Second Study Commission
Civil law and procedure

Meeting in Trondheim, 23 - 27 September 2007

Conclusions

SANCTIONS FOR PARTIES' INACTIVITY IN CIVIL LITIGATION

1. The parties should be required to disclose all factual information relating to the issues in a case at a very early stage of proceedings.

2. Provisions should exist whereby failure to meet procedural requirements in a timely way may result in the imposition of sanctions such as costs, dismissal of a claim or defense or some other procedural disadvantages.

3. While a judge should be pro-active in managing the progress of a litigation to avoid unnecessary delay, any power vested in him (e.g. to call witness or to conduct investigations) on his own motion requires to be exercised with proper regard to the need to be impartial and to avoid any appearance of partiality.

4. The remuneration of lawyers in civil litigations should be fixed in such a way as to encourage efficiency and the avoidance of unnecessary procedural steps.

Subject for the next year:
Damages for personal injury

GENERAL REPORT
Sanctions for parties' inactivity in civil litigation

INTRODUCTION

This general report has been prepared on the basis of 31 responses to the questionnaire. The member associations, which submitted reports, were:

AUSTRALIA	AUSTRIA	BELGIUM	BRAZIL	BULGARIA
CANADA	CROATIA	ESTONIA	FINLAND	FRANCE
GERMANY	HUNGARY	IRELAND	ISRAEL	ITALY
JAPAN	KAZAKHSTAN	LIECHTENSTEIN	LITHUANIA	LUXEMBOURG
MEXICO	NETHERLANDS	NORWAY	R.O.C. TAIWAN	SLOVAKIA
SLOVENIA	SPAIN	TUNISIA	UK Scotland UK England Wales	U.S.A.

I.

The general rationale of the questions asked in the section I. of the questionnaire is that civil litigation threatens to become complex and lengthy to the point where it is not possible to comply with the principle of the right to a fair trial. Because neither the state nor parties have infinite resources and funding for civil litigation, courts must control litigation, in the interests both of individual litigants and litigants in other cases. Parties are entitled to an appropriate share of the court's time and attention, but in deciding what is appropriate it is the judge's duty to take into account the needs of others, including the state, which is funding the court system, and parties who wish to use it.

1.Does your system of law have any rules governing the processing of cases prior to trial and during the trial that fix time-limits for parties a) to correct and supplement their cases and evidence b) to take other procedural steps?

9. Are there any limitations on a party's right to adduce a) fresh evidence b) fresh points of law at an appellate level? If so, are there any exceptions to this rule?

It is a vital aspect of efficient case management that parties crystallize their claims and the nature of their evidence at the earliest possible stage. It appears that in the great majority of countries, which submitted responses, the rules no longer allow parties to correct and/or supplement their cases and evidence without restriction. There are important differences between legal systems in relation to disclosure of documentation prior to trial. In some states (e.g. Australia, Canada, Germany) each party must make disclosure of relevant documents, in other states such proceedings are unknown. In a number of countries (Bulgaria, Austria, Canada, Croatia, Estonia, Finland, France, Germany, Hungary, Italy, Israel, Netherlands…) judges have the power to set time limits to parties to take procedural steps. Thus, judges may, according to the circumstances of the individual case, set time limits e.g. for allegations of facts (Germany, Norway; Scotland, Slovenia), payment of cost advances (Austria), presentation of evidence (Austria, Bulgaria, Estonia, Finland, Germany, Hungary, Norway, Slovenia, Tunisia), correction and supplement of pleadings (Croatia, Estonia, Italy, Israel, Liechtenstein, R.O.C. Taiwan). In Japan, the court can formulate a time plan for every trial. However, time limits for certain procedural steps are usually fixed by law (e.g. when parties file an appeal against a judicial decision).
The question 9 was concerned with the legal rules governing the admission of fresh evidence and new points of law at an appellate level. It appears that, except where the law prescribes otherwise, the court should normally not admit (except Belgium, Liechtenstein, Netherlands, Norway, Japan, Tunisia) new evidence. Exceptions include: the evidence could not with reasonable diligence have been obtained at first instance (Australia, Canada, England and Wales, Italy, Israel, Slovenia), allowing *de novo* trial at the appellate level (Bulgaria), force majeure (Brazil), the presentation of evidence at the first instance was not

possible (Estonia, Finland), evidence that did not exist at the time of the hearings at first instance (Estonia), failure of a judge to explain the case to the parties (Germany), evidence, which is indispensable in order to decide the case (Italy, Israel), evidence unavailable and unknown at the time of the hearings at first instance (Scotland). Australian report notes that fresh points of law are usually permitted at an appellate level, while in Liechtenstein they are permitted, in contrast to new claims, which are prohibited.

2.Do the trial proceedings consist of a large number of hearings for taking evidence or does your system of law define a limit in number of hearings, e.g. »no more than two hearings« per litigation?

3a.What are the sanctions when a party fails to take a procedural step within the time limits fixed by the law or the court?

3b. Do the same or similar sanctions apply when a party misuses procedure for the manifest purpose of delaying the proceedings?

4a.What sanctions is the court able to apply in cases of unjustified non-attendance of a witness?

4b.Are there any appropriate sanctions when an expert appointed by the court fails to communicate his report or is late in communicating it without good reason?

Some international documents (e.g. Council of Europe Recommendation No. R 84 5) suggest a limit in proceedings »of not more than two hearings«, one preliminary and the second for evidence and arguments. It appears from responses that this principle is viewed as a general template although no limit on the number of hearings is laid down in legislation. Some systems (Australia, Canada, Scotland) handle very large litigation which could not possibly be conducted within the constraints two hearings, others take evidence over a number oh hearings. The most important point is that in the great majority of countries judges from the outset control the timetable and duration of proceedings having power to refuse adjournments. Several reports (e.g. Croatia, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway) strongly emphasize the principle of the concentration of the hearing and the duty of a judge to avoid delays. The Italian report mentions that the quality of justice system also depends on the quality of infrastructure, which is not satisfactory in Italy.

Reports mention numerous sanctions, which could be applied when a party fails to take a procedural step within the time limits fixed by the law or the court: e.g. cost consequences (e.g. Austria), an action dismissed for delay (e.g. Canada), striking the claim or the defense off the list (e.g. England and Wales), order deeming some fact to be admitted (e.g. Australia), a party looses his right to take a procedural step (e.g. Croatia), staying proceedings, setting a hearing despite a party's unpreparedness (e.g. Australia), non-admission of late allegations (e.g. Austria), imposing a fine (e.g. Belgium, Bulgaria), default judgment (e.g. Finland), obligation to pay damages (e.g. Lithuania). The Italian report criticizes the provisions in the Italian procedural law, according to which judges are restricted to fix time limits to the situations where the law permits them to do so.

In the context of the economic efficiency of the proceedings it is interesting to know whether appropriate sanctions are applied in cases of unjustified non-attendance of witnesses and experts. When a witness is absent or refuses to testify the following sanctions could be imposed in most of the countries: fines, payment of the costs arising out of the failure, compulsory appearance and custody. However, some reports underline the fact that sanctions are either rarely used in practice in civil cases (Norway) or, as far fines are concerned, hardly ever executed (Italy). Only two systems (France, Tunis) do not provide for direct sanctions applied by the court in cases of unjustified non-attendance of a witness. Similar sanctions (except custody) could be imposed in most of the civil law countries when an expert appointed by the court fails to communicate his report or is late in communicating it without good reason: the file can be taken away from the expert (this is the only sanction in a few systems), fines, disciplinary measures taken by the court or by a professional organization (e.g. striking of the list of the experts). On the other hand, in some common law jurisdictions (e.g. Canada, England and Wales, Scotland), the court does not, generally speaking, appoint experts. If a party appoints an expert and his report is late the procedural step may be declared barred.

5a. Where a lawyer representing a party misuses procedure for the manifest purpose of delaying the proceedings, what disciplinary sanctions, if any, can be imposed by professional associations? Is it common for professional associations to use disciplinary sanctions?

5b.Do rules regarding the remuneration of lawyers guard against needless procedural steps. If so, what are the principle ways, in which such rules encourage lawyers to crystallize the parties' claims at the earliest possible stage of litigation?

Although in the great majority of countries judges have the power to control abuse of procedure by sanctions on lawyers, particularly as respects the power to make a complaint to the professional organization the responses indicate that these disciplinary measures are rarely used in practice.

Rules regarding the remuneration of lawyers could be an important incentive for lawyers to ensure the rapid progress of the proceedings. The German system has introduced stimulating provisions, which provide for a remuneration of lawyers in a certain percentage of the value of the case, regardless of the number of the procedural steps taken. By contrast, in a number of other countries (e.g. Italy) lawyers are paid in proportion to the number of procedural steps, which can have negative consequences on the duration of the proceedings. Few reports (Austria, Scotland, Brazil, England and Wales, Finland, Israel) note that a party is entitled to recover only the costs as were reasonably necessary for the conduct of the litigation.

6. Does your system of law allow judges to have power on »formal conduct« and to control the timetable and duration of proceedings (e.g. by setting firm dates, refusing adjournments)?

7.Do judges have power on substantive progress of civil proceedings, particularly as respects:

- *power to order the parties to provide such clarifications as are necessary*
- *power to order the parties to appear in person*
- *to raise questions of law*
- *to introduce factual evidence that parties have not adduced in cases where there are interests other than those of the parties at stake*
- *to control the taking of evidence*
- *to exclude witnesses whose possible testimony would be irrelevant*

It appears that legal reforms of civil procedure instituted over recent years gave judges greater power on »the formal conduct« of civil proceedings (question 6), which is widely recognized in countries that submitted responses, and also over their substantive progress (question 7). The court plays an active role in ensuring the rapid progress of the proceedings. It should however be said that some countries (e.g. Austria), have traditionally denied the power of the court to order parties to appear in person. In common law systems the attendance of parties is required at the pre-trial stage of the proceedings. As parties control the case, in these states generally there is also no power for judges to (proprio motu) introduce into a case a factual evidence that the parties have not adduced, to control the taking of evidence or to exclude witnesses. Several other reports mention (e.g. Austria, Liechtenstein) that judges have no power, except in certain types of cases (e.g. certain questions of family law), to introduce factual evidence that parties have not adduced, but they have an obligation to order the parties to provide such clarifications as are necessary.

8. Do the judges in your legal system have power to decide whether a) the procedure should be oral or written b) to resort a summary judgment or are these matters fixed by law?

The answer from most of the countries to the question concerning the power of judges to decide whether the procedure should be oral or written was in the negative. Only in Australia, England and Wales and Kazakhstan judges have *proprio motu* powers to choose between the oral and written procedure. In the USA, Estonia and Finland the procedure might be written under certain circumstances upon agreement of the parties. In other systems these matters are fixed by law. As respects the second matter addressed it should be said that there are differences in terminology in this area. Not all states understand the concept of summary, simplified and accelerated procedures in the same sense. It is the parties themselves who may apply for summary judgment in Australia, Brazil and Canada. In other systems the conditions for granting a summary judgment are fixed by law. The Dutch civil law procedure *kort geding (*or référé in the French and some other systems) is

of particular interest. It enables the judge to decide any question after hearing the parties on the basis of the sometimes limited evidence that they are able to put before the court within a short time. Legal rules of evidence do not apply. A decision is rendered within a very short time. It is enforceable, but it does not have the force of *res iudicata.* A party is free to commence a procedure on the merits, but this procedure will often never take place.

II:

1. Are there any proposals for reform of the civil procedural law to enhance effectiveness of the procedure by sanctioning parties' abuse of court procedure?

Some jurisdictions (Australia, Belgium, Bulgaria, England and Wales, Estonia, Finland, Germany, Norway, Slovakia, R.O.C. Taiwan) have recently enacted such reforms. Austria, France, Hungary, Liechtenstein, Japan, Tunisia and USA answered this question in the negative. A variety of proposals for change are under discussion or being suggested in many of the countries, which submitted a response. In general, the proposals involve movement towards greater judicial control over the process at the pre-trial stage and during the trial, enhancing discipline of the parties, sanctioning attorneys' abuse of the procedure, enhancing effective of procedure in relation to large commercial cases, a more concise judgment, introducing the praxis of "disclosure"…

2. What points would you wish to discuss in greater detail?

Some associations (Austria, Brazil, Italy, Slovenia) suggest further discussion of the matters dealt with in questions 1 and 7 of the questionnaire. A number of associations (Brazil, Bulgaria, Croatia, Germany, Israel, Tunisia) would wish to discuss how to sanction parties' and attorneys' abuse of the proceedings.

Other suggestions include:

- Sanctions applicable in ADR (USA).
- Burden of proof (Slovakia).
- Procedural delays, which can arise where a litigant refuses legal assistance (Scotland).
- What is more effective: oral or written proceedings? (Netherlands).
- Question 6 of the questionnaire (Liechtenstein).
- What factors should a court consider in deciding whether to call a witness itself? (Australia).

3. What subject do you suggest for the next meeting?

Austria
The consequences of unfair trade practices.
Brazil
Internet contracts
Croatia, Mexico
Class actions in civil cases
Germany, Slovenia
Pain and suffering damage
Italy
Agreements over future inheritances
Israel, Slovakia
Appointment of experts by the court
Netherlands
Which rules protect parties against a prejudice of a judge
R. O. C Taiwan
The principle of equal weapon; The preparation for oral argument
Tunisia
The role of the reporting judge in preliminary hearings (*la mise de l'affaire civile en état)*