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Swedish Civil Procedure under European Influence
– A Space Odyssey[1]

Words are flowing out like endless rain into a paper cup
They slither wildly as they slip away across the universe.
Lennon/McCartney

1 Introduction

Law, even procedural law, is no longer the exclusive prerogative of the state. Legislation and judgments flow from a multitude of sources. An act of law enacted under the Swedish Constitution may well find its way to Luxembourg and the European Court of Justice (ECJ), and conversely a regulation or a directive adopted by the European Union (EU) institutions is fairly likely to end up in a district court in the Swedish countryside. The present paper constitutes an odyssey or an intellectual voyage, albeit a short and tentative one, through this diverse and chaotic universe of procedural law. Like the 1968 Kubrick movie, it starts off at the very basics; explores a development that we have not yet seen and that may well work out in another way than we expect, and ends, arguably, in the implication of a new dimension. The paper will examine EU influence on Swedish civil procedure with particular attention to issues of party autonomy and court discretion. It is a snapshot of a doctoral project started in late 2009 and as such offers no solution or final conclusion;

[1] The paper is based on a presentation given at the seminar on Party Autonomy and Civil Procedure at Uppsala University on April 27th 2010. I am indebted to doctoral candidates Anna Waldenström and Sebastian Wejedal Beijbom and to the participants of the seminar for valuable comments.

on the contrary, it will end with a new question. The aim of this paper is to present a background and a problem: that of reconciliation between EU law and Swedish procedure. I will argue that there is a need for such reconciliation and I will attempt to understand the difficulties associated with it. I will outline the hypothesis that those difficulties are linked to the inherent differences in the two legal systems concerned, and I will put forward the impression that the differences are of such a nature, that it might be said that the ECJ judges are from Mars, whereas their Swedish counterparts are from Venus. Can they be reconciled at all?

2 The Big Bang

The Swedish Code of Judicial Procedure (*Rättegångsbalken*, hereinafter referred to as 'the SCJP') came into force in 1948. In an effort to radically break away from the previous procedural order, it relied heavily on the principles of orality, immediacy and concentration.[2] Since the code was not substantially amended during its first decades, it came to be considered rigid and impractical.[3] The most significant legal reforms in the area of procedural law have therefore focused on the moderation of the main principles and the creation of possibilities for the courts to adjust the procedure on a case-by-case basis.[4] Swedish procedural law has thus, in the last couple of decades, changed from being to a large extent binding on both the court and the parties to increasingly allowing for party influence and court discretion.

The first major reform took place in 1987. The SCJP could, it was concluded then, only be practically useful if its rules were made flexible enough to be adjustable to all types of actions brought in the general courts.[5] The explicit purpose of the 1987 SCJP reform was thus to increase the adjustment possibilities, i.e. the margin of discretion of the court, and the accessibility of the procedure, however without abandoning the principles of orality, immediacy and concentration.[6] The revised SCJP thus demanded more active judges. The courts were – and are – to pro-

[2] Lindell, Civil Procedure in Sweden, Uppsala 2004, p. 30 ff.

[3] Ibid. p. 26.

[4] See e.g. legislative proposal (Prop.) 1986/87:89 p. 64 ff., Prop. 1988/89:95 p. 30 and Prop. 2004/05:131 p. 81 f.

[5] Prop. 1986/87:89 p. 65.

[6] Prop. 1986/87:89 p. 69 ff.

vide guidance to the parties not only on the conduct of the proceedings, but also on the substance of the case, for instance by actively helping the parties to sort out their claims. In sum, the scope of court discretion was broadened and power to frame the details of the procedure was transferred from the legislature (through the issuing of detailed, binding decrees) to the courts (through the interpretation and application of vague general clauses). By the obligation to provide guidance on the substance of the case, the courts were also entrusted with tasks that had hitherto been considered the prerogatives and responsibilities of the parties.[7]

The 2005 reform, which came into force in 2008, was in many respects a sequel to the 1987 one. Its main purpose was to "create a more modern trial in civil and criminal courts, that meets the requirements of due process and of effective and expedient handling of cases."[8] Increased flexibility was considered a key element in achieving that ultimate goal.[9] By this reform the legislature continued to enable the court or the parties to deviate from the principles of orality, immediacy and concentration. Many of the new or amended rules are dependent on party initiative for their applicability, or grant discretion to the court (or a combination of the two). Whereas the 1987 reform emphasised the role of the court in conducting the trial and guiding the parties, the 2005 legislators stressed that rules imposing restrictions on the party autonomy principle should be avoided in order for the parties to assume responsibility for defining the substance of the case.[10] On some occasions *ex officio* court action was therefore subjected to delimitations (see Section 3.2 *infra*).

In conclusion, the development of Swedish civil procedure has lead to increased calls for active and substantive decision-making on the part of both the parties and the courts, with the law offering no or little articulate guidance for these decisions. The law increasingly *delegates* or *transfers competence* to the courts, rather than controls them. The division of powers between the legislature and the judiciary is thereby confused. In a word, the current tendency of procedural development may be described as *decentralised.*

[7] See SOU 1982:26 p. 101 ff. and Prop. 1986/87:89 p. 103 ff.
[8] Prop. 2004/05:131 p. 1. Author's translation.
[9] Prop. 2004/05:131 p. 78 f.
[10] Prop. 2004/05:131 p. 154 f.

3 Lonely Planet? The Principle of National Procedural Autonomy

The dividing line between substantive law, on the one hand, and procedural law, on the other, which has a long tradition in Swedish law, has to some extent also been upheld at the EU level. While the ECJ has been a strong advocate for the integration of EU and Member State law in most fields of substantive law, already in 1976 it established *the principle of national procedural autonomy*, holding that "in the absence of Community rules on [procedure and remedies], it is for the national legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law".[11] The field of procedural law has thus been able to hide behind this veil of national procedural autonomy and claim that EU law is none of its concern. However, there are notable exceptions and indications that the Union law-making, both legislative and judicial, is picking up speed.

The procedural autonomy of the Member States is first and foremost limited by the principles of *equivalence*, according to which the rules governing the enforcement of Union rights cannot be less favourable to the complainant than those governing a similar action of purely domestic nature, and of *effectiveness*, which prohibits Member State rules of procedure that make it practically impossible or excessively difficult for individuals to exercise their rights.[12] The margin of discretion of the Member States is further limited by the principle of *sincere cooperation*.[13] That principle obliges all Member State institutions, including courts, to take

[11] 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECR 1975 p. 01989, para. 5.

[12] These principles were first mentioned already in the *Rewe* (n. 11 *supra*) judgment and have been consistently upheld and developed, e.g. in joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, ECR 1995 p. I-04705, and C-78/98 *Shirley Preston and Othes v. Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v. Midland Bank plc.*, ECR 2000 p. I-03201. They have also been thoroughly discussed in the literature, see e.g. Douglas-Scott, Constitutional Law of the European Union, Harlow 2002, p. 314 ff. and Craig and de Búrca, EU Law – Text, Cases and Materials, Oxford 2007, p. 313 ff.

[13] Art. 4(3) of the Treaty on the European Union. The EU Treaties will hereinafter be referred to as the TEU and the TFEU respectively.

all appropriate measures in order to fulfil the Member State's obligations arising out of the EU Treaties. Finally, the general principles of law that are common to the legal traditions of the Member States are of course binding in the field of procedural law as in other areas and thus constitutes a minimum harmonisation of sorts.[14]

In addition to the above-mentioned principles there are also a number of distinct, detailed rules of procedure issued at the EU level and applicable in the Member State courts. These rules have most often been issued within the Union's sectoral competence, e.g. consumer or competition law, and later interpreted by the ECJ to have procedural implications.[15] Many of these stray procedural rules can therefore be found in otherwise or seemingly entirely substantive measures, or only in the case law of the ECJ.[16] They are not generally applicable, as opposed to the aforementioned principles, but only binding on the Member State courts when the measure in question is relevant to the dispute under adjudication.

This development pierces the veil of national procedural autonomy and blurs the distinction between national and Union law also when it comes to procedure. The geocentric model of procedural law, I will argue, cannot be upheld. Member State court systems are not lonely or independent planets, but integral parts of a more complex EU solar system. EU law is increasingly and irrevocably becoming a part of national procedure.[17]

The same conclusion has been advocated in European literature.[18] The principle of national procedural autonomy and, especially, the exceptions to that same autonomy, have been discussed at length. It has repeatedly been argued that "procedural autonomy" is a misleading expression and that it is rather a matter of a residual *procedural competence* of the

[14] See e.g. 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, ECR 1986 p. 01651, para. 18 and joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 335. Cf. also art. 6(3) TEU.

[15] E.g. joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA and Salvat Editores SA v. Rocio Murciano Quintero et al.*, ECR 2000 p. I-04941 and C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, ECR 1999 p. I-03055.

[16] Tulibacka in Common Market Law Review 2009, p. 1536 ff.

[17] Cf. however the conclusion reached by Anna Waldenström in her contribution to this volume. As she points out, the development has not (yet) gone so far as to render the notion of national procedural autonomy entirely obsolete.

[18] E.g. Delicostopoulos in European Law Journal 2003, p. 599 ff., Kakouris in Common Market Law Review 1997, p. 1405 ff.

national legislatures, within certain (not so well defined) frames and in the absence of Union measures. The general obligation of Member State courts to disapply any act of national legislation that is contradictory to the requirements of EU law holds true – indeed, was established[19] – also in the field of procedural law. It follows that individual judges in the Member State courts, in their application of national law, e.g. the SCJP, are under obligation to ensure that that law is compatible in every situation with EU law requirements and, in cases of incompatibility, to reinterpret national law or grant precedence to directly applicable acts of Union law.

The concrete, practical implications of this obligation have, at least from a Swedish point of view, been the subject of little scholarly attention.[20] This paper is an attempt to approach the question of EU influence on procedural law from the bottom up. Instead of defining EU law principles and trying to elucidate general rules, I will take my point of reference from individual sections of the SCJP being applied daily in Swedish district courts, in order to examine the different courses of action available and discuss how these different interpretations or applications relate to the relevant EU law requirements. This will be done through the analysis of three fictive situations. Finally, I will draw on the result of these analyses in an effort to achieve enhanced understanding of the process of integration between Swedish and EU procedural law.

4 When Worlds Collide – Three Fictional Situations

4.1 Substantive Procedural Guidance

As we have seen the Swedish procedural reforms have entailed increased calls for court activity in defining the substance of the case. Such activity by the court will be referred to as *substantive procedural guidance*.[21] Suppose that a Swedish court finds that one of the parties to a dispute,

[19] 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECR 1978 p. 00629.

[20] A notable exception is Andersson, Dispositionsprincipen och EG:s konkurrensregler – en studie i snittet av svensk processrätt och EG-rätten, Uppsala 1999.

[21] Cf. the German term *materielle Prozessleitung*, from which the corresponding Swedish term *materiell processledning* derives.

party A, could rely on a directly effective rule of EU law, provided that a certain fact F is at hand.[22] Suppose further that A has neither realised the relevance of the EU measure in question, nor invoked F in support of his claim, but that the court finds it likely that F is indeed at hand.

Swedish civil procedure follows the principle sometimes expressed by the sentence *da mihi factum, dabo tibi ius*.[23] The court is to consider all relevant points of law of its own motion, but is bound by the claims and the facts relied upon by the parties and is, when adjudicating disputes amenable to out-of-court settlements, prevented from *ex officio* taking of evidence.[24] The court is thus allowed to take the rule of EU law into consideration, but would have to find that it is not applicable, as party A has not relied on F.

However, the court is authorized to exercise substantive procedural guidance, which entails that the court shall promote "the issues in dispute to be elucidated and the parties to state everything that they wish to invoke in the case" and the case to be "investigated according to its nature". Through the use of "questions and observations" the court is also to "attempt to remedy unclear and incomplete statements made by the parties".[25] It seems to follow that the court is allowed, if it considers it warranted, to draw the parties' attention to the (possible) existence of F, with the possible or even likely consequence that A realises his mistake and decides to invoke F. Clearly, such action on the side of the court balances between introducing of its own motion matters of law, which as a principle rule is allowed, and of matters of fact, which as a principle rule is not. Such court activity also entails a risk that the court is not perceived as impartial. In the *traveaux preparatoires* of the 1987 SCJP reform, it is emphasised that the court is to exercise precaution when interfering with the parties' conduct of the proceedings, but that at least under more particular circumstances it must be acceptable that the judge occasions the parties to expand the ambit of the dispute. Regard is to be had to "the

[22] The situation somewhat resembles the factual circumstances of *van Schijndel* (n. 12 *supra*).

[23] See e.g. Andersson (n. 20 *supra*) p. 179 ff., Ekelöf and Edelstam, Rättegång II, Stockholm 2002, p. 127 ff. and Fitger, Rättegångsbalken, Stockholm (amended 2007), p. 17:9 ff. Cf. however Lindell, Civilprocessen, Uppsala 2003, p. 61 ff. and 266 ff., who seems to be of the opinion that the court is at least under certain circumstances prohibited to raise points of law not relied on by the parties.

[24] SCJP Chapter 17 Section 3 and Chapter 35 Section 6.

[25] SCJP Chapters 42 and 43 Sections 8 and 4 respectively, as translated in Ds 1998:65.

character of the case and the situation at hand."[26] It is manifest that the judge in every singel case has a wide discretion to decide on a course of action that he or she considers appropriate.

The ECJ has on a couple of occasions pronounced on the interpretation of national procedural rules that confer discretion to Member State courts.[27] The issue was brought to the fore for the first time in *van Schijndel*, a case concerning the obligation of the court to raise points of law of its own motion. It should be noted, however, that it appears that the disputed new pleas in law were not "pure" points of law but required some additional examination of facts.[28] The ECJ initially stated that a Member State court, which is under obligation pursuant to national procedure to raise points of law of its own motion, is by virtue of the principle of equivalence also under obligation to raise points of EU law even when the parties have not relied on them. "The position *is the same*", i.e. the court is under obligation to apply EU law *ex officio*, "if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law."[29] This follows, according to the ECJ, from the principle of sincere cooperation; the court is required to use all means available to further the effectiveness of EU law.

In *van Schijndel* the ECJ established a difference between matters of law and matters of fact. The former were to be considered *ex officio* by the court if such a possibility existed in national law (paras. 13–15), whereas in respect of the latter the party autonomy principle outweighed the effectiveness of EU law (paras. 16–22). This seems to be in accordance with Swedish procedure as described above. However, the distinction between law and fact is obscure and it is highly debatable whether or not it can be upheld.[30] An obligation to consider *ex officio* matters of law would often be

[26] Prop. 1986/87:89 p. 104 ff. Author's translation.

[27] For the first time in *van Schijndel* (n. 12 *supra*) para. 14 and C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-HollandState,* ECR 1997 p. I-05403, para. 58 and more recently in C-2/06 *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas,* ECR 2008 p. I-00411, para. 45 and C-40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, ECR 2009 p. I-09579, para. 54. Cf. also C-453/00 *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, ECR 2004 p. I-00837, para. 28.

[28] See *van Schijndel* (n. 12 *supra*) para. 11.

[29] *van Schijndel* (n. 12 *supra*) para. 14. Emphasis added.

[30] See Bolding, Bevisbördan och den juridiska tekniken, Uppsala 1951, p. 33 ff. and 50 ff. and Lindell, Partsautonomins gränser, Uppsala 1988, p. 37 f. Andersson remarks that the dividingline between matters of law and fact in Dutch law seems to differ from

of little significance if the court were not allowed at least some discretion also when it comes to examining the facts or defining the claims. That was illustrated by the ruling in *Asturcom,* where the ECJ in a reasoning in many aspects resembling that of *van Schijndel*, held that the Member State court, if according to national law it has an obligation or a discretion to do so, is "obliged to assess of its own motion whether that clause is unfair in the light of [the relevant provision of EU law], *where it has available to it the legal and factual elements necessary for that task*".[31]

The Swedish judge in our example would have to balance the benefits of the proposed act of substantive procedural guidance, primarily to contribute to the thorough examination of the dispute and a substantively correct judgment, against the drawbacks, most notably the risk of being perceived as partial. That balance of interests is altered if the effectiveness of EU law is taken into consideration – and the *van Schijndel* interpretation of the principle of sincere cooperation suggests that it *must* be. Where the court in a purely domestic case, i.e. a case that is to be decided solely on the basis of national law, would find that the value of impartiality outweighs the interest of ascertaining that all relevant facts and claims are considered, its obligation to promote the effectiveness of EU law may cause the latter interest to take precedence. It thus appears that the court's possibility to let the drawbacks of substantive procedural guidance outweigh the benefits is reduced in EU law cases. Using the wording of the SCJP one could argue that the *EU law nature of a case* gives ground for a more active court than would a similar case of another, i.e. domestic, nature.[32]

4.2 The Rejection of Evidence

The reference to the principle of sincere cooperation, which is *a generally applicable principle of EU law,* implies that a more extensive interpretation of the *van Schijndel* case law is possible. In *Kühne & Heitz* the Member State institutions were obliged to review a final administrative judgment provided that four cumulative criteria were fulfilled, one of which was that the national authority had the power under national

Swedish practice (Andersson (n. 20 *supra*), p. 197 n. 891, cf. *van Schijndel* (n. 12 *supra*) para. 11).

31 *Asturcom* (n. 27 *supra*) paras. 53–54. Emphasis added.

32 SCJP Chapter 42 Section 8. Cf. Andersson (n. 20 *supra*) p. 403 ff.

law to do so.[33] That ruling indicates that the same line of argument can be relevant to procedural issues other than those directly relating to the court activity/party initiative relation, which has been examined in the foregoing.[34] If the *van Schijndel* interpretation of the principle of sincere cooperation affects all procedural rules granting the court a discretion, the consequence would be an obligation for the national court to assess the facts of the case at hand, to decide which of the permitted courses of action would best ensure the effective application of EU law, and to act accordingly, *as if it were prescribed by a mandatory rule*.[35]

The second example concerns the possible consequences of an extensive interpretation of the ECJ case law. Chapter 35, Section 7 of the SCJP contains the following rule: "The court *may* reject a proof if, despite *reasonable efforts,* it cannot be presented and the ruling *should not* be delayed further".[36] It is plain that a rule framed in that manner leaves considerable discretion to the court adjudicating an individual dispute. First, it is for the court to decide which efforts are to be considered "reasonable" and whether there are reasons to accept a delay of the proceedings. But even if the court finds that all reasonable efforts have been made and that further delay should not be accepted, it does, it appears, still have a choice; it *may*, but it does not have to, reject the proof. It is however difficult to imagine a situation where the court would allow a piece of evidence that would inappropriately prolong the proceedings and force the parties and/or the court itself to unreasonable efforts.

Or is it? Consider the following hypothetical case:[37] The supplier S has filed a lawsuit against the retailer R seeking compensation for R's non-compliance with a contract. R disputes the claim, alleging that the contract is void as S has unduly taken advantage of R's vulnerable market position. R relies on a statement by the witness W, who is a former employee of S's and negotiated the contract with R. W is believed to have left the country and can only with some difficulty be located. The first attempts to serve him with a subpoena have failed. The court therefore finds that the criteria

[33] *Kühne & Heitz* (n. 27 *supra*) para. 28.
[34] Andersson (n. 20 *supra*) p. 289 f.
[35] Andersson (n. 20 *supra*) p. 198 and 410.
[36] Author's translation. Emphasis added.
[37] The example is loosely based on C-453/99 *Courage Ltd v. Bernard Crehand and Bernard Crehan v. Courage Ltd and others*, ECR 2001 p. I-06297.

for rejection of the witness statement are fulfilled. Suppose, however, that the court also finds reason to suspect that the contract violates EU competition law and that W's statement might contain information which is of relevance for the application of that law. Should the court under such circumstances use its possibility to allow the continued efforts to produce the evidence after all? Is it even under an obligation to do so?

Although the continued efforts to successfully serve W will cause a delay in the proceedings, the court in our example will most likely find that Swedish law permits it to allow renewed service attempts.[38] Furthermore, it will find that hearing the statement might put it in a position to uphold a rule of EU law, which it may otherwise have to overlook, due to the principle of party initiative (see Section 3.1 *supra*). Finally, adopting an extensive interpretation of the ECJ case law in question, it will find that the principle of sincere cooperation contains a positive obligation to take *any action permitted* pursuant to national law to further the effectiveness of EU law. Under the circumstances outlined in the previous paragraph, the continued efforts to have the witness appear in court might be regarded as such an action. In sum, it seems reasonable to suggest that the court ought to permit more far-reaching inconveniences before rejecting the evidence than would have been the case, had EU law not been of relevance.

4.3 Court Competence

So far the examples have concerned rules that grant a discretion to the court. This third example will discuss EU influence on party autonomy. In the above-mentioned *van Schijndel* judgment the ECJ held that although the party autonomy principle constitutes a limitation of the effect of EU law, "that limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. The principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings, in particular, by protecting them from the delays inherent

[38] However, the delay caused by a such decision must of course not be so long as to amount to a violation of the right to a hearing within reasonable time pursuant to Art. 6 of the European Convention of Human Rights (ECHR).

in examination of new pleas."[39] Essentially, the party initiative principle thus appears to be compatible with the requirements of EU law.

There is, however, a catch in the description of the court's power as "being able to act of its own motion *only in exceptional cases where the public interest requires its intervention*". The ECJ here seems to have created its very own *Solange*-doctrine of procedural law; the principle of party initiative will be accepted, *so long as* it does not interfere with an important public interest of EU law. The ECJ has held i.a. consumer protection to be such an interest.[40] In *Océano* a lawsuit had been filed against a consumer in the court for the place of residence of the claimant, a commercial enterprise, pursuant to a prorogation clause in a sales agreement between the parties. It was clear according to national as well as EU law that the clause was unfair and that the court in question consequently lacked competence to try the case, but the applicable national law of procedure did not allow for the rejection of the lawsuit unless the competence of the court was challenged by one of the parties. The ECJ ruled that the effectiveness of the relevant act of EU law would be impaired "if the consumer were himself obliged to raise the unfair nature of such terms".[41] It followed, according to the ECJ, that the "effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion."[42]

Suppose that the correspondent situation were to occur in a Swedish court. A commercial enterprise E files a lawsuit against a consumer C in the court for the place where E resides, either pursuant to a standard clause in its contract with C or without legal basis (the difference between the two alternatives is mainly theoretical, since the standard clause would in all likelihood be void under Swedish – and EU – consumer law). If C challenges the competence of the court, there will not be any problem; the case will be rejected and E will have to take the case to another court. But if C does not object, the court according to Swedish law will consider itself competent by submission and will let the case go to trial.[43] It appears from the *Océano* judgment that the court will thereby violate EU law. And the reasoning of the ECJ raises further questions: What if C,

[39] *van Schijndel* (n. 12 *supra*) para. 21.

[40] C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, ECR 2006 p. I-10421 para. 38.

[41] *Océano* (n. 15 *supra*) para. 26.

[42] Ibid.

[43] SCJP Chapter 10 Section 18 and Chapter 34 Section 2.

ignorant of the fact that the prorogation clause is void, gives up his right to initiate proceedings at the court of his own domicile (SCJP Chapter 10 Section 8 a) and instead files the lawsuit at the court for E's place of residence? Will the court still be obliged under EU law to evaluate its competence of its own motion? However, since the outcome in *Océano* was derived from a directive, which is not directly applicable, the court will not have any legal basis for setting aside the national procedural rules.[44]

4.4 Lost in Space? Summary and Preliminary Conclusions

The ECJ case law on non-compulsory rules implies at the very least that substantive procedural guidance will have to be more active in EU law cases than in purely domestic ones. However, the rulings may also be construed more widely. Taking the rationale of that case law and the scope of the principle of sincere cooperation into consideration, it may be speculated whether the obligation should not be for Member State courts to use *any* discretion to further EU law. If that interpretation is adopted, court discretion and adaptation of the proceedings to the circumstances of the dispute at hand cannot be exercised in EU law cases. Instead, all discretion would have to be used to advance the effectiveness of EU law. It also means that the court would have to take sides between, on the one hand, the explicit effort of the Swedish legislature to increase party influence in the trial and, on the other, the calls of the European legislature (mediated through the ECJ) for increased court control of the dispute.

Similarly, it seems clear that the party autonomy principle cannot be upheld when it comes to court competence in consumer disputes. But can the scope of that case law be assumed to be so narrow?[45] The reference to "public interest" indicates that a wider interpretation is possible. What makes consumer law special? The ECJ points to the relative weakness in terms of legal knowledge and pecuniary assets on the part of

[44] Cf. Andersson in Europarättslig tidskrift 2001, p. 569 ff., who concludes that it might be possible to interpret Swedish law in the light of the directive but that the current legal position in Sweden is uncertain, and calls for legislative action to ensure foreseeability. So far, no such action has been taken.

[45] Later ECJ case law indicates that the exception includes the entire field of consumer law, see e.g. C-473/00 *Cofidis SA v. Jean-Louis Fredout*, ECR 2002 p. I-10875, *Mostaza Claro* (n. 40 *supra*) and C-227/08 *Eva Martín Martín v. EDP Editores SL,* not yet reported.

the consumer and the "imbalance between the consumer and the seller or supplier".[46] But those very same problems may occur in a number of different fields of law.[47] It can reasonably be assumed that there may be other fields of law that also embody a public interest strong enough to bring about an exception to the compatibility of the party autonomy principle and EU law. Such an interpretation would significantly weaken the party autonomy.

The combined impact of the *van Schijndel* case law on court discretion and the *Océano* case law on party autonomy could potentially produce a chain effect. The wording of the ECJ's ruling in *Océano* suggests that to fulfil the requirements of EU law, it suffices that the court has a *possibility* to act of its own motion in order to protect public interests of EU law. The party autonomy could thus in principle be maintained, provided that the court is not prohibited to act *ex officio*. However, if the court has a *possibility*, but not an *obligation,* to act, it also has the discretion to choose not to. And if the court has discretion, by virtue of the principle of sincere cooperation as interpreted in *van Schijndel* it would have to apply the law in the manner that best safeguards the full effectiveness of EU law. Consequently, in a "public interest dispute", the court would be obliged to raise any point of law or fact, or even to amend the parties' claims,[48] of its own motion in order to further the effectiveness of EU law, regardless of the submissions of the parties and without itself questioning the appropriateness of such action in the dispute being litigated.

The ECJ has yet to confirm – or refute – the interpretations outlined above and it is uncertain when or even if this will happen. It ought also to be pointed out that the reasoning should not be taken to its extreme. In *van Schijndel* the ECJ balanced the principle of effectiveness against fundamental procedural principles common to the Member States. It seems

[46] *Océano* (n. 15 *supra*) para. 27.

[47] The *van Schijndel* case involved two individual employees challenging the legality of a pension fund, the membership of which was compulsory for all practitioners of the profession in question. The imbalance in terms of assets and knowledge was arguably as palpable as in *Océano*, yet the ECJ in this case upheld the party autonomy principle.

[48] If, for instance, a consumer, not having noticed an unfair clause, demands a price reduction but the court finds that the contract should be declared void. Cf. Andersson (n. 20 *supra*) p. 185 ff.

reasonable to assume that a similar balance of interest could be struck in respect of the principle of sincere cooperation. In principle, however, I do believe that the above reasoning is a possibility worthy of consideration.

5 Equality before the Law – Brussels, We Have a Problem!

The hypothesis outlined above would be relevant only in EU law cases, i.e. disputes governed in substance by EU law (or having cross-border implications, cf. Art. 81 TFEU). In purely domestic cases, i.e. disputes between two Swedish parties, heard in a Swedish court and concerning a field of law that is not subject to EU harmonisation or a matter where existing EU legislation is not relevant, the ECJ has no authority. Application of Union law would therefore have a discriminatory effect, as the court would have less discretion in EU law cases than in purely domestic ones.

I find that consequence somewhat problematic. A fundamental principle of any legal system recognising the rule of law is that of equality before the law – similar cases should be treated alike.[49] But when are two cases relevantly similar? For our purposes it suffices to ask whether or not a difference in the origin of the law applicable to a dispute under adjudication constitutes a relevant dissimilarity. Is it legitimate to treat two in all other respects similar cases differently, because one of them is to be determined pursuant to a rule of EU law, or a rule of Swedish law implementing EU law, and the other pursuant to a rule of national origin?

The ECJ has answered that question in the affirmative, provided however that the claim receiving the better treatment is the one based on Union law.[50] Nevertheless, such a distinction seems highly questionable from the point of view of an individual party. Unlike the Member States and their institutions, that party has no duty to guarantee the

[49] I.a. the Swedish Instrument of Government, Chapter 1 Section 9: "Courts of law […] shall have regard in their work to the equality of all before the law and shall observe objectivity and impartiality", and the EU Charter of Fundamental Rights, Art. 20: "Everyone is equal before the law." See also Art. 7 of the Universal Declaration of Human Rights.

[50] The principle of equivalence, see i.a. *Rewe* (n. 11 *supra*) para. 5, *van Schijndel* (n. 12 *supra*) para. 17 and *Asturcom* (n. 27 *supra*) para. 49 and Section 2 *supra*. Cf. however C-118/08 *Transportes Urbanos y Servicios Generales, SAL v. Administración del Estado*, not yet reported, discussed *infra*.

effectiveness of EU law and normally has no interest in doing so, unless the enforcement of his or her rights happens to coincide with the upholding of EU law. In fact, he or she may not know or care whether the right claimed has been enacted by the national parliament or, directly or through implementation, by the EU institutions. To require such awareness appears to place heavy demands on the parties, for instance in cases where a national statute implements an EU directive. However, in order for the parties to be able to predict the course of proceedings and estimate i.a. the amount of activity required from them, such awareness would be necessary – *if* the origin of the substantive law at issue is perceived as a relevant dissimilarity. In the light of the foregoing, I do not find such a perception adequate.

The principle of equality before the law does not create new procedural rules and can hardly be directly relied on in Swedish courts. Then how is equal treatment to be achieved without requesting individual judges to overstep their powers? As for rules granting discretion to the court, it could be done easily enough. Since EU law does not require the court to exceed the discretion granted to it under national law, there is no need for an additional legal basis to fulfil the principle of equal treatment. The court can simply (although there is nothing simple about it) decide which course of action would be required for claims based on EU law, and apply the same standard in the domestic cases. No actual deviation from national law is needed. However, the foreseeability of the procedure would be impaired, since a rule that by its wording seems to, for instance, leave a discretion to the courts must be applied as if it were compulsory, due to (unwritten) EU law requirements.

In situations as the one exemplified in Section 3.3 *supra* the matter becomes more intricate. In these cases the courts do not have any discretion to choose between different solutions, as they are bound by the acts of the parties. The parties on the other hand cannot be expected to adjust their actions to advance the effectiveness of EU law. Whereas in a dispute concerning EU law the court should rely on the principle of effectiveness, which belongs to the primary EU law and is directly applicable in national courts, to disapply the national rule, that principle is not applicable in a purely domestic dispute. For those cases another solution will have to be devised if we are to avoid the unequal treatment of domestic and EU law cases.

6 Is There Life on Mars? Possible Reinterpretation of EU Law

As was noted above, the principle of equivalence has so far been a unidirectional principle, operating only in the favour of EU law. Since the *Rewe* judgment in 1976, the ECJ has consistently held that Member State procedural rules, pursuant to which claims based on EU law are to be tried, *cannot be less favourable* than those relating to similar actions of a domestic nature. However, neither the *Rewe* formula, nor the subsequent ECJ case law has forbidden the opposite: no objections have been made to the less favourable treatment of claims based on national law.

That case law appears to have taken a slightly different turn in the recent *Transportes Urbanos* ruling.[51] In that judgment the ECJ initially restated the *Rewe* definition of the principles of effectiveness and equivalence. In the subsequent elaboration, of almost unprecedented length, on the principle of equivalence, the ECJ went on to specify that said principle "requires that all the rules applicable to actions *apply without distinction* to actions alleging infringement of European Union law and to similar actions alleging infringement of national law."[52] That phrasing has been used by the ECJ on a few previous occasions,[53] but until now it has not been decisive for the outcome.

Analysing the reasoning of the ECJ, it appears to follow *solely* from the facts that a) a claim based on breach of national law was treated differently compared to a claim based on breach of EU law (which was undisputed), and b) those two claims were to be considered similar, that the principle of equivalence had been infringed. The ECJ did not apply the "less favourable" criterion to the disputed rules. It therefore seems that the question of which treatment was the more favourable to the claimant *was not relevant for the outcome*.

If – and that is a big 'if' – the *Transportes Urbanos* ruling is upheld to this effect in future case law of the ECJ, such a reinterpretation of the principle of equivalence would potentially entail a number of consequences. The most immediate one would be that the principle would no longer be unidirectional, i.e. the reverse discrimination of claims based on national law would no longer be permitted under EU law. There-

[51] Cf. however n. 26 in the Opinion of the Advocate General.

[52] *Transportes Urbanos* (n. 50 *supra*) para. 33. Emphasis added.

[53] See references ibid.

fore, the national court could rely on the principle of equivalence even in purely domestic cases, in order to make sure that similar cases are dealt with in accordance with the principle of equality before the law.

It seems, then, that the problems outlined in this paper could all be resolved by reference to EU law. In cases where either of the parties, or the court of its own motion, relies on EU law in support of their claim, the court should interpret the SCJP in the light of the obligation to take all appropriate measures to ensure the effectiveness of EU law (according to the principle of sincere cooperation) and, if that proves insufficient, rely directly on the principle of effectiveness. In the litigation of purely domestic cases, there are two options. If the disputed Swedish rule leaves a certain amount of discretion to the court, that discretion could – considering the fundamental principle of equal treatment, even should – be used to ensure the same treatment of the claim, as would have been the effect of a direct application of the principle of effectiveness. If the court is obliged, either by the rule in itself or by the parties' submissions pursuant to that rule, to take a certain course of action, the court could rely on the *Transportes Urbanos* interpretation of the principle of equivalence, and hold that the (directly applicable) EU principle requires the equal treatment of similar cases regardless of the legal basis of the claim.

7 ECJ Judges Are from Mars, Swedish Ones Are from Venus

EU procedural law (at least concerning disputes without transnational elements) still consists mainly of principles, which lack both the completeness and the wealth of details required from a self-contained procedural system. They can hardly be applied separately from the national procedural law of the Member States and EU law can thus hardly be construed as more than a complement to Member State law of procedure. This underlines the need for an adequate method for the reconciliation of EU and Member State procedure. That need will not cease to exist, even if we accept that principles of EU law will take precedence and that, in cases of incompatibility, national law will be disapplied also in the area of procedural law.[54]

[54] Moreover, it is questionable whether all Member States or Member State courts would be prepared to explicitly subordinate their national law to EU law. National law is widely

The merger of Swedish procedure and EU law is however a merger not only or even mainly of rules, but also and foremost a merger of different models of judicial reasoning. The reasoning of the ECJ differs in several aspects from that of the Swedish Supreme Court, Högsta domstolen.[55] If that merger is to take effect at court level, every Swedish judge will have to understand both models and how to reconcile them.

Swedish procedural law is – or at least was, prior to the EU accession – intended to form a complete and independent legal system, while EU law from its outset has been a complement to the national law of the Member States and dependent on those national legal systems for filling the gaps. The EU is founded on the principle of separation of powers and acts of legislation must be approved by two or three separate bodies, whereas Swedish legislation is approved or disapproved by the parliament alone. The judicial power exercised by the ECJ is larger than that of the Swedish Supreme Court, which lacks the authority to invalidate an act of parliament. In terms of jurisdiction, the ECJ is only competent to judge matters of law, whereas national courts are expected to also evaluate evidence and rule on matters of fact. Lastly, the ECJ, compared to the Swedish judiciary, plays a significantly more active role in law-making. These systemic differences have created different approaches to adjudication.

EU legal reasoning is built to a large extent on principled arguments, where the enforcement of individual Union rights and the *effet utile* of Union law can be construed as overriding principles. The method could be described as deontological in that the point of departure of the ECJ is the rule to be upheld, whereas Swedish procedure gradually has been moving towards a more consequentialist approach for the last three decades. The Swedish legislature, to whom the courts can be presumed to adhere due to the strong position of preparatory works in the Swedish doctrine of sources of law, has emphasised the importance of flexibility and adjustment to the circumstances of every dispute and situation during the trial. A Swedish judge is therefore to make his or her decisions on the conduct of the proceedings based on the known circumstances of the case and the expected effects of different courses of action. The ECJ on the other hand has taken the opposite standpoint, stating that the interpretation

conceived as more legitimate than EU law, which, especially considering the "democratic deficit" of the EU, may still be regarded with some suspiciousness. Cf. Craig and de Búrca (n. 12 *supra*) p. 353 ff.

55 Bernitz in Juridisk Tidskrift 2009/10, p. 479 ff.

of procedural rules "may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue."[56] ECJ reasoning is thus characterized by a higher degree of generality, but conversely requires detailed interpretation when applied to concrete cases.

In sum, the ECJ can be said to represent a principled approach to legal reasoning whereas the Swedish legislature is turning towards a pragmatic or consequentialist one. This fundamental difference, on a more concrete level of adjudication, entails differences in the interpretation and application of the law. There is a correlation between a consequentialist approach to legal argumentation and a preference for more specific methods of interpretation and decision-making, and conversely between a principled perception of the law and a preference for more general interpretations.[57] The difference also supports the suggestion that the ECJ judges are, metaphorically, from Mars, whereas their Swedish counterparts are from Venus.

8 Across the Universe

The present paper does not aim to find a solution to the question of the reconciliation of Swedish and EU procedural legal culture, but merely to point to some of the problems. In the following I will however outline a line of reasoning that might be helpful in future efforts to accomplish a successful fusion.

The *teleological method*,[58] as introduced in Swedish procedure by Professor Per Olof Ekelöf, takes its point of departure in the assumption that words are not exact and rules consequently cannot be written to semantically include all situations intended to be included and those situations only. Thus, a literal interpretation of the wording of a rule cannot be decisive for its application. However, despite this inherent ambiguity of language, the teleological method recognises that a word has a *core meaning*,[59] which is so evident as not to be up for interpretation. By study-

[56] *Preston* (n. 12 *supra*) para. 62.
[57] Cf., concerning the differences between principled and pragmatic approaches, Spaak, Principled and Pragmatic Theories of Legal Reasoning, in Fogelklou and Spaak, Festskrift till Åke Frändberg, Uppsala 2003, p. 235–262, especially p. 247 ff.
[58] See Ekelöf, Teleological Construction of Statutes, in De Lege, Uppsala 1991, p. 127–168.
[59] Ekelöf used the German expression *Begriffskern*.

ing the effect of a rule in those incontestable cases, the abstract *function* of the rule is determined. Once the function has been identified, the rule in question can be construed, even in harder cases, in the manner which best serves that function. The teleological method acknowledges that such an interpretation may extend the scope to situations that are clearly not covered by the wording of a rule and corresponding exclude situations that would have been included, had a literal method of interpretation been practised. For this reason, Ekelöf held that the teleological method could more accurately be considered a method of *construction* of statutes.

Comparing the teleological method to that of the ECJ, some similarities are manifest. ECJ legal reasoning rarely engages in examinations of the historical intents of the Treaty drafters but favours interpretations based on a contextual understanding of the purpose or the objective of a provision.[60] Hartley even remarks, in a clear parallel to the above characterisation of the teleological method, that the method of interpretation of the ECJ "really goes beyond interpretation properly so called: it is decision-making on the basis of judicial policy."[61] However, the Swedish teleological method does not share the principled or deontological approach of the ECJ, but may best be described as consequence-oriented. Nor does it share the inclination of European law of rely heavily on *rights* (as rights are regarded with some scepticism in Scandinavian legal realism). These are features in which the teleological method resembles, or has influenced, the Swedish culture of procedural law.[62]

In the previous section I characterised EU law as principled in its reasoning and general in its conclusions, in contrast to the Swedish procedural system which was found to be more consequentialist and situation-oriented. Ekelöf's teleological method may not be as abstract as that of the ECJ, but shares the view that the application of law should not be "carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract," even if that would entail a less-than-optimal outcome in an individual dispute. It is thus clearly marked by a higher degree of generality. It is however, equally clearly, consequentialist rather than principled in its legal argumentation. The teleological method can thus, at least in some aspects, be considered a

60 Douglas-Scott (n. 12 *supra*) p. 208 ff.

61 Hartley, The Foundations of European Union Law, Oxford 2010, p. 72.

62 However, the concept of rights seems to have become stronger following, primarily, the 1995 implementation of the ECHR.

compromise. And I wonder – could it bridge the gap between the ECJ and the Swedish legislative, between the EU case law and the SCJP, and between the fields of European and procedural law?[63] Indeed: could it allow us to travel from Venus to Mars and back again?

[63] For a similar approach to the reconciliation of Finnish legal dogmatics and the European human rights doctrine using Eckhoff's theories, see Karhu in Tidskrift publicerad av Juridiska Föreningen i Finland 2005, p. 24–42.