As has already been mentioned, the CPA-1999 limited the right to assert new facts and evidence to (the end of) the first session of the main hearing (later, only such new facts and evidence can be asserted which a party could not assert before without fault). But with this system the CPA remained “half way”. The problem of preparatory written submis-

societies, Dubrovnik, 2006, published on: <http://alanuzelac.from.hr/text/iuc-course.htm> (15.7.2008).

³⁴ See e.g. N. Betetto, Settlement hearing [Poravnalni narok], *Podjetje in delo*, 2002, No. 6–7, p. 1561–1573, p. 1562.

³⁵ V. Balazic, Metode racionalnega vodenja postopka in odločanja v gospodarskih sporih [Methods of rational case management and decision making in commercial disputes], *Pravosodni bilten*, 1999, št. 3, str. 7–20, str. 170, J. Ogrizek, Novi zakon o pravnem postopku – obet novega ravnovesja v civilni pravdi [New Civil Procedure Act – an expectation of a new balance in litigation], *Podjetje in delo*, 2003, No. 6–7, p. 1196, Ude et al., op. cit., Vol. 2, p. 606.

³⁶ See e.g. decision of the Ljubljana Court of Appeals, I Cp 1658/1999, dated 13.10.1999.

sions during the litigation remained entirely unsolved. If these submissions contained new facts and evidence, they could be presented even just a short time before the first session of the main hearing or even at this session (which shall often cause a need for adjournment). The system of preclusions as described above also did not solve a problem of preparatory submissions which the parties filed during the time between sessions of the main hearing. True, the possibility to assert new facts and evidence was limited; however there were no limitations for submissions which contain for example a denial of facts or an opposition to evidence, offered by other party or just further explanations and clarifications of facts which have already been asserted or contain legal viewpoints or the presentation of case law in similar cases.

7 The 2008 Amendment of the CPA – strengthening of procedural sanctions and emphasizing on the preparatory stage of procedure

The Slovenian CPA was substantially reformed in 2008.³⁷ Though the main field of the reform concerned reshaping of the system of access to the Supreme court (introduction of a “leave to appeal” system with aim to strengthen the role of the Supreme court in creating precedents), important novelties were introduced with regard to proceedings in the first instance court as well. The system of procedural sanctions for delays in litigations was strengthened and more importance was given to the preparatory stage of litigation.³⁸ In order to enable the other party a right to be heard and to organize its case, a party is now obliged to, whenever

³⁷ Amendment to the Civil Procedure Act (ZPP-D); Official gazette of the Republic of Slovenia, No. 45/2008 (in force since October 1, 2008).

³⁸ The amendment of the CPA in 2008 also introduced a provision on a presumed waiver of the right to object to a procedural error. Pursuant to Art. 286.b of the CPA, a party who knows that any provision of the CPA has not been complied with and yet proceeds with litigation without stating his or her objection to such non-compliance without undue delay, or, if a time limit is provided therefore, within such period of time, is deemed to have waived his or her right to object. Thus: an appeal against a final judgment cannot be based on such procedural violation. The only exception applies with regard to grave procedural errors, which the appellate court examines *ex officio* (such as: *res iudicata*, *lis pendens*, lack of capacity to be a party, lack of capacity to sue, etc.).

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 provision is framed following the example of Art. 273 of the German ZPO, according to which a court can demand from the parties to submit written statements on certain points that need to be clarified (*klärungsbeduerftige Punkte*).³⁹ This tool can contribute to the goal that procedural material should be as much as possible collected and clarified already before the main hearing. If the judge exercises the aforementioned powers, he or she can achieve that the standpoints of the parties are clearer and more complete and that it is clarified which facts are really at dispute and which questions the main hearing should be concentrated at.⁴⁰ In fact, already before the implementation of the 2008 reform, judges in Slovenia have often requested parties to file further written observations and clarifications or to adduce evidence (e.g. documents). It has often been stressed out that at least in certain cases it is beneficial to exercise powers of material procedural guidance already in written phase of procedure.⁴¹ What was missing however, was a sanction for case of non-compliance. With the implementation of the 2008 reform the situation is different: if a court set the time limits for the filing of new preparatory submissions and this time limit is not met, new submissions made after the time period has expired are admissible only if the court is convinced that admitting them will not delay the resolution of the dispute or if the party provides an adequate justification for the delay in presenting them (Art. 286a/2, CPA). These powers of the judge

³⁹ This is considered to be a very important tool for achieving a proper preparation of a trial. See e.g. D. Leipold in: Stein, Jonas, KOMMENTAR ZPO, 22. Aufl., Vol. 4, p. 494.

⁴⁰ Such is also the official explanation of the novelty. See The Explanatory memorandum of the Ministry of Justice to the draft amendment of the Civil procedure Act, op. cit., p. 136.

⁴¹ M. Dolenc, 2007, op. cit., p. 73.

can be exercised during the oral hearing and also in a written form in time between hearings. What is even more important; the judge can now 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.⁴²

Of course, there are numerous reasons (*inter alia*, new legal stand-points, which appear relevant due to the development of litigation, results of the evidence ...) which justify the filing of new submissions not only at the first, but also at subsequent sessions of the court, but this should be solved through a flexible interpretation of the notion of “justified reasons”.⁴³ A system of preclusions as sanctions however must be attached to the imposed time limits, because otherwise it would remain a “dead letter”. It is also important that the system is flexible and that it enables a judge to adapt each litigation to its characteristics and to determine the proper time framework.⁴⁴ Litigations can differ strongly – some are easily solved, some involve difficult questions of law, some involve difficult questions of facts and time consuming evidence procedure, in some highly qualified attorneys participate (sometimes in a mutually co-operative manner, sometimes in a rather hostile atmosphere) while in others lay parties represent themselves. Therefore a flexible system (in which it is left to the judge to decide whether further written submissions from the parties shall be requested and if so, in what time limit) is

⁴² V. Bergant Rakocevic, Materialno procesno vodstvo v pisnih fazah postopka in razmerje do prekluzije [Material procedural guidance in written stage of litigation and its 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, op. cit., p. 135.

⁴³ See M. Šipec, op. cit., p. 1206, N. Betetto, Ustavna procesna ..., op. cit., p. 18.

⁴⁴ V. Bergant Rakocevic, op. cit., p. 1602.

more appropriate than a rigid system of time limits imposed by law. It is also plausible that a judge can decide, according to the particularities of the given case, whether it shall implement a written preparatory procedure (requesting parties to file further written preparatory submissions) or whether an oral hearing shall take place and the case shall be discussed orally with the parties.⁴⁵

It is necessary to stress out that precisely in the field of imposing binding time limits, it is very clearly shown that it can only be a mutual responsibility both of the parties as well as of the court to assure a concentration of proceedings.⁴⁶ The law must give the judge the power to prepare a case for a trial. Imposing a system which assures that all preparatory submissions shall be filed on time and especially a system which also enables a judge to have initiative in directing parties to file further observations and submissions can be a positive novelty which can contribute to concentration of litigation. But the goal that litigation should in principle be concluded in a single main hearing can be achieved only if this hearing is diligently and completely prepared. However, for a diligent and complete preparation of a main hearing the mere adequate statutory regulation does not suffice. It is also of a paramount importance that a judge already knows the file well, that he or she knows which facts are asserted by the parties and especially that he or she already have (a preliminary) legal evaluation of a dispute. Only this can namely enable him or her to realize which facts and evidence are relevant for the case.⁴⁷ A judge who is himself or herself not well prepared for the case, cannot effectively exercise powers in directing parties to give further clarifications and supplementations and neither can he or she decide on whether conditions for preclusion (debarring) of new facts and evidence are fulfilled. Thus, also in this regard it can be

⁴⁵ This approach is evident not only in for example the German ZPO, but also in the new English CPR, according to which a court must direct a case in a certain “track”; fast track, small claims track or multiple track – especially the latter enables the court much flexibility in order to adjust the time framework to the particularities of each case. C. Osborne, *Civil Litigation*, Oxford University Press, 2002, p. 225–265.

⁴⁶ See e.g. M. Dolenc, *Materialno procesno vodstvo – sredstvo za racionalizacijo postopka ali dodatno breme in prelaganje odgovornosti?* [Material procedural guidance – a tool for a rationalisation of proceedings or an additional burden and discharging of responsibilities?], *Podjetje in delo*, 2008, No. 6–7, p. 1574, M. Voglar, *Prekluzije in sankcije po ZPP-D v praksi: izkušnja sodnika* [Preclusions and sanctions pursuant to CPA-D amendment in practice: experience of a judge], *Podjetje in delo*, 2009, No. 6–7, p. 1654.

⁴⁷ See, for example, S. Triva, *op. cit.*, p. 343–364, Z. Trampuš, *Metode ...*, *op. cit.*, p. 49, V. Balažic, *op. cit.*, p. 17, L. Ude et al., *op. cit.*, p. 73–76.

concluded that the new system is emphasizing on the responsibilities and activities of the parties without that this would result in diminishing of the active role of the judge.

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.⁴⁸ 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 at the same time does not mean that responsibilities and activities of the court are diminished. In consequence this contributes also to the substantive quality of adjudication.⁴⁹ 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.⁵⁰ 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.⁵¹ The introduction of procedural sanctions does not mean that they shall actually often be implemented. It is not unrealistic to expect that in most cases time limits and court orders are respected and that the culture of compliance shall prevail. In such case, it is beneficial not just for the acceleration of proceedings but also for substantive aspect of adjudication that parties are well prepared and diligent in conducting of their litigation. The same goes also for the court and its activities in proper case management and material procedural guidance which is, through the latest reform, gaining on importance. For the substantive quality of justice (and also for the effective fulfillment of constitutional right to be

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ Decision of the Constitutional Court of Slovenia, No. Up- 2443/08, dated October, 7, 2009

⁵¹ *Ibidem*.

heard) it is also beneficial if all relevant submissions are given on time, so the opponent has sufficient time to reflect on them. Actually, the experience in Slovenia proves that it was the system which was without proper sanctions for inactivity and delay, that caused the fading of the goal of substantive justice. As explained above, the lack of proper tools that would enable for timely gathering of procedural material resulted in frequent adjournments of hearings and in “piece-meal” manner of presentation of facts, and evidence and therefore proceedings often get too formalized and bereft of substance.

8 Conclusion

To the rights of the parties in litigation corresponds their responsibility to contribute to the fulfillment of these rights and also to contribute to the quality, concentration and acceleration of litigation. A modern system of civil procedure should not only aim to establish a proper balance between a claimant and a defendant but also a proper balance and distribution of procedural burdens between the parties and the court. As described, there have in recent times been many heated debates in Slovenia about passive or active court and maybe this too often resulted in an erroneous impression that the activity of the court necessarily corresponds in the passivity of the parties and *vice versa*. Experiences show that a certain degree of active case management by the court contributes not only to substantive quality of adjudication, but also to the concentration and acceleration of litigation. These positive effects can however be achieved only if the parties are also active and diligent at the participating in litigation. Thus, it should be a responsibility and obligation of both – the parties and the court – to assure the concentration and acceleration of litigation. The dilemma of either “passive judge and active parties” or “passive parties and active judge” is wrong. Only a regulation that promotes the activity of both the court as well as the parties is capable to assure the effectiveness of modern civil litigation. Thus, it is fair to conclude that parties are obliged to contribute to acceleration and concentration of proceedings. To make this obligation effective, a certain system of imposing sanctions against parties who do not fulfill this obligation may and should be imposed. This is not a question of diminishing or even abolishing the principle of autonomy of the parties in civil procedure or a question of ideologically burdened discussions about inquisitorial or adversarial or even “eastern” or “western” civil procedure. Parties do remain *dominus litis* (»the mas-

ter«) of litigation. This refers to the respect of their autonomy with regard to framing the issue of litigation (claim and facts upon which the claim is based), the respect for the acts of claim disposition (settlement, withdrawal, admission of claim) and the full respect for the parties' constitutional right to be heard. But there is no plausible reason to consider the parties as a *dominus litis* of a litigation also regarding the question whether it should be left to the parties to decide when (if whenever at all) the litigation would be allowed to proceed from one stage to another and whether a hearing of a court would be carried out or adjourned.

Summary

The Slovenian Civil Procedure Act is still closely linked to its Austrian predecessor. 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 concerning substantive preparation and examination of the case. On the other hand, the experience in Slovenian courts showed that a judge lacked certain other powers of case-management, namely those which would enable him or her to assure a timely presentation of facts and evidence and a proper preparation of a case for a trial. With the latest legislative reform in 2008, powers of judge were strengthened, the system of procedural sanctions for parties' non-compliance and delays was improved and more emphasis was given to the preparatory stage of civil litigation.