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Party Autonomy – Civil Procedural Views on Party Autonomy, Franz Klein, EU Law and more

Editor
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Editor's Note

De Lege is the yearbook of the Faculty of Law at Uppsala University. One objective of De Lege is to present legal research of high quality. The present volume is a good example of such research in the field of Procedural Law. Today, the internationalization of law is evident, both due to the impact of EU Law, and through cross-border research. For many years now, the Uppsala Faculty of Law has had extensive international contacts. Research with foreign colleagues is increasingly important, and this volume bears testimony to this fact. To publish research in English means that it will be accessible internationally and the Faculty is most proud to present this volume of De Lege.

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Mattias Dahlberg

Editor

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Torbjörn Andersson

Background to the Project

The texts in this book are based on papers presented at a civil procedural colloquium in Uppsala 27–28 of April 2010: *Party Autonomy in Civil Procedure – a comparison of Austria, Slovenia and Sweden, in the light of the ideas of Franz Klein and with a view to the political contexts of the three countries*. The Uppsala event contained a number of presentations on the theme of party autonomy. Furthermore ongoing research by young scholars from Ljubljana, Zürich, Uppsala and Gothenburg was presented, since the colloquium was set up also for the purpose to develop and initiate research exchange and ditto collaboration between the four participating countries in the field of civil procedure.

The first step leading to the project was taken when Ales Galic, holding a position as guest professor in Uppsala in the spring of 2008, presented a paper on some recent developments in Slovenian civil procedure with focus on the principle of party autonomy. This was followed by a corresponding presentation on the same theme, but from a Swedish perspective, by Torbjörn Andersson, now in Ljubljana in the autumn of 2009. After the involvement of Paul Oberhammer, Zürich/Vienna, the colloquium was planned and arranged. We are grateful to Centrum för Tysklandsstudier Uppsala universitet (Centre of Germanic Studies of Uppsala university), due to the generous financial contribution. We are also grateful to Christina Andersson, making all the practical arrangements and to the Faculty of Law, Uppsala university, providing its premises. Without this support the colloquium would not have happened and this book would not exist.

As to the contents of the book: The principle of party autonomy regulates, or rather describes, the autonomy of the parties in relation to the court in civil procedure. The construction of the principle is connected to the constitutional relation between state (courts) and citizens (parties).

A liberalistic society is characterized by a high degree of party autonomy, while in a society characterized by strong state powers, the degree of party autonomy is low. At least that is the general presumption. The Austrian code of civil procedure is built from an ideology of procedure developed by Franz Klein and it is generally referred to as "social civil procedure". The Austrian civil procedural order was the big source of inspiration for the Swedish code, which after decades of legislative work came into force in 1948. As Slovenia was a part of Austria in the days of Klein, his original impact is obvious; the maintained influence of social civil procedure is clear from the fact that the Austrian code of civil procedure with modifications continued to apply in Slovenia throughout the 20th century.

This book has as its overriding purpose the comparison of different civil procedural orders. These procedural orders share a common origin, but have been subject to cultivation in states with great differences in respect of political climate during the 20th century. The comparison is done in order to illustrate the connection between political ideology and civil procedural regulations, but also in order to check out whether the model of "social civil procedure" according to Klein is still valid today.

Aleš Galič

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. Stuerner, 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 Jahrzents 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 report[5]). 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 Act [8] (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. Šipec, 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, Prinsengrachttreeks, 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 pravdnega 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 Rights[9] as well as the Constitutional Court of Slovenia[10] 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 dilligent* 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 judges[22] 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. Šipec, 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, RabelsZ, 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. Balažic, 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 pravdnem 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 standpoints, 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 cooperative 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 it relation to preclusions], *Podjetje in delo*, 2008, No. 6–7, p. 1598. See also: The Explanatory memorandum of the Ministry of Justice to the draft amendment of the Civil procedure Act, 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 it 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 master«) 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 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.

Torbjörn Andersson

The Balance of Powers Between Court and Parties in Swedish Civil Procedure

1 Background

Unlike e.g. Denmark and Norway, Sweden did not replace its old code of procedure of 1734 in the beginning of the 20th century. In stead the Swedish code of procedure – like the Spanish including both civil and criminal procedure – came into force 1948. But then the new code was the result of decades of laborious work, discussions and proposals.[1] Germany was the dominating influence as to Swedish culture, thinking and science during the 19th century and first half of the 20th. Therefore during that period, also Swedish legal thinking was mainly influenced by Germany and other German speaking countries. Possibly due to the fact that during that period Swedish legal scholars had to devote their energy to interpretations and extrapolations of a very old, out of date and in certain respects obsolete procedural code,[2] the influence from, and usage of, German civil procedural theories and conceptions are particular.[3]

[1] See Marius Kohler, Die Entwicklung des schwedischen Zivilprozessrechts. Eine rezeptionshistorische Strukturanalyse der Grundlagen des modernen schwedischen Verfahrensrechts. Mohr Siebeck, Tübingen 2002.

[2] You cannot, though, explain the importance of German theory in Swedish procedural law and writings on procedure with reference to Swedish scholars having to use German ideas to bring the old law on terms with the modern society growing and new societal demands; you see the same influence in areas in Swedish law which were subject to new acts (contracts and sales of goods) and also in Scandinavian countries the procedural laws of which were regulated by newly enacted codes (Denmark and Norway). I would say that the important German influence on Swedish civil procedure is just one tiny aspect of the major importance German thinking had in the spheres of society, culture and science at large.

[3] As late as in the 1950's you may pick up a Swedish dissertation or a law school text book and find at least as many references to German authors as there are to Swedish.

Slovenia's connection to Austrian civil procedure did not untie when the country parted from Austria in 1918. Of course the Austrian influence on Swedish civil procedure was lesser, but it may be interesting to note that the rapidly diminishing Germanic influence on the Swedish society at large after the Second World War, still allowed for the bringing into force of the Swedish code in 1948, in spite of its being highly inspired by German and Austrian thinking. Possibly, the growing importance of the social democratic party in Swedish politics and the building of the welfare model society made Klein's model of "social procedure" attractive for the legislative process leading to the new code.

In this paper I will discuss the balance of powers between court and parties in Swedish civil procedure. I will use the same delimitations and approach the same procedural questions as does professor Galic in his article. Since the purpose of this book is to reveal common features and challenges in procedural systems developed in different political contexts and consider the common inspiration from Austria and Franz Klein, I will try to focus on the similarities and differences between Slovenian and Swedish civil procedure.

Since the principles for dealing with the balance of powers between court and parties were established in 1948 and have since then been subject only to minor changes, there is nothing to say on major legislative reforms as from the latter part of the last century.[4] One may point, though, to the difference in this respect to Slovenia and draw the natural connection to the development of political systems and ideologies in the two states. Whereas Slovenia has undergone dramatic political changes and three wars during the 20th century, Sweden has been a stabile society, not involved in a war in over 200 years, and has cultivated the idea of being the inventor of the welfare state model. In view of this, it is striking that the subject of prof Galic's and my papers are subject to so similar regulations and display the same difficulties.

Still, Swedish civil procedure has seen one major development of some importance the last two decades and that is the incorporation of the ECHR as well as the growing impact of EU law. In this respect it is interesting to observe that it appears like Slovenian legislation and court practice take European law much more seriously and are willing to adjustments and integration, while their Swedish counterparts seem to

[4] Cf Bengt Lindell, Civil Procedure in Sweden. Kluwer Law International 1996. p. 30 et seq.

be somewhat reluctant and slow. It may be too quick an explanation that Slovenian law is used to and willing to change, while Swedish law can appear self-contained and sceptic of change.

As said above, this paper is set out to deal with the subject of how power is balanced between the court and parties in Swedish civil procedure and it aims at a comparison with Slovenian civil procedure in this respect. *Since* this paper has an element of comparison, *since* Slovenia and Sweden has a history of different prevailing ideologies during the 20th century, *since* we have a common element of inspiration in Austrian civil procedural thinking and *since* the balance of powers in civil procedure is closely linked to prevailing political ideologies concerning the relation between state and individual, it would seem natural to try and develop a grand thesis or a theory on the connection between prevailing political ideology on individual autonomy and the actual regulation of individual autonomy in civil procedure. Perhaps this cooperation may be the beginning of building such theories, but for the time being I more or less have to make a halt after the comparison, just adding some flavour of political ideology when explaining some of the regulatory choices made by Swedish courts, in particularly with respect to human rights.

Still, it is hardly subject to dispute to claim that the legal and political ideology prevailing in both Sweden and Slovenia is, roughly spoken, liberal. And consequently also civil procedure in both countries may be said to be built on liberal ideas. The exact meaning of "social procedure" in a system built on liberal ideas may still have to be addressed and perhaps you can discuss it if you consider some of the overriding objectives, or values or functions, which are attributed to civil procedure in Swedish literature. The following objectives are coexisting, counteracting and also reinforcing each other and they are all addressed in professor Galic's paper. It is interesting to note that they all, even if to varied extent, are values which are quite characteristic for liberal ideas.

Thus, civil procedure is here to

- certify the useful effect of substantive law (effet utile),
- resolve conflicts (achieving peace between parties – individually – and in society – collectively),
- obtain protection of individual rights/justice (retrospectively and prospectively),
- fulfil the constitutional responsibility of the third branch of government (clarify the law, make law and control other governmental branches).

During the passing of time since the development of modern civil procedure, emphasis has been put differently on these objectives. In the early 20th century, the discourse tended to focus on protection of individual rights and the quest for truth and substantively correct judgments. When modernity had its high during the 20th century (a period where the welfare state was created in Sweden, while other parts of Europe saw state systems being built on communism, fascism and economic liberalism), the focus shifted to the useful effects of substantive law, from the individual dispute towards the collective effects of individual disputes. The late 20th century clearly indicates a shift both to conflict resolution (mediation and arbitration) and to the constitutional role of courts. I would say that the growing importance of ECHR has less to do with the traditional concept of individual rights protection, than the constitutional aspect. The right to a fair hearing is less concerned with providing exact justice for every individual who has a right, than with upholding individual participation in processes which determine the life conditions of the same individual (participatory values).

In my concluding remarks I will comment on where the regulation of the balance of powers between court and parties in Slovenia and Sweden puts emphasis in respect of these general objectives/values. In that context I will also deal briefly with how the concept of "social civil procedure" shall be understood and how party autonomy in these two countries should be qualified in that respect.

2 A distiction between the appropriate level of activity of judges and the balance of powers between court and parties in Swedish civil procedure

When you ask yourself the question whether a specific procedural system may be considered to require its judges to be *active*, you have to reflect on various forms and degrees of possible activity performed by judges. Of course, procedure construed from the ideal of the *official maxim*, requiring the court to establish the facts relevant to the dispute at issue on its own motion, must be characterised as presupposing the judges to be active during the proceedings. Some parts of Swedish administrative procedure can be said to be designed that way, as well as some parts of civil law cases concerning e.g. parenthood. Naturally, there are other parts of Swedish procedure which seem, explicitly or implicitly, to value passive rather than active judges. One obvious example would be arbitration proceedings.

Before looking more carefully at Swedish civil procedure and analysing whether it may be said to favour active or passive judges in proceedings, I would like to make a distinction between the question of *required activity* of the court and the question of *the balance of powers between the parties and the court*. The required degree of activity seems to be connected in some way with the balance of powers: it would appear that a system which puts in the hands of the court to determine the process of proceedings would require active judges; and it would seem that a system which puts the power to determine the course of proceedings in the hands of the parties would require that judges have passive roles. Furthermore, if you connect the power structure laid down within a specific procedural system, with the general idea in society at large of a fair/just/proper division of powers between state and individual, you can easily justify a thesis that a society upholding and based upon an authoritarian political ideology would promote a procedural system tipping the balance of power to the courts, from the parties, and presupposing active judges and passive parties. And consequently, a society embracing a laissez-fair liberal ideology would need a procedural system putting emphasis and power on the will of the individual parties and requiring the judges to be passive and parties active.

But the connection between the degree of activity of the judges and the power structure of the proceedings is not really clear cut. For instance, it is quite possible to allow for heavy *materielle Prozessleitung* on matters which only the parties have the exclusive power to decide, say the bringing of new facts; the activity of the judge in such a context has the purpose to allow the parties to use their powers and make *informed choices*.

Another example would be that it is semantically difficult to say that a court by actively deciding not to allow e.g. new evidence is taking passive action; even if a rule on preclusion has as its purpose to make the parties active at an early stage of the proceedings, this purpose can only be fulfilled if also the court is active by applying the rule – thus, party activity may require judge activity[5]. And the same may be said about the first example.

[5] This also one of prof Galic's main points.

Therefore, the question of determining the political ideology as expressed in the balance between judge and parties in civil procedure, cannot be assessed solely with reference to active-passive roles of judges and parties; you have to analyse the presupposed activity/passivity with a view to the whole context of how the balance is struck between court and parties when it comes to have decisive influence on the course of the proceedings.

3 The Balance of Powers: The principle of Party Disposition

During the 19th century Swedish writers on procedural law used only one principle to describe the influence of the parties on the proceedings and that was the "*Verhandlungsmaxime*". In literature from late 19th century and early 20th century, a period dominated by something in Sweden called the "classical school",[6] two separate principles were used: *the principle of party disposition*[7] and *the adversarial principle*[8]. These two principles had their contraries in *the officialmaxime* and the *inquisitorial principle*.

Although many things have been written on the correct meaning of the principle of party disposition as from the beginning of the 20th century and onwards and although lots of disagreement have been displayed, sometimes in fierce academic style, the pragmatic approach of Swedish professor Per Olof Ekelöf introduced in the midfifties has prevailed. According to him the adversary principle should be considered the wider principle encompassing all procedural rules providing for the parties to be active during the proceedings, while the principle of party disposition should cover all procedural rules allowing for the court to decide only after initiative from one or both of the parties. Generally it was, and is, considered in Swedish civil procedure that there should be a direct correlation between procedural rules covered by the principle of party disposition and the freedom of individuals in society at large to dispose over their substantive rights and relations.

6 Inspired by German juridprudence and most followers of this path were, at least later, claimed to handle law like concepts (conceptual jurisprudence, begriffsjurisprudenz).

7 Thus, *Dispositionsmaxime*.

8 In German *Verhandlungsmaxime*.

As corollaries to these two principles: the *officialmaxim* may be defined to cover rules which allow the court to decide matters independently of party initiative; the inquisitorial principle would cover also rules allowing the court to take initiative, even where a decision eventually requires action of one of the parties. Thus: the choice of either of the pair of principles depends merely on perspective.

The principle of party disposition is considered to characterise the proceedings as governed by Swedish civil procedure.[9] And this, I would say, goes for every civil procedural system in Europe today. Therefore, the consequences of building a procedural system on these principles are well-known. The parties are not only, roughly spoken, free to determine what shall be brought before the judge to be decided, they are also responsible for their determinations in this respect. Even if generally freedom is considered to be a good thing, it may be an expensive and heavy burden to carry in civil procedure.[10]

Due to res judicata, the judgment precludes all the disputed facts of relevance to the subject-matter. That may have the consequence of altering the legal relationship between the parties compared to the outcome if all relevant facts had been considered and correctly applied with complete knowledge of all relevant rules of private law. A judgment precludes not only facts presented as relevant, but also facts which could have been relevant had they been presented as relevant to the claim.

Furthermore: of course the petitum, the specific claim, is precluded by the judgment, but as from the 1990s, due to a number of precedents by the Swedish Supreme Court, also different, but alternative and economically equal petitas may be precluded. Thus, if a buyer considers that purchased goods are deviating from what has been agreed and brings an action for reduction of the price, a judgment not allowing a reduction also precludes a second claim to have the purchase cancelled due to the fault. The same would occur where a buyer of services against a claim for payment for services presents only some of the faults which are possible to use as objections to the claim for payment; the res judicata of the judgement will prevent the buyer to bring a claim for damages founded on faults not

[9] Almost a plattitude: today you never hear an advocate of any procedural system claiming that it is characterised by the inquisitorial system.

[10] A concrete party disposition may be constituted by explicit positive action, but also by refraining from taking action, passivity. A party's freedom of choice is balanced by his or her burden of the risk of neglect and miscalculations.

presented in the first trial. Thus, in Sweden where a judge finds that the fault is not grave a enough to entitle the buyer to cancel the agreement, where cancellation is claimed, the judge must not only dismiss the claim without deciding on price reduction, the judge must do so knowing that a subsequent claim for price reduction on the facts, will be stopped due to res judicata.[11]

In Sweden, unlike in Slovenia, the principle of party disposition is not laid down in an introductory part to the Code of Civil and Criminal Procedure. Neither is it embedded in the constitution. In fact it is not literally addressed anywhere in the legislative body of Swedish law. Its strongest expression is considered to be the rule of Ch 17 sec 3 where it is provided that, where the dispute concerns a matter over which the parties may reach a settlement, the court must not base its judgement on facts not alleged by the party as a foundation of the claim. Furthermore, the court must not give its judgment on something other or something more than that which the claimant has claimed.

This means that the principle applies only in civil procedure and only in such cases in which the parties are allowed to reach settlements. First, this is a basis for the proposition that an individual's ability to decide on his or her legal position should be the same independently of whether the individual is before a court or not; if you can make valid agreements or contracts on a subject-matter, then you should also have the power to enter into a settlement concerning the subject-matter and consequently have the freedom/responsibility to make other kinds of procedural dispositions in respect of the subject-matter. Second, even where a dispute concerns a subject-matter over which the parties may reach a settlement, the subject-matter may contain elements over which the parties may not dispose of under private law. E.g. although the parties may make a settlement in a dispute concerning property, a valid agreement on property may require consent from a spouse where one of the parties are married. This, it has been argued, would mean that the rule does not allow for parties to dispose over property in proceedings neither; facts beyond party disposal have been called *officialfakta*.

Like in Slovenia, it is beyond the control of the court to commence proceedings.[12] And like in Slovenia, the court is bound by the claim (petitum) and also by the facts presented by the claimant as the relevant

[11] Cf Galic.

[12] Nemo judex sine actore.

factual basis of the claim. Similarly, the court must not decide something more or other than that which has been claimed.[13] An application for a summons shall contain a clear claim, a complete description of the facts presented as relevant as a basis for the claim, the evidence presented and what each piece of evidence is supposed to prove and facts relevant to the jurisidiction of the court.[14]

The claim must not refer to a specific relief or remedy. In Sweden, it is possible to bring two types of action, either a claim of performative character or a claim of declaratory character.[15] A judgment on a claim of the first kind is enforceable, while a judgment on the latter kind of claim is not. Therefore, it is perfectly possible to bring an action claiming the court to declare that the claimant and not the defendant is the rightful owner of some property. It is also possible to bring an action claiming the court to declare that the claimant should be entitled to damages from the defendant, for any damages occurring due to some harmful behaviour undertaken by the defendant. In the latter kind of situations, the claimant does not have to specify injuries or damages, nor specify a specific amount of money claimed. A declaratory judgment possesses res judicata in respect of subsequent declaratory claims concerning the same subject-matter, but not in respect of subsequent performatory claims. In a subsequent action for a specified claim in damages, a previous judgment concerning the defendant's liability must not be tried again, but the court is bound by the previous judgment.[16]

Like in Slovenia, a claimant may voluntarily give up the claim and a defendant may accept the claim and an in-court settlement may be decided by the court, thereby encompassed by the res judicata effect of

[13] After the commencement of proceedings and in all three instances, the claimant may substitute a claim, or add a new claim, if this is due to something which has occurred during the proceedings (e.g. alter a claim for specific performance of some property to a claim for money, should the property have gone missing or been destroyed). This is the only exception to the rule that no new claims are allowed before the court of appeal. Apart from what is said above, new claims are probably allowed in the first instance where they do not alter the subject-matter of the dispute (possible where the new claim is alternative and of equal value). New claims are allowed when they concern interest, quantitative raises of the original claim and when they rest on essentially the same facts as the original claim.

[14] Preconditions for judgment in default; possibility to make a request for specifications; possibility to rule without issuing writ when the claim apparently has no legal basis.

[15] This follows from Ch 13 sections 1 and 2.

[16] In Sweden this has been called "positive rechtkraft", "the private law effect of a judgment".

a judgment. The court is bound by such dispositions by the parties even when they are clearly erroneous and/or completely out of line in comparison to what follows from substantive law. In Swedish law, unlike in Slovenia and various other jurisdictions in Europe, there are no rules on abuse of procedure, apart from rules on costs and preclusion. Where one party is tricking the other to admit a claim by way of fraud, the new circumstances may constitute a basis for re-opening the case.[17] Where both parties try to circumvent compulsory rules, by using their freedom to dispose in civil procedure, as submitted above, the court should draw the line for the party autonomy in correspondence to where the lines are drawn by private law and, under Ch 17 section 3, not allow party dispositions over subject-matters or elements of subject-matters which they cannot dispose over substantively.

Furthermore, like in Slovenia the court is bound by parties admitting facts, even when it is clearly wrong.[18] In court practice, courts have allowed parties to acknowledging also some specific legal relevance of facts, although some authors argue that that may be an interference with the obligation on the courts under the principle of *jura novit curia* to decide issues of law independently of the attitudes and opinions of the parties. Unlike in Slovenia, the courts are not under an obligation to check a claim's foundation in substantive law, where a defendant admits all the facts.

In Sweden, like in Slovenia, a claimant may withdraw a claim without it being subject to the force of res judicata via a judgment. Up until the defendant has replied to the writ, the claimant may unilaterally withdraw the claim without a judgment. But should the defendant have replied, then the defendant is entitled to apply for the subject-matter to be tried by the court.[19] Due to rules on cost, the defendant generally favours to have a judgment rather than the matter withdrawn.

Even if, as said above, the parties are required to submit the evidence which they rely on and what they want to prove with each piece of evidence, the court is not completely bound by the parties dispositions in this field. The court may on its own motion decide to have a second hearing with a witness. If one of the parties apply for it at a later stage of

[17] In practice, this have happened on a number of cases concerning in-court settlements.

[18] Ch 35 section 3.

[19] Ch 13 section 5.

the proceedings, the court may allow for new witnesses and new written evidence. Furthermore, the court may dismiss evidence where it finds that the evidence would prove something that obviously would be of no importance in the case or where the evidence is superfluous.[20] Here, Swedish law seems to be the same as Slovenian.

In Sweden the principle of jura novit curia is not laid down in legislation. In stead its meaning can be comprehended by reading rules on party autonomy *e contrario*. Thus, it is considered that the parties cannot bind the court by e.g. presenting agreements, or making procedural acknowledgments, on how the law should be interpreted or by limiting the scope of substantive rules under which the claim should be tried. In fact, there are some cases where only the Supreme Court has discovered legal grounds not previously addressed by the parties or courts, legal grounds which the Supreme Court has not hesitated to apply where the relevant facts founding the claims cover them. At present, there is no doubt that the court even at a late stage of the proceedings may, yes, in fact the court is obliged to, apply a relevant substantive rule which the parties have overlooked. But before so doing, the court has to offer the parties an opportunity to bring forward their opinions on the question of law. The general opinion is that it would constitute a procedural error, possibly a grave procedural error, to apply a substantive rule without letting the parties have their say.

4 Active Case Management

Like the Slovenian CPA, the Swedish code is inspired and influenced by Austrian and German procedural thinking, and the area of active case management is a spot where the influence has had a major impact. At least, that may be said in respect of legislation, preparatory works and jurisprudence, the law as it stands leave room for many variations on how actively cases really should be managed and I think it fair to say that court practice shows that judges make use of that wide margin of variation. I will come back to it, but as a starting-point I would say that the views on active case management seem very similar in Sweden and Slovenia. In comparison, though, the Swedish legislative text is more laconic: “Besides, the court shall see to it that the case is disentangled in the way its character requires and that nothing unnecessary is brought into it. By

[20] Ch 35 sections 6 and 7.

way of questions and remarks, the court shall try to remedy vagueness and incompleteness in the statements which are made".

As said above, also in Sweden the court is bound by the claims made by the parties and also by the relevant facts brought forward, allegedly forming the factual basis of the claim. Basically, the court is also bound by the evidence brought forward by the parties. As to questions of law, though, the court is not bound by rules addressed by parties or by assessments proposed by the parties.

As is clear from the wording of the above-mentioned statute, a Swedish judge like his or her Slovenian colleague has a right and a duty to make the parties to clarify their assertions of facts. But this is a general obligation which allows for different courses of action by judges in specific situations. Some judges would say that the appropriate level of clarification, which must be reached, would be to have the facts just clear enough to make it possible to found a judgment in default on them. Others would find themselves, if not obliged so at least free, to draw the parties attention to possible alternative factual grounds. And I would say that both kinds of attitude is within the limits of the requirements of the law – neither course of action would constitute a procedural fault on the part of the court.

In comparison to Slovenian law, I would say that Swedish court practice is more relaxed when it comes to some aspects of case management. Even if it may happen occasionally that a judge says something on the distribution of the burden of proof and on whether or not the evidence produced is sufficient, Swedish judges do not consider themselves obliged to do so. And I would say that this also reflects the law as it stands on these issues.

As to neglected legal viewpoints, like mentioned above, it would constitute a grave procedural fault on part of the judge to rule on one such point without offering the parties a fair possibility to have a say on it. Here Sweden does not differ from Slovenia. Even if jura novit curia requires judges to draw neglected legal viewpoints into the case ex officio, the attention of most judges are probably not directed towards new legal angles before the case is brought to decision. Since it is rather unusual that a presented factual basis can be requalified under another legal rule without amending the relevant facts, I would say that most judges at a late stage of the proceedings hesitate to bring in a new legal viewpoint. Perhaps it would make the frame of the proceedings burst and require doing some of it again.

There are major advantages of having cases managed actively in civil procedure. As said above, to some extent this is required under Swedish law; to some extent it is up to the individual judge. The disadvantages of active case management are well known. An active judge may appear being partial to the one of the parties presumably benefiting from activity. Generally, lawyers consider active case management an interference in their domain. Active case management requires skilled judges with profound knowledge in substantive law; Swedish judges are "generalists", not specialists.

5 New facts and evidence

In Sweden the main rule is that the claim, including the presented facts, must not be altered at all as it is put to the court in the application for summons. Still, Ch 13 section 3 submits that under certain preconditions you may alter, expand or substitute the petitum; and it is submitted that it should not be considered to be an alteration if the claimant, without it changing the subject-matter of dispute, reduces the claim or adds new facts to the factual basis. A new petitum will not be accepted if brought forward at the main hearing (or if the case in some other way has been brought to decision), if it would cause difficulties to handle it. New petitas are not allowed after appeal. An exception to this are petitas brought forward as substitutes to the original petitum and where a substitute is needed due to something that has occurred during the proceedings. Such petitas are accepted even if they cause difficulties at the main hearing and they are accepted also in higher court.

As a general rule, the claimant will not suffer an incurable loss if a new petitum is dismissed; generally, new petitas escape res judicata of the judgment. Still, after the above-mentioned turn of court practice meaning that alternative claims may be precluded, the general idea in literature is that also petitas which otherwise are precluded by the judgment must be allowed, at least during first instance proceedings.

The general rule is that new facts may be introduced as late as during the main hearing in the first instance. But there are some exceptions to this. First, should a party alter or add to what has been said earlier, or present facts or evidence which have not been presented before the main hearing, the judge may neglect the new material. For this, though, it is necessary that the judge suspects that the party by introducing the new material tries to prolong the proceedings, or tries to surprise the counter-party or that presenting the material aims at some other illicit objective or is made out of gross negligence.[21] Second, under Chapter 42 section 15a the court may set a dead line, after which the preliminary phase of the trial should be concluded. After that point no new facts or evidence may be presented, unless the party makes probable that he/she has had a *valid excuse*[22] not to present the material at an earlier stage or if the introduction of the new material does not considerably prolong the proceedings. If a party wants to introduce new facts or evidence before the Court of Appeal or the Supreme Court, accordingly, the party needs to have had a valid excuse for not presenting the material earlier.[23] Furthermore, it is possible to set a definite time limit in an order directed against one of the parties, if it seems necessary from how that party has conducted his or her plea earlier during the proceedings.[24]

6 The Preparatory Stage of Civil Litigation and the Main Hearing

Like in Slovenia, Swedish rules on the process of proceedings are rooted in the principle of concentration. When a writ is issued and served the defendant, preparation is compulsory.[25] The purpose of the preparation is to establish and clarify the claims of the parties, their objections and the relevant facts they present as basis for their claims. The preparation also aims at clarify to what extent the parties disagree on questions of fact and to clarify which evidence that shall be presented and what it is expected to prove. Furthermore, the preparation aims to clarify if further inquiries or measures are needed before the determination of the case; and if there is a possibility to settle the case. In principle, the court is responsible to make a time schedule for the continuation of the case.[26]

At the preparatory phase, the defendant has to present the defence, which shall include objections, a statement on whether and to what extent the claim is admitted or denied, the facts which the defendant considers

[21] Ch 43 section 10.
[22] I guess in practice this corresponds to "reasons beyond control".
[23] Ch 50 section 25.
[24] Ch 42 section 15.
[25] Ch 42 section 6.
[26] Ch 42 section 6.

support her/his denial of the claim and the evidence the defendant wants to present, as well as what each piece of evidence is supposed to prove.[27]

The preparation may be undertaken during a meeting, exchange of written submissions or in some other way. Generally, the preparation is undertaken by way of a meeting and generally the meeting is supposed to terminate the preparatory phase. The court shall order the parties to participate at preparatory meetings at the risk of otherwise receiving a judgment in default on the subject-matter.[28] Above, I also mentioned that the court may set a time limit for the termination of the preparatory phase, which precludes the parties from presenting new facts and evidence.

The main hearing shall be conducted without unnecessary delays and as far as possible without interruptions. This is laid down in detail: should the main hearing not require more than three days, it shall be conducted within a week. If the main hearing is expected to take longer, the main hearing should go on for at least three days every week until it is finished. There are exceptions: you may take longer breaks where the case is big or if extraordinary circumstances are at hand. Where a main hearing have been subject of delays and interruptions to an extent where its purpose has been lost, the court has to set out a new main hearing.[29] After the end of a main hearing, the court has the possibility to supplement the main hearing by hearing the parties again.

7 The Consideration of Human Rights in Civil Procedure

From the article of professor Galic it is apparent that the right to fair trial is a living and integrated part of Slovenian civil procedure. The same may be said about Swedish civil procedure, but it is clear that this is true to a comparatively minor extent. I will try to illustrate this with reference to a recent case decided twice by the Supreme Court, which does not concern the application of a preclusion rule but another rule of preclusive character.

[27] Ch 42 section 7.
[28] Ch 42 section 12.
[29] Ch 43 sections 11 and 12. A new main hearing means that everything that has taken place must be undertaken again, see section 13.

The case concerned a dispute over a piece of land. On the one side, a pair of cousins considered themselves the rightful owners of the land. On the other, a collective of landowners considered the land collectively owned. The cousins applied to the local real estate agency to have their real estate determined to include the disputed piece of land. They were successful, but first the court of first instance and then the court of appeal decided that the property should be determined to be included in the property collectively owned. This case was brought in the procedure specially designed for the determination of real estate boundaries. Even if the decision by an agency is appealed to an ordinary court (acting in the capacity of real estate court), the court in such a case does not have jurisdiction to make ultimate decisions on questions of ownership.

After losing the case, the cousins brought a case before the first instance court, claiming a declaration that they are the rightful owners of the disputed piece of land. The Swedish code of procedure contains a rule which was introduced in the 1980s in order to make it easier for the court to deal with "crazy claims". Ch 42 section 4 provides that if the claim is not legally founded or else obviously lacks foundation, the court may rule immediately without serving the writ. The court used that rule and issued an immediate judgment in the negative. The same happened in the Court of Appeal and also in the Supreme Court.[30]

This is indeed interesting when considering earlier case law of the Supreme Court. In the late 1990s a case for damages based on injuries allegedly inflicted by way of smoking tobacco was brought before a Swedish first instance court. That court used the above-mentioned rule and immediately ruled in the negative, without issuing a writ. The Supreme Court in that case held that the rule in question must be used with caution and particular respect must be paid to the European Convention on Human Rights. In that case, with reference to the fact that immediate judgment constituted a grave procedural error, the Supreme Court quashed the judgment by the lower instance and sent the case back. And that was in line with earlier case law, but more explicit in how restrained the use of this rule should be.

When the cousins in the real estate conflict applied to the Supreme Court for re-opening the case, due to the judgment constituting a grave procedural error as well as substantive errors, the Supreme Court merely

[30] See NJA 2007 s 125.

held that the judgment was correct in substance and dismissed the application.

In my opinion, the Supreme Court misses the point with the ECHR. It may be that a judgment over a matter concerning the determination of real estate boundaries has the actual effect of positively determining also the ownership of a piece of land subject to that determination. But this question is definitely unclear enough to require that the parties are allowed to put forward their arguments and argue. From my point of view, this clearly indicates that the Supreme Court puts the emphasis on the practical effect of substantive law and the quick resolution of conflicts elements of the overriding procedural objectives, before the participatory values embedded in the ECHR and also the old school idea of civil procedure promoting protection of individual rights. If a legal order possesses the peculiarity of singling out questions of determining real estates boundaries within a special jurisdiction, it should take the full consequence of this and not allow property rights (protected by ECHR) to be determined indirectly.

As said before, in contrast to Slovenian civil procedure this case shows a reluctance and slowness in Swedish court practice, when it comes to adjust to the requirements of the ECHR.

8 Conclusion

Not surprisingly, it is apparent that Sweden and Slovenia have chosen more or less the same mix between the balance of power and case management: the parties have the ultimate power to determine the claim, the facts and evidence, but questions of law are subject to the power of the court; this is balanced by a) preclusion rules (exempted where the parties are excused) and b) active case management. This should give the parties incentives to avoid delay and to use their powers by way of informed choices. Flexibility is brought into the system by a) some of the preclusion rules do not apply automatically, but only after an active decision by the judge, and b) rules permitting and requiring active case management, allow for a wide variety of course of action by the specific judges. Even if flexibility is necessary, it is also risky putting a lot of responsibility on the individual judges.

The mix chosen by Slovenia and Sweden tends to be in line with all four overriding objectives as lined out in the beginning of this paper. Keeping the power to decide questions of law reserved for the court, promotes the practical effect of substantive law. Giving the parties the power to determine the subject-matter of dispute, also means allowing them the power and the responsibility to protect their own individual rights. This is a liberalistic ideal of course, and the fact that the parties' responsibility in this respect is mitigated both in Slovenia and Sweden indicates a "social liberalistic" ideal, rather than a laissez-faire liberalistic ideal. Also, not allowing the parties to have decisive influence over questions of law, displays some social (or paternalistic, if you like) consideration.

Rules of preclusion have as their objective to concentrate the dispute and, ultimately, to make the proceedings as speedy as possible. The fact that preclusion rules may promote individual protection must be viewed as a positive side-effect. The main purpose of preclusion rules is to have the parties' conflict resolved and over with as soon as possible, for the benefit of them and, primarily, society; it is of course a natural state objective to have its citizens engaged so little as possible in disputes with one another, and so much as possible in activities which help society to prosper and develop. The other side of the coin is that preclusion rules, in promoting the termination of disputes, are negative in respect of objectives such as the protection of individual rights and the effet utile of substantive law. When Slovenia after the enactments in 2008 takes about the same position as Sweden, it must be admitted that this change of position is a change from individual protection and effet utile, towards resolution of conflicts as an overriding objective.

I would say that that the emphasis of the constitutional role of courts in civil procedure is poor in Sweden compared to Slovenia. This is not only clear from the legislation which is introduced, but also, and perhaps primarily, from the court practice. The discourse on the regulation of party autonomy seldom relates to the ECHR in Sweden, whereas it is clear from prof Galic's article that the right to a fair trial is a concept which is well integrated in both the legislation and in court practice in Slovenia.

The constitutional role of courts in civil procedure is a value which is difficult to determine with reference to the social liberal ideal of civil procedure. It promotes protection of individual rights to participate and be active. By doing so it is more in line with the laissez-faire ideal than the social, paternalistic liberalistic ideal. Perhaps that is why it has had some difficulty of being integrated in Swedish civil procedure. Another aspect of the constitutional role of courts, would be that of controlling the legislator. Also this aspect is in conflict with the social liberalistic view of procedure as it appears to be construed in Sweden; only this year the first step was taken to lift the limits to court control over the legislation. Since traditionally there have been limitations in this respect and since courts in civil procedure mainly perform controlling activities within the field of questions of law, there has been little emphasis of the obligation to control in civil procedure.

Paul Oberhammer

Party Autonomy and Procedural Law:

A Few Comments from an Austrian Perspective

> "Einschränkungen der prozessualen Dispositionsfreiheit bedürfen aber stets einer auf konkrete Wertungen abstellenden Begründung für das jeweilige Einzelproblem, die sich durch den Hinweis auf allgemeine und pauschale Schutzbedürfnisse oder gar abstrakte soziale Gestaltungsziele nicht ersetzen lässt." (*Gerhard Wagner*, Prozessverträge – Privatautonomie im Verfahrensrecht [1998] 61)

I.

This paper is based on a short lecture I gave in April 2010 at an Uppsala conference on "Party Autonomy in Civil Procedure" organised by *Torbjörn Andersson*. *Torbjörn Andersson* and *Aleś Galič* were the two keynote speakers and both focused on a number of aspects relating to the balance of powers between the judge and the parties in their respective jurisdictions. When they invited me to join the conference, they might have expected that I would do the same with respect to Austrian law, probably because the well-known concept of a welfare-state oriented civil procedure developed by *Franz Klein,* which was the basis for the Austrian Zivilprozessordnung of 1898, seemed important. However, I did not fulfil their expectations for the following reasons: First, it is indeed true that *Klein's* legal thinking is important in this context, not only from an Austrian, but also from a European perspective. I have, however, commented on this a number of times[1] and I do not want to repeat myself again

[1] See especially *Oberhammer*, Richtermacht, Wahrheitspflicht und Parteienvertretung, in: *Kralik/Rechberger* (eds), Konfliktvermeidung und Konfliktregelung, Veröffentlichungen des Ludwig Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XIII, (1993) 31 et seq; see also *Oberhammer*, Richterliche Gewalt, gegenseitige Unterstützung und

at this stage of my academic career. Second, having been educated in a legal system under *Klein's* spell, I developed a certain natural tendency not to believe every single word of his scripture. And third, the subject of the conference was, after all, "Party Autonomy", and that was not what *Klein* was actually aiming at; on the contrary, he did everything to reduce it. Furthermore, his procedural thinking was strongly influenced by the idea of a strong state, which was probably more appealing in the late 19th century than it is today. We have since learned from experience that the state is in reality not that strong in a system based on democracy and a market economy and that such a system necessarily has to rely on private initiative, such as, e.g., the exercise of party autonomy in civil procedure. *Klein*'s political approach was somewhat authoritarian (at least from today's perspective) and resulted in a massive strengthening of the judge's powers in civil litigation. However, the procedure created on this basis turned out to be a great practical success. It is almost generally accepted today that an active role of the judge in the fact-finding process is one of the most important tools for making civil procedure more efficient, irrespective of ideology. I absolutely agree with this view.[2] I am, however, not of the opinion that this necessarily results in a corresponding reduction of party autonomy in every case. On one hand, the "strong judge" can also be a flexible one, offering a range of dispute resolution techniques to the parties. On the other hand, the idea of an efficient civil procedure is not something that should be forced upon parties in any event – after all, litigation is about their property. It seems as if we tend to forget this from time to time.

anwaltliche Vertretung im österreichischen Zivilprozeßrecht, in: L'assistance dans la résolution des conflits, 4e partie: Europe médiéval et moderne, suite, Recueils de la Société Jean Bodin LXV (1998) 215 et seq; *Oberhammer*, Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen, in *Bundesministerium für Justiz* (ed), Franz Klein Symposion (2005) 55 et seq; *Oberhammer/Domej*, Powers of the Judge – Germany, Austria, Switzerland in *van Rhee* (ed), European Traditions in Civil Procedure (2005) 295–305; *Oberhammer/Domej*, Improving the Efficiency of Justice: Some Remarks from an Austrian Perspective, in *van Rhee/Uzelac* (eds), Civil Justice between Efficiency and Quality: From Ius Commune to CEPEJ (2008) 61–70; *Oberhammer/Domej*, Delay in Modern Austrian Civil Procedure and the Legislator's Response, in *van Rhee* (ed), Within a Reasonable Period of Time: The History of Due and Undue Delay in Civil Litigation (2010) 255 et seq.

[2] See *Oberhammer*, Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos „Een nieuwe balans" aus Sicht des deutschen Rechtskreises, in *Ingelse* (ed), Commentaren op fundamentele herbezinning (2004) 81 et seq.

This article is not a thorough academic analysis on the subject of party autonomy, but simply presents a number of thoughts I shared with the Uppsala audience in order to stimulate discussion on the subject. In this respect, it turned out to be rather successful. Initially, I did not want to publish it at all, but as *Torbjörn's* pressure to do so kept growing, I finally gave in.

II.

As "party autonomy" is a rather abstract concept, I would like to start with a case from Austrian court practice. It is not a spectacular or even a very important case, but it can serve as a starting point for what I want to discuss. In a recent decision[3], the Austrian supreme court had to deal with the following issue: The parties to a litigation had agreed to replace the claimant by a third party; the third party had agreed as well. I will return to the facts of the case later. At this stage, I only want to point out that, although all the relevant parties had agreed upon this change of claimant, the court was of the opinion that this change of parties raised serious and complicated legal issues. In the end, and after lengthy deliberations, the court came to the decision that this change of claimant was not admissible under Austrian procedural law. I actually agree with the Supreme Court that this case was not "an easy one" under Austrian law. From a distance, however, one might ask why this is so. The litigation was about the payment of unpaid rent and the eviction of a tenant, in other words, an ordinary case under the law of obligations with no specific public interest involved. The claimant could have waived his claim while the defendant could have agreed to pay and leave the flat. So why is it a legal problem when they decide to have the case tried with a third party? The answer seems to be simple. In civil procedure, courts do not simply do what the parties tell them to do under Austrian law. The same is true to some extent for all of the legal systems I know. Let me take a closer look at this aspect of civil procedure. I will first address the traditional notions of party autonomy under the laws of German-speaking countries. Then I will return to the case I have mentioned before and explain why I referred to it.

[3] Oberster Gerichtshof, decision of 15 December 2008, 4 Ob 79/08h, published in Wohnrechtliche Blätter 2010, 85 et seq.

III.

In German-speaking countries, the issue of party autonomy is discussed under three different traditional notions: the "Dispositionsgrundsatz", the "Verhandlungsgrundsatz" and the "Parteibetrieb".

With respect to the "Dispositionsgrundsatz" ("nemo iudex sine actore"), textbooks usually mention the opening of the proceedings as well as amendments of the initial complaint and the disposition over the subject matter, for example, by settlement, withdrawal of the action or cognovit.[4] This principle is basically considered to be a consequence of party autonomy under substantive law: The party who is in the position to waive his or her claim under substantive law should also be the one who may withdraw or settle the complaint under procedural law. This principle is, however, not as trivial as it may seem. Legal history and comparative law reveal different notions of party autonomy. Consider, on the one hand, the former socialist systems where entering into a settlement required court approval based on a test as to whether the settlement was fair and in line with the principles of the socialist society.[5] Even today, Swiss courts have the duty to examine settlements in divorce proceedings as to whether "the spouses reached agreement of their own free will and after careful reflection and that the agreement is clear, complete and not manifestly inappropriate".[6] Consider, on the other hand, the class action system where people become claimants without actually realizing it. There have been voices in the German-speaking countries that this is against public policy because it is in conflict with the "Dispositionsmaxime". [7]

The principle "da mihi facta, dabo tibi ius" is expressed in the "Verhandlungsmaxime" (or "Beibringungsgrundsatz"), the adversarial principle. This relates to the role of the judge and the parties in the fact-

[4] See e.g. *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 479 et seq (Germany); *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 203 et seq (Austria); *Staehelin/Staehelin/Grolimund*, Zivilprozessrecht (2008) 111 et seq (Switzerland).

[5] See e.g. *Oberhammer*, Richterbild im Zivilprozeß: Zwischenbilanz eines Jahrzehnts der Reformen in Mitteleuropa, in *Oberhammer* (ed), Richterbild und Rechtsreform in Mitteleuropa (2001) 131 et seq = Justiz im Umbruch: Richtermacht in den neuen Demokratien Mitteleuropas, in *Storme/Hess* (Hg), Discretionary Power of the Judge: Limits and Control (2003), 273 et seq.

[6] See e.g. *Büchler/Vetterli*, Ehe – Partnerschaft – Kinder (2007) 105.

[7] E.g. *Ebbing*, Class Action, Zeitschrift für vergleichende Rechtswissenschaft 103 (2004) 46.

finding process. While German[8] and Swiss[9] textbooks state that the adversarial principle applies in these countries, some Austrian authors are of the opinion that the proceedings in Austria are somewhat more inquisitorial.[10] Note, however, that this discussion is symbolic to a certain extent. For example, Austrian academic lawyers stress that all means of evidence can be taken by the judge ex officio under Austrian law. In reality, however, this almost never takes place because the parties refer to the relevant evidence themselves anyway. After all, they want to win the case. In contrast, under German law, witness evidence must not be taken ex officio. From a distance and from a comparative perspective, all of this seems pretty irrelevant. And indeed, for example, from a traditional common law perspective, both German and Austrian proceedings are simply inquisitorial.[11] Such minor differences, however, are considered to be very important in the political discussions in many jurisdictions. All in all, the role of the parties and the judge in the fact-finding process is perhaps most important from a "Germanic" perspective when it comes to party autonomy. Contributions with titles like "Richtermacht und Parteifreiheit"[12] have their focus almost entirely on that aspect. – And indeed, this is an aspect worth discussing. As already mentioned above,[13] I have done so quite frequently in the past.

The third traditional notion of party autonomy in the German-speaking jurisdictions is "Parteibetrieb" vs. "Amtsbetrieb":[14] Who exercises control over the formal conduct of the proceedings, i.e. who has the initiative with respect to hearings, deadlines, service of summons etc? Normally, textbooks do not deal with this in great detail and it seems to be a technical issue even for proceduralists. In practice, however, there are significant differences which you cannot learn from textbooks. For example, in most of the jurisdictions, there are time periods fixed by law and time periods

8 See e.g. *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 481 et seq

9 See e.g. *Staehelin/Staehelin/Grolimund*, Zivilprozessrecht (2008) 116 et seq.

10 See for a typical example *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 204 et seq.

11 Cf *Kötz*, Zur Funktionsteilung zwischen Anwalt und Richter im deutschen und englischen Zivilprozess, Festschrift für Imre Zajtay (1982) 277.

12 Sc *Habscheid*, Richtermacht und Parteifreiheit, ZZP 81 (1968) 175 et seq.

13 See supra I.

14 See *Rosenberg/Schwab/Gottwald*, Zivilprozessrecht, 16th ed (2004) 496 (Germany); *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 207 (Austria); *Guldener*, Schweizerisches Zivilprozessrecht, 3rd ed (1979) 179 et seq (Switzerland).

where the judge has discretion. Both the Swiss and the Austrian codes allow an extension of the time limit for the answer to the complaint. The Austrian Code simply says that the judge "can" do so (Section 128 of the Austrian Code of Civil Procedure), while under the Swiss Code there must be "sufficient reasons" to do so *(*Art. 144 of the Swiss Code of Civil Procedure). The reality, however, is very different between Switzerland and Austria. If it is not a simple case, the courts of Zurich will normally grant an extension at least once if the defendant sends a polite apology to the court with an explanation as to why he or she could not comply with the initial time limit. In contrast, Austrian courts almost never do so. In addition, in Swiss practice, an extension will most likely be granted when the opponent agrees to it. The Austrian Code, however, expressly states that the parties cannot agree upon such an extension. One might wonder about the reasons for this difference and, especially, why the parties' consent on that aspect is irrelevant under Austrian law – and so do I. *Franz Klein*, the creator of the Austrian Code of Civil Procedure, was very fond of the limitation of party control. In his writings, he stated that an extension of time limits or the postponement of hearings based simply on party consent is absolutely disastrous because it delays proceedings.[15] Of course, proceedings do take longer in such situations. It is, however, hard to see why this is disastrous. There is a creditor and a debtor, and both express that they are not in a hurry and agree to such measures. So why was *Franz Klein* so proud of the fact that he forced these people into faster proceedings they did not want to have? It could not have been the national budget, as this kind of procedural delay does not make the proceedings more expensive for the state. I believe that this rather technical aspect of procedure shows a fundamental approach to procedure, and, more generally, to the relation between the individual and the state. As already mentioned above, it is obvious from *Klein's* publications that he strongly believed in the state and therefore in the judiciary while at the same time despising the parties to a certain extent. That was already evident in his thesis on fraudulent parties[16] and is also obvious in his more political writings.[17] This resulted in a very state- and court-oriented

[15] He characterised this as a "wüstes Vertagungsunwesen"; see, e.g., *Klein*, Vorlesungen über die Praxis des Zivilprozesses (1900) 7.
[16] *Klein*, Die schuldhafte Parteihandlung (1885).
[17] See *Oberhammer*, Prozessbeschleunigung als rechtspolitisches Gestaltungsanliegen, in *Bundesministerium für Justiz* (ed), Franz Klein Symposion (2005) 55 et seq.

concept of procedure. Most of this was of course visionary at his time but some of it was simply authoritarian, and this is true for the example I just gave.

IV.

Let me go back to the case I referred to above.[18] The question whether parties are free to agree to any change of the parties in the course of litigation obviously relates to the subject of party autonomy. So one might expect that the answer to this question has something to do with the three principles outlined above in a very sketchy fashion.[19] It seems obvious to me that it does not lie in the adversarial concept of procedure. Every informed Austrian lawyer would deny that it has something to do with the principle that the court runs the formal course of the proceedings, as it is not a mere "formality" who is a party to a litigation. It could, however, be the case that the solution to this problem can be found in the "Dispositionsgrundsatz". After all, this principle is based on the assumption that the parties who have free disposition over the rights and claims involved under substantive law should also be the "domini litis", the masters of the conflict under procedural law. In its decision, the Austrian Supreme Court, however, did not address this principle at all, either directly or indirectly and, more generally, also did not refer to any other general concept of party autonomy. The reasoning of the decision is telling. The initial plaintiff, who was the landlord, sued the tenant for payment of the unpaid rent and for eviction. Subsequently, the landlord's claim for payment of the rent was seized by a bank, the third party in this case. All the parties agreed that the bank, as the garnishee of the claim, should replace the landlord as the claimant in the pending proceedings against the tenant. In its decision, the Austrian Supreme court first pointed out that one should have a rather liberal approach in such situations. It did so in a broad obiter dictum stating that legal doctrine was too conservative with respect to a change of parties based on the parties' consent. The court may be correct in that respect. Secondly, however, the court stated that this change of claimant could not take place in the case at hand for the following reason: As a consequence of the enforcement proceedings, the bank was only entitled to sue the tenant for payment. The right to

[18] Cf. supra II.
[19] Cf. supra III.

evict the tenant could, however, not be subject to separate garnishment or assignment without a transfer of ownership of the house. – This is of course true under Austrian private law. Under the "Dispositionsgrundsatz", one might, however, have expected a different result with respect to procedure. If the bank had sued the tenant for eviction from the outset, nobody would have been of the opinion that the claim was inadmissible because the bank was not a party to the procedure. On the contrary, it derives from the principle of party disposition that the bank would simply be a party to that litigation because they commenced it with their action in their own name ("formeller Parteibegriff"[20]). The fact that the bank has no standing to evict the tenant would then simply result in a dismissal of the action on lack of merits. If the Austrian Supreme Court had applied the same approach to the exchange of claimant situation, the result would have been obvious: "Let them have their way, and maybe tell them that there are concerns about the standing of the bank, but if all the parties involved agree, respect that and maybe grant the outstanding rent claim and dismiss the eviction claim later on." This is obviously not what the Austrian Supreme Court did and the fact that the case was about a fundamental issue of party autonomy went unnoticed. The reason for that is clear. It is correct that the traditional notion of the "Dispositionsmaxime" does not cover situations like the one in this case, and there is also no other principle that could be applied here instead. As a matter of fact, there are numerous situations under procedural law where "party autonomy" might be an argument, but this is not the way it is done in the German-speaking countries, and especially not in Austria.

Therefore, one cannot blame the Austrian Supreme Court for not understanding that the case was also about a fundamental issue of party autonomy in civil procedure – seeing things from that perspective is simply not part of traditional legal thinking under Austrian procedural law. For an Austrian judge, it is crystal-clear that procedural law, at least as a starting point, is mandatory law. Party dispositions are therefore only accepted where the law has express provisions or there is a basis for an analogy. This approach is very common in Austria, but it also exists in Germany and Switzerland. There are some wonderful examples of this kind of thinking in Austrian legal scholarship. For example, there is a traditional discussion on the "nature" of forum selection and arbitration agreements. Under the prevailing opinion, these agreements must not

[20] Cf. *Rechberger/Simotta*, Zivilprozessrecht, 7th ed (2009) 124 et seq.

be considered contracts. Leading scholars even went so far as to say that they are not even agreements, but only the statutory consequence of two timely coexisting acts of procedural law performed by the parties.[21] This approach is unfortunately not only theoretical, but also of some practical relevance, for example, when it comes to the interpretation of such clauses.[22]

V.

I remember a discussion when I was still a young assistant at the department of civil procedure in Vienna. In this discussion, I dared to suggest something like a "laissez-faire approach" with respect to an issue of procedural law. I do not remember the exact issue, but I do remember the reaction of one of the professors very vividly. She told me: "What you are proposing is simply a 'Konventionalprozess'". I did not know the term "Konventionalprozess" then and the Professor did not explain it to me either. Obviously, she did not find it worth explaining why a "Konventionalprozess" is something so negative, but the tone of her voice and the expression on her face clearly showed me that it this must be the case for anybody who is not completely out of their mind. So I did not dare to ask about the "Konventionalprozess" concept then because I was afraid that the professor would get the impression that I had no idea what procedural law was all about. After having passed all the necessary steps of academic qualification, I might be in the position to ask my stupid questions now. It has been correctly stated that the danger of such a "Konventionalprozess" was used much too often in the past as an argument in order to restrict party autonomy in civil procedure.[23] A typical example for such an approach is given in the Austrian Supreme Court's decision of 7 October 2003:[24] In this judgment, the Supreme Court held that "Beweisverträge", i.e. agreements on evidence (such as the value of certain means of evidence or the evaluation of evidence) are inadmissible

[21] See e.g. *Matscher*, Die Zuständigkeitsvereinbarung im österreichischen und internationalen Zivilprozessrecht (1967) 23, 53.
[22] See *Oberhammer*, Internationale Gerichtsstandsvereinbarungen: Konkurrierende oder ausschließliche Zuständigkeit?, Juristische Blätter 1997, 434 et seq.
[23] *Wagner*, Prozessverträge (1998) 85.
[24] Oberster Gerichtshof, decision of 7 October 2003, 4 Ob 188/03 f, published in: Österreichische Richterzeitung 2004/10; Recht der Wirtschaft 2004, 223; Evidenzblatt 2004/40.

and therefore void under Austrian law because such agreements "violate the prohibition of the 'Konventionalprozess'" and would be contrary to the "mandatory character of procedural rules which are part of public law". The Supreme Court does not give any reason for this and does not explain the term "Konventionalprozess" either. Unfortunately, I have not had the time for serious research on the term "Konventionalprozess" on a historical basis. I will do so in the future. It still seems to be popular in Vienna today. When I googled it, my first hit was the outline of the main lecture on civil procedure at Vienna University (held by another professor than the one mentioned before).[25] Slide 8 of this presentation had the heading "Nature of Civil Procedure"; then it went like this: "1st: Public law; 2nd: Mandatory law; no 'Konventionalprozess'; opportunity for agreements in exceptional cases only".

All of this is in stark contrast to the fact that in all matters involving pecuniary claims, the parties can simply do away with this mandatory complex of laws by agreeing upon an arbitration clause.[26] If they do so, all these very important mandatory rules suddenly do not apply any longer, save for some very important principles such as public policy and due process. In arbitration, everything is up to the parties' disposition except for some issues of specific importance. In litigation, it seems as if the opposite is true.[27] It almost goes without saying that this is not the normal approach to mandatory law. Just think of labour law, which provides for numerous mandatory rules in most jurisdictions in order to protect employees. Of course, you cannot get rid of all these mandatory rules of labour law by simply agreeing that labour law does not apply as a whole, because, for example, the person who works for you agreed not to do so as an "employee", but as something different, e.g. a "slave". – This is, however, the case with the relation between arbitration and litigation. Almost every rule governing court proceedings is mandatory, but you can also have a final, binding and enforceable judgment without all of these mandatory rules by simply avoiding the whole court system. All this leads to the question which I want to discuss in the last part of this paper: What

25 See http://zvr.univie.ac.at/fileadmin/user_upload/inst_zvr/Konecny/Hauptvorlesung/VO-ZIVILPROZESS_Teil1.pdf (visited on 8 November 2010).

26 See for Austria section 582 para 1 of the Code of Civil Procedure; para 2 leg cit provides for some exceptions such as family law etc. For a comparative analysis see e.g. *Born*, International Commercial Arbitration (2009) 766 et seq.

27 See also *Wagner*, Prozessverträge (1998) 62 et seq.

are the reasons for that approach? Why is procedural law mandatory law in the jurisdictions I know, at least in principle?

Many lawyers seem to think that this is a consequence of civil procedure being public law. And, of course, in public law, there is usually much more mandatory law than in private law. However, the concepts of "public" and "private" law are rather vague. Most theories I know look at the relation between the parties involved and their interests. In civil procedure, we have two kinds of relations: the relation between the court and the parties, which is of course an expression of the state's sovereignty, and the relation between the parties, which under all concepts I know would have to be considered private. – The mere involvement of the court does not necessarily make this relation fall under public law. If this were the case, marriage or the sale of land would also have to be considered public law because you cannot get married or become the owner of real estate without public institutions such as the land registry or the registrar of marriages being involved. In addition, the fact that public law is normally mandatory does not indicate that civil procedural law has to be mandatory as well. Naturally, in a court system under the rule of law, court activity needs to be governed by sufficiently specific rules in order to protect parties from judges acting arbitrarily. Therefore, civil procedure cannot simply be a suggestion to the judge saying "you can do it like this, but you can also do it any other way if you prefer" (although, of course, judges will always necessarily have some degree of procedural discretion). This insight, however, is no explanation for the relatively detailed body of mandatory law governing civil procedure, for example, in Germany and Austria. The rule of law only requires that the state, i.e., the court, is prohibited from acting arbitrarily. However, a procedural rule ordering the judge to act on the basis of the parties' consent is perfectly in line with the rule of law. Individual freedom is not at all contrary to the "Rechtsstaatsprinzip"; although this is absolutely trivial, many proceduralists seem to forget that every now and then. Therefore, stating that civil procedure is part of public law is no argument at all for limiting party autonomy by mandatory rules.[28]

Moreover, even the degree to which court activity needs to be governed by strict legal rules is not fixed. Comparative law shows that there are significant differences in this respect. For example, the text of the

[28] See *Goldschmidt*, Der Prozess als Rechtslage (1925) 149; *Wagner*, Prozessverträge (1998) 13 et seq.

Austrian Code of Civil Procedure is more than twice as long as the new Swiss Code of Civil Procedure, and the German Code is even longer. – And indeed, Swiss judges have more procedural discretion than their Austrian colleagues. I do not want to discuss which approach is "better" here, but it is obvious even from that very simplistic comparison that there is no "natural degree" of regulation in civil procedure. Last year, I heard a lecture by a German colleague criticizing the new German code on non-adversarial and family proceedings. His main argument was that the number of sections on certain issues is much too small and that is contrary to "Rechtsstaatlichkeit". He did not even argue why these issues require more regulation. When I asked him why he believes that more sections are a sign of more "Rechtstaatlichkeit", he admitted that it is not as simple as this, but added that normally more statutory text indicates that there is more "Rechtsstaatlichkeit".

In many cases, mandatory law is used to protect the interests of parties such as children, consumers, employees and tenants etc. As is generally known, such rules exist in civil procedure as well. In the law of obligations, such rules are normally the exception to the general principle of party autonomy, whereas in civil procedure party autonomy already is the exception. Therefore, the specific rules for the protection of weak parties normally only eliminate a few of the small numbers of cases where party autonomy actually exists in civil procedure, such as forum selection or arbitration clauses. There is no "B2B" litigation in the German speaking countries where party autonomy would be the rule.

There may be practical reasons for mandatory procedural law. After all, procedure is the judge's tool and it might be practical that this tool does not change from one litigation to another. This is indeed true, but it does not seem to be a very strong general argument for limiting party autonomy – "it is more comfortable for the state" does not seem to be a very convincing argument against individual freedom, and it is definitely not a good argument for practically not allowing party dispositions in a field of law at all. This is even more true in proceedings involving large amounts in controversy. In these cases, the court fees, at least in Austria and Germany, do not only fully cover the costs of the court, but also heavily cross-finance small claim proceedings. I do not want to sound like a cynical neo-liberal here, but the argument that "it is more comfortable for the state" might be hard to understand for well-informed businesses who pay dearly for their litigation anyway.

VI.

As I have pointed out above, this paper does not even attempt to give a thorough analysis of the subject. It simply tried to "think outside the box" with respect to party autonomy in a number of respects and I can only voice a few guesses, questions and concerns. Much more thinking and discussion would be required to formulate something like a modern comprehensive concept of party autonomy in civil procedure in German-speaking jurisdictions. The traditional notions of "Dispositionsgrundsatz vs. Offizialmaxime", "Verhandlungsgrundsatz vs. Untersuchungsgrundsatz" and "Parteibetrieb vs. Amtsbetrieb" only reflect certain aspects of the relation between the parties and the court. At the same time, we do not sufficiently discuss civil procedure as a subject of regulation on a general level: What are the objectives and tools? How much regulation is required? What should be left to the judge's discretion and/or to party disposition etc.?

Anna Waldenström

Party Perspective on Transnational Civil Procedure in the EU*

1 Introduction

With this paper I would like to present the main topics of my PhD project, which I commenced in the Autumn of 2009. The core question of my research regards whether the national laws of evidence in the EU Member States are *compatible*. With *compatibility* between national laws of evidence I mean that evidence collected in one Member State, and according to the laws there, can be used in the court proceedings of another Member State without any negative effect on the main proceedings. The development of judicial cooperation in the EU is based on diversity among the national legislations, while at the same time aiming for a common sense of justice within the EU. The agglutinating tools at hand are mutual recognition and to some extend mutual trust. Through my PhD research I hope to establish what the differences between French and Swedish civil procedure are and whether the existing diversity does allow for commonality regarding the sense of justice on the one hand and for legal certainty in transnational proceedings on the other hand.

* I would like to express my gratitude to Torbjörn Andersson for inviting me to present these fundamental concepts addressed within my dissertation project at the colloquium of very distinguished and experienced legal researchers and to subsequently publish them in this edition of de Lege. Special thanks to my tutors Carl Fredrik Bergström and Eric Bylander and fellow doctoral candidate Anna Wallerman for invaluable comments and Brian Gonourie for proof-reading.

2 Diversity, International Law and the Taking of Evidence

In a court proceeding where evidence can be found in another Member State than the one where the proceeding is being held, national courts in the EU can turn to one another for assistance to take evidence on the territory of another Member State. This is done with the application of the EU Evidence Regulation.[1] The aim of the Regulation is to create faster and simpler procedures for the cooperation between the courts in matters concerning the taking of evidence abroad. The idea is that judicial cooperation in civil matters[2] and the existence of choice of law rules are to neutralize the consequences of the choice jurisdiction (i.e. forum shopping) in conflicts between parties with residency in different Member States. The direct effect of union law rights means that the rights can be claimed directly at the national courts. The main rule is that the Member States' national procedural legislations are to be applied to protect these union rights, according to the EU law principle of procedural autonomy[3].

Following international law traditions the EU Evidence Regulation leaves it to the Member States' national law to regulate the proceedings for the taking of evidence. The principle can be likened to the idea of a Lowest Common Denominator between the two national laws concerned; the main rule being that the law of the Member State of the requested court is to be applied.[4] The requesting court can call for the request to be executed in accordance with a special procedure, and this shall be complied with as long as it is not incompatible with the law in the Member State of the requested court.[5] The main example of special procedures is the use of oaths, which might be necessary for the value of the evidence in the requesting court.

[1] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

[2] See Eva Storskrubb, Civil Procedure and EU Law, A Policy Area Uncovered, Oxford University Press, Oxford, 2008 concerning the terminology regarding of this policy area.

[3] 33/76, *Rewe*

[4] Article 10.2 Evidence Regulation

[5] Article 10.3 Evidence Regulation

The possibilities for a requested court to deny taking evidence for a court in another Member State are limited to situations where according to national law a person has a right to refuse being heard as a witness, i.e. doctors, clergymen and other people in such professions. The only other possibility to refuse the execution of a request is if the request falls outside the scope of the Regulation or the requesting court has not met with the requirements of the Regulation.

In the practice guide for the application of the Regulation the Commission clarifies that the regulation applies to "all civil and commercial proceedings whatever the nature of the court or tribunal in which they are taking place".[6] This includes "consumer law, employment law and even competition law as far as private proceedings are concerned, as well as matters relating to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings." The scope of the Evidence Regulation, as we can see, goes beyond the Brussels I Regulation.

The interpretation of the Regulation has only been submitted to the Court of Justice twice. In the Tedesco case (C-175/06) an Italian court referred to the Court of Justice for a preliminary ruling. The case in the Italian court regarded infringements in intellectual property rights. The Italian court requested, in accordance with the normal procedure in Italy, a, so-called, *descrizione,* which is a description of the product, which allegedly constituted an infringement of the intellectual property rights. The English Authority however considered this to be "a search for documents and a seizure of samples", and thus excluded from the scope of the Regulation. The case was withdrawn at the Italian court and was therefore never tried by the Court of Justice but the Advocate General issued her opinion. She argued that the Regulation be interpreted generously and autonomously in order to protect the aims of the Regulation, namely to simplify the cooperation between the courts in cross-border disputes. In the second case (C-283/09) a Polish national court refers to the ECJ a question for a preliminary ruling regarding the right for the requested (national) court to demand from the requesting court an advance for expenses involved in taking evidence for the sake of proceedings in the requesting court. The

[6] Practice Guide for the Application of the Regulation on the Taking of Evidence, http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf

reference for a preliminary ruling was lodged on 23 July 2009, and the Advocate General presented her opinion on 2 September 2010.

The Tedesco case shows how easily a person in one Member State can be subjected to the legislation in another Member State, seeing as an infringement of an intellectual property right does not presuppose any prior contact between the parties. As is pointed out by the Advocate General in the Tedesco case the Regulation lacks definitions of the notion "taking of evidence" and the case shows how widely different the interpretation of this central notion can be – a result of the variations of the national legal orders.

A question which was of great importance in the work of the Hague Convention is the one regarding *disclosure*, which in American law goes under the more descriptive name of *pretrial discovery*. In common law countries, in the preparatory stages of the proceedings, the collection of evidence involves an open form of request for the production of evidence from opposing parties. The parties have an obligation to submit to one another information relevant to the proceedings, whether or not supporting the own case. Not only do many EU Member States lack such a system, but also is it considered to clash with the legal orders of many Member States. The Regulation does not include any specific rule excluding the use of pretrial discovery, but the Council has declared that such procedures do fall outside the scope of the Regulation.

The Evidence Regulation gives the national courts the freedom to contact each other directly to submit a request for the taking of evidence. This is to be seen in comparison to the international agreement preceding the Evidence Regulation, namely the Hague Convention of 1970 on the Taking of Evidence Abroad.[7] According to the Hague Convention the national courts are to go through a central authority in order to put forward a request for the taking of evidence in another signatory State. That procedure is kept for the purposes of the Direct Taking of Evidence procedure, regulated in the Evidence Regulation. The direct contact between Member States' courts is only possible if the Member States give up a fraction of their sovereignty. Direct contact between the national courts is a significant change in the international regulation of judicial cooperation.

[7] The Hague Convention is still in force between its non-EU signatory States on the one hand and between the EU Member States and the Hague signatory States.

3 Mutuality, Commonality and EU Governance

With the Treaty of Amsterdam of May 1999 the EC Treaty was restructured and a shift of the competencies of the communities on the one hand and the Member States on the other, was carried through. By placing the rules of judicial cooperation in civil matters in the First Pillar, a basis for legislation at Community level instead of at intergovernmental level was created. During a transitional period of five years, the Council acted unanimously on the proposal from the Commission or on the initiative of a Member State after consulting the European Parliament. After this period the Council only acted on proposal from the Commission. The acts were adopted unanimously, preserving the Member States' right to veto. With the Treaty of Nice in 2003, the legislative procedure according to article 65, in conjunction with article 67, was amended so as to allow for the Parliament and Council to act jointly in a co-decision procedure where legal acts in the field if judicial cooperation in civil matters were adopted on a qualified majority vote. Through the entry into force of the Lisbon Treaty in 2009 the equivalent rule is introduced in article 81 of the Treaty on the Functioning of the European Union (TFEU), where further reference is being made to the ordinary legislative procedure described in articles 289 and 294. The new procedure requires no unanimity in the Council, but that the Parliament and Council on a majority vote basis respectively reach the same decision regarding the adoption of a legal act. Apart from Denmark, which has opted out of the development of a judicial cooperation in civil matters, a Member State opposing a specific legal act, since the Treaty of Nice, no longer has a veto.

At the Council meeting in Tampere in 1999[8] the Member States agreed to give form to an Area of Freedom, Security and Justice (which was established with the Treaty of Amsterdam of 1997). In the Tampere Conclusions the Council writes that "the challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives", and continues by stating that "the enjoyment of freedom requires a

[8] Presidency Conclusions – Tampere European Council, 15 and 16 October 1999. Council of the European Union, (12.10.2004).

genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own." Within the Area of Freedom, Security and Justice several legal acts have been adopted. Among these are the Brussels Regulations[9], the European Enforcement Order Regulation[10], the Service Regulation[11] and the Evidence Regulation.

In line with the Tampere Conclusions of 1999 followed by the Hague Programme of 2005[12], the Union aims at forming a *common sense of justice* within the Union.[13] To promote the mutual trust needed for increased mutual recognition of legal judgments and decisions, the Stockholm Programme[14] aims at making European citizenship a "tangible reality", with a possibility for the citizens of Europe and others "to exercise their specific rights to the full within the European Union". Access to justice must then be facilitated and this is to be achieved through a consolidation of a European area of justice "so as to move beyond the current fragmentation".[15] The need for mutual trust, reliance and understanding is reiterated in the Stockholm Programme. It is explicitly said to be important between authorities and services as well as decision-makers in the different Member States. One might add that also the European citizens would benefit

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1, *(Brussels I)*; and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1, *(Brussels II)*.

[10] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15

[11] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ L 324, 10.12.2007, p. 79

[12] The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice (COM (2005) 184)

[13] The notion seems to have been invented for the sake of the developing judicial cooperation of the EU in the Action Plan of 3 December 1998, see note 18 below for further reference.

[14] The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, p.1.

[15] In other words, the decision seems to already have been made; the harmonisation and unification of the jurisdictions seems to be the goal that the Prime Ministers and Heads of State have agreed upon.

from a real reason to trust the judicial systems and the decision-makers, authorities and services across the EU. Also, such a trust would most likely enhance the *tangibility* of the European citizenship.

Diversity and mutual recognition are traditional in international procedural law. Mutual recognition was explicitly established in the Tampere Conclusions. State sovereignty has historically weighed more than party rights in transnational procedure. Procedural autonomy, established by the ECJ as a limitation for EU law in respect to national law, can be described as an expression of this traditional point of view. The above-mentioned shift of competencies in this area, from the Council with the Member State right to veto, to the Council and Parliament with a majority vote procedure, can therefore be described as historical.

In the Stockholm Programme the European Council explains that in order to take full advantage of the development concerning mutual recognition, measures aimed at strengthening mutual trust are necessary. Some mutual trust must have already existed in order for the decision-makers to accept such a cooperative measure as mutual recognition of oneanother's judicial decisions. Indeed, the Council states that the Union "is based on common values and respect for fundamental rights". It is, however, nevertheless, most likely true that mutual trust needs some support for its further development and for the development of mutual recognition. The Stockholm Programme reemphasizes the need for assistance in administrative and legal procedures the citizens face when exercising their right to move and reside freely in the EU. It is also stated that the obstacles to the right to free movement should be removed. One might consider the differences between the legal systems as an obstacle in the extent knowledge of the various systems is a prerequisite for the understanding and trust of the same – which in turn might be a prerequisite for the use of the judiciary as such. The impression is that these differences will be eradicated legislative step by legislative step, or at least, that this is the underlying plan behind the Stockholm Programme. One can guess that the lack of knowledge of the various legal systems causes an uncertainty and apprehension against turning to the foreign legal systems on the part of the individual. The existence of the Evidence Regulation and its sister regulations do on the one hand not only constitute legal means but also bear with them legal obligations for the authorities and services to act in accordance with the principle of mutual recognition. The mutual trust can therefore be said to having been put aside, seeing as mutual recognition is an obligation for the authorities. It is for these reasons mutual trust is perhaps more acutely needed for the individuals and small businesses, when they are to choose whether or not to turn to a foreign judicial system or the "own" judicial system, for that matter.

Procedural law matters have been considered of central importance on the path of making people's lives easier in transnational situations since the Tampere meeting in 1999. Approximation of legislation is deemed necessary and it is stated that such approximation would facilitate the cooperation between the authorities and judicial protection of individual rights. The principle of mutual recognition of judicial decisions and judgments is expressed in the TFEU, articles 67, 81 and 82. In accordance with the statement of the Hague Programme, the Stockholm Programme emphasises that mutual trust is a prerequisite for the effectiveness of mutual recognition. In the same programme the respect for the national legal systems and the diversity within the Union is to be realised through "progressively developing a European judicial culture based on the diversity of legal systems and unity through European law"[16]. There are challenges ahead for the cooperation within the Union and the development of such cooperation when the European judicial culture is to be based on diversity. In the Tampere Conclusions the possibility to create minimum standards in certain aspects of civil procedure and for the implementation of the principle of mutual recognition was mentioned. Such minimum standards could ascertain that the proceedings in civil and commercial matters reach a common ground, and the cultural differences permitted by the European Court of Human Rights would not have to be allowed within the EU. Otherwise expressed one might say that in order to give the citizens of the Union a common sense of justice the notion of justice needs a definition.

We are at the present in the middle of a process; it is not entirely new, but it is still uncertain what direction the process will take. Its aim is to obtain a functioning inter-state judicial system within the EU, governed by a common sense of justice and for the benefit of the sense of legal certainty and predictability of the citizens of Europe. One of the main tools at hand is the established instrument of mutual recognition. Another tool, although not yet considered fully constructed, is the instrument of mutual trust. Mutual recognition and mutual trust is not only one thing before the other. The way they have been used they are also two starting points from which to reach a common sense of justice. Although

[16] The Stockholm Programme, p. 21.

one cannot expect any mutual recognition without mutual trust, one can reach a certain level of mutual trust and regulate mutual recognition at that level. At that level of mutual recognition one forges a common sense of justice through the means of harmonised law. From the other starting point, one can keep up the work on mutual trust, through way of education and mutual understanding of the different legal systems of the Member States. This seems to be the way of the EU, particularly since the Stockholm Programme.

Another duality for reaching a common sense of justice among the citizens of the EU is the one between the procedural autonomy on the one hand, and harmonisation on the other; both of these methods are applied. The Hague Programme expresses the international private and procedural law tradition, with a high level of respect for State sovereignty, national identity and procedural autonomy. With the harmonisation approach, function and cooperation weigh heavier than national identity, and therefore supranational legislation is used. It is unclear which way benefits the citizens of the EU more from a procedural law point of view.

4 Commonality, Compatibility and Party Perspective

The Evidence Regulation mainly consists of some introductory rules followed by a number of forms for the courts to use in their communication with each other. Each court is to primarily apply the law of its own Member State. From an international law perspective this can be a fair solution to an existing cross-border problem. From a procedural law perspective it might not be so clear. To a party in a court proceeding predictability is of central importance. From a party perspective court proceedings are a gamble and parties need to know whether to play or not. Without any kind of predictability one cannot appreciate the risks, financial or other, of the proceedings. Bearing in mind that the parties in civil and commercial matters often have a choice never to turn to the courts for help, the costs and risks of the proceedings are deciding factors.

The Regulation concerns the forms for cooperation between the courts whereas only national law regulates the conditions under which a national court can or shall request that evidence be taken by the court of another Member State. Likewise it is the national law of the requested

Member State which regulates the procedure for taking evidence. The influence of the parties in these matters is also mainly the concern of national law. So, what are the legal consequences if there is evidence to be collected in a Member State but the legislation there does not allow for the evidence to be taken in the manner required according to the law of the proceeding? In such a case, the balance between the parties that the law of the procedure is to guarantee would be twisted.

In the Dombo Beheer BV Case the European Court of Human Rights held "that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."[17] In the same case a substantial disadvantage was found in the inability to hear a witness. As we have seen, the EU Evidence Regulation accepts limitations to hear witnesses belonging to certain groups of professionals. One might guess that such restrictions are not entirely uncommon in the EU national legislations. If the procedural law of one Member State is a coherent system, standing steady on its feet, the limitations to hear a witness might very well be compensated for within the system. But what happens when the limitation to hear a witness travels across the borders to another court proceeding? What happens when it is incorporated in a proceeding based on the free evaluation of evidence and the freedom to present evidence? Compensation to ensure the equality of arms between the parties does not exist in such a situation within the Swedish Procedural Law, since it affects the sturdyness of the totality of the evidence to be evaluated. It is reasonable to presume that such compensation deficit will occur also in other situations of transnational proceedings, maybe even more so where the evidence is not evaluted as freely as in Sweden.

As a consequence to the principle of mutual recognition of judgments, a fifth freedom has been introduced, namely the freedom of legal judgments. In 1998 the Justice and Home Affairs Council adopted an Action Plan on how to best implement the Provisions of the Treaty of Amsterdam[18], where it is stated that "the ambition is to give citizens a common sense of justice throughout the Union". The Evidence Regulation is based on the *supposition* of an already existing "common sense of justice" among the Member States of the European Union. Partially it is stated in various documents that a *minium* common sense of justice

[17] Dombo Beheer B.V. v. The Netherlands, Judgment of 27 October 1993.
[18] Action Plan mentioned in note 13.

(values as well as fundamental rights and freedoms) is the basic foundation for the European project now called the EU. The development of the principle of mutual recognition presupposes, in reality, a minimum of mutual trust, and mutual trust presupposes, in reality, a sensation of a common sense of justice. Mutual recognition would thus not have been, had there not, in the first place, already existed a sensation that there is a common sense of justice shared by the peoples of the European Project.

One can claim, which was also done in former article 6.1 EU, that the human rights and fundamental freedoms as well as the principle of the rule of law are common to the Member States. But a short and superficial analysis of the Member States' laws of evidence shows that the view on justice is not common on the area of evidentiary law. According to article 6 of the new EU Treaty, the Union is to respect the rights such as they are expressed in the EU Charter and the European Convention of Human Rights. According to the *margin of appreciation* doctrine of the Strasbourg court there may be cultural differences within its jurisdiction which might lead to one procedure being acceptable in one of the signatory States but be considered a breach of the convention in another State. The legal security a citizen and party in transnational proceedings can feel in such a situation must be assumed to be limited.

The Regulation means that the citizens of the EU can be required to both apply and be subjected to no less than 26 different legal orders within the territory of its own Member State. The possibilities to get an overview for the common citizen or small and medium enterprises I daresay are non-existent. The risks for a general legal insecurity are evident. One condition for the citizens to have a feeling that there is a common sense of justice must be that the citizens have a notion of what law is applicable in the other Member States.

5 Short Comparison

A most superficial study, which will be carried out in detail further on in the work of my PhD thesis, shows that the taking of evidence is a part of national legislation where widely different ethical points of view prevail in the various legal orders of the Member States.[19] Regarding the taking of evidence, the Greek judge enjoys rather large freedom to take evidence

[19] José Lebre de Freitas, The Law of Evidence in the European Union, Kluwer Law International, Hague, 2004, p. 1–31.

ex officio. He is also free to deny the taking of evidence requested by a party, without there being a possibility for the party to appeal. The English judge, just like his Spanish colleague, is restricted to the evidence presented by the parties, and seems to have no rights to take evidence on his own initiative. Spanish law and French law both have regulated the admissibility and evaluation of the evidence to a comparatively large extent, whereas the free evaluation of evidence is a basic principle of Swedish, German and Austrian law.[20]

In the same way, the rules regarding admissibility of evidence and burden of proof vary within the EU. In some Member States the burden of proof in a specific case might fall on party A, in others on party B. In some cases there is an obligation to cooperate in the discovery and presentation of evidence, which might go against the basic principles of the law of another Member State.

In the gamble of the proceedings evidence plays a central role. The EU Evidence Regulation is a helpful tool to the parties and to the courts. But the procedure is regulated with a set of rules, built on basic principles and values. Swedish civil litigation rests on the principle of orality. Although the proceedings are not always entirely oral, the principle of orality is the foundation. That and the principle of public access to court proceedings made the legislator in Sweden comfortable to leave the evaluation of the evidence entirely to the court.[21] As another side to the principle of the free evaluation of evidence is the principle of free production of evidence. The parties are, apart from some very limited exception, entirely free to present to the courts whatever evidence they find relevant.

French law of evidence is comparatively formalised. Only where there is no regulation of the evaluation of a certain kind of evidence, the judge is free to evaluate the evidence himself; that however seems to be the exception. The parties can agree on the value of certain evidence and the judge is then bound to this within certain limits of legal security. If in France one is weary of letting such powers as the evaluation of evidence to the courts, the predictability of regulated evaluation of evidence is considered of greater importance. Just as Swedish procedural law, French procedural law includes a principle of orality, but it does not enjoy such

[20] European Judicial Network in civil and commercial matters, http://ec.europa.eu/civiljustice/index_en.htm

[21] Chapter 35 § 1 of the Swedish Code of Judicial Procedure (SFS 1942:740)

royal position as it does in Sweden.[22] In Sweden, evidence must be presented orally and directly to the court, if at all possible; written evidence should in principle be read out loud. That is not the French way. Quoting Professor C-J Hamson at the Faculty of Law at Cambridge University, who in 1949 summarised the differences in the hearings of English and French civil procedure as the English hypothesis being that the judge, although well-read, cannot read, and the French hypothesis being that the judge, although not hard of hearing, has problems understanding the human voice.[23] The description of the English hypothesis seems to be a correct analysis also of the Swedish attitude in civil litigation – but strangely Swedish administrative court judges suffer from the same disabilities as the French judges!

From this superficial comparative study the impression is that the sense of justice might not be common in the Union. Does diversity allow for commonality in the sense of justice? How much diversity is possible in order to reach the aim of a common sense of justice?

6 Conclusion

Judicial cooperation in transnational procedural law in the EU is based on two conflicting approaches; the diversity approach and the commonality approach. The diversity approach gives more weight to the national legal culture whereas the commonality approach gives more weight to the supranational legal culture. When evidence relevant to a court case cannot be found within the jurisdiction of the court, but instead within the territory and jurisdiction of another State, traditionally, the problem has been solved by ways of international law. Focus is on State sovereignty and diversity is the effect. Mutuality is the bridge between the national legislations. Predictability and legal certainty in procedure are not focal points.

National procedural law is to a large extent untouched by EU law, or otherwise expressed: national procedural law is to this day untouched enough for it to be accurate to still be talking about procedural auto-

22 Albeit its position has fallen gradually since its crowning through the adoption of the 1942 Code of Judicial Procedure, se Eric Bylander, Muntlighetsprincipen : en rättsvetenskaplig studie av processuella handläggningsformer i svensk rätt, Iustus, Uppsala, 2006, and its summary in English.

23 C-J Hamson, La procedure civile en Angleterre et en France, Revue internationale de droit comparé, 1950, Vol. 2, No 1. p. 77.

nomy.[24] The Single Market is regulated by a plurality of legislations. Foreseeability through procedural law is blurred by this plurality. The process in which we are at the time being, presents us with a choice between a pluralistic approach or a harmonisation approach. Both can be combined and both are represented by values expressed as late as in the Lisbon Treaty and the Stockholm Programme. The Council has indeed decided that the future of the EU will be a balancing act between diversity of legal culture and a common sense of justice.

The differences between the Member States' evidentiary rules create *per se* an insecurity and risk for the feeling of injustice, because even if the legal order of one Member State is coherent it can be incomprehensible to a foreigner. The feeling of a risk for injustice creates insecurity at the prospect of cross-border court proceedings. That can in its turn constitute a hindrance to cross-border agreements on the internal market, which the union civil law is supposed to promote. We no longer have 26 different jurisdictions, each and every one connected to the territory of one Member State, but rather 26 different jurisdictions applicable on the territory of all 26 Member States. How common is our sense of justice, judging by the national procedural legislations today? How much trust, between the individual actors on the Single Market or in the unified Europe is reasonable, judging by the national procedural legislations?

[24] Anna Wallerman, however, studies how accurate it really is to be talking about national procedural autonomy at this point in time, and presents her thoughts so far in her article in this volume.

Christian Koller*

The Role of Judges and Arbitrators in Contemporary Dispute Resolution

1 Introduction

A comparison of judges and arbitrators can take many different forms. Issues that have attracted much attention in legal literature and played a significant role in practice, *inter alia*, include: the status of arbitrators, i.e. issues of immunity and liability[1], different approaches to judicial independence and impartiality[2] as well as the role of judges and arbitrators as settlement facilitators[3].

* The present article is based on a slightly expanded version of a presentation given at the Colloquium on Party Autonomy in Civil Procedure, University of Uppsala, 27–28 April 2010.

[1] See, e.g., S. Riegler & M. Platte, Arbitrator's Liability, in Klausegger et al. (eds.), *Austrian Arbitration Yearbook* 108 (2007); C. Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, J. Int'l Arb 13 (1990); S. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, N.Y.L. Sch. J. Int'l & Comp. 15 (2000); E. Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, Am. Rev. Int'l Arb. 391 (2006).

[2] See H.-L. Yu & L. Shore, *Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives*, Int'l & Comp. L.Q. 935 (2003); Y. Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, Loy. L.A. Int'l & Comp. L. Rev. 473 (2008).

[3] See, e.g., B. Ehle, The Arbitrator as a Settlement Facilitator, in *Walking A Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do, Recent Developments and Trends*, Colloquium CEPANI40, 77 (2010); H. Raeschke-Kessler, *The Arbitrator as a Settlement Facilitator*, Arb. Int'l 535 (2005); G. Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, Arb. Int'l 187 (2009).

The present article will, however, evaluate the role of judges and arbitrators from a different perspective. It will compare the *power* of judges and arbitrators, specifically focusing on the following issues: differences regarding the conduct of the proceedings and case management (see 3.), specific questions related to the taking of evidence (see 4.), and finally the applicability of the rule *iura novit curia* (or *da mihi factum, dabo tibi ius*) in international arbitration (see 5). As an initial step, the regulatory framework relevant for such comparison will briefly be outlined (see 2.)

Since arbitration has become the preferred dispute resolution mechanism for international commercial transactions, the present comparison of judges and arbitrators will not be limited to a particular jurisdiction. It is rather based on an international approach comparing the power of judges (in civil law and common law countries) with the power of arbitrators in international commercial arbitration. Considering that internal differences in these two broad legal cultures can also be considerable, a comparison between "civil law" and "common law" necessarily entails generalizations – and sometimes also simplifications. However, there are at least certain general characteristics that distinguish civil law from common law. In international arbitration a system has evolved that is neither civil nor common law, but rather a hybrid procedure based upon both systems[4]. This has accurately been referred to as the "marriage of civil and common law"[5]. It is said to combine the best of common and civil law litigation practices.

Before delving into the intricacies of comparing judges and arbitrators, one might legitimately ask, why such comparison should be undertaken in the first place. On the one hand, the hybrid procedure developed in international arbitration might serve as a model for a transnational code of civil procedure rules. This is to some extent reflected in the *travaux preparatoires* of the UNIDTROIT Principles of Transnational Civil Procedure where it is stated that "[*i*]*t may appear sensible to take into account the experiences with international arbitration*"[6]. On the other hand it might

[4] E. V. Helmer, *International Commercial Arbitration: Americanized, "Civilized" or Harmonized?* Ohio St. J. on Disp. Resol. 48 (2003).

[5] H. Smit, Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence, in A. J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICC Congress Series No. 7, 164 (1994).

[6] R. Stürner, Transnational Rules of Civil Procedure – Feasibility Study, UNIDROIT

serve as a tool to (critically) reflect on the principles underlying the rules applicable in state court proceedings. Additionally, the question arises whether the experiences made in international arbitration can be used to improve state court proceedings, and if so how.[7] In other words: Can the "cross-fertilization" that occurred in international arbitration be of any use for the development of national civil procedure laws? Equally, one might ask whether the solutions adopted in state court proceedings provide guidance for arbitral proceedings. It is not uncommon that even in arbitral proceedings between parties originating from civil law systems procedures foreign to their legal background are applied, such as the exchange of witness statements or the cross examination of witnesses.[8]

The following comparison necessarily focuses on large commercial disputes; it cannot include small value or straightforward payment claims which can, in most cases, be decided much more effectively by state courts.

2 Regulatory framework

2.1 National courts

The extent of power available to judges depends on the respective legal system and is therefore governed by the *lexi fori*.[9] In the field of civil procedure law, which is to a great extent considered mandatory by nature, party autonomy is rather limited. The starting point, in international arbitration, if any exists, is completely different.[10]

Study LXXVI – Doc. 1, 14 (1999); available at http://www.unidroit.org/english/documents/1999/study76/s-76-01-e.pdf (last consulted 01.11.2010).

[7] See H. Raeschke-Kessler, Kann die Zivilgerichtsbarkeit von der internationalen Schiedsgerichtsbarkeit lernen? in H. E. Brandner et al. (eds), *Festschrift für Karlmann Geiß* 155 (2000).

[8] See, e.g., M. Wirth, *Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, German Arbitration Journal 9 (2003).

[9] See, e.g., P. Bernadini, *The Role of the International Arbitrator*, Arb. Int'l 113 (2004); J. Dolinger & C. Tiburcio, *The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or Lex Diligentiae?* Tex. Int'l L. J. 426 (1998).

[10] G. Petrochilos, *Procedural Law in International Arbitration* 2, 8 (2004).

2.2 Arbitral tribunals

Arbitrators derive their jurisdiction from the parties' agreement (and not from the state).[11] Both judges and arbitrators are increasingly called upon to manage the resolution of disputes fairly and efficiently. Judges must adhere to rigid rules of civil procedure and evidence which the parties in most cases may not derogate from. By contrast, in arbitration the parties can agree on a tailor-made set of proceedings (subject only to the mandatory rules and public policy requirements of the law of the seat of arbitration).[12] Failing such agreement most arbitration laws provide that the arbitral tribunal has discretion to conduct the proceedings as it considers appropriate.[13] A comparative review of statutes and cases shows that an international consensus about two major principles applicable in international arbitration has been reached: party autonomy in matters of procedure and the parties' right to due process.[14] Arbitral discretion is, of course, not unlimited. It is subject to public policy and mandatory provisions of the arbitration law in force at the place of arbitration.[15] It is generally acknowledged that arbitrators are not bound by local civil procedure rules applicable in state court proceedings.[16]

The flexibility of arbitral proceedings compared to court proceedings is often highlighted as one of its major advantages.[17] This flexibility is not

[11] See, e.g., N. Blackaby & C. Partasides, *Redfern and Hunter on International Arbitration*, at para. 2.01 (2009); J. Lew & L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, at para. 6–1 (2003).

[12] See, e.g., F. Schwarz, The Limits of Party Autonomy in International Commercial Arbitration, in Knahr et al. (eds.), *Investment and Commercial Arbitration – Similarities and Divergences* 73 (2010); G. Born, *International Commercial Arbitration* 1321 et seqq. (2009).

[13] See Art. 19(2) UNCITRAL Model Law on International Commercial Arbitration; sec. 34(1) English Arbitration Act; Art. 1460 French Code of Civil Procedure ("CPC"); Art. 182 Swiss Private International Law Act ("PILA"); sec. 594 Austrian Arbitration Act;sec. 21 Swedish Arbitration Act.

[14] J. Lew & L. Mistelis & S. Kröll, *supra* note 11, at para. 21–16; G. Born, *supra* note 12, 1741 et seqq.; P. Bernadini, *supra* note 9, 116.

[15] See *supra* note 12.

[16] N. Blackaby & C. Partasides, *supra* note 11, at para.6.02; Art. 1460(1) CPC explicitly provides that the arbitrators "shall not be bound by any rules applicable in court proceedings unless the parties have provided otherwise in the arbitration agreement".

[17] N. Blackaby & C. Partasides, *supra* note 11, at para. 6.01; G. Born, *supra* note 12, 1743.

only based on the parties' freedom to choose the applicable procedural rules but also on the cultural clashes between civil law and common law traditions that inevitably occur in international arbitration.[18] Considering the diverse nationalities that meet as claimants and respondents in international arbitration the process requires arbitrators and parties to adapt to different legal systems and procedural patterns[19].

However, this clash of cultures entails a considerable degree of uncertainty and unpredictability in the arbitral process. Against this background International Organizations, such as the International Bar Association, the UNCITRAL and the International Law Association, have started promulgating rules of best international practice in order to achieve some level of harmonization.[20] This trend is, however, subject to criticism. To some extent legitimate complaints have been voiced that the adoption of more and more rules would amount to a judicialization of arbitration[21] and runs counter to one of its hallmarks, i.e. procedural flexibility.

For the purpose of the present article one of the most successful soft law instruments in international arbitration will be analysed, namely the IBA Rules on the Taking of Evidence in International Arbitration[22]. A revised version of the IBA Rules of Evidence was adopted by the IBA on 29 May 2010.[23]

[18] P. Lalive, *Cultural differences and international arbitration*, Euromoney 13 (1995).

[19] R. von Mehren, *An International Arbitrator's Point of View*, Am. Rev. Int'l Arb. 203 (1999).

[20] N. Voser, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration*, German Arbitration Journal 113 (2005).

[21] See E. V. Helmer, *supra* note 4, 36; T. J. Stipanowich, *Arbitration: The "New Litigation"*, 7 TDM 1 (2010).

[22] Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last consulted 01.11.2010).

[23] A commentary on the IBA Rules is available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx (last consulted 01.11.2010).

3 Formal conduct of the proceedings and case management early in the course of the proceedings

3.1 National courts

It is generally said that common law procedures are adversarial (or accusatorial) as opposed to inquisitorial. Therefore the parties, or more specifically their counsel, direct the proceedings while the judge for the most part remains passive.[24] One of the major obstacles to managerial judging in ordinary civil cases in the United States is the traditional division of responsibility between judge and jury with regard to the determination of disputed facts.[25] In England the Civil Procedure Rules drastically changed that approach by the extending and intensifying the active case management and judicial control of the civil process.[26]

Similarly, in contemporary civil procedure in all German-speaking countries, the judge assumes a strong position of control over the formal course of the proceedings.[27]

In order to promote procedural efficiency many civil procedure codes provide for case management measures early in the course of the proceedings. According to Austrian civil procedure law, for instance, the court has to hold a preparatory hearing.[28] The purpose of this hearing is on the one hand to discuss the relevant issues of law with the parties and on the other to determine together with the parties which means of evidence are to be used and in what order. Sec. 258(1) no. 4 of the Austrian Code of Civil

[24] L. Demeyere, *An essay on differing approaches to procedures under common law and civil law*, German Arbitration Journal 283 (2008); G. C. Hazard & A. Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, Cornell Int'l L.J. 61 (2006).

[25] See P. Murray & R. Stürner, *German Civil Justice* 638 (2004).

[26] See P. Laughlin & S. Gerlis, *Civil Procedure* 4 (2004); N. H. Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* 48 et seqq. (2008); N. H. Andrews, The New English Civil Procedure Rules (1998), in van Rhee (ed.), *European Traditions in Civil Procedure* 167 (2005).

[27] P. Oberhammer & T. Domej, Powers of the Judge– Germany, Austria, Switzerland, in van Rhee (ed.), *European Traditions in Civil Procedure* 295 (2005).

[28] For the underlying ratio of such hearing and historical developments see, e.g., P. Oberhammer & T. Domej, Delay in Austrian Civil Proceedings, in van Rhee (ed.), *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* 268 (2010).

Procedure requires the judge to adopt a procedural program for the trial (so called "*Prozessprogramm*") at the end of the preparatory hearing.[29] In a similar vein, Art. 226 of the (future) Swiss Code of Civil Procedure provides that the court can conduct preparatory hearings at any time. Since hearing dates are excluded and procedural roadmaps are often drafted too vaguely, these early case management strategies – at least in Austrian civil proceedings – to a large extent miss their goal, namely to foster procedural efficiency.[30] The system enshrined in the English Civil Procedure Rules seems more efficient in this regard. In one of the two important pre-trial hearings, i.e. the "pre-hearing review", the judge may set a timetable for the trial and give only other directions for the conduct of the trial he considers appropriate.[31]

3.2 Arbitral tribunals

The conduct of international arbitration is largely in the hands of the parties and the tribunal. In practice the parties do not make arrangements on particular procedural questions but rather refer to institutional arbitration rules.[32] It has to be noted that institutional arbitration rules only establish a broad outline of the procedural framework, specifically identifying key events (e.g., the request for arbitration, the hearing, and the rendering of the award). Consequently, many aspects regarding the conduct of the proceedings will be subject to the arbitral tribunal's directions (exercising the discretion granted by the applicable national law or arbitration rules).[33]

It might be legitimately said that one of the factors contributing to the major success of international arbitration is the case management system that starts early in the proceedings when a procedural schedule is agreed upon between the parties and the arbitrators. This consent-based

[29] See G. Kodek, in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, sec. 258 at para. 22 et seqq. (2004).

[30] It has therefore been submitted that continental European state court proceedings could be inspired by arbitral case management in this regard; see A. Reiner, *Gerichte und Schiedsgerichte*, ÖJZ 305 (2009).

[31] N. H. Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* 51 (2008).

[32] See, e.g., G. Born, *supra* note 12, 1782.

[33] G. Born, *supra* note 12, 1782.

approach forces the parties to cooperate, more specifically to agree on deadlines for submissions on points of law and evidence as well as on hearing dates. Additionally, it is common in international arbitration to hold one or two major hearings instead of splitting the proceedings into a number of short hearings. In short, the arbitral procedure will be tailored to the specific needs and circumstances of the particular case.[34]

Following an Anglo-American tradition[35] it is common in international arbitration to hold a prehearing (or preparatory) conference in order to organize the proceedings, to discuss the relevant issues and frame the necessary steps for the dispute to be resolved.[36] A useful soft-law tool providing a sort of check-list approach has been adopted by the UNCITRAL, namely the UNCITRAL Notes on Organizing Arbitral Proceedings.[37]

4 Taking of evidence

The power judges have in the fact-finding process to some extent indicates whether a procedural system is dominated by adversarial or inquisitorial elements. However, in both systems a trend towards strengthening the power of judges can be observed even in countries which have traditionally followed an adversarial system, such as England[38]. In the following section two areas will be highlighted where a comparison between judges and arbitrators might be useful because new ways regarding the taking of evidence have been developed in international arbitral practice, i.e. the examination of witnesses and the production of document.

[34] G. Born, *supra* note 12, 1784.

[35] See E. V. Helmer, *supra* note 4, 60.

[36] See J. Lew & L. Mistelis & S. Kröll, *supra* note 11, at para. 21–19 et seqq.; N. Blackaby & C. Partasides, *supra* note 11, at para. 6–27 et seqq.

[37] UN Doc. V 96-84935; available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html (last consulted 01.11.2010); see J. Sekolec, *UNCITRAL Notes on Organizing Arbitral Proceedings – Background Remarks*, in A. J. van den Berg (ed), YB. Comm. Arb. 448 (1997); R. Ceccon, *UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence – A New Approach to International Arbitration*, J. Int'l Arb. 67 (1997).

[38] R. Verkerk, Powers of the Judge – England and Wales, in van Rhee (ed.), *European Traditions in Civil Procedure* 307 et seqq. (2005).

4.1 Witness Testimony

4.1.1 National courts

Traditionally in common law countries, such as England, the parties were responsible for the presentation of facts and evidence at the hearing. They even decided the order in which the witnesses were summoned.[39] However, this approach has changed drastically and judges have started to take a more active role. Under the English Civil Procedure Rules 1998 the judge has the power to influence the sequence in which witnesses are summoned and ask questions to clarify issues.[40] The use of written witness statements and cross-examination is a method typical for common law rules on evidence.[41] The technique of asking questions in the format of cross-examination is different from the questioning of witnesses in civil law jurisdictions. Cross-examination typically entails so-called "leading" or "closed questions", in other words, questions that suggest or contain the answer.[42] The interrogation stops abruptly when the answer sought is given. The emphasis placed on witness testimony may be explained historically: Due to the presence of the jury in common law litigation, the oral presentation of evidence as well as the examination and cross-examination of witnesses by the parties played an important role.[43]

Under civil law procedure the court is in control of the taking of evidence, and it is generally the judge's task to question witnesses. Cross-examination in the strict sense of the term does not usually exist in civil law countries. It is often said that civil law lawyers consider documentary evidence to be, in general, more reliable than testimonial evidence.[44]

[39] H. Smit, *supra* note 5, 163; R. Verkerk, *supra* note 38, 312.

[40] R. Verkerk, *supra* note 38, 313.

[41] See, e.g., Rule 32.11 of the English Civil Procedure Rules; I. Varga, *Beweiserhebung im transatlantischen Schiedsverfahren* 182 et seqq. (2006); F. Schäffler, *Zulässigkeit und Zweckmässigkeit der Anwendung angloamerikanischer Beweismethoden in deutschen und internationalen Schiedsverfahren* 16 (2003).

[42] M. McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* 309 (2010).

[43] L. Demeyere, *supra* note 24, 281 et seqq.

[44] See S. Elsing & J. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, Arb. Int'l 59 (2002); for a critical view on the reliability of documents see L. Shore, *Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for itself, and Seeing the Witness through her Written Statement*, German Arbitration Journal 78 (2004).

4.1.2 Arbitral tribunals

In international arbitration the different approaches to witness testimony outlined above are combined. It is now common that the parties submit written witness statements in advance of the hearing[45]. Mostly it is agreed that these statements represent the witnesses' direct evidence, which means that the time for questions by the party nominating the respective witness can be considerably reduced.[46] Art 8.3 lit b of the IBA Rules provides that following direct testimony, any other party may question such witness, in an order to be determined by the arbitral tribunal. The party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning. Although it does not explicitly say so the hearing is mainly limited to cross-examination and possibly re-direct examination. Finally, the arbitral tribunal may ask questions to a witness at any time according to Art. 8.3 lit g IBA Rules.[47] At the same time the tribunal shall have complete control over the Evidentiary Hearing[48] at all times, which clearly shows that the IBA Rules are also influenced by civil law traditions.[49]

This combined approach shortens the time needed for the hearing and at the same time avoids surprises during the hearing. Under the 1999 version of the IBA Rules each witness who has submitted a witness statement had to appear for testimony at an evidentiary hearing, *unless the Parties agree otherwise*. The revised version of Art. 8.1 IBA Rules slightly changes that approach since each party *shall inform the arbitral tribunal* and the other party of the witnesses whose appearance it requests. This touches upon the principle of immediacy and requires the parties to actively request the appearance of a witness.[50]

As regards examination techniques, Art 8.2 IBA Rules provides that questions to a witness during direct and re-direct testimony may not be

45 See Art 4.4 IBA Rules.

46 See, e.g., S. Elsing & J. Townsend, *supra* note 44, 59; M. Bühler & C. Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, J. Int'l Arb. 11 et seqq. (2000); P. Griffin, *Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings*, J. Int'l Arb. 27 (2000).

47 M. Bühler & C. Dorgan, *supra* note 46, 25.

48 See Art. 8.1 IBA Rules.

49 See Commentary on the IBA Rules, *supra* note 23, 23.

50 See Commentary on the IBA Rules, *supra* note 23, 17.

unreasonably leading. It follows that the tribunal has the power to forbid such leading questions upon the objection of the opposing party.[51]

The drafting of witness statements and adoption of cross-examination techniques in international arbitration raise additional problems related to the pre-hearing contact between counsel and witnesses.[52] It might cause an imbalance when the counsel to one of the parties is restricted by ethical rules for attorneys to be in contact with a witness. This topic goes beyond the scope of the present article. In the author's view it is doubtful whether such rules equally apply to arbitral proceedings as long as the tribunal makes sure that witnesses are not improperly influenced or at least the decision is not based on such testimony.

4.2 Documentary Evidence

4.2.1 National courts

Provisions empowering judges to order document production in civil proceedings differ greatly in various jurisdictions. On the one hand, the US Federal Rules of Civil Procedure ("FRCP") provide for vast pre-trial discovery, one of the most important instruments of which is document production[53]. US Discovery is broad, – in simplified terms – it encompasses any document which may lead to admissible evidence, even if it does not constitute evidence in and of itself. The duty to produce documents covers any relevant document, including internal documents and documents which are contrary to that party's interest.[54] Exceptions do, of course, exist. Discovery is, *inter alia*, limited by legal privileges, such as attorney-client privilege or protection of business secrets.[55]

On the other hand the English Civil Procedure Rules 1998[56] ("CPR)

[51] G. Born, *supra* note 12, 1844.

[52] See G. von Segesser, *Witness Preparation in International Commercial Arbitration*, ASA Bulletin 222 (2002); C. Oetiker, *Witnesses Before the International Arbitral Tribunal*, ASA Bulletin 262 (2007); M. Bühler & C. Dorgan, *supra* note 46, 10 and 19; H. van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457 (2003).

[53] See Rule 26(1) FRCP.

[54] G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, Vand. J. Transnat'l L. 1325 (2003); J. B. Oakley & V. D. Amar, *American Civil Procedure: A Guide to Civil Adjudication in US Courts* 182 (2009).

[55] See G. Kaufmann-Kohler & P. Bärtsch, *Discovery in international arbitration: How much is too much?* German Arbitration Journal 16 (2004).

[56] See Rule 31 et seqq CPR.

have curbed documentary discovery. First, it does not apply in small claims litigation at all[57]. Second, the definition of standard disclosure (mainly) requires the parties to disclose the following documents: (a) adversely affecting its case, (b) adversely affecting another party's case, and (c) supporting another party's case.[58] Disclosure is also subject to the standard of reasonableness, i.e., only a reasonable search is required, and the overriding principle of proportionality[59]. It may, e.g., be disproportionate to search for a certain document if the number of documents involved outweighs the (potential) evidentiary significance of the document to be located during the search.[60]

Civil law systems do not usually provide for document discovery. Each party produces the document on which it tends to rely in support of its case. There is no general obligation to also produce any documents that may negatively affect one's case.[61] Under most civil law regimes document production requests must specifically describe a document in the possession of the opponent. Additionally, in order to obtain such document, it must either be relevant with regard to the fact alleged or the party relying on it as evidence can demand the production of the document under the provisions of the applicable law[62].

Under Austrian law, for instance, a party alleging that the opposing party possesses a relevant document can request the court to order the opposing party to produce said document. According to sec. 303(2) ACCP the party requesting the production of a document has to specify its content as precisely as possible and to point to the facts it intends to prove with the requested document. Provided one of the following conditions is met, the opposing party is obliged to produce the document: (a) if the opposing party itself relied on the document; (b) if the opposing party is under such obligation to produce the document under

[57] See Rule 31.1(2) CPR.

[58] See, e.g., N. H. Andrews, *supra* note 26, 168.

[59] See Pracitce Direction 31A, point 2.

[60] G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 16; see 31.7 CPR.

[61] See, e.g., G. Born, *supra* note 12, 1892; G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 16; K. Sachs, *Use of documents and document discovery: „Fishing expeditions" versus transparency and burden of proof*, German Arbitration Journal 194 (2003).

[62] S. Elsing & J. Townsend, *supra* note 44, 59; for document production requests under German law see P. Murray & R. Stürner, *supra* note 25, 277; G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 17.

the applicable substantive law; or (c) if the document, according to its content, is considered a joint document ("gemeinschaftliche Urkunde", see sec. 304[3] ACCP).[63]

According to Chapter 38 of the Swedish Code of Civil Procedure anyone possessing a document that can be assumed to be of importance as proof, is obliged to produce it. Similar to document production requests under Austrian law the motion must be specific as to the contents and relevance of the document to be produced. The obligation to produce documents does not apply to documents covered by legal privilege or business secrets.[64]

4.2.2 Arbitration

Once again a compromise has been developed in international arbitration. Failing any contrary agreement by the parties US-style discovery or even English-style disclosure are not available in arbitration.[65] It is however generally accepted that arbitral tribunals might grant some level of disclosure exercising their procedural discretion.[66] It has sometimes even been suggested that a refusal to grant the production of a document might amount to a violation of the respective parties' right to be heard under specific circumstances.[67]

According to Art 3.3 IBA Rules a tribunal will allow the production of documents, provided the party requesting can prima facie establish the following requirements: (a) the documents sought are identified with reasonably specific ("description of a *narrow and specific category* of documents), (b) they relate to facts relevant and material for the outcome of the dispute, (c) they are in the possession or control of the other party, and (d) they are not protected by some privilege, or do not contain information subject to commercial confidentiality or special political or insti-

[63] See S. Riegler & C. Koller, Austria, in L. Mistelis et al. (eds.), *World Arbitration Reporter* 76 et seq. (2010).

[64] See B. Lindel, Evidence in Sweden, in J. M. Lebre de Freitas (ed.), *The Law of Evidence in the European Union* 422 (2004); C. Broman & M. Granström, Sweden, in S. R. Grubbs, *International Civil Procedure* 715 (2003).

[65] R. Pietrowski, *Evidence in International Arbitration*, Arb. Int'l 392 (2006).

[66] L. Shore, *supra* note 44, 77; G. Kaufmann-Kohler, *supra* note 54, 1327; Commentary on the IBA Rules, *supra* note 23, 7.

[67] Cf A. Z. Marossi, *The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals*, J. Int'l Arb. 513 (2009).

tutional sensitivity. Privileges in international arbitration raise difficult conflict of law issues.[68] Even their qualification as a matter of substance or procedure is approached differently in various jurisdictions. While under Austrian law privileges are matters of procedure, the prevailing trend in international arbitral practice favours a substantive law qualification. It is argued that the tribunal shall apply the law of the jurisdiction with which the relevant communication is most closely connected, i.e., the law where the party has its place of business.[69] Art 9.3 IBA Rules provides specific guidelines arbitral tribunals may take into account when dealing with privilege issues, such as the attorney-client privilege and the so-called "without prejudice" or "settlement" privilege.[70]

In the event that the privileged or confidential nature of a document is controversial, Art 3.8 IBA Rules allows for the review of the documents be entrusted to an independent and impartial expert, bound by confidentiality, whose assignment is it to report to the arbitral tribunal on the principle and scope of protection.[71]

The requirement to specifically describe the document and the interrelation with facts relevant and material for the outcome should exclude so-called (inadmissible) "fishing expeditions" (in German referred to as "*unzulässiger Ausforschungsbeweis*").[72]

[68] See, e.g., M. Sindler & T. Wüstemann, *Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?* ASA Bulletin 610 (2005); O. Meyer, *Time to Take a Closer Look: Privilege in International Arbitration*, J. Int'l Arb. 365 (2007); C. Tevendale & U. Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus?* J. Int'l Arb. 823 (2009); K. P. Berger, *Evidentiary Privileges under the revised IBA Rules on the Taking of Evidence in International Arbitration*, IntALR 171 (2010).

[69] S. Riegler & C. Koller, *supra* note 63, 74.

[70] See Commentary on the IBA Rules, *supra* note 23, 25; cf K. P. Berger, *supra* note 68, 172.

[71] See, e.g., C. Krapfl, *Die Dokumentenvorlage im internationalen Schiedsverfahren* 258 (2007).

[72] See Commentary on the IBA Rules, *supra* note 23, 8.

5 The Principle of iura novit curia

According to the *iura novit curia* principle ("the court knows the law") the legal assessment of the case lies within the responsibility of the judge.[73] In this regard, the court is not limited to the legal arguments advanced by the parties even if the parties explicitly want to exclude the application of a certain rule. This raises the question whether arbitrators also enjoy full authority with regard to legal questions. Since (international) arbitral tribunals have no *lex fori*, a comparison can only be made as regards the application of foreign law.[74]

In some jurisdictions the content of foreign law is considered to be a fact and must be proven like any other factual issue. In contrast, in other jurisdictions it is the court's task to establish the content of the applicable law based on the principle of *iura novit curia*.[75] In state courts such questions naturally only arise with regard to foreign law.

5.1 National courts

The status of foreign law is approached differently in various jurisdictions.[76] The different approaches however do not strictly follow a common law – civil law divide. Under English law, for instance, parties have to prove and plead foreign law as if it were a factual matter.[77] By contrast, German, Swiss (Art 16 PILS) and Austrian law (§ 3 and 4 Act on Private International Law "IPRG") follow the maxim *iura novit curia* according to which the court is assumed to know the law (and apply it *ex officio*).[78] The parties only have to prove the facts supporting their claim and iden-

[73] See, e.g., K. P. Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction*, Arb. Int'l 219 (2009).

[74] G. Kaufmann-Kohler, "The Governing Law: Fact or Law?" – A Transnational Rule on Establishing its Contents, in M. Wirth (ed.), *ASA Special Series No. 26 – Best Practices in International Arbitration* 79 (2006).

[75] This is, e.g., the case under Finnish and Swedish law, see M. S. Kurkela, *'Jura Novit Curia' and the Burden of Education in International Arbitration – A Nordic Perspective*, ASA Bulletin 486 (2003).

[76] See ILA, *Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* 8 (Rio de Janeiro Conference 2008), available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last consulted 01.11.2010).

[77] Dicey, Morris & Collins, *The Conflict of Laws* 255 (2006).

[78] See P. Oberhammer & T. Domej, *supra* note 27, 303; G. Kaufmann-Kohler, *supra* note 74, 80.

tify the relief they seek. An intermediate system applies in US federal litigation: pursuant to Rule 44.1 of the Federal Rules of Civil Procedure pleading foreign law rests with the parties and the responsibility to ascertain its content is shared between the court and the parties.[79]

In short three approaches can be differentiated: (a) those in which the court has to apply foreign law and ascertain its content *ex officio*, in other words, foreign law is treated as law, (b) those where foreign law is essentially treated as if it were a factual matter and therefore requires the parties to plead and prove foreign law, and (c) the mixed approach taken by the FRCP where courts have broad authority to conduct their own research but no duty to do so.[80]

5.2 Arbitral tribunals

The question whether the *iura novit curia* principle also applies in international arbitration, and if so, to what extant, can be particularly relevant in cases where the parties fail to raise pertinent legal issues.[81] Additionally, it might be indispensable for the arbitral tribunal to ascertain the contents of the applicable law in case of default by the respondent.[82] In general, the following questions can be differentiated in international arbitral practice: How should arbitrators acquire information about the contents of the applicable law? How should arbitrators interact with the parties about the contents of the applicable law? How should arbitrators make use of the information they receive about the contents of the applicable law?

Most arbitration laws are silent on those issues. Notably, the English Arbitration Act provides an exception to this rule. Sec. 34(1)(g) of the Act clarifies that the issue of "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law" qualifies as one of the procedural and evidential matters falling within the tribunal's

[79] See L. Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, Journal of Maritime Law and Commerce 97 (2003).

[80] ILA Report, *supra* note 76, 8 et seq.

[81] See A. Dimolitsa, *The equivocal power of the arbitrators to introduce ex officio new issues of law*, ASA Bulletin 426 (2009); T. Giovannini, International Arbitration and Jura Novit Curia – Towards Harmonization, in M. Á. Fernández-Ballesteros & D. Arias (eds), *Liber Amicorum Bernardo Cremades* 501 (2010).

[82] See A. Dimolitsa, *supra* note 81, 429, for further examples.

discretion. This provision does, however, not provide guidance as to how the tribunal should exercise its power.

The application of the *iura novit curia* principle in international arbitration is, at least in principle, also confirmed by the ILA in its Resolution No. 1/2008 (Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration)[83]:

> "1. At any time in the proceedings that a question requiring the application of a rule of law (including a question of jurisdiction, procedure, merits or conflicts of laws) arises, arbitrators should identify the potentially applicable laws and rules and ascertain their contents insofar as it is necessary to do so to decide the dispute.
>
> 2. In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or appearance of bias."

In a similar vein, the Swiss Federal Tribunal has decided that the principle of *iura novit curia* also applies to arbitral proceedings.[84] It has, however, also been confirmed in case law that the introduction of new issues of law by the arbitral tribunal is subject to the fundamental principle of due process.[85] Notably, the Swiss Federal Tribunal set aside an award where the parties were not given the opportunity to comment on legal arguments applied by the arbitral tribunal, because those arguments were not foreseeable.[86] At the same time the Swiss Federal Tribunal, however, noted that the *iura novit curia* principle should be applied in arbitration with caution.[87] A similar stance has been taken by the French Cour de cassation annulling an award based on a provision of the French Civil Code not invoked by the parties.[88]

[83] Available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last consulted 01.11.2010).

[84] Arrêt du Tribunal Federal ("ATF") 4A_400/2008, ASA Bulletin 495 (2009); for further references see C. Müller, *Swiss Case Law in International Arbitration* 160 (2010).

[85] For a detailed analysis see A. Dimolitsa, *supra* note 81, 431; T. Giovannini, *supra* note 81, 503.

[86] ATF130 III 35, ASA Bulletin 574 (2004); in this case tribunal relied on contractual provisions not invoked by the parties.

[87] ATF 4P.4/2007, ASA Bulletin 152 (2008).

[88] Cour de cassation (1re Ch. civ.) 14 March 2006, Rev Arb 653 (2006).

Provided that the status of the governing law is procedural in nature, the arbitral tribunal has discretion when determining its content, failing any contrary agreement by the parties.[89] The arbitrator's autonomy is, however, restricted by basic procedural principles such as the parties' right to be heard.[90] The tribunal cannot base its decision on a wholly unexpected rule neither party has invoked.[91]

Strictly equating judges with arbitrators when it comes to the application of the *iura novit curia* principle would not be appropriate in international commercial arbitration.[92] Such approach would entail the risk of bias or at least the appearance of bias. This does, however, not exclude appropriate directions in relation to legal issues that are relevant. To the contrary, a "*laissez faire* approach" employed by the arbitral tribunal could lead to considerable difficulties in the deliberation phase. If the tribunal realizes only at that stage of the proceedings that the parties were "on the wrong track" it will ultimately have to reopen the proceedings.[93] In other words much time and money will possibly have been invested in vain.

In the author's view the possibilities for arbitrators to introduce new issues of law should only be used in exceptional circumstances, e.g., if rules of public policy or of a mandatory nature are potentially concerned.[94] It may be difficult to differentiate between "new issues" and such issues that only amount to a substantiation or reinforcement of legal arguments already brought forward.[95] Moreover, it is questionable whether the tri-

[89] G. Kaufmann-Kohler, *supra* note 74, 81.

[90] See *supra* note 85.

[91] G. Kaufmann-Kohler, *supra* note 74, 82.

[92] See ILA Report, *supra* note 76, 12; ILA Resolution No. 1/2008, *supra* note 83, para. 4.

[93] A. Dimolitsa, *supra* note 81, 431.

[94] See ILA Resolution No. 1/2008, *supra* note 83, para. 6 which states:
"In general, and subject to Recommendation 13, arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised."
Para. 13 in turn deals with special circumstances and provides:
"In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award."

[95] Arbitrators may rely on additional sources without further notice to the parties if

bunal should (only) have the discretion to introduce legal issues[96] and arguments on the merits not invoked by the parties or whether it should be under an obligation to do so[97]. According to some authors a distinction needs to be drawn between issues emerging from the contract and those arising from provisions of the applicable law. Only with regard to the former should an obligation to raise (new) legal issues with the parties be endorsed.[98]

As to the content of foreign law, the arbitrators should primarily receive information by the parties.[99] This is because the transnational legal environment is too diverse, potentially involving participants from different legal cultures. Additionally, access to the applicable law can pose considerable difficulties, be it for reasons of language, availability or reliability of the relevant sources.[100]

6 Conclusion

The brief comparative analysis outlined above shows that the clash of legal cultures occurring in international arbitration has a significant impact on the role judges and arbitrators play in contemporary dispute resolution. As regards the comparison of judges and arbitrators and the potential areas for a "cross-fertilization" between arbitral and state court proceedings, the following points can be made:

First, despite the procedural flexibility granted to parties in international arbitration, arbitrators have a comparatively strong position. This is because in most cases parties only agree on a broad outline of the procedural framework leaving the conduct of the proceedings to the direction of the arbitrators. Once a legal battle has started, an agreement on specific procedural issues has no reasonable chance.

Second, the early case management approach applied in arbitration and the opportunity to hold one or two major hearings could also inspire

those sources merely corroborate or reinforce other sources already addressed by the parties; see ILA Resolution No. 1/2008, *supra* note 83, para. 10.

[96] Cf A. Dimolitsa, *supra* note 81, 429; G. Kaufmann-Kohler, *supra* note 74, 84.

[97] Cf T. Giovannini, *supra* note 81, 500; at the same time, however, emphasizing that the first duty in this regard falls under the parties' responsibility.

[98] A. Dimolitsa, *supra* note 81, 429.

[99] See ILA Resolution No. 1/2008, *supra* note 83, para. 5.

[100] G. Kaufmann-Kohler, *supra* note 74, 84.

national civil procedure law – particularly in civil law countries – in fostering procedural economy.

Finally, for the settlement of large commercial disputes the hybrid procedure of common and civil law developed in international arbitration might also provide guidance for enhancing procedural flexibility in state court proceedings. The success of international arbitration shows that a great level of party autonomy in civil procedure and a procedural model based on cooperation between decision-making bodies and parties does not necessarily imperil procedural efficiency. In a more and more globalized world the strict application of "traditional evidentiary rules and procedural principles" cannot always keep up with the needs of international commerce.

Anna Wallerman

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.

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Anna Waldenström, born in 1976, has an LL.M. from the Faculty of Law, Stockholm University. She is a doctoral candidate at Uppsala University, having commenced research concerning the EU Evidence Regulation in 2009. Prior to her doctoral studies, she worked as a Lawyer Linguist at the ECJ. The Regulation is a result of a cooperative method in the EU, which does not directly touch national procedural legislation. It is based on principles of international law, but its effects arise within the framework of the concrete civil procedure. As part of her project she will study the development of an area of justice within the EU and analyse the concept of justice within civil procedure.

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