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HISTORY OF CIVIL LITIGATION IN EUROPE

Whether or not procedural laws in the European Union should be harmonised is a matter of debate. A discussion of this question is not possible without a thorough knowledge of (1) the origins of the civil procedural laws of Europe and (2) the differences between these procedures and their similarities.

Within the European Union at least three procedural families may be distinguished: those which have developed around the French *Code de procédure civile*, the ones of the German-speaking countries and finally the systems which belong to the Common Law family.

The course is devoted to the characteristics of each procedural family. In discussing these characteristics, the origins of civil procedure in France, Germany and England will be studied in some detail. Subsequently the differences between the three procedural families and their similarities will be evaluated. It will appear that most similarities can be explained on the basis of the origin of particular procedural rules. As regards continental Europe, most of these rules originate from the so-called Romano-canonical procedure, which came into being in the 12th century. As regards the Common law, the Romano-canonical procedure was less important, but nevertheless it will be shown that this procedure did affect English procedural law (surprisingly, the 19th century Field Code for the State of New York played a role in this respect).

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CIVIL PROCEDURE

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Abstract
After addressing some problems specific to comparative legal research in civil procedure, this article focuses on 'families' of civil procedure, fundamental and other civil procedural principles, contemporary trends and developments in civil litigation at the national and international level and harmonisation of civil procedural law.

Keywords: civil procedure, civil litigation, private law

0. Introduction

When approached from a national point of view, the notion of 'civil procedure' does not pose major difficulties. In principle, civil procedure governs the adjudication of civil cases before a court of law. Apart from the occasional difficulty, for example the fact that in some countries such as France and the Netherlands there is limited room for deciding 'civil' claims for compensation in a criminal procedure, legal scholars and practitioners are perfectly able to give a definition of civil procedure in a national context. This is different in comparative legal research. Of course, also in this context one may claim that civil procedure governs the adjudication of civil cases before a court of law. However, if one observes this definition closely, one may conclude that it is problematic.

The first difficulty - and this will not come as a surprise for those who are familiar with the case-law of the European Court of Human Rights as regards the definition of 'civil rights and obligations' in Article 6 of the European Convention of Human Rights (Jacobs & White, 2002, 139-170) - is posed by the definition of a 'civil case'. In England, for example, the adjective 'civil' is used in the dichotomy civil–criminal. In principle, cases that are not criminal in nature are classified as civil. As such they are subject to the rules of civil procedure. In other countries the definition of a civil case is different. This is due to the fact that in most Civil Law countries the main dichotomy is that between private law and public law. The rules of procedure that are applicable to cases within the ambit of public law are either criminal or administrative in nature. Administrative procedural rules are applicable as regards actions in which one of the parties is the State or another public authority. This results in a major difference as regards jurisdictions like England, where such actions are adjudicated on the basis of the ordinary civil procedure rules (Jolowicz, 2000, 11-22).

The second difficulty as regards the definition of civil procedure is related to the classification of rules as 'procedural' or 'substantive'. This classification is of primary importance in an international context due to the applicability of the *lex fori* as regards procedural law (for examples, see Kerameus, 1997). Although a court may apply foreign substantive private law, it will under no circumstances adjudicate cases according to foreign civil procedure rules. At first sight the distinction between substantive law and procedural law seems clear. Substantive law *inter alia* defines, regulates and creates rights and duties, whereas procedural law regulates the legal proceedings in case of a dispute concerning these rights and duties. However, in practice the distinction is not always that clear. How should, for example, remedies in English law be classified? Do they belong to the domain of procedural or substantive law? (Andrews, 2003, No. 1.44) And to what area of the law do the rules on proof belong? In some jurisdictions, such as

France, rules on proof can be found both in the Civil Code and in the Code of Civil Procedure. In the Netherlands, which originally knew a system that was similar to that of France, the situation has changed. In that country the rules on proof have been transferred to the Code of Civil Procedure.

On the basis of the above one may conclude that defining 'civil procedure' in a comparative legal context is a difficult task. If one attempts to provide for a working definition nevertheless, it seems justified to closely follow the working definition for 'civil litigation' supplied by J.A. Jolowicz (Jolowicz, 2000, 20-22). The learned author states: (1) Civil litigation involves proceedings before a court of law; (2) The initiation of civil proceedings is a voluntary act; (3) The plaintiff acts in his own interest; (4) Civil litigation does not occur without the will of the defendant. It is this type of litigation that is governed by 'civil procedure'. Of course, this definition, although much more useful in comparative legal studies than the definition mentioned in the initial paragraph, is not ideal either, for parts of the law that in some countries are brought under the heading 'civil procedure' cannot be brought under it. Problematic areas are, for example, the rules on judicial organisation, enforcement, and the rules on cases which do not involve the adjudication of contested matter but the performance of acts of an 'administrative' nature by a court of law (for example, the appointment of a guardian).

Apart from problems of definition, other difficulties specific to comparative legal research in the area of civil procedure can be mentioned. In a well-known article, J.H. Langbein, for example, criticises comparative legal research in American and German civil procedure by Johnson & Drew. Johnson & Drew came to the conclusion that American courts are 'undermanned' when compared to the much greater number of judges *per capita* in Germany. Langbein, however, points out that there is a fundamental difference between American and German civil procedure which makes this conclusion doubtful. He states that many of the tasks that are performed by the court in Germany are performed by the parties and their counsel in the American adversarial system. Therefore, a smaller number of judges is required (Langbein, 1979).

In the next paragraphs we will focus on a selection of topics that are of interest from a comparative legal point of view. First, some remarks will be made on 'families of civil procedure'. Next, fundamental and other principles of civil procedure will be discussed. Thirdly, contemporary trends and developments in civil procedure in the various national systems of civil procedure will be addressed. Finally, some remarks will be made on harmonisation of civil procedural law (on these and related topics also, for example, Kaplan, 1960; Cappelletti, 1989; Jolowicz, 1990; Markesinis, 1990; Habscheid, 1991; Grunsky, 1992; Lemmens & Taelman, 1994-…; Civil Procedure in Europe, 1997-…; Jacob, 1998; Carpi & Lupoi, 2001; Stürner, 2001; Kötz, 2003; Storme, 2003).

1. Families of civil procedure

At least two large families of civil procedure may be distinguished in today's world: those that find their origin in the Common Law and those that have developed on the basis of the Romano-canonical procedure (Van Caenegem, 1973; Van Rhee, 2000).

The Common Law family is, of course, the result of the expansion of the British Empire, which brought the English system of civil litigation to places all over the world, for example the United States of America, Canada, Australia, India and South Africa.

Originally, the distinction between Common Law and Equity, which today is mainly relevant in the area of substantive law, also played a role in the field of procedure. In England, the three

superior courts of Common Law (King's Bench, Common Pleas and Exchequer) knew the writ system with its forms of action. Litigation could only be commenced if a suitable remedy was available and, because the available writs in the register of writs became fixed, this was not necessarily the case. The English Courts of Equity (basically the Court of Chancery and the Equity side of the Exchequer) knew a procedure that was more akin to the Romano-canonical procedure of the European Continent. In equitable cases, the Chancery was not bound by a fixed list of writs.

In the nineteenth century, this system changed considerably. The first step was taken in the United States of America. There, the 1848 Code of Procedure of the State of New York, drafted by David Dudley Field (1805-1894), was to some extent influenced by the Romano-canonical model and abolished the distinction between Common Law and Equity in the field of procedure. It introduced a uniform procedure for Common Law and Equity which knew only one 'form of action', that is the 'civil action' (Clark, 1993; Van Rhee, 2003).

Other Common Law countries followed suit. In India, for example, this happened with the introduction of the 1859 Code of Civil Procedure, whereas in England itself the Judicature Acts 1873-1875 brought about a system that resembled, to a certain extent, the system of the 1848 New York Code (Van Rhee, 2005). South Africa is a special case. After the Cape had been taken over by England from the Dutch in 1795, the Roman-Dutch law continued to reign supreme in the field of substantive law. However, a procedural system was introduced that was based on English law. An important difference between England and South Africa was that in the latter country the distinction between Common Law and Equity was not introduced in the field of procedure because it was absent in substantive law; substantive law remained Roman-Dutch (De Vos, 2002).

On the Continent of Europe, the medieval Romano-canonical procedure formed the basis of further developments. It was not only based on Roman law, but also on canons from the second part of Gratian's *Decretum*, the law of northern Italian cities and papal decretals. Originally applied within the ecclesiastical sphere, the learned Romano-canonical procedure soon became the model for the modernisation of procedural law within the secular courts. In Europe, most superior courts like the *Reichskammergericht* for the German States, the French *Parlement de Paris*, as well as the *Grand Conseil de Malines* in the Low Countries knew a procedure that was inspired by the learned Romano-canonical model. During the so-called 'codification period' (roughly the late 18th century until – in some countries - the end of the nineteenth century), the learned procedure exerted considerable influence, both in a positive and in a negative way. In a positive way because many of its basic features were adopted by the codes of civil procedure that were introduced all over Europe (often through the intermediary of the 1806 French *Code de procédure civile*), and in a negative way, because various features that were felt to be unsuitable to nineteenth century conditions were substituted by their opposite (an oral instead of a written procedure, the hearing of witnesses in public instead of behind closed doors) (Van Caenegem, 1973; Van Rhee, 2000).

An aspect of the Romano-canonical procedure that was left untouched by many of the Codes was the relatively passive position of the judge which resulted in undue delay and high costs. An early but in the end unsuccessful attempt to introduce an active judge was the First Book of the *Corpus Iuris Fridericianum* of Frederic the Great of Prussia, dating from 1781. More successful was the procedural model advocated in Austria by Franz Klein (1854-1926) at the end of the nineteenth century. This model became the focus of attention in Continental Europe and beyond (Jelinek, 1991). In his programmatic work *Pro Futuro* Klein stated, amongst other things, that an active judge would be a solution to undue delay and high costs (Klein, 1891). The judge should

establish the 'substantive truth' instead of basing his judgment on the truth as fabricated by the parties (the 'formal truth'). Klein's 1895 Code of Civil Procedure became very influential outside Austria and paved the way to an approach of civil procedural law which at the end of the twentieth century even became popular in England with its traditionally adversarial model of civil litigation. The 1998 English Civil Procedure Rules are the result of this development. Currently, the keyword in many countries is 'co-operation' between the parties and between the judge and the parties (see also Stadler, 2003, 57, 69).

2. Fundamental principles and 'other' principles of civil procedure

A distinction must be made between fundamental principles and 'other' principles of civil procedure. Fundamental principles of civil procedure may be seen as standards to fulfil the requirements of justice (Andrews, 2003, No. 3.02). When these principles are ignored, one cannot speak of a fair trial. Other principles of civil procedure are not fundamental, but are nevertheless observed in many jurisdictions. If they are ignored, however, the fairness of the trial is not immediately endangered.

Although the precise content of a list of fundamental principles of civil procedure is subject to debate - one may think of the right to trial by jury of the 7th Amendment to the Constitution of the United States, a right which even in England is absent in most civil cases (Andrews, 2003, ch. 34) - many fundamental principles are widely shared throughout the world. Exemplary for the codification of (fundamental) principles of civil procedure in a national code are the *principes directeurs du procès* of the French Code of Civil Procedure. These Guiding Procedural Principles take the form of a chapter at the start of the Code. This Chapter is divided into ten sections devoted, respectively, to the judicial proceedings (Section 1, Articles 1-3), the subject-matter of the dispute (Section 2, Articles 4-5), facts (Section 3, Articles 6-8), evidence (Section 4, Articles 10-11), law (Section 5, Articles 12-13), adversarial procedure (Section 6, Articles 14-17), defence (Section 7, Articles 18-20), conciliation (Section 8, Article 21), oral arguments (Section 9, Articles 22-23) and the duty of restraint (Section 10, Article 24) (Cadiet, 2005).

Fundamental principles of civil procedure have shaped and continue to shape civil procedure in many countries. A good example are the principles that may be found in Article 6 of the European Convention of Human Rights (on a world wide scale, Article 14(1) of the International Convenant on Civil and Political Rights of the United Nations contains similar guarantees). Only the first paragraph of Article 6 ECHR is applicable to civil litigation. It lays down that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' After a somewhat dormant existence in the years following the coming into force of the European Convention on 3 September 1953, Article 6 now figures prominently in the case-law of the European Court of Human Rights. On the basis of it, the European Court has worked out a detailed scheme of fundamental principles that must be observed by the Courts of the Members States of the Council of Europe (Jacobs & White, 2002, 139-170; Andrews, 2003, ch. 7). Article 6 ECHR has had a harmonising effect on the systems of civil procedure in Europe.

Apart from fundamental principles, 'other' principles of civil procedure may be distinguished. A combination of fundamental and 'other' principles may be found in the Principles (and Rules) of Transnational Civil Procedure that are currently being prepared within the framework of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner & Gidi, 2001; UNIDROIT 2004, Study LXXVI-Doc. 11; American Law Institute & UNIDROIT, 2006). The project was instigated by the American Law Institute and aimed originally solely at creating transnational

rules for international commercial disputes. Later, when the project was incorporated within the framework of UNIDROIT in 2000, work on transnational principles started. Principles, which are less specific and broader than rules of procedure, may be better fit for the harmonisation of civil procedure. The fundamental principles that have been identified concern, amongst other things, the independence and impartiality of the court, the right to engage a lawyer and the right to be heard. An example of a principle that in our opinion cannot be classified as fundamental is the principle that the proceedings shall ordinarily be conducted in the language of the court.

The drafters of the principles claim in their introductory paragraph that their principles may be implemented by a national system in different manners: either by statute or a set of rules or by way of an international treaty. Case-law of national courts could in their opinion also play a role.

3. Trends and Developments in the national systems of civil procedure

Civil procedure changes quickly. Throughout the world several general trends and developments can be perceived.

First of all, there is the age-old problem of high costs and undue delay (Van Rhee, 2004). High costs and undue delay are according to some currently even more problematic than in the past due to the increase in litigation rates during the last few decades (Zuckerman, 1999, 42). Various strategies have been employed to fight this problem. The cheapest, and therefore a popular strategy is the introduction of new rules of civil procedure. Reorganising the courts and additional funding is another approach. A change in procedural culture is a third option. This option is currently advocated in countries like England and The Netherlands. In practice combinations of these approaches may be chosen.

Undue delay and high costs may give rise to a review of the triangular relationship between the judge and the parties or aspects of it. A distinction is often made between two theoretical extremes: the inquisitorial model and the adversarial model (Jolowicz, 2003). In a purely adversarial system the judge acts as an umpire. He does nothing but listen to what the parties put before him and declares a ‘winner’ in his judgement. In a pure inquisitorial procedure the judge has an active, dominant role. He is, for example, involved in the framing of the issues and the gathering of the evidence. Neither extremes exist in practice. Nevertheless, the United States of America and, before the introduction of the 1998 Civil Procedure Rules, England are often seen as examples of systems tending towards the adversarial model. The Civil Law systems are categorised as less adversarial (the adjective ‘inquisitorial’ instead of ‘less adversarial’ is often used by English and American authors). This is due to the fact that in these systems the judge is more active than his Anglo-American counterpart. The differences, however, can easily be exaggerated. Throughout most systems of civil procedure the parties enjoy a certain degree of autonomy. The decision whether or not to initiate legal proceedings is left to their decision, they decide about the subject-matter that is put before the court, and it is also usually the parties who decide whether or not to make use of available procedural techniques and instruments.

The role of the judge is changing or has changed in many jurisdictions. As stated above, this happened in Austria at an early moment as a result of the 1895 Code if Civil Procedure (Oberhammer & Domej, 2005). French law gradually changed from 1935 onwards, giving the *juge chargé de suivre la procedure* (the expression *juge-rapporteur* became more common) and later the *juge de la mise en état* certain case management powers (Wijffels, 2005). Recent changes in English law also reveal a clear shift in control over the procedure from the parties to the judge. Lord Woolf, the ‘father’ of the 1998 English Civil Procedure Rules, identified the

adversarial culture as one of the main reasons why English procedure before the reforms was slow and expensive.

In the United States, case management has also been on the agenda since experiments in this field were started in the pre-trial stage at the Circuit Court of Wayne County, Michigan, sitting in Detroit in the 1920s (Epp, 1991, 715-717). However, during trial the adversarial model is largely left untouched and hence the procedural system of the USA is very different from European procedural models. The role of the American judge in civil proceedings has been the subject of discussion during the last few decades. This discussion was started by a celebrated article of J.H. Langbein, entitled 'The German Advantage in Civil Procedure' (Langbein, 1985). In complex litigation in the United States Langbein saw 'growing manifestations of judicial control of fact-gathering'. He stated: 'Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence [….] that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure'. Langbein has triggered a discussion that continues until this very day (Allen, Köck, Riecherberg & Rosen, 1988; Bryan, 2004).

Apart from giving the judge a more active role, another strategy to decrease costs and undue delay is tailoring the procedure to the complexity of the case. This has resulted in the introduction of summary procedures for small claims litigation in many countries. In Austria, for example, summary proceedings for debt collection (*Mahnverfahren*) are obligatory for money claims not exceeding 30.000 Euro. In Poland there is a simplified fast-track procedure for small claims since the Reform of Civil Procedure in 2000. In England a small claims procedure was introduced in 1974, at first limited to claims under £100. Later this was changed to £1000. With the introduction of the 1998 Civil Procedural Rules the amount was raised further to £5000 for the majority of cases (Andrews, 2003, No. 22.01). Also as regards more complicated cases there is differentiation in England; the two other procedural tracks that are available are the fast-track and the multi-track.

At the European level a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation has been issued in 2002 (COM (2002) 746 final, 20.12.2002). In this respect, one may also refer to the European Directive combating late payment in commercial transactions (2000/35/EC, 29.06.2000, Official Journal 2000 L200, 35-38).

A third way to reduce litigation costs and undue delay is avoiding litigation altogether or to stop it at an early stage. There is an increasing interest in Alternative Dispute Resolution (ADR) such as, for example, mediation, mini-trial and arbitration. Many countries have passed legislation to encourage ADR. In Austria, for example, legislation on mediation (*Mediationgesetz*) has been accepted by the *Nationalrat* recently. In Belgium new legislation in this field has been adopted by Parliament (new Sections 1724-1737 of the Belgian Judicial Code). Also on the supra-national level an interest has been shown in ADR. Within the framework of the Council of Europe, the Committee of Experts on the Efficiency of Justice (CJ-EJ) examines questions connected with mediation as an alternative to court proceedings in civil cases. The European Union has published a Green Paper on the issue of ADR, regarding alternative methods as an important means to enhance access to justice (COM (2002) 196 final, 19.04.2002). In addition the European Commission issued a preliminary draft proposal for a directive on certain aspects of mediation in civil and commercial matters in 2004 (COD/2004/0251).

Apart from the three methods to combat undue delay and costs mentioned above, a multitude of other approaches to curb undue delay and costs exist in different national legal systems. An interesting example is the Austrian *Fristsetzungsantrag* or 'application to set a time-limit'. By way of this application the parties may file a request with a higher court to order the lower court to perform a requested procedural act within a certain time-limit. The application is, however, rarely used, most likely because it may give rise to further delay (Oberhammer, 2004, 230). Another example is the use of IT technologies. In some countries (for example, Austria and Germany) electronic communication is used at a large scale, whereas other countries (for example, The Netherlands) are behind in this respect.

Some authors are extremely sceptical as regards the effectiveness of reform in civil procedure in order to address problems in civil litigation (Leubsdorf, 1999). Indeed, history shows us that the effects of reform projects were often short-lived (Van Rhee, 2004). It is therefore still an open question whether, for example, the new English Civil Procedure Rules 1998 will have a lasting impact. First signs are, however, positive.

4. Harmonisation of civil procedural law

In many fields of law efforts are made to reduce the differences between the existing national legal systems (on fundamental similarities in and differences among procedural systems, see Hazard, Taruffo, Stürner & Gidi, 2001, 772ff). This is also true in the area of procedural law even though harmonisation of procedural law may pose specific difficulties due to the fact that it is closely related to court organisation: a change in procedural rules may necessitate changes in court organisation and this often turns out to be an insurmountable problem, if only for political reasons. This is very clear where the harmonisation of the rules on recourse against judgements is at stake (on 'harmonisation' and the related concept of 'approximation', see Hazard, Taruffo, Stürner & Gidi, 2001, 769-772).

Some authors claim that harmonisation of procedural law may have negative consequences, for example if it means that a country with an efficient system will have to change its rules in order to comply with a common standard that is less efficient (Lindblom, 1997). Others are of the opinion that harmonisation of procedural law should be pursued due to its benefits. It could, for example, simplify transnational proceedings and cut transaction costs. Harmonisation may also safeguard preceding substantive law harmonisation (Kerameus, 1998; Schwartze, 2000).

The authors who are in favour of harmonisation also claim that the harmonisation of civil procedure is highly feasible. In their view one reason for this is that the unification of procedural law may have a fragmentary character: '[…] specific procedures can be unified or only a partial degree of unification can be carried out. This is more difficult in substantive law, where there is a greater tendency towards overall standardisation: the law of contracts and the law of bankruptcy, for instance, form a coherent whole, so that it is difficult to put forward partial reforms' (Storme, 1994, 54).

In the context of the European Union Article 65 of the Treaty Establishing the European Community (cf. Articles III-158 and III-170 of the European Convention), provides a legal basis for the harmonisation of civil procedural law, at least as regards civil matters having cross-border implications and in so far as necessary for the proper functioning of the internal market (Drappatz, 2002). Although the field of operation of Article 65 ECT is still unclear (Hess, 2002, 13-14), it is not unlikely, that in the future Article 65 ECT or its successors will also be of significance for cases which are currently qualified as purely national (especially Article 65 sub

c may be relevant in this context, which allows measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States).

An important question is how procedural harmonisation can be achieved (Kerameus 1990; Stürner, 1992). One of approach is the drafting of a model code. An example is the *Codigo Procesal Civil Modelo para Iberoamerica* (1988). Although this code has no binding force, it is a model for reforms in procedural law in Latin America. An early example of its influence is the 1989 *Codigo General del Proceso* in Uruguay (Storme, 1994, 42).

A project aiming at partial harmonisation is that of a working group chaired by Professor Marcel Storme from Ghent. In their report, published in 1994, the working group presented a series of Articles with explanations aiming at the harmonisation of civil procedural law in the European Union (Storme, 1994). The topics that were addressed are: Conciliation, The Commencement of the Proceedings, Subject Matter of Litigation, Discovery, Evidence, Technology and Proof, Discontinuance, Default, Costs, Provisional Remedies, Order for Payment, Enforcement of Judgements or Order for the Payment of Money, *Astreinte*, Computation of Time, Nullities, and Rules relating to Judges and Judgements. The proposal is aimed at a European directive (see also Schwartze, 2000, 143).

An earlier attempt by the Council of Europe (*Principes de procédure civile propres à améliorer le fonctionnement de la justice*) was more restriced. The Council's recommendation of 1984 addressed the formal course of proceedings (Council of Europe, R (84) 5, 28.02.1984). Part of its aims was to speed up the litigation process (Schwartze, 2000, 143).

The Storme Report has triggered some discussion. It was criticised by P.H. Lindblom (Lindblom, 1997). The main thrust of his criticism was that partial harmonisation will lead to great complexity because of the need to deal with the interaction between harmonised and non-harmonised rules. The author states that an analysis of the Storme Commission proposal demonstrates that they leave considerable uncertainty as to the remaining role of national laws, and that they would not gain universal acceptance because they would conflict with the approach adopted in some jurisdictions.

The Storme Report was followed by another project in the field of the harmonisation of civil procedural law: The Principles and Rules of Transnational Civil Procedure, drafted within the framework of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner & Gidi, 2001; UNIDROIT 2004, Study LXXVI-Doc. 11; American Law Institute & UNIDROIT, 2006). These Principles and Rules aim at providing a framework that a country might adopt for the adjudication of disputes arising from international transactions that find their way into the ordinary courts of justice. The project is inspired in part by the model of the Federal Rules of Civil Procedure in the United States. The Transnational Civil Procedure Project conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

Apart from the above projects, it seems that systems of civil procedure have a tendency to converge 'naturally' due to the increasing contacts between the systems. There is, for example, reason to believe that the divide between Common Law and Civil Law countries is narrowing (Van Rhee, 2003). The forms of action, that set civil procedure in civil and Common Law countries apart, have been abandoned in most, if not all, Common Law jurisdictions during the nineteenth and twentieth centuries (Van Rhee, 2003). Apart from the United States of America, the Anglo-American civil jury has nearly disappeared from the legal landscape. Written elements

gain in importance in civil litigation in Common Law countries (for example, witness statements in England which may serve as an alternative for examination in chief) (Zuckerman, 1999, 47). Currently, the adversarial system is under attack. England has witnessed a major reform in this respect. As stated above, the role of the judge has been strengthened in this country, giving him extensive case-management powers. Consequently, the English judge has become much more like his Continental European counterpart (Stadler, 2003, 56).

At the same time the law of civil procedure of many Civil Law countries changes, bringing this procedure nearer to Common Law examples. Orality, for examples, which traditionally did not play a significant role in the systems that found their origin in the Romano-canonical procedure, has been on the rise ever since the nineteenth century (Van Rhee, 2005). At the same time, Continental procedural lawyers show an interest in various elements of English civil procedure, such as, for example, discovery and pre-action protocols.

Apart from harmonisation projects and the 'natural' movement of systems of civil procedure in each others direction, some influential international regulations and conventions play a harmonising role (Werlauf, 1999). Some of these have already been mentioned, for example, Article 6 of the European Convention of Human Rights. Within Europe the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in civil and commercial matters has been important. The Convention originally only applied to the then six Member States of the European Community, but became more influential when the Community/Union expanded. The Brussels Convention has recently been converted into a European Regulation (EC No. 44/2001, 22.12.2000, Official Journal L012 1-23). This Regulation is applicable to all Member States except from Denmark.

In 1988 the parallel Lugano Convention was put into place. This Convention aims at international cases involving the Member States of the European Union and the Members of the European Free Trade Association (Schwartze, 2000, 141-142).

On a world-wide scale harmonisation is due to various Conventions on civil procedural topics drafted by the Hague Conference on Private International Law. An example is the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970).

Conclusion

The authors of the present article hope to have demonstrated that in the area of civil procedure some of the major differences that for a long time have set the various systems of civil procedure in the world apart from each other are disappearing. This occurs especially in those parts of the world, where the systems of civil procedure are in close contact with each other, for example in the European Union. There, the divide between the Common Law jurisdictions and the Civil Law jurisdictions has become less pronounced than in the past.

Whether or not harmonisation of civil procedure is a goal that should be pursued is open to discussion, as is the question how it should be pursued. Evidently the drafters of documents aiming at harmonisation are convinced of its benefits. Examples of such documents have been discussed in the present article, for example the model code of civil procedure in Latin American, or the Rules and Principles of Transnational Civil Procedure on a world-wide scale. However, even if one is not convinced of the blessings of harmonisation, it is clear that these documents and especially the comparative legal research on which they were based and to which they have given rise may contribute to a better understanding of the differences and similarities in the existing systems of civil procedure in today's world. They may also give the procedural

lawyer an insight into the shortcomings of the various procedural systems and into the question how these may be addressed. An example is the age-old problem of undue delay and high costs, the solution of which will certainly benefit from comparative research in civil procedure. That comparative scholarship in civil procedure is indeed a fruitful enterprise is demonstrated by the ongoing discussion on the 'German Advantage in Civil Procedure' triggered by J.H. Langbein in 1985. This discussion is still with us today and those scholars who have followed it will most likely underwrite our opinion that it has thoroughly deepened our insight in a multitude of procedural questions.

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THE ELEMENTS OF RATIONAL ASSESSMENT OF PERFORMANCE IN THE JUSTICE SYSTEM

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ACCELERATING CIVIL PROCEEDINGS IN CROATIA – A HISTORY OF ATTEMPTS TO IMPROVE THE EFFICIENCY OF CIVIL LITIGATION

1. Introduction

The general consensus is that the excessive duration of court proceedings is one of the fundamental and most important symptoms of the crisis in the judicial system of the Republic of Croatia. Although the Croatian judicial system may suffer from other, less obvious and less measurable, disfunctionalities, ranging from the lack of experience and knowledge of trial judges, which may result in decisions of poor quality, to difficulties in securing impartial and fair trials for particular categories of parties and cases, ensuring a fair trial within a reasonable period of time has emerged at the beginning of the third millennium as the most pressing and most obvious problem.

I start this paper by pointing to several of the factors that have stimulated discussion of the need to accelerate proceedings. Such factors help to explain why the speed of legal proceedings has emerged at the very centre of the public discussion of reforms of the judicial system.

Next, I attempt to define the basic notions necessary for understanding the meaning of 'acceleration' in the context of this paper. After having distinguished the two ways in which the problem of reasonable time can be understood, this paper presents a short history of the problem of the duration of court proceedings in Croatia in the light of its legal and political traditions.

The second part deals with current projects aimed at accelerating court proceedings. Six acceleration strategies that can be recognized in the various attempted reforms will be analysed. In particular, I will present the current reform of the law of civil procedure: the 2003 Amendments of the Code of Civil Procedure, enacted with a view to accelerating and streamlining procedure.[1] Some of the most impor-

[1] The 2003 Amendments of the Code of Civil Procedure were prepared several years prior to the initiation of the legislative process in the national Parliament (*Sabor*) in October 2002. The Amendments were finally enacted in July 2003 and published in *Narodne novine* (*Official Gazette*) 117/2003. They are applicable as from December 1, 2003.

tant innovations will be described, such as the new, increased sanctions for disrespect of procedural discipline that are aimed at strengthening the role of judges, provisions for concentrating proceedings by limiting *inter alia* the right to present new evidence and make new factual assertions, departure from the inquisitorial principle in favour of an adversarial obligation to produce evidence, etc. At the end of this paper, a critical assessment will be made of the achievements of past and current attempts to reduce delays and improve the speed of the proceedings.

2. Duration as a fundamental problem of the judicial system? Several theses about the origins of the fixation on the time dimension of the trial

The judicial system in the Republic of Croatia is certainly burdened with many serious problems. However, the issue of the duration of court proceedings has moved to the forefront in recent years.

The simplest explanation for why this topic has assumed such a central position in public debate may be found in the fact that lengthy proceedings are indeed a first-class problem in Croatia. There is a lot of truth to this explanation. But closer analysis will show that several additional aspects play a prominent role in stimulating discussion of the need to accelerate proceedings. Let us note several additional external aspects that have, perhaps, made an even bigger contribution to the popularity of this topic than any objective analysis of the length of civil legal proceedings:

- Several judicial statistics published in the 1990s pointed out that the number of unresolved cases has more than doubled despite the fact that there has been no increase in the number of cases initiated;[2]
- Certain cases in which court proceedings lasted several decades have come to the centre of public media attention;[3]
- After Croatia became a member of the Council of Europe in 1997, the first cases in which the European Court of Human Rights found a violation of human rights in Croatia were concerned directly with the right to a trial within a reasonable time;[4]

[2] According to the data of the Ministry of Justice, in 1989 there were 1.240.000 new cases in Croatian courts; about 485.000 cases were considered as backlog. Five years later, in 1994, there were only 1.086.000 new cases, but the number of backlogged cases rose to 640.000. In 1998, the influx of new cases was at 1.006.000, and the backlog stood at 895.000. In 2001, there were about 1.200.000 new cases, but the backlog was over a million, i.e., 1.020.413. These data do not include cases pending in the petty offence courts. See *Statistical Overview for 2001 of the Ministry of Justice*, Zagreb, March 2002 (not published).

[3] E.g., the Rajak case - a case initiated in 1975, and still pending at first instance in 2000. The case finally came before the European Court of Human Rights - see *infra* next note.

[4] Cases *Rajak* v. *Croatia* (49706/99), *Mikulić* v. *Croatia* (53176/99), *Horvat* v. *Croatia* (51585/99), *Fütterer* v. *Croatia* (52634/99), *Kutić* v. *Croatia* (48778/99), *Cerin* v. *Croatia* (54727/00) and similar cases.

- The duration of proceedings appears to be a neutral and a-political question that can divert the attention of the general and professional public from other, sensitive questions in the judicial area such as, for example, issues of lustration, corruption, incompetence, bias and the (social and political) responsibility of judges and government officials for the quality of national justice;[5]
- Placing the duration of the proceedings at the centre of attention not only creates the illusion of serious reform but can also serve as an argument for the redistribution of social wealth in favour of particular classes of Government servants (investments in the justice sector, improving the salaries of judges and a quantitative increase in judicial personnel).[6]

A more in-depth analysis of each of these elements would require a separate paper. A cursory attempt to consider some of them will be made below.

3. Two concepts of the duration of the proceedings – What does 'acceleration' mean?

The concept of the acceleration of proceedings does not belong to the classical, and generally accepted, notions of procedural law. The traditional standpoint of procedural theory deals with proceedings *sub specie aeternitatis* – in a purely normative sphere of 'positive law'. Actual problems facing the judicial system are easily categorized by proceduralists as simply a matter of general and legal sociology. It is therefore necessary to determine what is to be considered as the 'acceleration of court proceedings' for the purposes of this paper.

In the first place, the question of the duration of court proceedings might be defined as an integral part of a fundamental procedural human right – the right to a fair trial within a reasonable time, as determined by Article 6 of the European Convention on Human Rights and other international human rights instruments. Applying the method of analysis through binary variables, we could distinguish two elements of the right to a fair trial: the efficiency and the quality of the proceedings (the 'E-element' and the 'Q-element').

The issue of the duration of proceedings appears within the frame of the E-element along with another issue linked closely to the efficiency of the trial, i.e., the expense of proceedings (expenditures on court actions and the sums necessary to achieve a particular purpose).

The duration of proceedings can however be analysed in two different ways: in a horizontal and in a vertical direction. Horizontal analysis will compare individual proceedings and their types, focusing on the differences between them, while a

5 For the history of these sensitive issues, see A. Uzelac, 'Role and Status of Judges in Croatia 90-99', in P. Oberhammer (ed.), *Richterbild und Rechtsreform in Mitteleuropa*, Vienna, Manz, 2001, p. 23-66.

6 In fact, judicial salaries were very significantly raised at the beginning of 1999; as for investments, expenditures budgeted for court buildings and the creation of new posts are planned to be increased substantially in 2003. Both moves were justified by the need to speed up proceedings.

vertical analysis will explore the course of proceedings, from their commencement to their termination, focusing on the duration of particular segments within a particular process.

Horizontal analysis further demonstrates that the problem of acceleration can appear in two forms. First, there may be a need to deal with the insufficient speed of proceedings in all (or at least in a great majority) of court cases. Efforts can thereby be concentrated either on different types of courts (courts of general jurisdiction, specialized courts) and the types of proceedings conducted within such courts (e.g., summary proceedings, regular proceedings), or to courts' actions according to their territorial jurisdiction (a comparison of court proceedings in different parts of the State territory or a comparison according to some other territorial criterion, e.g., according to the division of the courts as between urban and rural areas).

Even if a majority of the proceedings in a particular jurisdiction (or a majority of types of proceedings) are not counted among those that are excessively long (according to any criteria), this does not exclude the appearance of isolated individual cases of especially lengthy proceedings. If they appear in a particularly negative context (of extreme duration, with an urgent social need to resolve them), such cases may also stimulate the need for intervention.

Vertical analysis, on the other hand, focuses on the course of the court proceedings, trying to establish a model that would determine which stages of proceedings correspond to standards of appropriate duration and speed, and which parts are burdened with unnecessary delay.

The occurrence of delays may be of a rather different intensity and density. Thus, the problem of acceleration in this context may also appear in two different forms: solving deeply rooted inefficiencies ('dragging') in proceedings at all stages or removing individual delays ('bottlenecks') that appear in the otherwise relatively satisfactory course of the proceedings.

This analysis of the notion of duration provides a context for the further course of this paper and can be outlined in the following table:

<table>
<tr><th colspan="5">Elements of fair trial – acceleration in the context of efficiency</th></tr>
<tr><td rowspan="5">Efficiency
(E-element)</td><td rowspan="4">Duration</td><td rowspan="2">Horizontal analysis</td><td rowspan="2">Majority/all proceedings</td><td>Type of proceedings</td></tr>
<tr><td>Territorial jurisdiction</td></tr>
<tr><td colspan="2">Single incidents ('cases')</td></tr>
<tr><td rowspan="2">Vertical analysis</td><td colspan="2">Lengthiness of all stages of the proceedings</td></tr>
<tr><td colspan="2">Delays in proceedings ('bottlenecks')</td></tr>
<tr><td>Expenses</td><td colspan="3">costs and expenditures</td></tr>
<tr><td>Quality
(Q-element)</td><td colspan="4">impartial and fair adjudication:
proper application of law, accurate fact-finding, etc.</td></tr>
</table>

In Croatia, the duration of proceedings appears to be an issue in terms of virtually all the stated meanings. Although there are no reliable statistical data about this issue, the general opinion – or even the prevailing one – is that a majority of court

proceedings does not unfold at the desired speed.[7] Although the degree of slowness is not the same with regard to different types of proceedings,[8] it exists to a greater or lesser extent in relation to practically all kinds of proceedings. Territorially, this problem exists as well, with greater delays in larger towns than in provincial courts (where occasionally even surplus capacity may be found).[9] On the other hand, as the tip of the iceberg, several prominent cases of notoriously lengthy trials featured prominently in public discussion, particularly in the context of judgments of the European Court of Human Rights against the Republic of Croatia.

By examining individual Croatian court proceedings from the beginning to the end (vertical analysis), it is evident that improvements in speed could be realized at practically all stages. However, delays appear more often at some stages of proceedings than at other stages. One of the major issues is the concentration of first instance (trial) proceedings – they are often carried out at numerous hearings which are distant in time from each other. Problems also appear with respect to the delivery of communications in proceedings, which opens extensive possibilities to abuse formal requirements and to obstruct the process. After the conclusion of the first instance hearings, delays often happen in the process of drafting and delivering written copies of the judgment – a process that regularly lasts at least several months.[10] Bottlenecks also appear in appellate proceedings, which often last even longer than first instance proceedings. When an appeal is heard, the result is often the annulment of the judgment and the ordering of a retrial at the first-instance court. This repetitive situation can happen several times in the same case, theoretically without limit. These and similar neuralgic points in the course of proceedings have largely motivated the 2003 Amendments of the Code of Civil Procedure (see *infra*, chapter 7).

4. The procedural and political tradition as background to the problem of the inappropriate duration of court proceedings

Some of the causes of problems in relation to the duration of court proceedings are to be found in the legal and procedural traditions of the Croatian judicial system, as well as in the specific historical circumstances under which it has developed.

7 This is supported by a survey of 12 countries and territories of southeastern Europe conducted in February 2002 by the Swedish International Institute for Democracy and Electoral Assistance (IDEA). It showed that in Croatia (unlike any other of the countries researched) courts enjoy the lowest public trust among all domestic institutions (only 17% of the citizens trust the courts, compared to 60% with trust in the Church, 55% with trust in private enterprises and 37% with trust in universities). See <http://www.idea.int/balkans/survey.cfm>.

8 E.g., delays in commercial disputes are not always as dramatic as those in some proceedings before courts of general jurisdiction.

9 There are examples of courts that exist only on paper, although their judges have been appointed and receive salaries. However, because of the lack of need for some such courts, their actual opening has been postponed indefinitely.

10 In some cases courts would even deliver the judgment to the parties several years after the conclusion of the hearing. See *infra*, chapter 7.3.6.

In the second half of the nineteenth century, during the period that was decisive for the formation of the institutions of the modern liberal State, Croatia developed as an autonomous constituent part of the Habsburg Monarchy (later: Austria-Hungary). This led to a large extent to the reception of legislative models from other areas of the then complex community of States, e.g., of laws enacted in Vienna. But that process did not develop harmoniously, in full, or without delays.[11] Some of the key pieces of procedural legislation (or the commentaries on them) were adopted in Croatia after they had already been superseded in Austria.[12]

For example, the Temporary Rules of Civil Procedure for Hungary, Croatia, Slavonia, Serbian Vojvodina and Tamiški Banat were adopted in Croatia in 1852, almost seventy years after the enactment of their Austrian model and principal source of inspiration, the General Rules of Court Procedure (*Allgemeine Gerichtsordnung*) of 1781. The major commentary on the Temporary Rules of Civil Procedure for Hungary etc. was published in Croatia in 1892,[13] only a few years before a completely different procedural model – the *Zivilprozessordnung* of Franz Klein – was adopted in Austria.

The same Austrian *Zivilprozessordnung* of 1895 was accepted in Croatia thirty years later, during the process of unification of procedural law that took place in Yugoslavia in 1929. The standard commentary on the Yugoslavian Code of Civil Procedure (which was practically a literal translation of the Austrian *Zivilprozessordnung*) was a translated Austrian commentary.[14] It was published in the Kingdom of Yugoslavia in 1935, almost forty years after the first publication of this commentary in Austria. Ominously, it was also the year in which Georg Neumann, its author, died.

As a consequence, the model of civil proceedings conceived by its creator, Franz Klein, in Austria – a model of quick, efficient, simple and concentrated proceedings, in which an activist judge holds a public hearing and then pronounces his judgment immediately[15] – never became a complete reality in the territory of Croa-

11 For the delayed reception of foreign models in the 'perpiphery' see D. Čepulo, 'Središte i periferija' ('The Center and the Periphery'), *Zbornik Pravnog fakulteta u Zagrebu*, 50/6, 2000, p. 889-920.

12 Some useful, although very short and overly simplified, remarks on the reception of Austrian law in Croatia can be found in W. Jelinek, 'Einflüsse des österreichischen Zivilprozeßrechts auf andere Rechtsordnungen', in W.J. Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld, Gieseking, 1991, p. 41-89 (p. 72-74, 85-86). See also A. Uzelac, 'Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien: Fall der Bestellung des Gerichtspräsidenten in der Republik Kroatien und daraus zu ziehende Lehren', *Jahrbuch für Ostrecht*: Sonderband 'Justiz in Osteuropa', volume 43, 1. Halbband, München, Beck, 2002, p. 77-79.

13 See Rušnov-Šilović, *Tumač građanskom parbenom postupniku*, Zagreb, Kugli & Deutsch, 1892.

14 G. Najman (Neumann), *Komentar Zakona o sudskom postupku u građanskim parnicama*, Beograd, Planeta, 1935. This commentary was largely a translation of G. Neumanns' *Komentar zum österreichischen Zivilprocessordnung*.

15 For Klein's reforms and their meaning today see R. Sprung, '100 Jahre Österreichische Zivilprozeßordnung', in W.H Rechberger and T. Klicka, *Procedural Law on the Threshold of a New Millenium – Das Prozessrecht an der Schwelle eines neuen Jahrtausends*, Wien, Manz, 2002, p. 11-30.

tia (and the wider region). Delays in the reception of the original Austrian model and the prevailing practice of earlier written, formal and secret proceedings seemingly led to a specific mixture of forms that were not fully in keeping with the original Austrian models. This development was intensified by certain political facts – first, the fact that the Austrian *Zivilprozessordnung* and its *Jurisdiktionsnorm* were accepted only ten years after Croatia had broken free from all governmental and legal ties to Austria and, second, the fact that the unification of civil procedural law in the Kingdom of Yugoslavia took place during the dictatorship of King Alexander of the Serbian royal house of Karađorđević. So, although legal doctrine was changed and legal teaching adjusted to the new procedural principles, the law in action continued its own autonomous way, developing a *stylus curiae* that still contained a great degree of the use of writing, seclusion and indirectness.

Other circumstances also contributed to these developments: The law on civil proceedings of 1929 was in force barely eleven years before World War II, and a socialist revolution and communist rule left their mark on the courts and their procedures. Although procedural legislation in the Socialist Federal Republic of Yugoslavia continued to follow earlier models, it was adjusted in some respects to socialist political doctrine. The inquisitorial elements and judicial activism of the Austrian procedural legislation stopped being interpreted as a warrant for concentration, publicity, directness and efficiency and became instead an instrument of socialist paternalism with the primary purpose of protecting the State from party autonomy and the uncontrolled actions of civil society. Since it was impossible to remove the party's initiative in civil proceedings completely (in contrast to some other branches of the law that were systematically cleansed of 'civil' and 'capitalist' concepts) civil procedural law continued to develop partly on the foundations of classical procedural patterns.[16] However, a consequence of the suspect 'civil' and 'private' nature of proceedings was the marginalization of court proceedings. They were reduced to the level of a second rate mechanism of social regulation, aimed at resolving 'secondary' problems only, disputes related to the relics of private property disputes in a society in which collectivist doctrine otherwise dominated.

As a consequence, the speed and efficiency of judicial proceedings were not high political priorities until the abandonment of socialism and change in the social system in the nineties. Quite the opposite, the relative length of proceedings and the high level of formalism were used in some cases as a tool to protect judges (who did not under socialism enjoy full guarantees of independence and who were subject to re-election by political bodies) from political persecution and the rage of the communist elites in power.

On the other hand, the previous, already generous system of pleading that enabled the change of claims and issues in the course of the proceedings and the reconsideration of first-instance court rulings, was further loosened. The party dissatisfied by the outcome of the proceedings had many opportunities to bring about a

16 For the development of civil procedural law in Croatia see, e.g., S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo (Civil Procedural Law)*, Zagreb, Narodne novine, 1986, § 1-5.

retrial through appeal and other legal remedies. On the basis of the socialist understanding of the 'principle of material truth', virtually unlimited possibilities of introducing new facts and evidence were established at first instance and appellate proceedings.[17] In addition, there was an established practice of the appellate courts limiting themselves to revoking a decision and sending the case back for retrial. Theoretical justification was found in the principle of immediacy (direct, personal evaluation of evidence) although very little of this principle remained in practice. Possibilities of State intervention through so-called 'requests for protection of legality' (*zahtjev za zaštitu zakonitosti)* by the State Attorney were introduced into civil proceedings. All this, taken together, served as a specific shock absorber for political blows against justice. But, on the other hand it surely did not contribute to the authority of judicial decisions and the firmness of court decisions, even with respect to those that were formally considered to be *res iudicata*.

Such a state of affairs certainly did not raise the awareness of judges of the need for the efficient management of proceedings and to ensure a reasonable duration for pre-trial, trial and post-trial routines. It was reflected in the expectations of candidates for judicial service, the recruitment and the selection of judges. Through several decades of socialist rule, the judicial profession was considered by graduate lawyers as a relatively poorly paid and bureaucratic branch of the civil service. Its advantages were seen in providing a relatively non-demanding job, with no pressure to do the work urgently and a lot of free time.

Thus, the typical distribution of jobs in families of lawyers was the following: the spouse who took care of the children went into judicial employment, while the other, bread-winning spouse supported the family by practising law as a private attorney. Even if this typical perception has an anecdotal character, the numbers are incontestable: in the ranks of judges of the courts of first instance at the beginning of the 90s in Croatia, women were significantly more numerous than men.[18]

When Croatia left the Yugoslav Federation in 1991, through a painful process marked by war and instability, there was a radical turn away from socialist collectivism. The doctrines of Marxism, of 'social property' and self-management were abandoned, and the prevalence of private ownership was re-established. That was a completely new situation for the national Judiciary. In the first place, there were much greater expectations, they had much greater responsibility and much more important tasks. Yet, some things did not change. For example, the attitude of politicians towards the Judiciary remained unchanged and – especially under war conditions – it was expected that judges would serve the interests of the political regime. For a period of six to seven years, the newly introduced constitutional principles of the independence of justice, tenured appointments and the separation of powers were not applied in practice. Many judges were appointed and dismissed in that period, again not according to objective and well-defined criteria of competence and responsibility, but according to their closeness to the centres of power, and po-

17 See *infra*, chapter 7.2.1.

18 According to statistical data for 1998, about 65% of trial court judges were women. However, at the same time, they constituted only about 40% of the judges of the Supreme Court.

litical and ethnic affiliation. A prolonged period of uncertainty and political purges led to the departure of the better and more proficient judges to other private legal work where they expected to find more peace, higher incomes and a greater level of personal and professional freedom. On the other hand, those judges who did not have a choice, or were ready to live under conditions that were considered by others to be unbearable, remained in the system. Newly appointed judges – there were many of them, in some courts over two thirds – were mostly young and without experience. Not infrequently they were appointed according to criteria of political and ethnic 'appropriateness', or under the influence of an unavoidable dose of nepotism, a common characteristic of southern European countries.[19]

The efficiency of the justice system (which has in any case never really embraced the rule *justice delayed, justice denied*) as a consequence radically changed for the worse in the nineties and later. General indicators of the backlog in courts demonstrate that the number of unresolved cases almost tripled between 1990 and 2000.[20]

Such indicators, along with the emerging interest of the public media in the problems of justice and a series of judicial scandals, stimulated a public awareness that reform might be necessary. Reform of the judicial system was among the pre-election promises of the coalition of parties which won the elections at the beginning of 2000. There were indeed many legislative and other projects from 2000 onwards concerned with reform of the judicial system. However, assessments of what was achieved were rather different. Many critics reproached the Government for the lack of concrete effects from the changes, and pointed to the further accumulation of cases and the lack of clear concepts and strategies for the judicial sector. Others objected to every governmental action in this area as a violation of the constitutional principle of the independence of justice. The debates about what needs to be changed and what should be the fundamental features of judicial reform are not even close to an end at the time of writing of this paper.[21]

The reforms that were undertaken vacillated between extremes – the major laws enacted in the mid-nineties changed several times (e.g., the Law on Execution and the Law on Bankruptcy) while others, e.g., the Code of Civil Procedure, are practically unchanged since the time of the Yugoslav Federation. Part of the reason for this is the political resistance of the Judiciary to the reforms, especially if such reforms were aimed at interfering with political appointees – certain judges appointed and used by the regime of President Tuđman. Even after the political changes, earlier structures did not change much but, with the support of certain political groups (partly also within the governing coalition), they resisted with success any changes

19 For this development see A. Uzelac, *Role and Status of Judges in Croatia 90-99*, *supra* note 5; see also A. Uzelac, 'Lustracija, diskvalifikacija, čistka. O procesnim i ustavnopravnim problemima izbora sudaca u prijelaznom razdoblju' ('Lustration, Disqualification, Chistka: Procedural and Constitutional Issues of the Appointment of Judges in Transition'), *Iudex*, 1, 1995, p. 413-434.

20 See *supra* note 2.

21 For some of the critical elements of the attempted reforms see A. Uzelac, *Ist eine Justizreform in Transitionsländern möglich?*, *supra* note 12.

that might influence their status. Discussions about reform of the judicial system were therefore politicized to a great extent even where it might have been expected that professional and impartial analysis would prevail.

Official documents on the reform of the judicial system can therefore be read even today as a catalogue of wishes and an unsystematic list of items that have legal and political priority. A systematic strategy of changes that would lead to the acceleration of civil proceedings is hardly to be found in these documents. However, for the purposes of this paper I will try to group and order the sometimes chaotic reform attempts and present them as different 'strategies', even if they were occasionally a product of mere coincidence.

5. Actual projects intended to accelerate civil proceedings – A typology of reform strategies

Accelerating proceedings is as complex as every other far-reaching reform in the judicial system. Simple and unilateral interventions are not sufficient when we face long-lasting and fundamental problems. Both procedural and organizational changes may be necessary at the same time. Similarly, changes in Croatia were also intended to deal not only with procedural rules (which, although burdened with some inadequate provisions, cannot be exclusively blamed for current inefficiencies).

I would like to try to group the various projects in this area into six strategies for the acceleration of proceedings. In my opinion, all can be recognized in actual initiatives, even if they are not apparently part of the general scheme of reform. These strategies are:

- the reform of procedural rules (changes in procedures and well-established routines for resolving judicial cases in order to streamline and shorten proceedings);
- transfer ('outsourcing') of tasks that are currently dealt with by the courts to other State and social services and other professional groups (especially public notaries) and transfer of tasks that are not central to the judicial function to other persons within or outside the courts;
- stimulating parties to resolve their disputes out of court, by settlements reached independently or with the assistance of third persons (mediators), or through arbitration;
- changes in the organization of the judicial system at the national level (the system of judicial jurisdiction), and at the level of individual courts (reorganization of court administration);
- technical and logistical improvements (introducing new technologies, especially in the IT area, reorganization of the delivery service and court registers);
- programmes of training (intensifying quality criteria in the recruitment of personnel in the judicial sector, permanent education and advanced, specialized and continuing training).

This rather extensive list basically covers all possible ways in which a certain country might address problems of inefficiency in its judicial system. In what follows, I will pay special attention to strategies related to changes in procedural regulations. Other strategies of acceleration will be elaborated elsewhere. I will commence with a brief overview of reforms of procedural regulation aimed directly at improving the speed of judicial proceedings.

6. Reform projects intended to accelerate court proceedings

Changes related to the acceleration of civil proceedings in Croatia are to be found mostly in three large procedural laws: the Code of Civil Procedure, the Law on Enforcement and the Law on Bankruptcy. As stated earlier, changes in these laws did not follow a fully logical course. The most important and fundamental law, the Code of Civil Procedure, was not significantly changed until the time of the writing of the draft of this paper. Instead, until 2003, the ex-Yugoslavian Procedural Code from 1976 remained in force, subject only to insignificant changes.

On the other hand, the two other laws had completely different destinies. Not only were they changed much earlier than the Code of Civil Procedure but completely new regulations were enacted – in 1996 the Law on Enforcement replaced the Law on Execution Proceedings[22] and the Law on Bankruptcy succeeded the Law on Forced Settlement, Liquidation and Bankruptcy.[23] Having been passed, both laws were significantly changed by amendments barely two to three years after the new law was passed. New changes – partly consisting in the abandonment of some previous changes – were passed as a part of the imminent package of judicial reform.[24] These changes, although significant, will not be discussed here.

7. Reform of the rules of civil litigation – 2003 Amendments

In the Yugoslav Federation, civil proceedings were generally regulated by federal legislation. Therefore, the Code of Civil Procedure that was (and still is) applicable in Croatia is a former federal law from 1976. The situation was similar in other successor countries of ex-Yugoslavia, but most of them have already undertaken a significant reform of proceedings and/or passed new procedural laws. For various reasons, reform of civil litigation in Croatia was postponed for a long time. The 'old' Procedural Code, with minimal adjustments, was in force even in 2003. In the end, it remained practically the only large piece of 'systemic' legislation that was not significantly changed after the declaration of independence in 1991. After almost ten years of the unofficial circulation of draft proposals (but without a broader public

22 *Ovršni zakon* (Enforcement Act), Official Gazette 57/96, 29/99 and 42/00.

23 *Stečajni zakon* (Bankruptcy Act), Official Gazette 44/96, 161/98, 29/99 and 129/00.

24 See Amendments to the Law on Bankruptcy, Official Gazette 123/2003; The amendments to the Enforcement Act were adopted in Parliament on 15 October 2003. They had not yet been published in the Official Gazette at the time this text was submitted for publication.

and professional debate, except on isolated and largely marginal subjects),[25] the first draft was presented to Parliament only at the end of 2002.[26]

The absence of any real legislative projects in this area during some 12 years of Croatian independence should not be taken as proving that the Code of Civil Procedure of 1976 enjoyed general acceptance by lawyers and the general public. Its inadequate provisions and its old-fashioned approach were often mentioned in the context of the extensive duration of court proceedings. Criticism was mainly directed at the extensive opportunities it offered to parties (and their representatives) to abuse procedural formalities and obstruct – or even block – the course of proceedings. Other criticism related to the lack of procedural discipline (i.e., the lack of sanctions for inactive parties and belated submissions) and the absence of planning of the proceedings. It was also pointed out that specific formal requirements have in the course of time lost any real meaning in practice (e.g., the condition that first instance trials be held by a panel of three persons, two of them being lay judges).

Novelties in the rather voluminous text of the 2003 Amendments[27] can be discussed under several headings. The following chapters deal therefore with the following issues (or groups of issues): changes regarding organizational aspects (the composition of court panels and *in rem* court jurisdiction); changes relating to evidence-taking and related basic procedural principles (abandonment of the inquisitorial authority of the trial court, limitations on the introduction of new evidence and factual submissions in the course of a trial); new measures to strengthen procedural discipline (including the controversial issue of mandatory party representation); and reforms of the system of legal remedies.

7.1 Changes regarding the composition and in rem jurisdiction of the courts

7.1.1 Abandoning the principle of collegiate adjudication – Introducing the monocratic principle at first instance proceedings

One of the least controversial changes that provoked almost no discussion abolished the principle of collegiate trial and lay participation in first-instance courts.[28] The principle of collegiate trial, although raised in socialist Yugoslavia to the level of a constitutional principle, has become a mere caricature of the original intentions of the Legislature during the last twenty years. In civil litigation, it survived until the 2003 Amendments, although in a restricted form. Apart from certain cases that were

25 E.g., about the issue of mandatory representation by licensed attorneys in civil proceedings. See *infra*, chapter 7.3.5.

26 See *Izvješća Hrvatskog sabora* (Reports of the Croatian Parliament), number 352, January 15, 2003, p. 19-24, <http://www.sabor.hr>.

27 The Amendments have 287 articles (amending the original text of the Code of Civil Procedure that contained 512 articles), so that one may freely speak of a substantially new piece of legislation.

28 The principle of collegiate adjudication lays down that trial courts should sit in panels composed of more than one member. In civil litigation, the regular composition of the trial court comprised one professional judge and two lay judges.

heard by a single judge, since 1990 parties could waive their right to lay members of the tribunal.

In practice, collegiate trial was characterized by the participation of two laymen who were mainly recruited from elderly and unemployed citizens, i.e., from the circles of those who had spare time and to whom the small compensation for taking part in court proceedings was not irrelevant. On paper, lay judges had all the rights and duties of professional judges, but in practice their role was reduced to a mere formality – they became passive and uninterested observers of the proceedings. If the original concept of a 'democratic trial' in which citizens could actively participate and even control judges had a certain justification and attractiveness, the way in which proceedings were conducted in practice made the active and meaningful participation of lay judges impossible. They could hardly get a comprehensive picture of any aspect of a case that dragged on through several hearings over a period of one or more years, and were dominated by a written exchange of party pleadings. However, as their presence was prescribed by law, from the formal perspective it opened various possibilities of abuse and procedural tactics for delay, especially because every defect in the composition of a court (e.g., the absence of one or more lay judges from a hearing) was a reason for the nullification of the judgment.

The 2003 Amendments of the Code of Civil Procedure completely reversed the previous rule: a single judge was established as the rule in the first instance, while collegiate bodies were to be exceptional. Additionally, in appellate proceedings a single judge might exceptionally reach a decision instead of the panel of three judges. He would have jurisdiction to rule conclusively on appeals against mere procedural decisions and on less important issues (disturbance of possession, costs of proceedings, issuance of payment orders). Three member panels instead of five member panels would now decide the same questions in proceedings of secondary appeal ('review', 'revision', *revizija*) before the Supreme Court.[29]

7.1.2 The stabilization of the *in rem* jurisdiction of the courts as a means of avoiding jurisdictional disputes

Another change of a mixed organizational and procedural character relates to the relativization of the *in rem* jurisdiction of the courts. Under the 2003 Amendments, under specific circumstances, a court that would otherwise not have *in rem* jurisdiction could become competent to validly resolve the dispute at hand (e.g., a commer-

[29] See the amendments to Article 41 Code of Civil Procedure. In the legislative debate, the drafters of the changes referred to Recommendation number R (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases of the Committee of the Ministers of the Council of Europe. Cf. Article 6: '[…] states should consider taking any or all of the following measures: a. not making use of more judges than necessary to deal with cases [...]'. According to this recommendation, a single judge can be used for the following matters: applications for leave to appeal, procedural applications, minor cases, where the parties so request, where the case is manifestly ill-founded, family cases, and urgent cases.

cial court would become competent to deal with matters falling within the jurisdiction of a municipal court and *vice versa*). Within the Croatian justice system, the role of specialized courts is not too significant – it is limited in civil proceedings to commercial courts as a counterpart to the courts of general jurisdiction. Notwithstanding, under the rigid rules of the past every change in the *in rem* jurisdiction of the courts led to a lack of jurisdiction. The challenge based on lack of jurisdiction could be invoked at any stage in the proceedings – moreover, the court was obliged to rule on them *ex officio.* This created a significant opportunity for the obstruction of a whole series of proceedings. Practically every decision by which a court found lack of *in rem* jurisdiction led to delays in proceedings that could last for several years. At the same time, the rules on the *in rem* jurisdiction of the courts changed frequently so that many cases had to be transferred by one kind of court to another. This transfer of cases generally happened without the participation of the parties. It is significant that it was jurisdictional ping-pong of exactly this kind which brought about at least part of the most disastrously inefficient proceedings. Some such cases in relation to the Republic of Croatia had their epilogue before the European Court of Human Rights that found violation of the rule of fair trial within a reasonable time under Article 6 of the Rome Convention.[30]

The official explanation of the new amendments therefore expressed the view that the

> 'legal and political importance of the rules of *in rem* jurisdiction are not such as to justify the quashing of judgments even after several years of proceedings and that the significance of competence issues, as issues that do not concern the essence of things, should be reduced to the minimal possible extent'.[31]

Thus, the 2003 Amendments provide that courts may decline jurisdiction for this reason only prior to the commencement of substantive arguments, i.e., at a preparatory hearing or – if such a hearing is not held – at the first hearing. After substantive oral pleadings at the first hearing, the parties are precluded from raising *in rem* jurisdictional objections – the jurisdiction may be considered ratified and the court can therefore continue and reach a final decision of the dispute regardless of the possible initial lack of *in rem* competence (e.g., a municipal court becomes competent to make a judgment in cases where commercial courts are competent). This proposal was partly attacked in parliamentary discussions because of the possibility that a 'non-specialized' court would decide cases where special expertise was necessary. However, it was also considered that the positive effects of this measure might considerably surpass any possible lack of specialist expertise which, in matters of the civil and commercial justice, has a very limited importance.

30 See, e.g., the Rajak case, *supra* notes 3 and 4.

31 From the explanatory notes attached to the draft 2003 Amendments (Ministry of Justice materials dated November 2002, unpublished).

7.2 *Changes with regard to the introduction, selection and taking of evidence*

7.2.1 General principles: relinquishing the inquisitorial principle in producing evidence, abandoning the principle of the material truth

Much more significant changes relevant both to practice and to procedural theory deal with the process of evidence-taking. Expressed in terms of procedural principles, the powerful inquisitorial authority of the court in gathering evidence is intended to be almost entirely abandoned and replaced by the rule that evidence is produced, more or less exclusively, on the initiative of the parties (adversary principle).[32]

By this course of reform Croatia would, at least on paper, move away from the activist concept of the system of justice as partially inherited from Austrian civil procedure and Franz Klein. However, this demands additional explanation. The main motivation for the changes in this field was again the attempt to accelerate proceedings, i.e., to remove possible generators of delays and the long duration of proceedings. This may sound curious since the original inquisitorial authority, as conceived in Klein's reforms, was aimed precisely at producing quick, inexpensive and efficient hearings unburdened with formalities. However, it seems that in Croatian reality, inquisitorial authority perverted the original intentions, and became a significant generator of the deceleration of proceedings. Among other arguments, it has been pointed out in particular that inquisitorial authority provided a leeway for procedural abuse and the obstruction of proceedings.

The explanation lies partly in procedural forms and practices, and not in the text of the Procedural Code. The general rule about the possibility of taking evidence *ex officio* was in law provided as an optional authorization, i.e., as a right, and not a duty, of the court. However, this possibility has often been interpreted in practice as an obligation. For example, higher courts would regularly quash judgments on appeal if the appellant referred to evidence that had not been taken at trial if such evidence might be considered relevant, irrespective of whether such evidence had been introduced (or even mentioned) by the parties. Such an approach was supported by the doctrine of the primacy of the 'material truth'. This concept was legitimized by the provision that established the 'court's duty to completely and truly establish disputable facts' (Article 7 paragraph 1).

Absolute priority of the 'material truth' above the efficiency of the trial and legal certainty partly originated in the socialist period. By adhering to the principle of the 'material truth', the socialist system found an ideological justification for political control over the justice system: the 'material truth' always had precedence over 'unnecessary, even damaging procedural formalisms'.[33] Such an approach resulted

[32] See the changes in Article 7 Code of Civil Procedure: the rule that 'the court can take the evidence not proposed by the parties if it is important for decision-making' is deleted and replaced by a general rule that 'parties have the obligation to state the facts on which they base their applications and to propose the evidence necessary to determine those facts'.

[33] On the political background of the theory of the material truth see A. Uzelac, *Istina u sudskom postupku (The Truth in Judicial Proceedings)*, Zagreb, Pravni fakultet, 1992.

in the weakening of the authority of court decisions – they had an ever-provisional nature because of the wide possibilities for their contestation, *inter alia* due to the failure to exercise the indispensable judicial activism in gathering evidence and fact-finding. However, although such an approach was largely rooted in socialist ideology, the inquisitorial psychology and inquisitorial consciousness among judges – especially those in higher ranks of the judicial hierarchy – survived socialism.

It may be somewhat peculiar to note that the actual text of the socialist law offered several possibilities for a completely different approach. Among other things, in spite of the possibility of taking evidence *ex officio*, rules on expenses did not allow that evidence be produced if the expenses of evidence-taking were not paid in advance by the parties.[34] But this opportunity to limit the inquisitorial authorities to the mere stimulation of party-driven evidence-taking was disregarded. In practice, even in such situations higher courts would consider on appeal that establishing the truth had priority and would revoke decisions because of the failure to 'truly and completely establish the facts of the case'.

The alleged failure to introduce some pieces of evidence at first instance was never compensated for at the appellate stage. The possibility of a hearing of evidence at second instance created by the Code of Civil Procedure was in reality abrogated in practice – such hearings never became reality in Croatia. This was partly due to the theoretical justification that the appellate court should not be turned into a trial court. Therefore, even under positive law second instance hearings could have only a limited scope for rehearing evidence taken at first instance, while new evidence was barred at second instance.

So the appellate courts found a universal answer to every factual doubt – returning a case for retrial. For higher courts, this was a comfortable and practical solution for a number of reasons. The annulment of a judgment would in statistical terms be considered a successfully resolved issue in the evaluation of the performance of appellate judges. By quashing a judgment, they would also confirm their commitment to a search for truth. At the same time, responsibility for the final resolution of the dispute was avoided, i.e., transferred back to the court of first instance. Striking down a 'mistaken' decision also reconfirmed their epistemological superiority and their legal authority over first instance judges. The possibility of the unnecessary annulment of a judgment (e.g., if the retrial would result in the same findings, which happened quite often) did not, *sub specie aeternitatis*, cause tragic consequences. If the annulled judgment was correct and the 'omitted' evidence did not modify the previous findings, the court of first instance could issue a new judgment with the same content, and justice would be considered to have been done.

The only nuisance, of little significance from the perspective of the higher court, consisted in the fact that rejection of the decision meant that the actual social conflict was far from being over. In practice, higher judicial authorities never had any real contact with real parties, and never had the opportunity to experience at first-hand their feelings with regard to such a restarting of the clock and the repetition of the often traumatic (and expensive) trial. Decisions about appeals were

[34] Article 153, paragraph 3 Code of Civil Procedure.

reached at closed sessions of appellate court panels, without the presence of the public – without the presence even of the parties and their lawyers. This may have affected the percentage of decisions annulled, which has remained high. Procedural rules also did not contain any limitations on the number of annulments and retrials allowed within the same proceedings. Not infrequently cases occurred in which judgments were quashed two, three or more times, many times for factual reasons.

Practice in the lower courts tried to adjust to these approaches and demands of the higher courts. In the evaluation of trial judges, annulled decisions had a negative impact and meaning, resulting in poor grades and less prospect of advancing to higher judicial posts. In order to avoid the annulment of their decisions on factual grounds, first instance judges developed a procedural style that insisted on every, even remotely relevant, piece of evidence. Court hearings were postponed several times if such evidence was not obtained, and consequently the proceedings dragged on for months and years. In combination with the unlimited possibility of introducing new facts and evidence and the low level of procedural discipline,[35] the inquisitorial style and psychology became one of the most important generators of inefficiency in court proceedings. The amalgamation of all these elements led to a type of procedure that was very distant from its proclaimed ideal – a quick, cheap, public, direct and concentrated procedure.

For all these reasons, the 2003 Amendments envisaged a quite radical turn away from judicial authorities producing evidence *ex officio*. According to the rules, the court would have to restrict its evidentiary efforts to the evidence proposed and produced by the parties. In other words, the court would be prohibited even from taking any evidence unless it was relied upon by the parties, except in the case where such evidence prevented illegal dispositions by the parties. It was considered that only by adopting such a solution could the *onus probandi* be clearly transferred to the parties. As stated in the legislative debate 'in the future [after adoption of the 2003 Amendments] the truth [in judicial proceedings] would only be what the parties could prove before the court'.[36] Henceforward, in the process of fact-finding, the court would maintain only a controlling function, and an activist approach would be permissible only if there was a legitimate belief that the parties in the civil proceedings by their actions would be violating mandatory law or acting against public morality.[37]

It remains to be seen how the strengthening of the adversarial structure of civil litigation will be applied in practice. It is also uncertain if, how and when these changes will contribute to the acceleration of proceedings. The new procedural rules could certainly reduce the likelihood of the annulment of decisions for failure to take certain pieces of evidence; but that applies only to evidence that was not proposed by the parties in the proceedings. This is an important psychological step, but

35 For these elements see *infra*, chapters 7.2.2 and 7.2.3.

36 From the speech of the Minister of Justice made while introducing the changes to the Parliament, *Izvješća Hrvatskog sabora* (Reports of the Croatian Parliament), number 352, 15 January 2003, p. 21.

37 See Ministry of Justice materials entitled 'On the Reform of the Justice System and its Directions', June 2002, unpublished, p. 52.

it may prove insufficient to remove altogether the inquisitorial consciousness of the judges. The possibility of a tolerant judicial attitude towards vexatious and irrelevant evidentiary proposals still remains, and there is even a chance – now parties know that they cannot rely on judicial activism in evidence taking – that such evidentiary proposals will occur more intensively. On the other hand, no sanctions are prescribed for a court that in opposition to the text of the law continues ordering evidence *ex officio,* and there are no guarantees that higher courts will break with past practice rather than make minor changes in the explanation of annulment decisions. As regards the potential negative sides of a consistent application of the new text, it seems that after the 2003 Amendments come into effect courts will be prevented from acting and ordering evidence even in cases where Equity would so require (e.g., in cases in which socially vulnerable parties appear without lawyers and adequate knowledge and resources).[38]

In any case, it is clear that a mere change in the text of the law will not by itself lead to substantial improvements. Efficiency can be raised, and proceedings can be accelerated in a proper and just way, only if amendments in the law are accompanied by a comprehensive change in approach and awareness – meaning a real shift from an inquisitorial towards an adversarial style of procedure. For that purpose, comprehensive programs of education and training will be necessary for all legal professionals (judges, lawyers, experts, etc.). It is quite likely that a longer period of adjustment will be needed to experience actual changes and their results.

7.2.2 The concentration of proceedings – The obligation to introduce and present evidence at the preparatory hearing and at the main hearing

The amendments to the Code of Civil Procedure introduced changes to the role and concept of several procedural institutions with the intention of concentrating proceedings.

The first change relates to the requirement that the defendant submit a written statement in reply to the claimant's allegations. Prior to 2003, such a written statement of defence was optional, while after the changes come into effect, this will be mandatory in most cases.

The obligation to submit a written statement of defence under the Amendments has a dual function: to strengthen procedural discipline and to concentrate proceedings. In the first place, if a defendant fails to provide a written statement of defence, a default judgment may be entered against him even at this early stage. In addition, the defendant's obligation to answer in writing should gain importance because of the new obligation of the defendant to express his/her position in rela-

[38] As a specific compensation, it is provided that the judge may, when this is needed for the correct resolution of the dispute, 'advise the parties about the need of submitting factual allegations and proposing certain evidence', along with an explanation for why this is considered to be necessary. See new Article 219, paragraph 2 Code of Civil Procedure. Whether this will be enough (because it depends on the discretion and good will of the court) or too much (if a failure to advise the parties would be considered to be a ground for appeal) is yet to be seen.

tion to the suit in full when replying and to enclose the documents he/she refers to, if it is possible.

The second change relates to the role of the preliminary hearing or the first main hearing. The Amendments have not changed past conceptions of the preliminary hearing as an optional stage in proceedings.[39] But the new rules have strengthened the obligation of the parties to state all facts and propose all evidence in their written statements of claim and defence, either at the preliminary hearing, or, at the latest, if the preliminary hearing is not held, at the first oral hearing on the merits. Sanctions against the delayed presentation of facts and evidence under the new concept, however, do not include exclusion of the right to present them altogether, but only the obligation to pay all the costs that would arise from such delayed statements. The court is to rule on such costs immediately, irrespective of the outcome of the case.[40]

Although these measures were optimistically announced as a great step towards the concentration of proceedings, it has yet to be seen what their real effect will be. Delayed statements of facts and evidentiary motions will still not be disregarded.[41] The threat to award expenses may prove insufficient, especially if judges hesitate to make use of it. Another problem may occur when determining the amount of damages caused by delayed motions for evidence. If costs are difficult to determine, it could further undermine the efficiency of the proceedings, and if strong proof of such costs is required, under certain circumstances this may in practice eliminate any advantage in using it. A somewhat stronger solution that would enable the court to determine deadlines for introducing new facts or proposing evidence would surely be more efficient, but at the present stage in the reform of the civil proceedings it was not accepted. It is therefore questionable whether the new rules will really contribute to the concentration and acceleration of first instance proceedings. Undoubtedly, the current practice of conducting proceedings through a large number of hearings at long intervals over the course of one, two or more years, can be considered among the main obstacles to the acceleration of the proceedings. It is also a precondition for the meaningful realization of some of the other procedural principles that the Code of Civil Procedure be particularly based on the principles of directness and free evaluation of evidence.

39 The fact that, after the changes, a single judge can rule in the great majority of civil cases, will lead in practice to the elimination of preliminary hearings, since they are held only if the trial is conducted by a panel of judges.

40 See the new text of Article 299 Code of Civil Procedure.

41 As stated in the explanatory material to the 2003 Amendments, '[…] a radical limitation of that right [*of beneficium novorum* in first instance proceedings] was avoided. It was assessed that by that, because of the general level of legal culture in Croatian society, abolition of the right to present new facts and evidence would seriously jeopardize the correctness and the accuracy of adjudication and legal certainty in general'. See Explanatory Material, II.4 *in fine*.

7.2.3 Abolishing the right to introduce new facts and evidence in second instance proceedings

Ideological proclamations that the search for truth is the supreme goal of civil proceedings resulted in expansive possibilities for introducing new facts and evidence throughout the trial, even in the course of appellate proceedings. This latitude provided a substantial potential for slowing down proceedings and their recurrent remand to some earlier stage – almost to the very beginning – in the case of newly discovered facts and evidence.

As already stated, the possibility of introducing new elements in first instance proceedings was practically unlimited – new facts and evidence could be introduced, practically without any sanction, at any time between the commencement of the suit and the conclusion of hearings. 'The privilege of relying on new facts and evidence' (*beneficum novorum*) existed, however, also in respect of legal remedies. As for the appeal, the right to introduce novelties was very widely prescribed in the Code of Civil Procedure, in principle even without limitations, as long as the new facts related to the period covered by the first instance judgment. Although even older procedural theory admitted that such a right 'has a negative effect on the concentration and acceleration of the proceedings, […] weakens the discipline of the parties, makes possible the abuse of procedural rights' etc., it was widely asserted that the search for the truth makes it indispensable. Under the old rules, the court would have to take into consideration any relevant facts and evidence, even if introduced only by means of appeal.[42] The only negative consequence consisted in the obligation of the party that introduced them to compensate for the costs incurred in accordance with the *culpa* principle. A rare limitation was introduced in 1990 through the rule that evidence may not be introduced on appeal if such evidence had been proposed at first instance proceedings but not been produced because of the failure of the party to advance the costs.

The 2003 Amendments went one step further and generally excluded new facts and evidence altogether from appellate proceedings. In that way, appellate procedure was reduced to the control of the proceedings of the lower court based upon evidence and facts presented at the trial. The only remaining opportunity for introducing new evidence and facts exists through a special legal remedy, the motion for retrial (*prijedlog za ponavljanje postupka*). The main reason for these changes was, as stated in the explanatory materials to the 2003 Amendments, to combat the practice whereby

> 'fraudulent parties, by concealing some facts or evidence during first instance proceedings and stating them only on the appeal, succeeded in securing the annulment of the contested judgment and having the case returned for retrial'.[43]

[42] See S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo*, *supra* note 16, § 143/20, 156/8.

[43] Explanatory Material to the 2003 Amendments, p. 45 (commentary to Article 195 of the Amendments).

Abolishing the right to rely upon new facts on appeal will surely be an important step towards removing possible abuses. These changes could contribute more significantly to the general efficiency of the trial if appropriately accepted and applied in practice. However, some other potential problems in relation to appeals and motions for retrials will still have to be overcome. The impossibility of introducing new facts on appeal could lead to an increased use of motions for retrial. The motion for retrial is a remedy that can be sought only after appeal, if the appeal was launched for procedural reasons. For example, retrial based on new facts will have to wait until appellate proceedings are over. The effectiveness of this reform will depend to a great extent on the ability of the judicial system to resist a potential wave of motions for retrial. Otherwise, instead of acceleration, the opposite effect could be reached with additional negative consequences (e.g., a further reduction in the authority and firmness of *res iudicatae*).

7.3 The strengthening of procedural discipline

7.3.1 New sanctions for the abuse of procedural rights

The main political slogan on the reform of civil proceedings related to the need to strengthen procedural discipline. According to the prevailing assessment of the reformers, the long duration and inefficiency of the trial are determined to a significant extent by the ability of the parties in proceedings to use their procedural rights to obstruct and even block the proceedings and to remain unpunished for such behaviour. The cause of the current abuses was not completely uncontroversial in the legislative debate: while some assigned the main guilt for obstruction to the parties (more precisely, to their lawyers), others argued that the greater fault lay with the judges who had failed to use existing mechanisms to fight abuse. In any case, one of the main ideas behind the reform was to emphasize the right and duty of the court to ensure procedural discipline, if necessary by stronger measures for fighting procedural abuses.

The new text of the law supplements the old, general formula that parties have a duty to use their rights conscientiously with new instruments aimed at enforcing such a duty. The court is now authorized to fine parties or their representatives for 'significant abuses of their procedural rights'.[44] If a decision to impose such a fine is made, however, the sanctioned party may appeal the decision and thereby suspend its enforcement. But, as an indirect sanction, the court can oblige the abusing party to the pay expenses caused by the party's fault independently of the outcome of the litigation, and such a court decision may be executed immediately, without delay.

At first sight these amendments may to a certain extent invoke the Anglo-Saxon concept of *contempt of court*. It seems, however, that in this respect the reform still went only half way. In other words, an appeal that may suspend enforcement in the case of fines could significantly limit the efficiency of this measure. Although maximum fines are not small (up to about € 1500 for individuals), their minimum is

44 See the text of Articles 9 and 10 Code of Civil Procedure.

relatively low (less than € 100). From past experience in similar situations, judges are reluctant to impose fines in civil proceedings, and if they use them, the minimum amounts are preferred. It can be supposed that a similar practice will continue with respect to the new fines, especially because it will surely be quite a while until the broad legal standard of 'significant abuses of procedural rights' will be clarified by case-law and legal theory.[45] For a resolute application of the new sanctions, a judge of impeccable ability, will and discipline is needed. In the present circumstances, this condition will probably not easily be met.

7.3.2 Avoiding vexatious motions on the delegation of court jurisdiction and challenges to judges

In relation to the fight against abuses of procedural rights, a more practical impact may be obtained from some other, minor changes aimed at reducing or disabling some of the delaying tactics which are widespread in practice.

One such change relates to petitions to delegate court jurisdiction (motions to have a case adjudicated by another competent court, e.g., because of reasons of convenience and costs). Until now, the competent court has been obliged to suspend the proceedings until a decision on such a motion was made by the highest court of the specific branch of that jurisdiction. In practice, this might cause delays of several months due to the case-load of the Supreme Court or the High Commercial Court. As some parties used such a motion only to gain time, new rules provide for the continuation of the trial while these courts decide on such motions.

The second, similar change excluded ungrounded challenges to judges, or general requests for the exclusion of all the judges of a certain court, or repeated challenges. The judge who is challenged may now exceptionally continue to act if he/she considers that the challenge is manifestly ill-founded and aimed at obstructing the proceedings.[46]

7.3.3 New rules of delivery

In the opinion of many, one of the most important sources of inefficiency has been inefficient rules and practices relating to the delivery of written communications. Problems in the application of these rules have provided parties with abundant opportunities to obstruct proceedings by avoiding delivery.

Admittedly, the rules of delivery in the Code of Civil Procedure originated in the nineteenth century. They were better adjusted to rural areas than to the new cir-

45 All the more so because the concept of the 'abuse of rights' is unclear. Some even argue that this term is a *contradictio in adiecto*, since 'rights' refer to actions that are generally permissible and available to parties, and therefore these parties cannot be punished if they make use of them. See 'Abuse of rights in the Civil Proceedings', *Newsletter of the Forum of the Zagreb Law School*, 2002, p. 2 (available at <http://www.zakon.pravo.hr>).

46 Changes to Articles 73 and 74 Code of Civil Procedure. If a petition is manifestly ill-founded and vexatious, the court is also authorized to fine the applicant and rule immediately on the costs incurred by the other party.

cumstances of urban life. Also, rules about delivery insisted to a large extent on personal delivery of the communication to the addressee, while some other types of delivery, e.g., substitute, presumed or fictional deliveries were provided only for very exceptional cases. However, it should be noted that the abuse of existing rules was intensified in practice through extreme formalism in their application and reluctance to use some of the alternative methods offered by the law.[47]

One more reason led to inefficiency in delivery in spite of elaborate rules of court delivery; in practice it was carried out by postal employees. As postmen, they were not trained in the application of the rules of court delivery. They, therefore, often confused postal rules with rules of court delivery, resulting in irregularities. Court bailiffs, who existed as well, were not adequately trained, equipped and motivated either for the adequate carrying out of their job.

For example, in the typical situation of delivery in cities, delivery was carried out on 'a working day, by daylight' when there was often no one at home, if both spouses were employed and the children went to school. Other persons who were allowed to receive delivery in place of the addressee were often not helpful – the concierge has practically died out in residential buildings in Croatia, and neighbours in urban areas (if they could be found at all) were rarely ready to assume the risk of accepting court deliveries. In such situations, a letter which could not be delivered would be returned to the court and the delivery would be repeated – even an unlimited number of times – while the proceedings as a rule came to a halt.

All these reasons induced the authors of the Amendments to change the rules of delivery quite extensively. The new law thus introduces a series of new articles authorizing alternative modes of delivery.

One new type of delivery anticipated by the law is delivery through a public notary. This possibility is conditioned upon a request from the party who will bear the expenses of notarial delivery. The second possibility consists in delivery to an address agreed on by the parties (including delivery to a person stated in the agreement). However, for the validity of such an agreement concluded before the filing of a suit, a written form and a certified signature of the defendant are required (except in commercial agreements). The third possibility consists in using private delivery services ('legal entities registered in this country or abroad for the delivery of written shipments'). However, for their usage a previous written agreement is also required, as is the case for the delivery to an agreed address. During the proceedings (but not before!) parties may agree that pleadings be directly exchanged between parties by registered mail. If both parties are represented by attorneys-at-law, such a manner of communication can be established by the court.[48]

The new delivery methods created by the 2003 Amendments were surely designed to accelerate civil proceedings. It seems likely, however, that the changes were again incomplete.

47 E.g., the power of the court to determine the delivery of communications 'in another place and/or in another time' from those prescribed by the law. Article 140, paragraph 2 Code of Civil Procedure (now amended as paragraph 3).

48 See the new Articles 133a to 133d Code of Civil Procedure.

Although only their use in practice will be able to verify their usefulness, it seems that certain of the changes are in fact more restrictive than permissive. It can even be argued that some rules go less far than what had been established by the practice of individual courts. Postal delivery remains the prevailing method of delivery, and among other possibilities, delivery by a notary public is openly favoured but at the expense of the parties and without any real guarantee of success.[49] As concerns the remaining three methods (agreed address, private delivery services, direct exchange of pleadings) the requirement of a prior written (and certified) agreement between the parties might seem more of an obstacle than an encouragement. Even more importantly, if there is no prior agreement in writing (which is most likely the case in most litigation), the new rules do not recognize the validity of delivery through today's very widely-spread, reliable and standard commercial delivery services (DHL, FedEx and similar organizations), thereby potentially reversing the case-law of some courts that had already begun to recognize them as an alternative of equal force to postal delivery. There is also no progress towards the recognition of other social realities, e.g., new technological means of communication (e-mail), not to speak of some already old-fashioned ones (fax).

For these reasons it will be interesting to see whether these new provisions have any positive effect in accelerating proceedings. In my view, the chances for progress are greater with respect to some other changes, e.g., provisions about the delivery to persons performing a registered activity (companies, institutions, merchants) to whom it will be possible to carry out a constructive delivery (delivery to a notice-board of the court) if delivery is not possible at the registered address. Another provision intended to strengthen procedural discipline is the express obligation of the party to inform the court about every change of address during proceedings and later, up to six months after the coming into force of the legal validity of the decision.[50]

In general, it still seems that the changes in relation to delivery are potentially the most controversial (and maybe the weakest) part of the reforms directed at accelerating judicial proceedings. It may easily happen that some past systemic difficulties could even become greater after the introduction of these changes – for example as the result of a combination of extensive, technical and highly formalized rules of delivery and the use of regular postal employees who are not trained in applying them. Expectations that delivery will become inexpensive and would become efficient after the new changes may therefore turn out to be an illusion.

49 So far, public notaries in Croatia have not had any role and/or experience in the delivery process. Given the wide range of their other functions, and plans to make this range even wider by new laws (hearings in inheritance proceedings, actions in enforcement proceedings) it is not likely that delivery will be at the center of their interest in the future. Therefore, it is not likely that notaries public will become good bailiffs or *huissiers de justice*.

50 New Article 145 Code of Civil Procedure.

7.3.4 Sanctions against procedural inactivity by parties, default judgment

The strengthening of the accusatory structure of civil proceedings and procedural discipline and the attempt to concentrate the main hearing also found their reflection in the possibility of attaching negative consequences to inactivity on the part of the defendant. Until 2003, default judgments could be given only at the preliminary hearing or the first main hearing provided that the defendant had failed to contest the claim until that time, either orally or in writing. By introducing a universal obligation to submit a defence by way of a written statement, a new type of default judgment was made possible. This new default judgment (*presuda zbog ogluhe*) will replace the old default judgment (*presuda zbog izostanka*) in all cases in which the defendant is ordered to submit a written statement of defence but fails to do so within the time-limit determined by the court. Both default judgments will be based on the presumption that a passive defendant acknowledges the claimant's factual allegations.[51]

A defendant's obligation to submit his defence will consequently be shifted to an earlier period, i.e., generally to 15 to 30 days after he has received the statement of claim. The intention of the amendment was to stimulate an early presentation of their case by both parties, and to accelerate procedures, in particular if there are no serious legal and factual issues to be resolved, but the suit is the consequence of other circumstances (the defendant's negligence, difficulties in securing payment, etc.).

Indeed, as the obligation to reply to the claim still does not entail an obligation to submit all available defence arguments and evidence in favour of the defendant's allegations, it can be presupposed that the current, very permissive practice with respect to late pleadings will not be significantly changed. There is also no guarantee that, just as today, 'empty shells', i.e., statements of defence that do not contain any substantial argument, but merely a denial of the claim, or even purely procedural matters (e.g., an application for the adjournment or prolongation of deadlines, an announcement that 'a comprehensive reply to the claim will be given later on', etc.) will be rejected (i.e., refused to be considered as a substantial presentation of the defence). The continuation of such practices could significantly restrict the effect of the changes on the concentration and acceleration of the proceedings.

The negative consequences of the defendant's inactivity will further be limited to the very initial stages of the proceedings, as default judgments can be given only prior to the joinder of issue. Subsequent defaults can be penalized only indirectly, if the court reaches a judgment based on unilaterally presented facts and evidence. The efficiency of such indirect sanctions for passivity of the parties in the proceedings will depend to a great extent on whether the adversarial principle will really be accepted and implemented by judges and the courts.

51 See Article 180 of the 2003 Amendments (new Article 331b).

7.3.5 The issue of party representation – The fight over the legal monopoly of registered attorneys

The most disputed point in the discussions that surrounded the reform of civil procedural law related to the right of representation and self-representation in civil proceedings. The main issues were whether parties should be admitted to appear in person before the court, and who should be entitled to represent them.

The Code of Civil Procedure of 1976 was very permissive with regard to representation and self-representation, enabling parties to defend their interests directly and without any representative. In choosing a representative, the party was permitted to retain any person, regardless of his/her qualifications and affiliation to a profession or professional group, as a representative in the proceedings. From the very announcement of the reform of civil procedural law, the Croatian Bar Association lobbied energetically for the introduction of a monopoly on representation (i.e., that only registered attorneys-at-law might be selected as representatives) and for the introduction of mandatory representation (*Anwaltszwang*) in potentially all types of litigation. This position encountered resistance, especially among representatives of corporate lawyers who would also have been affected had the proposal succeeded. The debate lasted several years and was reflected in the professional periodicals.[52] Irreconcilable opinions and the impossibility of reaching a satisfactory or even a compromise solution regarding this question was one of the main reasons why reform of civil procedural law was delayed for several years.

In the end, the current provisions and the *status quo* was in practice maintained in most courts, with only marginal limitations being introduced. The possibility of self-representation remained, but the circle of persons who could be representatives in litigation was narrowed. As a rule, if a party engages a legal representative, that legal representative must be an attorney-at-law whose monopoly in claiming fees for such a function was confirmed. Yet, as an exception, individuals have retained the right to appoint legal representatives from within the circle of their close relatives (spouses and children/parents). Legal persons (companies) further retained the right to be represented in legal proceedings by their corporate lawyers, or even any other of their employees.[53]

Although many arguments were offered to prove that qualified and professional representation would significantly strengthen procedural discipline and accelerate civil proceedings, it seems that the point has not as yet been proven. The majority of such arguments were tainted by the clear self-interest of their proponents, and impartial observers seem not to be convinced as to the final outcome. In reality, despite the absence of any obligation to engage an attorney in civil litigation, parties in Croatian civil proceedings have so far in most cases engaged lawyers if they were

[52] Among others see M. Giunio, *Pravo i porezi*, 9, 1997, p. 24-29; M. Hanžeković, *Pravo i porezi*, 11, 1997, p. 1127-1129; J. Kos, *Pravo i porezi*, 12, 1997, p. 38-42; M. Kovač, *Tvrtka*, 9, 1996, p. 51-53. For a synthesis of the discussions about mandatory representation see A. Uzelac, 'Obvezatno odvjetničko zastupanje' ('Mandatory representation by attorneys'), *Pravo u gospodarstvu*, 37, 2, 1998, p. 149-185.

[53] See the amended Articles 89-91 Code of Civil Procedure, including the new Article 89a.

able to afford legal services. On the other hand, there may be some truth in the argument of those who claimed that the participation of lawyers in the litigation process does not necessarily have an accelerating and simplifying effect on proceedings. Spectacular results could therefore hardly be expected even if an absolute duty to engage a lawyer in litigation had been imposed. Party representation of a high quality will become indispensable not as the result of a statutory requirement and the creation of a professional monopoly but only if and when inquisitorial psychology and attitudes are abandoned, and adversarial elements accompanied by the intended concentration of the proceedings are implemented.

7.3.6 Procedural discipline in relation to the court

Mutual accusation turned out to be a very popular strategy for explaining inefficiencies in the judicial system as between the different groups of legal professionals (attorneys, judges, experts etc.). Amendments to the Code of Civil Procedure, although supported by a slogan that demanded increased party discipline (and/or discipline of their lawyers) and fighting against procedural abuses, in fact admitted that nobody is immune from responsibility – not even courts or judges. Consequently, several new norms address procedural discipline.

Particularly typical cases of delays in civil proceedings (typical also as cases of the disrespect of procedural norms) were linked to legal deadlines in the process of the giving of judgments. Although the law prescribed that judgments had to be made and communicated orally to the parties immediately after the conclusion of the main hearings, this happened only in extremely rare cases. The pretext for failing to observe this norm was an exceptional option that allowed the postponement of decision-making 'in more complex cases' in which judgment would not be announced orally, but only delivered to the parties in writing. According to the same provision, a written judgment should be finalized and sent to the parties within eight days of the conclusion of the main hearings.[54] However, this deadline – generally considered unrealistically short – was almost never respected. Instead, dispatching the judgment to the parties took place often months, even years, after the end of the hearing.

The 2003 Amendments tried softer methods to achieve acceleration and to raise the procedural discipline of the trial judges. The time-limit for finalizing and dispatching the judgment was extended from eight to thirty days, with the possibility of another extension of up to thirty days. The decision on the extension will have to be made by the Chief Justice (Court President). The consequences of failure to meet these deadlines are not further elaborated in the Amendments, thereby indicating that the only option for rectifying such an omission will be disciplinary proceedings initiated against judges who do not observe them. Whether this will be a sufficient sanction greatly depends on the future actions of the Court Presidents who are authorized to initiate disciplinary proceedings, and on the support of the

[54] See Article 335 Code of Civil Procedure.

State Judicial Council, which decides on the disciplinary responsibility of the judges.

7.4 Reform of the system of legal remedies

7.4.1 Changes in relation to appeal

Considering that delays occur most often in appellate proceedings, it might be said that the biggest news in the 2003 Amendments lies in the fact that, unexpectedly, the appeal itself has undergone very few changes.

I already mentioned the changes relating to the right to introduce new facts and evidence at appellate proceedings and the exceptional possibility that a single judge will make decisions at appellate proceedings.[55] This is probably the most far-reaching breakthrough in appellate proceedings. The majority of the other changes are only of a limited character. Smaller changes in the list of fundamental procedural errors ('reasons for absolute nullification of the judgment') were mostly caused by other amendments, e.g., as regards the composition of the court tribunal at the trial stage. Some errors that a court had to take notice of *ex officio* in appellate proceedings now have to be invoked by the parties, as another measure of strengthening procedural discipline and the adversarial structure of proceedings.

However, in two important aspects the changes did not go deep enough to penetrate to the neuralgic points of the process – those that may be counted among the important causes for the duration and efficiency of appellate proceedings. One change, at least on the formal level, may even be seen as a capitulation in comparison with the previous law.

As demonstrated in some of the cases against Croatia before the European Court of Human Rights,[56] the reason for violations of the right to a fair trial within a reasonable time often relate to the fact that appellate courts generally restrict their intervention to annulling the decision of the lower court and remanding the case for retrial. Although the number of annulled decisions may diminish as a result of the reduction of the inquisitorial powers of the court, enough space is left for the old inefficient practices to survive. Higher courts still can (and must) return the case to the court of first instance when factual and/or procedural errors are found, and the number of times that a case may be returned for rehearing is still not limited. The possibility of holding second instance hearings, which had long existed in theory, although it was rather infrequently used in practice, has now simply been deleted from the text of the law. One might state that this move presents a recognition in practice of the defeat of efforts to open the doors of appellate courts to the public, and to introduce direct, transparent, and responsible justice into appellate courtrooms.

Thus the change that might have been effected, but is still missing, relates to the possibility of hearing the voice of the parties at second instance proceed-

55 See *supra*, chapters 7.2.3 and 7.2.1

56 See, e.g., the Mikulić and Rajak cases (*supra* note 3).

ings on a regular basis. Admittedly, as a replacement for the second instance hearing, the 2003 Amendments provided that the 'court of second instance, when it finds it necessary, may summon parties or their representatives to a session of the panel of the appellate court'.[57] But that remains only an option, and the court does not have to use it. It is not likely that appellate judges will summon the parties more often than they ordered second instance hearings – and that was almost never. Even if such 'half-open'[58] sessions of the court will be held more frequently, the rights and the roles of the parties and their representatives at those sessions remain unclear.

7.4.2 Changes in other ('extraordinary') legal remedies

Amendments to the Code of Civil Procedure did not abolish entirely the special legal remedies that may be launched against *res iudicatae* (the so-called 'extraordinary' legal remedies). The most significant change consists in abolishing one such remedy – the so-called 'request for the protection of legality' (*zahtjev za zaštitu zakonitosti)* by the State Attorney. This legal remedy was introduced after World War II into Croatian law as a result of the reception of Soviet law, and was clearly motivated by the doctrine of (socialist) state paternalism and the protection of State ('public') interests in private law disputes.[59] In the past three decades, this remedy has lost part of the background of State (public) interests and has become more an objective tool to harmonize the law and prevent illegalities. But, by strengthening the adversarial elements and the parties' role and position (as well as their responsibility for the course of proceedings) this legal remedy became systemically unsuitable and potentially dangerous. The official explanation for deleting the rules on the request for protection of legality was the 'removal of State controls' in civil proceedings, but it also pointed to some practical problems that had been caused by the fusion of the services of the State Defender's Office (the State Attorney who represents the State as a party to civil proceedings) with the service of public prosecution and the representation of public, general interests in all types of cases. As regards the acceleration of civil proceedings, not very much can be expected from abolishing this legal remedy because it was not used widely in practice.

The second extraordinary legal remedy that could bring the case before the Supreme Court ('revision', secondary appeal) also experienced important alterations. This legal remedy against final judgments of appellate courts was changed in a direction that is, to a certain degree, contrary to the attempt to accelerate proceedings.

57 New Article 362 paragraph 2 Code of Civil Procedure.

58 As opposed to the so-called 'closed' sessions of the appellate judges where neither parties nor the general public have access. Deciding in closed sessions was the rule in second instance proceedings in Croatia. I fear that nothing will really change in this respect.

59 See S. Zuglia, *Građansko procesno pravo Federativne Narodne Republike Jugoslavije (Civil procedural law of the Federal People's Republic of Yugoslavia)*, Zagreb, Školska knjiga, 1957, p. 570-573 (note 5 on p. 573). S. Triva, V. Belajec and M. Dika, *Građansko parnično procesno pravo*, *supra* note 16, § 153.

Until the 2003 Amendments, secondary appeal was admissible only if a set of conditions provided by the law was met, e.g., with respect to the amount in dispute or the type of case. The Supreme Court could neither admit cases not covered by those conditions, nor refuse to hear a case if it was admissible under the express rules of the law. The Amendments have for the first time introduced a discretionary power to decide on the admissibility of revision. This power is provided only in a positive, not in a negative direction, i.e., the court can decide to hear a case if it would otherwise not be admissible, 'if the decision on the merits depends on the solution of some issue of substantive or procedural law that is important for harmonizing the application of the law and/or the equality of the citizens'.[60] The justification for introducing such a discretionary power was found in the constitutional position of the highest Croatian court that, among other things, should also take care for the uniform application of the law. Although the official explanation of the new rules emphasizes the reaffirmation of the constitutional powers of the Supreme Court as the only goal, pointing to similar Austrian models,[61] it seems likely that some other factors also contributed to the widening of the scope of 'revisable' cases. Part of the motive may be that in 1999, under previous changes in the Procedural Code, the monetary thresholds for this remedy were raised considerably, allowing only the most valuable cases to be heard.[62] An impression was thereby created in certain circles that a majority of cases remained outside the reach of the third instance, and as a reaction, a way to loosen the tight rules was found.

While the new provisions might contribute to the harmonizing activities of the Supreme Court in certain cases, certain doubts remain as to the application of the *certiorari* system. The bill presented to Parliament provided that the Supreme Court was to decide on the admissibility of this recourse. However, at the last moment, the provision was altered, so that leave to apply for revision must now be obtained from the appellate courts, i.e., the very judges who passed the judgment. It seems that the change was prompted by the fear that new 'exceptional' revisions would slow down, or even block, the Supreme Court's activities. However, since the decision lies with the appellate courts only now, new dangers loom in that the various courts and judges will have different approaches. The outcome cannot be predicted and might range from a total absence of admissible cases to a great influx (or even a flood) of new 'revisions'.

8. Conclusion

In this text I have provided an account of recent efforts to accelerate civil proceedings in Croatia, focusing on the reform of civil procedural law. However, this analysis of the legislative reforms and their background may demonstrate another fact:

60 Amended text of Article 382, paragraph 2 Code of Civil Procedure.

61 See Explanatory Notes, at 2(II).

62 By amendments from 1999 (Official Gazette 112/99) the threshold of admissibility was raised from 3.000 Croatian Kunas to 100.000 Croatian Kunas (from € 400 to over € 13.000) and in commercial disputes from 8.000 Croatian Kunas to 500.000 Croatian Kunas (from about € 1000 to almost € 70.000).

that mere changes in legal provisions are hardly sufficient to produce effective changes in the existing situation. The history of the development of Croatian civil procedure (and other branches of law) offers more than enough examples of failed reforms – imported models that have started to live a life of their own, sometimes entirely different from the original plans and aims.

New amendments to the Code of Civil Procedure, planned as the most far-reaching reform of the law of civil litigation in the past fifty years, raise doubts as to what their real achievements are likely to be in practice even before they are officially adopted and implemented. There are two main reasons for this. Firstly, the provisions of the new legislation have ultimately gone only half-way, changing many details, but leaving unaffected some of the principal causes for delays and the unreasonable duration of process. The second reason relates to the fact that the changes basically attempted to establish – or perhaps, in rather stronger language, form – the same rules and principles that were already contained in the old law, but that were not implemented in practice. In so doing, one starting point remained unclear – whether the lack of respect and obedience for one set of legal provisions could be cured by changes in these provisions alone.

Yet, it would be wrong to conclude that, whatever happens, acceleration is impossible. The ideal of a fair trial within a reasonable time is too valuable to be abandoned. However, deep structural changes may be necessary to effectively guarantee this human right – changes in people, institutions and routines. As presented in this text, the period of transition from patterns of the socialist State to modern liberal democracy may be considerably longer and more difficult in the area of the judicial system. In Croatia, as in many other countries in transition, the path towards a highly competent, responsible and efficient Judiciary is often beset by paradoxes. The new approach, sensitive to the needs of citizens for an efficient Judiciary, needs new judges, ready to embrace it, as well as radical change in the state of mind of every other participant in the judicial process. On the other hand, it is exactly the ideology of a modern liberal State that has helped the survival of the old patterns and psychology, by stretching the principle of the independence of the Judiciary to the dominating layer of jurists formed and educated under wholly different circumstances, when slowness of justice was considered to be a virtue, and acceleration a dangerous exception. The vicious circle of self-reproducing patterns of delays and inefficiencies has to be broken. Whether Croatia will enjoy the human right to a speedy and effective justice system ultimately rests on the ability of the country to break that circle.

Mr. Richard Verkijk (Maastricht)

LEGAL AND OTHER ASPECTS OF MEDIATION IN EUROPEAN COUNTRIES

Tuesday, May 23

Legal aspects of mediation in European countries

Why is it that the European Union tries to stimulate ADR and especially mediation? What has mediation, in essence a non-legal procedure, to do with access to justice? The answers to these and similar questions are relevant for a better understanding of the importance of mediation as a means of dispute resolution.

Although mediation is essentially a non-legal procedure, lawyers should take an interest in mediation for several reasons. In the first place, a legal framework should be developed for mediation, even if it were only because mediation is often related to formal court proceedings. In the second place, practicing lawyers can be confronted with mediation and should be able to advice their clients about the risks that are involved in the choice to mediate – or the choice to abstain from mediation.

These topics will be adressed in this course, where appropriate from the point of view of a practicing attorney and mediator.

Literature

See some of the many materials available on the internet on ADR in Europe and in the UK:
On ADR in general http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_en.htm
Draft dir. http://europa.eu.int/eurlex/lex/LexUriServ/site/en/com/2004/com2004_0718en01.pdf
Greenpaper http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf
UK http://www.cedr.co.uk/index.php?location=/library/articles/legal_questions_about_mediation.htm

Further materials to be distributed during the course.

Mr. Vanja Bilic (Zagreb)

COURT- ANNEXED MEDIATION PROJECTS

Tuesday, May 23

WHETHER AND HOW TO MEDIATE – ETHICAL AND PRACTICAL CONSIDERATIONS

Except elements concerning particular kind of issue, There are a number of considerations for an attorney to make in deciding if, when and why to mediate. The two most common considerations are ethical and practical ones.

Attorney has duty to protect the best interest of his/her client, meaning that he/she has to represent client in order to establish clients rights in the fastest, cheapest, most practical way, in full volume, with proper material and personal satisfaction.

In that context: Is there an "ethical duty" of trying ADR? Questions about choosing and considering of choosing ADR, may be considered ad an ethical questions. The public considerations of the ethical duty recently become a current "hot issue" in some states in USA. The (perhaps overly simplistic) argument goes as follows:

- ADR methods, and mediation in specific, are more likely to settle, than not to settle cases at the minimal cost and risk.
- If case could be settled (in ADR) there's no excuse for an extra judicial costs, that state has right to transfer to a customer.
- If ADR has 80% chance of success, attorney should at least advise client about the option.

In Croatian judicial system it is hard (before noticed and analyzed ADR practice) to speak about percentage, but, considering some estimations and experiences, similar conclusions could be made. At this moment it's only theoretical question, because of lack of available ADR programs (court annexed or private ones).

Attorneys could claim that they tried everything to protect the client's interests (before engaging a court) with numerous letters, threats, meetings and other contacts with the opposite side (and/or his/her attorney) which opted for total ignorance of those attempts. I.e. if an initiative for the negotiations had no effect, how to presume that opposite side will suddenly take a reasonable course and accept to compromise in mediation? It is truth that negotiations are the oldest and original ADR method, but ADR is changing toward advancing negotiation techniques (and other ADR methods). Mediation is not the supplement for negotiations. ADR techniques have been emancipated to a dispute solving method.

One reason that mediation works very well in improving the negotiation process is because it helps defuse the natural conflicts created by differences in negotiation styles. Mediation is generally set up in a structure that isolates parties from style conflicts. The parties take fixed positions prior to the mediation meeting. The parties present their sides of the conflict with minimal interruption. The parties then retire to caucuses (separate areas) and the mediator shuttles back and forth with offers, positions, questions and information reworded in more neutral terms by the mediator.

The most common contemporary mediation process tends to take the negotiation style out of the process and reduces the matter to positional shifts and objective statements. Mediator, aware of existence of various negotiation styles could use it for an improvement of interaction and result. When negotiations hit a bottleneck or a seemingly impossible conflict of

personality, by being aware of these issues they can aid mediation work to resolve the matter by removing the issue of style conflicts.[1]

However, the overall use of negotiation techniques and the appropriate time and place for the use of them is an appropriate ethical consideration as could be the possibility of resolving an issue by mediation. The savings to the client consist not only of financial, but of emotional and social resources. Attorneys owe their clients a duty to consider such things in the conduct of their cases.

In addition to the ethical considerations, there are several very practical elements in mediation that improve client satisfaction and client relations.

a) Speed.

A client goes to a lawyer to find someone who knows how to get something done. Implied in "getting something done" is getting something done as soon as possible. When successful, mediation resolves disputes much more quickly than will the process of litigation.

b) Understanding.

The mediation process spends considerable time bringing the client along in the process of the negotiation and in evaluation and understanding of the positions and the case. As a result, following mediation there is a higher level of client understanding and agreement with the negotiated results or the failure to negotiate results. This leads to an increase in client satisfaction, cooperation and agreement to settlement. Even if no settlement of the claim is reached, engaging in mediation increases client understanding and satisfaction. If the case fails to settle and goes to trial, mediation is a positive influence on client perceptions as to what the attorney is doing. Many ADR procedures are designed to aid parties and their attorneys first to evaluate and educate with settlement only as a side effect.

c) Preparation.

ADR methods, including mediation, are useful when settlement is not anticipated. In the complex or risky case, mediation is an excellent tool for creating and preserving a client's acceptance and support of the attorney regardless of the outcome at trial. As a client relations tool, especially in a case that "must be tried" (and that will be tried and that actually is tried) because of the issues, nature, difficulty or risks of the case, ADR is very important. Where client satisfaction is important, mediation is a useful tool.

d) Control.

A study of federal courts (in USA) and court ordered ADR in those courts reflected that clients who were sent to the ADR track actually felt that they had more control than those who remained in the conventional litigation track.

For above mentioned reasons, mediation and other ADR procedures deserve consideration in every case from both an ethical and a client satisfaction regard. While not every case should (or could) be mediated, every case can be considered for appropriate treatment. From ethical point of view that would meet criteria of working in the best interest of client.

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[1] The five methods of negotiation are:

a. Attack or fight. This type of negotiator is often called an aggressive negotiator.
b. Appease or attempt to convert. This type of negotiator is often called a cooperative negotiator.
c. Flee or attempt to evade the problem. This kind of negotiator is often called a distractor.
d. Displace or analyze the problem. When a man is told not to come in to the office today because it has burned down and responds by analyzing the changes in traffic patterns the fire trucks will have made, he is engaging in displacement. This kind of negotiator is often called an analyst.
e. Truth seeking. This kind of negotiator is often called an idealist.

Professor dr. Jon T. Johnsen (Oslo)

'BEST-POLICIES' FOR LEGAL AID: THE FINNISH SYSTEM IN AN INTERNATIONAL CONTEXT

Wednesday, May 24

“Best Policies” for Legal Aid: The Finnish system in an international context

Law in modern societies is complicated and comprehensive. It also impacts on most aspects of life. Effective use of civil law – especially in disputes and litigation – presupposes a legal knowledge that few citizens possess themselves. Legal service therefore is a flourishing business, with lawyers as the main providers. However, since lawyers’ services are costly, huge groups cannot afford the market price, and it has become a public task to put up legal aid schemes for them.

The course will consist of three parts. The first part will focus on legal aid policy and summarize what recent research tells us about “best policies” for legal aid. What values are essential to legal aid schemes, and what are the major components of an effective system? How generous should such schemes be? How do we prioritize between help with non court matters and litigation aid? What are the working methods in legal aid? Should legal aid mainly deliver the services lawyers usually provide to paying clients, or may they use other strategies, like telephone and internet services, do-it-yourself-kits or IT-assisted self help systems? Might they also use impact strategies like “class actions”, “neighbourhood empowerment” and press for legislative reforms when appropriate? The second part will describe the Finnish legal aid system in some detail, and compare it to the “best policy” principles, while the third part places Finnish legal aid in a Scandinavian context, and compares the Scandinavian systems with legal aid in common law countries.

Mrs. Corinne Montineri (Vienna, UNCITRAL)

UNCITRAL AND THE DEVELOPMENT OF NATIONAL ARBITRATION CULTURES AND PRACTICES

Thursday, May 25

BACKGROUND TO THE MAL AND THE ENACTMENT BY STATES

INTRODUCTION

The UNCITRAL Model Law on International Commercial Arbitration and the UN Convention on Contracts for the International Sale of Goods are the two most successful products of the UN harmonization and unification program in the filed of international commercial law. Both of them reflect the needs of the rapid increase of international trade relations, and consequently, the need for harmonization and unification of international trade law and practices in these fields. The growth in international trade and commerce has revived the interest of governments and businesses in legal harmonization.

This is not, however, a new phenomenon. Efforts to harmonize laws across nations through negotiation of bilateral and multilateral treaties of unification or harmonization, some of which still in force, can in fact be traced back to the 19th century.[2]

Of course, times have since changed. One of the most obvious differences between the current harmonization process and earlier efforts is the existence nowadays of a number of both governmental and business organizations dedicated to this work – sometimes even exclusively. Another distinct feature of contemporary harmonization is the wide range of tools used to formulate and implement uniform rules. The aim of enhancing legal certainty and predictability is still the main driving force of international harmonization efforts. The positive role of legal harmonization in reducing transaction costs and facilitating business worldwide is now well recognised.

Obviously, UNCITRAL was not the first international organization to act in the field of harmonization of commercial and private law. Other prestigious organizations, such as the Hague Conference on Private International Law and the Institute for the Unification of Private Law (UNIDROIT), or non-governmental institutions such as the International Chamber of Commerce (ICC) or the *Comité Maritime International* (CMI) had been active long before the United Nations was established, in 1945.

However, the work of those other organizations had two important limitations: uniform rules and standards produced by non-governmental organizations could only achieve the expected harmonization effect to the extent that private parties agreed to use them and courts upheld that agreement; as regards intergovernmental organizations, their membership was typically limited to the developed economies of the West, with little involvement by developing or socialist countries.

Those were two of the main reasons that led member States to see a role for the United Nations, as the one truly universal organization, in the area of trade law harmonization. In the United Nations, arguments for unification have tended to emphasize the economic benefits to be gained by the unification of trade law, especially for the developing nations. Yet member States have also recognized that the activity of international trade could itself provide a basis for friendly relations if it were structured by a common set of rules, informed by the principles of equality and mutual respect. Business and political representatives have recognized the relationship between trade promotion and facilitation – two of the aims of legal harmonization – and the broader goals of the United Nations, such as promotion of world peace and human development.

I. TECHNIQUES OF HARMONIZATION AND UNIFICATION

When discussing techniques used for legal harmonization, it is essential to distinguish between supranational organizations, such as the European Union, and classical international organizations, such as the United Nations. The European Union has itself the power to promulgate texts that have the force of law in all its member States without the need for any act of acceptance of incorporation into the domestic legal order, the EU may bind the member States to achieve a certain legislative objective, leaving them only the choice of implementation for that purpose.

In contrast, instruments produced by UNCITRAL may only become binding law after a State has decided to adopt it – either by ratification or by domestic enactment – but no State is obliged to do so. Thus, the entire work of harmonization done by UNCITRAL is of voluntary nature and takes full account of State sovereignty. This characteristic explains the continuous and often difficult search for consensus in the work of UNCITRAL, which relies only on the acceptability of its texts to achieve wide adoption.

A. GENERAL PROBLEMS IN INTERNATIONAL RULE-MAKING

The search for consensus between different legal traditions is not an easy enterprise level, and international uniform rules are often subject of criticism by domestic readers, who point out the superiority of national law over the product of international negotiations– if not in substance, at least in style.

These are general problems faced by international legal harmonization, irrespective of the subject matter and the form of the instrument. One area of particular difficulty is the operation of the judicial system and, although there are a number of conventions on judicial cooperation, none that attempts to unify the procedure in the courts. It is generally easier to prepare a legal text for activities that take place entirely or primarily in the international sphere, although this is by no means an assurance of speedy or smooth negotiations.

Another difficulty of international legal harmonization is that the search for compromise often means that the preferred rule in a given legal system may be eventually mitigated or abandoned altogether, especially when it is unlikely that it will obtain support of other legal systems. Countries considering adoption of internationally negotiated instruments have to be aware of reasons leading to such deviations from rules familiar to them and be ready to accept the possibility of having to apply different rules depending on whether a particular transaction is governed by purely domestic or by uniform law.

These difficulties are well known. Yet the challenging question is still open: what to do where disharmony is not acceptable?[3] In the ambit of organizations such as UNCITRAL (and also UNDROIT and the Hague Conference) all stages of the preparation, negotiation and adoption of an international instrument depend exclusively on the will of States. One must assume that States make decisions to undertake work and to carry it through despite the difficulty, length, cost and uncertainty inherent to the process because they have concluded that a certain degree of harmonization in a given area is desirable. Once States have decided that harmonization is necessary or desirable, they have to use the tools available to them.

B. CHOICE OF INSTRUMENT FOR HARMONIZATION

The factors discussed above affect the form in which the international legislator will draft the resulting text. Treaties have been the traditional vehicle for legal relations between States and have been the primary vehicle for the international unification of domestic law. Model laws and other forms of legal unification have been a more recent innovation.

UNCITRAL has adopted a flexible approach with respect to the techniques it uses to perform its mandate. These techniques operate at different levels and involve different types of compromise or acceptance of difference. They fall into three broad categories: legislative (conventions, model laws and model legislative or treaty provisions), contractual (standard contract clauses and rules) and explanatory (legislative guides and legal guides for use in legal practice). To some extent, the techniques used by UNCITRAL also show the process of harmonization occurring at different stages of business development. While in most cases the process of harmonization works to bring long-established practices closer together, there are cases that might be seen as examples of "preventive" harmonization. This is involves establishing new principles and practices that minimize divergence when national laws on new issues are developed. This has been typical in areas of commerce affected by new technology or new business practices, such as electronic commerce.

Model laws

A model law is a legislative text that is recommended to States for enactment as part of their national law. A model law is an appropriate vehicle for modernization and unification of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. It is precisely this flexibility which makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered and promotes greater acceptance of a model law than of a convention dealing with the same subject matter.

Notwithstanding this flexibility, and in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged (e.g. by a resolution of the General Assembly) to make as few changes as possible when incorporating a model law into their legal systems.

Model laws are generally finalized and adopted by UNCITRAL, as opposed to a convention which requires the convening of a diplomatic conference.

The UNCITRAL Model Law on International Commercial Arbitration (1985) was the first model law adopted by UNCITRAL and was followed by the UNCITRAL Model Law on International Credit Transfers (1992), the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994), the UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment (1996), the UNCITRAL Model Law on Cross-Border Insolvency, with Guide to Enactment (1997), the UNCITRAL Model Law on Electronic Signatures, with Guide to Enactment (2001), and the UNCITRAL Model Law on International Commercial Conciliation, with Guide to Enactment (2002)

As indicated above, model laws are a relatively new addition to the traditional tools used in international legal harmonization. Nevertheless, nearly twenty years after the adoption of its first model law, it is possible to make an assessment of UNCITRAL's experience with this technique.

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The UNCITRAL Model Law on International Commercial Arbitration (henceforth: the UNCITRAL Model Arbitration Law or the Model Law) has been a very successful example of international preparation of a legal text in the private law area. To date, 44 countries[4] and non-sovereign jurisdictions[5] have adopted the Model Law.

[4] Australia (*International Arbitration Amendment Act 1989*); Azerbaijan (*Law on International Arbitration 1999*); Bahrain (*Decree Law No. 9 of 1994 with Respect to Promulgation of International Commercial Arbitration*); Bangladesh (*Arbitration Act 2001*); Belarus (*International Arbitration Law – Law No. 279-3 of 9 July 1999*); Bulgaria (*Law Amending the Law on International Commercial Arbitration 1993*); Canada

1. Origin and main features

The origin of the Model Law can be traced back to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York , 1958). The fundamental rule of that Convention is laid down in its article III, which provides that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (…) and that "(t)here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." The New York Convention has been a remarkable success in achieving that basic rule, but its ambit is limited.

Indeed, a party wishing to enforce an award under the Convention will have to be informed of a number of matters not dealt with in the Convention, such as whether the award will be enforced by a court or by another authority, or which court or which other authority; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement. All those important details are found in the statutes of the country of enforcement.

UNCITRAL recognized those difficulties, but was not willing to embark upon amending an instrument as successful as the New York Convention. Instead, UNCITRAL undertook the preparation of what became the UNCITRAL Model Arbitration Law.

The UNCITRAL Model Law was preceded by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Arbitration Rules. In the preparation of the Model Law, the drafters were careful not to include deviation from those two previous documents. One of the question was whether to find new solutions or to maintain

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(*Federal Commercial Arbitration Act 1985*); Chile (*Ley n° 19.971 of 2004 – Ley de arbitraje comercial internacional*); Croatia (*Arbitration Law 2001*); Cyprus (*International Commercial Arbitration Law 1987*); Egypt (*Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters*); Germany (*Code of Civil Procedure 1998, Tenth Book*); Greece (*Law No 2735 of 1999- International Arbitration Law*); Guatemala (*Decreto n° 67-95 - Ley de Arbitraje*); Hungary (*Act LXXI of 1994 On Arbitration*); India (*Arbitration and Conciliation Ordinance, No. 8 of 1996*); Islamic Republic of Iran (*Law on International Commercial Arbitration, of 5 November 1997*); Ireland (*Arbitration (International Commercial) Act 1998 (No. 14 of 1998)*); Japan (*Law No. 138 of 2003 – Law of Arbitration*); Jordan (*Law No. 31 of 2001 – Arbitration Law*); Kenya (*Arbitration Act 1995 (No. 4 of 1995)*); Lithuania (*Law on Commercial Arbitration 1996 (No. 1-1274)*); Madagascar (*Code de procédure civile, Libre quatrième: de l'arbitrage(Loi 98-019 du 11 novembre 1998)*); Malta (*Arbitration Act 1996 (No. 11 of 1 996)*; Mexico (*Código de Comercio: Título IV, Libro V – Del Arbitraje Comercial (1993)*); New Zealand (*Arbitration Act 1996*); Nigeria (*Arbitration and Conciliation Decree 1988 (Decree No. 11 of March 14, 1988)*); Oman (*Act on Arbitration in Civil and Commercial Matters (Sultanate Decree No. 47/97 issuing the Act in Civil and Commercial Matters)*); Paraguay (*Código de Procedimiento Civil, Libro V – Del proceso arbitral (Ley n° 1.337/88*); Peru (*Ley n° 26572, 1996 – Ley General de Arbitraje*); Republic of Korea (Arbitration Act - Amended by Act No.6083 as of 31 December 1999); Russian Federation (*Law of the Russian Federation on International Commercial Arbitration 1993*); Singapore (*International Arbitration Act 1994*); Spain (*Ley 60/2003, de 23 de diciembre, de arbitraje*); Sri Lanka (*Arbitration Act (No. 11 of 1995*); Thailand (*Arbitration Act 1987*); Tunisia (*Loi 93-42 du 26 avril 1993 - Code de l'abitrage*); Ukraine (Law on Commercial Arbitration 1994*);* Zambia (*Arbitration Act 2000*), Zimbabwe (*Arbitration Act 1996 (No. 6 of 1996*).

[5] In China, by the Hong Kong Special Administrative Region (*Arbitration Ordinance 1996*) and the Macau Special Administrative Region (*Decreto-Lei No. 55/98/M*); Within the United kingdom, by Scotland (Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) and in the U.K. overseas territory of Bermuda (Bermuda International Conciliation and Arbitration Act 1993); within the United States, California (*Code of Civil Procedure*); Connecticut (*An Act Concerning the UNCITRAL Model Law on International Commercial Arbitration 1989*); Illinois (*International Commercial Arbitration Act 1998*); Oregon (*International Commercial Arbitration and Conciliation Act 1991*); Texas (*An Act Relating to the Arbitration or Conciliation of International Commercial Disputes 1989, Title 10*)

uniformity among existing texts. The priority was to preserve harmony between the different texts.

The main purpose of the Model Law is to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration. The UNCITRAL Model Arbitration Law deals with the essential elements of a favourable legal framework for the conduct of arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal (including appointment, substitution and challenge of arbitrators); jurisdiction of arbitral tribunal (including its competence of arbitral tribunal to rule on its own jurisdiction and its power to order interim measures); conduct of arbitral proceedings (treatment of parties, determination of rules of procedure, hearings and written proceedings, party default, appointment of experts, court assistance in taking evidence); making of award and termination of proceedings (settlement, form and contents of award; its correction and interpretation); setting aside and arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement

2. Implementation of the Model Law

When preparation of the UNCITRAL Model Arbitration Law first began, it was thought that it would be primarily useful for the developing world. Industrialized countries believed that their law of arbitration was adequate, if not much better than whatever UNCITRAL might produce. Interestingly, the past twenty years have shown that the UNCITRAL Model Arbitration Law has indeed been highly useful for developing countries, but also for many industrialized countries which have also reformed their law by adopting the Model Law.

UNCITRAL has not established fixed criteria or minimum requirements for determining when a country can be regarded as having enacted the Model Law. Nevertheless, it could be said that generally domestic arbitration statutes are considered to be enactments of the Model Law when it is clear that the legislator took the Model Law as a basis and made certain amendments and additions, but did not simply take the Model Law as one amongst various models or follow only 'its principles'.[6] This usually means also that the bulk of the provisions of the Model Law have been enacted and that the domestic statute does not contain any provision incompatible with the basic philosophy of the Model Law. Within those general parameters, a certain degree of adaptation is admissible and indeed necessary, as are certain deviations, in particular where they are intended to adjust the Model Law to the local context. Many of the decisions that need to be made by an enacting State were anticipated by UNCITRAL, while others may be particular to the country concerned, or at least to the group of countries with similar legal systems.[7]

(a) Form of enactment

UNCITRAL prepared the Model Arbitration Law as a freestanding arbitration statute. That fits the legislative structure of many countries, but in many others the legislative provisions on arbitration are to be found in the Code of Civil Procedure.

Some common law countries have arbitration laws based on the UNCITRAL Model Arbitration Law that are peculiar in appearance to lawyers from civil law jurisdictions in that the UNCITRAL Model Arbitration Law was incorporated in its entirety (including the footnote to Article 1 describing what should be considered commercial) as a schedule to a domestic act. This technique is similar to the technique used in those jurisdictions to promulgate a treaty as positive law. In those jurisdictions, all the changes to the UNCITRAL Model Arbitration Law as well as all additional provisions appear in the basic statute.

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[6] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* , 3rd ed. (Sweet & Maxwell, London, 1990), p. 642.

[7] The best overall description of the choices made both at UNCITRAL and by States in their adoption of the UNCITRAL Model Arbitration Law is Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London, Sweet & Maxwell 2000).

(b) Scope of application

The main focus of UNCITRAL when preparing the Model Arbitration Law was to harmonize and modernize the law governing the settlement of international commercial disputes, rather than the conduct of domestic arbitrations. Nevertheless, it was obvious that a State could easily adapt the UNCITRAL Model Arbitration Law to domestic arbitrations and a significant number of States have done so. Only a small number of provisions like place, language, time limits need different solutions in national and international arbitration

Consistent with its mandate to promote the harmonization of the law of international trade, UNCITRAL conceived its Model Law for use in commercial arbitrations. The difficulty however was in determining what matters should be regarded as "commercial". UNCITRAL eventually adopted the footnote to article 1(1) that lists a large number of activities of an economic nature that should be considered as "commercial" in the context of the UNCITRAL Model Arbitration Law. Inevitably, not all of them necessarily coincide with what individual States traditionally regard as "commercial".

Those States that have adopted the UNCITRAL Model Arbitration Law in a schedule to a new national arbitration law had an easy way to include the footnote. In other countries, the essentials of the footnote have been included in the main text of the arbitration law.[8] In many other cases the footnote has been left out and there is no indication in the text of the arbitration law as to what is commercial.

In some countries the answer is provided by the use of general provisions aimed at both defining the material scope of the arbitration act and determining the types of disputes that are capable of settlement by arbitration ("arbitrability"). Article V(2) of the New York Convention recognizes that arbitrability is to be defined by each State when it provides that recognition and enforcement of an arbitral award may be refused if the subject matter of the difference "is not capable of settlement by arbitration under the law of that country." The UNCITRAL Model Arbitration Law adopts the same provision, not only for recognition and enforcement of an award in article 36(1)(b)(i), but also as grounds for setting aside in article 34(2)(b)(i). Nevertheless, there is no indication in the UNCITRAL Model Arbitration Law as to what disputes are not, or should not be, capable of settlement by arbitration.

(c) Additions, deletions and variations

One of the basic concerns during the preparation of the UNCITRAL Model Arbitration Law was to devise a system the preserves as much as possible the parties' agreement to arbitrate and the conduct of arbitration proceedings from extraneous interference. Therefore, one of the more important features of the Model Arbitration Law is article 5, which provides that in matters governed by the Model Law, no court shall intervene except where so provided in the Model Law. While this provision was adopted in most jurisdictions that have implemented the UNCITRAL Model Arbitration Law, some countries apparently felt that the provision went too far and preferred not to adopt it.[9]

Closely related to article 5 is article 6, which lists provisions in the UNCITRAL Model Arbitration Law that call on the courts to perform some function in aid of arbitration and calls on the adopting State to specify the court or other authority that is to perform them. This is not a complete list of provisions in which the UNCITRAL Model Arbitration Law anticipates the involvement of a court in the arbitration. In particular, article 9 anticipates that parties may request a court for an interim measure of protection and article 27 authorizes "a competent court of this State" to give assistance in the taking of evidence on the request of the arbitral tribunal or a party with the approval of the arbitral tribunal. Evidently, the drafters of the UNCITRAL Model Arbitration Law could not say much more on matters of internal judicial competence, and nearly all enacting States filled these gaps by indicating the competent courts to act under those provisions.

[8] E.g. Cyprus, Egypt, Islamic Republic of Iran, Nigeria, Oman, Russian Federation.
[9] E.g. Egypt, Islamic Republic of Iran, Oman, Sri Lanka.

A similar situation arises under article 9, which recognizes the right of the parties to request a court for interim measures of protection "before or during arbitral proceedings". A number of jurisdictions found it appropriate to list the details and types of interim measures that may be requested.[10]

One area where enacting States have often elaborated on the provisions contained in the UNCITRAL Model Arbitration Law relates to the application for setting aside an arbitral award. Some States have attempted to define the notion of "public policy" as a grounds for avoiding an arbitral award, other. A few countries have even added additional ground for setting aside an award.

3. Assessment

Despite the adjustments and adaptations made by various enacting jurisdictions, it can be said that there is a high degree of substantive uniformity in the implementation of the UNCITRAL Model Arbitration Law. The success of this Model Law can be explained by a number of reasons. The first of them is timing. The increasing adherence to the New York Convention and the spreading influence of the UNCITRAL Arbitration Rules had encouraged the international arbitration community to look for ways to reduce the remaining obstacles to the effective use of arbitration in international commercial disputes. But timing is not everything. The drafters of the UNCITRAL Model Arbitration Law were also sensitive to what could and what could not be done by way of unifying the law of arbitration. Arbitration practitioners in enacting jurisdictions did also their part by raising awareness among policy makers and judicial authorities as to what are the essential needs of a functioning system of commercial arbitrations. This led to a growing acceptance of some fundamental features of modern international arbitration, such as respect for party autonomy, freedom to agree on the conduct of arbitration proceedings, competence of arbitral tribunals to decide on their own jurisdiction, judicial support to arbitration coupled with restraint from undue interference.

CONCLUSION

There are various reasons why countries use UNCITRAL model laws as a basis for the development of domestic legislation. Some countries may adopt a model law because its legal community and policy makers regard it as a good step to further the unification of the law in the relevant area. For a number of other countries, UNCITRAL model laws serve as convenient first drafts of modern statutes, with or without regard for the legal harmonization argument. For other States, adoption of an UNCITRAL model law may be seen as an important factor in publicizing to the international legal community – which knows these texts and usually trusts them – the desirability of doing business in that country. Or, States may simply conclude that, from a substantive point of view, the solutions recommended in a given model law will effectively improve the domestic environment for the types of transactions covered by it.

Whatever the reason is, the decision to adopt a model law is always voluntary and in no way forced upon States. This is an important point, as it usually means that those in charge of drafting domestic legislation to enact a model law will be more personally involved in the process and may become instrumental in raising knowledge about the new law. This level of engagement may be very useful for the success of legal harmonization, and, more generally, of any law reform effort.

The drafting style of an UNCITRAL model law, as with of all legal texts adopted at international level, will be different, sometimes radically different, from the style of drafting in some countries. The importance of that fact in the politics of adoption of a new law will depend in part on the strength of the local drafting tradition. The entire law may be resisted by lawyers, legislative draftsmen, professors of law and ministry officials simply because the law does not look the way their laws look. The temptation to improve on the drafting of the text is

[10] E.g. Hungary, India, New Zealand and Zimbabwe; within the United Kingdom, in Scotland; within the United States, California, Oregon, Texas.

obvious. No one would challenge a legislator's legitimate right to improve things that deserve improvement. It is important, however, to study carefully the reasons why an international text is formulated in a certain way and the rationale for the policy choices it makes. A certain level of variation – for instance to ensure conformity with the local drafting style or to better reflect local economic conditions or legal tradition – may be appropriate, or even necessary, where the primary purpose of adopting an international model is to modernize the law. Changing the text of a model law to conform to the local style of drafting or to fit squarely the legal status quo may be rather counter-productive, however, if one of the purposes of the new law is to make business in the country more attractive to the foreign lawyer.

> "There is a new global deal on the table: When developing countries fight corruption, strengthen their institutions, adopt market-oriented policies, respect human rights and the rule of law, and spend more on the needs of the poor, rich countries can support them with trade, aid, investment and debt relief." (Kofi Annan, *"Help by Rewarding Good Governance",* International Herald Tribune*, Wednesday, 20 March 2002, p. 8.)*

Doc. dr. Marko Petrak (Faculty of Law, Zagreb)

ARBITRATION AS THE PRIMARY FORM OF CIVIL PROCEEDINGS

Thursday, May 25

Arbitration as the Primary Form of Civil Proceedings?

Marko PETRAK*

The aim of lecture is to analyse the *Schiedsgerichtstheorie*: the theory on arbitration as the primary form of civil proceedings.

The view that arbitration is the original and oldest form of civil proceedings is commonly encountered in the writings of civil procedure scholars and thus became the important part of history of ideas of procedural legal science. In order to understand the basic features of this theory and its significance for contemporary civil procedural law, we shall, *exempli gratia,* analyse some observations regarding the origin and development of civil proceedings in the classic Croatian and European manuals on the civil procedure.

However, the *Schiedsgerichtstheorie* did not originally emerge and develop within the field of civil procedural law, but in the writings of Roman law scholars during the first half of the 20th century in response to complex issues regarding the origin and development of Roman civil proceedings based on the very precise legal-theoretical (*Jhering*) and philosophical foundations (*Hobbes*). More recent romanistic studies, on the contrary, have refuted the *Schiedsgerichtstheorie* as a set of rationalist speculations devoid of any essential compatibility with historical reality and advocated with convincing arguments the idea that the ancient Romans, like all other peoples, settled disputes in their community by turning to the supernatural powers of their deities, in the form of various types of trials by ordeal or prophecies.

Thus, it is also necessary that contemporary civil procedure scholars abandon the obsolete *Schiedsgerichtstheorie* as one legal-theoretical "rationalistic myth" of 20th century and take into account the more recent reconstructions of the origin and development of Roman civil proceedings as the essential part of European procedural legal tradition.

Materials:

M. PETRAK, *Arbitration as the Primary Form of Civil Proceedings? Contribution to the Criticism of the Schiedsgerichtstheorie*, Croatian Arbitration Yearbook 11 (2004) pp. 83-98.

* Dr. Marko Petrak, Associate Professor, Chair of Roman Law, University of Zagreb, Croatia.

Arbitration as the Primary Form of Civil Proceedings? A Contribution to Criticism of the Schiedsgerichtstheorie

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The aim of this paper is to analyse the Schiedsgerichtstheorie: the theory on arbitration as the primary form of civil proceedings. The view that arbitration is the original and oldest form of civil proceedings is commonly encountered in the writings of civil procedure scholars. However, the Schiedsgerichtstheorie did not originally emerge and develop within the field of civil procedural law, but in the writings of Roman law scholars during the first half of the 20th century in response to complex issues regarding the origin and development of Roman civil proceedings. More recent romanistic studies, on the contrary, have refuted the Schiedsgerichtstheorie and advocated with convincing arguments the idea that the ancient Romans, like all other peoples, settled disputes in their community by turning to the supernatural powers of their deities, in the form of various types of trials by ordeal or prophecies. Thus, in the opinion of this author, it is also necessary that contemporary civil procedure scholars abandon the obsolete Schiedsgerichtstheorie and take into account the more recent reconstructions of the origin and development of Roman civil proceedings.

I. Introductory Remarks

The aim of this paper is to analyse the *Schiedsgerichtstheorie:* the theory on arbitration as the primary form of civil proceedings. The view that arbitration is the original and the oldest form of civil proceedings is commonly encountered in civil procedural law scholarship. In order to understand the basic features of this theory and its significance for contemporary civil procedural law, we shall briefly, *exempli gratia,* analyse some observations regarding the origin and development of civil proceedings in the classic Croatian work in this discipline – *Građansko parnično procesno pravo (Civil Litigation Procedural Law)* by professor Siniša Triva.

At the very beginning of his book, in analysing the forms of protection of private rights, Triva gives a brief overview of the development of the various forms in which legal protection is rendered.[11] In his opinion, the protection of private rights has not always been regulated by law. Initially, protection was provided only by means of private and unregulated self-help. "An individual would undertake the measures he considered to be adequate and applicable in realising his presumed right".[12] In the next stage of development, individuals were obliged to cooperate, and eventually started to settle their disputes by means of agreements. Their disputes were settled by a third person in whom both parties had confidence. This person assumed the role of a chosen judge or arbitrator by whose decision the conflicting parties would voluntarily abide. Eventually, the state sanctioned this form of the private protection of rights, yet in subsequent stages of development, it gradually "imposed on everyone an organised judicial apparatus, thus replacing private protection with organised state protection".[13] However, this transition from private arbitration to the system of protection offered by the state did not take place 'overnight'; rather, it was a long historical process. The transition period was characterised by some specific forms combining elements of private

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11 S. Triva, *Građansko parnično procesno pravo* (*Civil Litigation Procedural Law*) (Zagreb 1983), at pp. 9 *et seq.*

12 *Ibid*., at p. 9.

13 S. Triva, op. cit. n. 11, at p. 10.

arbitration and state legal protection. In this context, Triva emphasises in particular the Roman system of legal protection where "in the first stage, the dispute was settled before the state judicial organs (*in jure)* with the purpose of formulating the content of hypothetical legal protection while in the second stage the admissibility of the request for legal protection was decided before a chosen judge in whom the parties had confidence (*in judicio)*.[14] Following the transitional period, the system of state legal protection prevailed, and in the final stage of development, the state "also took over the enforcement of its decisions".[15]
According to this reconstruction of events, the initial process emerged when self-help was superseded as a mode of protection by private arbitration which was then in turn replaced by the protection provided by the state judiciary. Self-help – private arbitration – legal protection by the state: these are the successive stages in the development of legal protection.

However, it must be emphasised that the theory of arbitration, *Schiedsgerichtstheorie*, whose basic tenets we have just presented based on Triva's textbook did not originally emerge and develop within the field of civil procedural law. Rather, it developed within modern Roman law scholarship in response to complex issues regarding the origin and development of Roman civil proceedings and was adopted by other legal disciplines from there.

II. Schiedsgerichtstheorie in the Modern Science of Roman Law

The author of the theory of arbitration as the primary form of civil proceedings (*Schiedsgerichtstheorie)*, was the famous Austrian Romanist Moriz Wlassak (1854-1939) whose works, written during the first quarter of the 20th century, gave this theory a systematic treatment. The following statement by Wlassak perhaps best describes the essence of his research on the origin of Roman civil proceedings: "My goal was and still is to create a firm foundation for the thesis that Roman private proceedings originated from arbitration*"*.[16]
Taking Wlassak's statement as a starting point, it is not difficult to understand why his studies on the origin and development of Roman civil proceedings eventually became known in Romanist literature as *Schiedsgerichtstheorie*.[17]

a) Arbitration as the primary form of Roman civil proceedings

According to Wlassak's analysis of the origin and development of Roman civil proceedings, self-help was the primary form of dispute resolution. In the subsequent historical phase, the parties to a dispute agreed, on the basis of a contract, to entrust the resolution of their dispute regarding a certain right to an unbiased third party. Wlassak was of the opinion that in this manner, self-help had been replaced by a private process of arbitration.[18] Further historical development of these proceedings was characterised by the state's gradually assuming control over private arbitration litigation, i.e. its becoming subject to control by the state judiciary. This phenomenon can be clearly perceived in the basic structures of *legis actio* and formulary

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[14] *Ibid*., at p. 10.

[15] *Ibid*., at p. 10.

[16] M. Wlassak, Der Gerichtsmagistrat im gesetzlichen Spruchverfahren, 25 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (further: ZSS/RA/) (1904) at p. 139: '*Mein Ziel war und ist es, eine haltbare Grundlage zu schaffen für die These: der römische Privatprozeß hat seinem Ursprung im Schiedsgericht'.*

[17] M. Kaser – K. Hackl, *Das römische Zivilprozeßrecht* (Munich 1996) pp. 29 et seq.; Talamanca, s.v. *Processo civile (diritto romano), Enciclopedia del diritto XXXVI* (Milan 1987) at p. 6.

[18] *See* e.g., M. Wlassak, Die Litiskontestation im Formularprozeß, in: Festschrift für B. Windscheid, Leipzig, 1899, at pp. 54 et seq.; M. Wlassak, *Anklage und Streitbefestigung im Kriminalrecht der Römer* (Vienna 1917) at p. 222; M. Wlassak, *Der Judikationsbefehl der römischen Prozesse* (Vienna 1921) at p. 247: M. Wlassak, *Die klasische Prozeßformel* (Vienna 1924) Wien, 1924, pp. 147 seq.

proceedings, i.e. in their bipartite division into proceedings before the state magistrate or praetor (*in iure)* and proceedings before a chosen judge (*apud iudicem*).[19] Wlassak calls this form of proceedings "semi-state proceedings" (*der halbstaatliche Prozeß).*[20] However, the contractual basis of the proceedings as their oldest element could still be recognised in this stage of development. The contractual basis of the proceedings was recognised by Wlassak in the act of *litis contestatio*. Generally speaking, only several sources referring to *litis contestatio* in the *legis actio* proceedings have been preserved. From these it may be seen that the act of *litis contestatio* took place before a magistrate, i.e. praetor (*in iure)* in such a way that the parties to the dispute would call in several Roman citizens to witness the presentation of the matter in dispute (*lis),*[21] so that later, if necessary, they could testify in the proceedings *apud iudicem* regarding the dispute between the litigants.[22] Based on these facts, Wlassak contended that *litis contestatio* was essentially a contract between the litigants made before the praetor and in the presence of the summoned witnesses. In this contract, the litigants set forth the matter in dispute, chose a judge (*iudex)* to settle their dispute and agreed to abide by the decision of judge. The contents of *litis contestatio* were particularly discernible in the structure of the formulary proceedings which were devoid of the strict formalism of the preceding period.[23] In the last stage of development of Roman civil proceedings, i.e. in the period of cognition (extraordinary) proceedings, there was no bipartite division of the proceedings and no contractual appointment of a *iudex*. The *iudex* became a state official who conducted unified proceedings, from filing a civil suit to pronouncing a judgement. Therefore, according to Wlassak, the introduction of cognition proceedings marked the introduction of purely state proceedings.

This interpretation is based on an assumption of the "strict gradual development" (*streng stufenmaßige Entwicklung)* of Roman proceedings. As we have seen, the stages of this development were as follows: 1) self-help; 2) private arbitration; 3) semi-state proceedings; and 4) purely state proceedings. Wlassak's reconstruction of the origin and development of Roman civil proceedings had a significant impact on the study of Roman law during the first half of the 20th century and virtually became *communis opinio doctorum.*[24]

In Croatian studies of Roman law, Wlassak's views were followed in particular by Marijan Horvat's early works. This may be easily recognised in Horvat's *Savremeni nazori o postanku i značaju dvodiobe rimskog privatnog procesa* (Contemporary Opinions on the Origin and Significance of the Bipartite Division of Roman Private Proceedings) from 1938, a detailed

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[19] For a general discussion of the basic characteristics of *legis actio* proceedings *see* more in Talamanca, op. cit. n. 17, at pp. 4 et seq.; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 34 et seq.; H. Honsell – Th. Mayer-Maly – W. Selb, *Römisches Recht* (Berlin 1987) pp. 506 et seq. with references to extensive bibliography; for a general discussion of the origin, structure and basic characteristics of the formulary proceedings *see* in more detail in Talamanca, op. cit. n. 17, at pp. 25 et seq.; H. Honsell – Th. Mayer-Maly – W. Selb, ibid., at pp. 524 et seq.; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 151 et seq., with detailed references to extensive bibliography on these issues.

[20] M. Wlassak, op. cit. n. 18 (1921), at p. 247.

[21] The very name *litis contestatio* was given due to the presence of witnesses in the process of presenting the disputed matter (*contestari litem)*; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 75 et seq.

[22] In his analysis of the process of *legis actio* proceedings, Gaius does not mention the act of *litis contestatio* but one definition of the term "*contestari litem"* is preserved in Festus' extracts from the dictionary of rare words (*De verborum significatu*) by the grammarian Verrius Flaccus; *see* Festus, s.v. *contestari litem* (ed. Lindsay, 50): "*Contestari litem dicuntur duo aut plures adversarii, quod ordinato iudicio utraque pars dicere solet: 'Testes estote'";* for the Croatian translation, *see* A. Romac, *Izvori rimskog prava (Roman Law Sources*)(Školska knjiga, Zagreb, 1973) at p. 559; on Festus see D. ŠKILJAN (ed.), *Leksikon antičkih autora* (*Lexicon of Ancient Writers*) (Zagreb, 1996), at p. 205, and on Verrius Flaccus, *see* Festus, op cit. at p. 603.

[23] M. Wlassak, op. cit. n. 18 (1899), at pp. 59 et seq.; *idem, Anklage und Streitbefestigung, Abwehr gegen Phillip Lothmar* (Vienna 1920), at pp. 9 et seq.

[24] Koschaker, Rabel, Biondi, Mazeaud, Betti, Heuss, Bozza, Carreli, etc. followed Wlassak's interpretation; for information on the works of these and other authors who followed Wlassak *see* G. Broggini, *Iudex arbiterve,* Prolegomena zum *Officium* des römischen Privatrichters (Cologn/Graz 1957) at p. 7, fn. 14.

synthetic account of the ideas about the development of Roman civil proceedings of that time.[25]

However, *Schiedsgerichtstheorie* also had a fundamental impact beyond the sphere of Roman legal studies. Some important authors believed that the stage of self-help was replaced by private arbitration as the primary form of proceedings in other ancient bodies of law as well – such as, for example, ancient Babylonian and ancient Greek law.[26]

Moreover, it is important to emphasise in this context that, as we have seen, contemporary civil procedure scholarship also followed Wlassak's paradigm of the origin and development of civil proceedings. This is very obvious from, *inter alia,* the aforementioned brief overview of the development of the various forms of legal protection by Triva.[27]

b) Litis contestatio as the contractual basis of Roman civil proceedings?

The validity of this paradigm basically depends only one key issue: can we really regard the *litis contestatio* of the *legis actio* proceedings as representing, in its essence, a formal act of a contractual nature, and is it a direct descendant of those primary contracts on private arbitration which supplanted self-help?

The first Romanist who presented this thesis *in nuce* was the famous German lawyer Rudolph von Jhering (1818-1892). In his opinion, briefly outlined in the first part of his epochal work *Geist des römischen Rechts*[28], the origins of legal proceedings among the ancient Romans were completely different than in the case of all other civilisations. Namely, some peoples had initially transcended self-help and settled the disputes in their communities by resorting to the supernatural powers of their deities in the form of different types of trials by ordeal, prophecies, casting lots, and so on. Others had replaced self-help by appointing authorities to settle disputes in their communities. In both cases, the parties to the dispute had to appear before the court of some superior authority, either divine or human. Jhering, however, was of the opinion that this had not been the case during the ancient Roman period. The Romans differed from all other peoples in having transcended the self-help stage by introducing a contractual form of resolving legal disputes ("*vertragsmäßige Entscheidung der Rechtsstreitigkeiten*") through the institution of a defence judge, i.e. an arbitrator (*Schiedsrichter)* or an extrajudicial oath taking.[29] Therefore, Jhering argued that the primary

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[25] *See*: M. Horvat, Savremeni nazori o postanku i značaju dvodiobe rimskog privatnog procesa (*Contemporary Opinions on the Existence and Significance of the Bipartite Division of Roman Private Proceedings*), 64 *Law Society Paper* (1938) at pp. 149 et seq.; B. Eisner – M. Horvat, *Rimsko pravo* (*Roman Law*) (Zagreb 1948) at pp. 541 et seq.

[26] For ancient Babylonian law *see* Lautner, *Die richterliche Entscheidung und die Streitbeendigung im altbabylonischen Prozeßrecht* (Leipzig 1922); for ancient Greek law *see* A. Steinwenter, *Die Streitbeendigung durch Urteil, Schiedspruch und Vergleich nach griechischem Rechte* (Munich 1925). It is worth mentioning that Steinwenter came to the conclusion that private arbitration litigation represented the original form of the ancient Greek proceedings. Such a conclusion was based on an analysis of the court scene depicted on Achilles's shield which Homer described in the *Iliad*, Canto 18, verses 497-508. According to Steinwenter's interpretation, the person called *istor* mentioned in these verses, whom the parties to the dispute had turned to, was actually a private arbitrator. Therefore, according to this author, the court scene was likewise an ancient confirmation of the correctness of the *Schiedsgerichts-theorie;* see A. Steinwenter*,* ibid., at p. 36 et seq. A different explanation of the word *istor* was once given in Croatian literature by L. Margetić, Pokušaj pravne interpretacije sudbene scene na Ahilovu štitu (*An Attempt to Interprete the Court Scene on Achilles' Shield*)*,* Collected Papers Dedicated to A. Vajs, Belgrade, 1966, at pp. 51 et seq. According to this author, the *istor* was not an arbitrator, but rather a person of public trust who registered relevant legal events in his memory. However, Margetić did not analyse this specific problem within the context of the origin and development of legal proceedings. In conclusion, it must be emphasised that the authors who have analysed this court scene recently (e.g. H. J. Wolf, G. Thür), have, for valid reasons, abandoned the *Schiedsgerichtstheorie* as an interpretative paradigm; *see amplius* G. Thür, Artur Steinwenter als Gräzist, 115 *ZSS/RA* (1998) at pp. 432 et seq. On the Romanist criticism of this theory *see* amplius *infra* under II *c)*.

[27] *See* supra, under 1; cf. also J. Juhart, *Civilno procesno pravo FNRJ* (*Civil Procedural Law of the FPR Yugoslavia*) (Ljubljana 1961) at pp. 1 et seq.; L. Ude, Civilni pravndi postopek in samoupravni sudski postopek (Ljubljana 1980) at p. 41.

[28] *See* R. von Jhering*,* Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (Leipzig 1878) at pp. 108 and 167 et seq.

[29] R. von Jhering, op. cit. n. 28, at p. 167.

procedural form of settling disputes in ancient Rome had been private arbitration. Parties to a dispute would enter into a contract to appoint an arbitrator. That is, they did not submit themselves to an arbitrator as some sort of public authority, but rather voluntarily bound themselves to abide by his decision based on a private contract. According to Jhering, this primary contractual form of settling disputes was also preserved in the solemn forms of *legis actio* proceedings. While Jhering regarded primary private arbitration as having already been placed under state jurisdiction in the *legis actio* proceedings, it was possible to recognise the contractual basis of the entire proceedings in the act of *litis contestatio.* As we have already stated, it may be concluded based on the small number of extant sources dealing with *litis contestatio* in *legis actio* proceedings, that this act took place before a praetor (*in iure)* in such a manner that the parties to the dispute summoned several Roman citizens to serve as witnesses when the matter in dispute was presented (*lis)* so that in the subsequent proceedings *apud iudicem*, they could, if necessary, testify as to what the matter being disputed between the parties actually was.[30] On the basis of the aforementioned sources, Jhering argued that *litis contestatio* was, in essence, a contract entered into by the parties to the dispute before the praetor and in the presence of the summoned witnesses. In this contract, the parties would define the matter in dispute, chose a judge (*iudex*) to settle their dispute and agree to abide by the decision of the *iudex*.[31] Based on Jhering's analysis, we may conclude that the contract by which the judge was chosen was the oldest element of *legis actio* proceedings. Jhering was of the opinion that private arbitration had been agreed upon by means of such contracts as the primary procedural form for settling disputes in ancient Rome. Over time, however, private arbitration came under the control of the state judiciary. This historical development can be demonstrated mainly by the fact that litigation was divided into two parts. In the first part of the proceedings, historically more recent and conducted before the praetor (*in iure),* the magistrate would examine whether all the prescribed preconditions for rendering legal protection had been fulfilled.[32] If this were the case, the parties would, with the praetor's consent, choose a judge who rendered a judgement in the second stage of the proceedings (*apud iudicem)*. According to Jhering, the latter originated directly from private arbitration, as the oldest Roman form of litigation. Jhering believed that the state had taken over private arbitration without changing its basic features.[33] In such a way, the earlier private arbitrator was replaced by a *iudex* chosen from an official list of judges (*album iudicum)*; yet his role remained unchanged. However, in contrast to a private arbitrator, the judgement of *iudex* was authorised by the state due to the extremely important role of the praetor in the entire proceedings.

Jhering's understanding of the act of *litis contestatio*, as a contract on private arbitration replacing self-help was, as we have seen, adopted and elaborated by Wlassak as a sort of Archimedean point for his reflections on the origin and development of Roman civil proceedings from which his *Schiedsgerichtstheorie* was derived.

It has already been pointed out that there are very few direct sources on *litis contestatio* in the *legis actio* proceedings. On the basis of the most important one, Festus' previously cited interpretation of the concept "*contestari litem"*, we can see clearly only that the parties to the dispute summoned several Roman citizens to witness the presentation of the matter in dispute.[34] According to the prevailing interpretation of Festus' fragment among 19th century Romanists, the witnesses appeared before the praetor only at the very end of the *in iure*

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30 Festus interpretation of the concept *contestari litem* cited op. cit. n. 21.

31 R. von Jhering, op. cit. n. 28, at pp. 168 et seq.

32 Since the oldest *legis actio* proceedings was, as we have said, conducted in a strictly formal way, the praetor had to observe quite closely as to whether the parties were fully abiding by the prescribed procedural ritual.

33 R. von Jhering, op. cit. n. 28, at p. 172, fn. 73.

34 Fest's explanation of the concept "*contestari litem"* cited op. cit. n. 21.

proceedings in response to a joint ritual invitation by the parties: "*Testes estote!"*. Therefore, prior to Wlassak's work, the prevailing view was that *litis contestatio* referred only to the act of summoning the witnesses before whom the content of the previous hearing was then recapitulated as the final stage of the *in iure* proceedings. In this way, the witnesses were in a position to testify, if necessary, in the *apud iudicem* proceedings as to what the matter in dispute between the parties was.[35] However, as we have already seen, Wlassak interpreted the concept of *litis contestatio* in this oldest form of *legis actio* proceedings (*legis actio sacramento)* in a much broader way. According to him, the summoning of the witnesses was merely one phenomenon accompanying the procedure. The essence of *litis contestatio* consisted in the solemn appearance of the witnesses before the praetor, whereby the parties presented the matter in dispute and agreed that their dispute would be settled by a chosen judge, by whose decision they would abide.[36] On the basis of this interpretation, Wlassak drew the conclusion that *litis contestatio* actually represented a contract between the parties to the dispute, concluded before the praetor and the witnesses via the strict forms of the oldest *legis actio* proceedings. By means of this contract, the matter in dispute was presented and a judge was chosen to settle the dispute. However, the contractual nature of *litis contestatio* is not easily recognisable in the solemn forms of *legis actio* proceedings. The very nature of *litis contestatio,* according to the aforementioned author*,* can fully be recognised only in the formulary proceedings, purged of the strict formalism of the preceding period. Regardless of the formal aspects, Wlassak argued, the content of this contract had always been the same. Moreover, this interpretation of *litis contestatio* was also crucial to understanding the oldest stage of Roman legal proceedings, i.e. that which had preceded the emergence of a state judicial authority. For if *litis contestatio* were a procedural contract between the parties, presenting the matter in dispute and choosing the judge by whose decision they would abide, then it would have the same content as a private arbitration contract. According to Wlassak's historical reconstruction, it could be concluded that *litis contestatio* developed from private arbitration contracts, and that the Romans, prior to the emergence of the *legis actio* proceedings, had settled their disputes through private arbitration as the primary form of legal proceedings. Private arbitration was placed under the control of the state judiciary in the *legis actio* proceedings. This explains how the phenomenon of a bipartite division of the proceedings emerged, whereby the first part was conducted before a state magistrate (*in iure)* and the second before a judge chosen by the parties (*apud iudicem).*[37]

c) Criticism of Schiedsgerichtstheorie in modern studies of Roman law

As we have already said, Wlassak's theory of arbitration as the primary form of Roman civil proceedings (*Schiedsgerichtstheorie*), which was based mainly on his interpretation of *litis contestatio* as a procedural contract dominated the Romanist literature of the first half of the 20th century from where it penetrated to other disciplines as well, above all civil procedure scholarship.

However, in the course of the forties and fifties, significant Romanist works, published by Kaser and Biscardi, completely refuted this thesis on the contractual character of *litis contestatio* in *legis actio* proceedings. Contemporary Romanist discussion of *litis contestatio* have been based on the insights of these authors.[38] According to the currently prevailing

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[35] This interpretation was first developed in 1827 by a Swiss romanist F. Keller in his work *Über Litis Contestation und Urteil* (Zurich, 1827) and it eventually became generally accepted; *see* M. Kaser – K. Hackl, op. cit. n. 17, at p. 291; cf. also B. Eisner – M. Horvat, op. cit. n. 24, at p. 556.

[36] *See* e.g., M. Wlassak, op. cit. n. 18 (1899), at pp. 81 et seq. and 81 et seq.; cf. B. Eisner – M. Horvat, op. cit. n. 24, at. p. 556, fn. 2; M.Kaser – K. Hackl, op. cit. n. 17, at pp. 291 et seq.

[37] *See* M. Wlassak, op. cit. n. 18 (1899), at pp. 69 et seq. and 81 et seq.; cf. B. Eisner – M. Horvat, op. cit. n. 24, at. p. 556, fn. 2.; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 291 et seq.

[38] *See* M. Kaser, Zum Ursprung des geteilten römischen Zivilprozessverfahrens, in: Festschrift für L. Wenger, Vol, I, Munich, 1944, at p. 126; A. Biscardi, La *litis contestatio* nella procedura *per legis actiones,* in: Studi in onore di V.

interpretation, *litis contestatio* in *legis actio* proceedings consisted of solemn acts of the parties to the dispute before the praetor and the witnesses whereby the matter in dispute was defined.[39] There are, in fact, a number of arguments, related to both form and content that run counter to Wlassak's interpretation and these are advanced today to deny the contractual character of *litis contestatio* in *legis actio* proceedings. From the formal point of view it has been argued that the solemn acts making up *litis contestatio* did not correspond to any known Roman contractual forms, and that in ancient times, there was no general concept of a contract under which such an act could possibly be subsumed.[40] In terms of content, it is completely disputable whether the choice of a *iudex* formed part of *litis contestatio* or not. Moreover, the question arises of whether there was even the possibility for the parties to choose a judge in *legis actio* prodeedings. Thus, for example, the Croatian Romanist Horvat, in his work entitled *Deux phases du procès romain* of 1959[41], in which he abandoned the Wlassak's interpretation of the origin and development of these proceedings, thus also significantly revising his own former views,[42] emphasised that there had been no room in *legis actio* proceedings for any agreement among the litigants regarding the choice of a judge. For, as was obvious from Gaius' statements on *legis actio per iudicis arbitrive postulationem*, the plaintiff made a request to the praetor (*postulatio)* in a strictly prescribed form, whereupon the praetor would assign *(datio)* the judge.[43] Gaius also mentions this idea of assigning a judge in connection with *legis actio sacramento.*[44] The plaintiff's unilateral request is completely incompatible with any notion of the contractual appointment of a judge. Moreover, it is obvious that praetor had the final word in assigning the judge and that the *datio iudicis* constituted first and foremost an act of the praetor's authority.[45] Bearing all of this in mind,

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Arangio-Ruiz, III, Napoli, 1953, at pp. 461 et seq.; A. Biscardi, Esquisse d'une critique de la *litis cotestatio,* 33 *Rev. hist. dr. fran. étr*. RH (1955) at pp. 1 et seq.

[39] *See* M. Kaser – K. Hackl, op. cit. n. 17, at pp. 75 et seq. As we have already said (*supra,* n. 35), older Romanist doctrine, following Keller, held that the witnesses appeared before the praetor only after the parties had mutually and ritually summoned them: "*Testes estote".* The witnesses were thus called in at the very end of the proceedings *in iure*, in order that the content of the hearing could be restated before them. Therefore, according to this view, only the final stage of the *in iure* proceedings constituted an act of *litis contestatio; see* F. Keller, op. cit. n. 35, at. pp. 1 et seq.; I. Baron, *Institucije rimskog prava* (*Institutions of Roman Law*) (Zagreb 1893) at p. 419: B. Eisner – M. Horvat, op. cit. n. 24, at p. 556, fn. 2. Contrary to this older interpretation, the prevailing opinion among Romanists today is that several Roman citizens of legal age (*Quirites)* were summoned as witnesses in advance, at the very beginning of the *in iure* proceedings, in order to be present during the entire solemn acts by the parties to the dispute (e.g. vindication, counter-vindication, etc.) in presenting the disputed matter (*lis).* However, the ritual exclamation "*testes estote"* was directed to the Quirites by the parties to the dispute only at the end of the *in iure* proceedings*,* thereby bidning them to their legal duty to testify about what they had seen and heard (cf. Lex XII Tab. 8, 22 where it is prescribed that a witness to an act, who later refuses to testify about it, is punished by being made *inprobus intestabilisque*). It is worth mentioning that this reconstruction has been made on the basis of some content-related similarities in content with Gaius, Inst. 2, 104, which concern the composition of a testament *per aes et libram.* The testator summoned five Roman citizens of legal age to be present at the ritual of composing a solemn testament, yet only at the end of this ritual, i.e. with the final words of the nuncupative act, would he solemnly bind those five Qurites to be the witnesses to his testament: " *... itaque vos Quirites, testimonium mihi perhibetote"* (cf. M. Kaser – K. Hackl, op. cit. n. 17, at p. 76, fn. 40; on the original meaning of the nuncupative act *see amplius* P. Noailles, Du Droit sacré au Droit civil, *Cours de Droit Romain Approfondi* 1941-1942, Paris, 1949, at pp. 300 et seq. Bearing all these facts in mind, it should be emphasised once again that *litis contestatio* in *legis actio* proceedings consisted of the litigants' solemn acts before the praetor and the witnesses in presenting the matter of the dispute.

[40] *See* M. Kaser – K. Hackl, op. cit. n. 17, at p. 79.

[41] M. Horvat, Deux phases du procès romain, in: *Droits de l'antiquité et sociologie juridique*. Mélanges Henri Lévy-Bruhl, Paris, 1959, at pp. 163 et seq.; M. Horvat, O dvodiobi u najstarijem rimskom civilnom procesu (On the bipartite division in the oldest Roman civil proceedings), *Zbornik Pravnog fakulteta*) 8 Zbornik Pravnog fakulteta u Zagrebu (*Collected Papers of the Faculty of Law in Zagreb*) (1958) at pp. 137 et seq.

[42] On Horvat's earlier views *see supra,* under II *a)*.

[43] *See* Gaius, Inst. 4, 17 where it is said that the plaintiff, were the defendant to deny his claim, was obliged to direct the following words to the praetor: "*Quando tu negas, te praetor iudicem (sive arbitrum) postulo uti des"* ("Since you have denied, I request of you, praetor, to assign a judge /or arbitrator/").

[44] *See* Gaius, Inst. 4, 15, where we find the expressions like «*iudex daretur», «dabatur iudex», or «quam iudex datus esset».*

[45] M. Horvat, op. cit. n. 41, at p. 139 et seq.: cf. M. Kaser – K. Hackl, op. cit. n. 17, at p. 79.

we may conclude, in accordance with all of the existing sources that *litis contestatio* in *legis actio* proceedings did not by any means represent a contract between the parties to the dispute. Thus, there was no historical connection between *litis contestatio* and its ostensible predecessor, the private arbitration agreement. This statement refutes Wlassak's entire theory of arbitration as the primary form of Roman civil proceedings (*Schiedsgerichtstheorie).* Therefore, *legis actio* proceedings cannot be regarded as a form of "semi-state proceedings" in which private arbitration was placed under the control of the state judiciary. This also annuls Wlassak's interpretation of the origin of a bipartite division in *legis actio* proceedings. Finally, if *litis contestatio* was not a procedural contract, then there is no proof whatsoever for the statement that private arbitration represented the oldest procedural form for settling disputes in ancient Rome, one which, at some point in time, had replaced self-help and was in turn later transformed into the *legis actio* proceedings, thus becoming partially "state controlled". Based on these arguments, Romanists gradually abandoned Wlassak's views during the second half of the 20th century.[46] The original form of Roman civil proceedings was decidedly not a private arbitration whose partial "state control" had subsequently given birth to *legis actio* proceedings.

III. Concluding Remarks

Proceeding from this Romanist criticism of the nature of *litis contestatio,* it is not difficult to conclude that, as a result, Jhering's basic insight that the origins of ancient Roman civil proceedings were completely different from those of other peoples - on which Wlassak's *Schiedsgerichtstheorie* was later based - also becomes highly questionable. According to Jhering, as we have already emphasised, only the Romans had transcended the stage of self-help by introducing the contractual settlement of legal disputes ("*vertragsmäßige Entscheidung der Rechtsstreitigkeiten")*, whereas other peoples had abandoned self-help by either turning to the supernatural powers of their deities in the form of various types of trials by ordeal, prophecies, casting lots, and so on, or empowering certain authorities to settle disputes in their community.

Jehring's thesis and Wlassak's theoretical interpretation based thereon undoubtedly represent extremely lucid and inspired attempts to explain the origin and development of Roman civil proceedings. However, we believe that their explanations are inconsistent with ancient Roman reality as we shall try to elaborate briefly in the conclusion to this paper.

First of all, it must be emphasised that Wlassak's *Schiedsgerichtstheorie* was completely based on Jhering's theory of self-help (*Selbsthilfetheorie)*. The core of this theory, as presented in the first part of Jhering's capital work entitled *Der Geist des römischen Rechts,*[47] consisted of the propositions that self-help was the primary form of settling disputes and that self-help had been supplanted by private arbitration. Consequently, it is not difficult to conclude that Jhering's Selbsthilfetheorie was based on the presumption that, in the pre-state era, there existed a situation in which everyone was at war against everyone else, unhindered by any rules. Therefore, according to Jhering, the primary source of law resided neither in divine revelation nor in the will of the state but was to be sought in primordial physical power, in the power of the individual.[48] In ancient times, only from power (*vis)*, could law (*ius)* emerge, with self-help as the primary form of the protection of rights. At that time an individual only had what rights he could succeed in realising and maintaining through the strength of his own body (*Faustrecht).* Therefore, the only law that existed was the law of the stronger (*Recht des Stärkeren)*, until the self-help phase was replaced by the contractual

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46 Cf. M. Talamanca, op. cit. n. 17, at pp. 6, 22 et seq.; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 29 et seq. and 79 et seq.

47 *See* R. von Jhering, op. cit. n. 28, at pp. 108 et seq. and 167 et seq.

48 *Ibid*., at p. 107 et seq.

settlement of legal disputes; therefore, arbitration was the oldest form of civil proceedings. It must be mentioned here that in later editions of the aforementioned work, Jhering emphasised that his overview of the genesis of Roman civil proceedings, based on the idea of transcending self-help via the contractual settlement of legal disputes, represented only a hypothetical construction of legal prehistory. (*"eine hypotetische Construction der Urzeit").* Jhering expressly stated that his observations did not refer to that historical period in which *iurisdictio* of *praetor* most certainly did not derive from contractual will of the parties to a dispute but rather was assigned to him.[49] However, we do not find such reservations in the many later proponents of the theory of self-help, beginning with Wlassak[50], who completely superimposed Jhering's hypothetical construction upon ancient Roman reality.

Since it is our intention to prove in this conclusion that *Selbsthilfetheorie* and the *Schiedsgerichtstheorie* based thereupon are, as "hypothetical constructions", quite inapplicable when analysing the origin of Roman civil proceedings, we must briefly analyse the philosophical foundations of these theories. First of all, Jhering's construction of the "zero point" of history when there was a war of everyone against everyone else and the power of the stronger represented the sole law, obviously drew upon the naturalistic theories of the second half of the 19th century, primarily on Darwinist evolutionary hypotheses. Jhering transferred Darwin's principle of selection, i.e. the idea that only the hardiest species survived in a merciless and continual struggle for life, into the sphere of law (*Kampf ums Recht),* taking it as one of the basic starting points for his philosophical and legal observations. His legal thinking thus took on the contours of a sort of "social Darwinism". In this respect, Jhering's theses on the genesis of the law and legal proceedings, as presented in his work *Der Geist des römischen Rechts* obviously stemmed from the aforementioned Darwinist paradigm.[51] However, by projecting the conclusions of natural science onto social reality, Jhering simultaneously lent a new form to some much older philosophical concepts containing analogous ideas. Here we are referring primarily to the ideas of the English philosopher Thomas Hobbes (1588-1679) according to whom the primary, i.e. natural human state (*status naturalis)* was a war of everyone against everyone else (*bellum omnium in omnes).*[52] Prior to the emergence of the state, there reigned only the law of self-preservation and egoism. Every individual had a natural right to all things which obviously resulted in numerous conflicts. However, the fear of death and destruction gradually forced individuals to terminate this war. Hobbes was of the opinion that it was a basic law of nature and a general rule of the mind that everyone would strive for peace. However, this state of peace could only be achieved by creating state authority. Therefore, reason itself demanded the creation of the state which came into being on the basis of a social contract in which all individuals renounced a certain part of their natural rights and transferred them to the sovereign authority.[53] Even this slight reference to some of Hobbes' basic ideas on the origin of the state will suffice to show how Jhering's thoughts on the origin of Roman civil proceedings had been permeated by such tenets to a considerable degree. It seems obvious that *Selbsthilfetheorie* is only one theoretical variation on the thesis of the natural human condition as "a war of everyone against everyone

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49 R. von Jhering, op. cit. n. 28, at p. 169, fn. 71.

50 On Wlassak's views, *see amplius supra* under II.

51 On Jhering's social Darwinism *see,* for example, F. Wieacker, Privatrechtsgeschichte der Neuzeit (unter besonderer Berücksichtigung der deutschen Entwicklung), (Göttingen 1967) at pp. 450 et seq.; F. Wieacker, Rudolph von Jhering, 86 *ZSS/RA* (1969) at pp. 9 et seq. and 25 et seq.; F. Wieacker, Jhering under der "Darvinismus", in: Paulus/Diederichsen/Canaris (eds.), Festschrift für Karl Larenz zum 70. Geburtstag, Munich, 1973, pp. 63 et seq.

52 Hobbes used the expression *bellum omnium in omnes* for the first time in his work *De cive* (1, 12) from 1642.

53 On Hobbes's phylosophical and political ideas *see,* for example, C.B. McPherson, Introduction,, in: T. Hobbes, Leviathan (Penguin Classics), Harmonsworth, 1986, at pp. 9 et seq., and the bibliography listed on page 65.

else".[54] Moreover, Jhering's thesis that the Romans, unlike other peoples, had transcended the stage of self-help in a rational way, i.e. by contractually settling disputes, is obviously nothing other than an application of the concept of the social contract to a discussion of the genesis of Roman civil proceedings. In order to additionally support this statement, we shall mention that in his *Der Geist des römishen Rechts,* Jhering also advocated the view that a social contract had been the basis for the creation of the state.[55] Therefore we may conclude that Hobbes' concept of the social contract constituted the deepest philosophical root of Wlassak's *Schiedsgerichtstheorie.*

On the basis of a detailed analysis, we have already established that the latter theory, according to which self-help was replaced by the contractual settlement of disputes, does not correspond to historical truth.[56] What then is the status of the other tenets of which the theory of self-help consists? Leaving aside the most recent scientific insights that completely challenge the Darwinist paradigm[57] as well as the question whether such a paradigm may be applied to an analysis of interpersonal relations,[58] we shall confine ourselves to the conclusion that this picture of the hypothetical "zero point" of history where total chaos and anarchy reign and wild individuals wander around brandishing sticks, desperately struggling for survival, is utterly ahistorical. There are simply no sources and no evidence on whose basis one might establish that such primordial and "natural" conditions characterised by the absence of any community, authority or rules, and in which naked physical strength was the only law, and self-help the only protection, ever existed, even in prehistory.[59] The evidence we possess on Palaeolithic peoples, thanks primarily to the discovery of their cave drawings, has shown that prehistoric man lived in organised communities bound by numerous commands and religious taboos. In addition, contemporary ethnological discoveries regarding "primitive" cultures have resulted similar findings.[60] These facts undeniably speak in favour of the thesis that Hobbes' *status naturalis* or Jhering's stage of self-help were only rationalist speculations devoid of any essential compatibility with (pre)historical reality.[61] In any case, this paradigm is, due to its ahistorical nature, inapplicable as a methodological model in attempting to

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[54] On Hobbes philosophical and political tenets as one of the forerunners of Jhering's *Selbsthilfetheorie see* Staszkow, *Vim dicere* im altrömischen Prozeß, 80 *ZSS/RA* (1963) at pp. 86 et seq.; cf. also M. Kaser, Vom Ursprung des römischen Rechtsgedankens, in: Moschietti (ed.), *Atti del Congresso internazionale di diritto romano e di storia der diritto in Verona* (1948), II, Milano, 1951, 27 sq.

[55] *See* R. von Jhering, op. cit. n. 28, at pp. 209 et seq. and 216 et seq.

[56] *See supra,* under II *c)*.

[57] *See*, for example, M. Lings, *Ancient Beliefs and Modern Superstitions* (Cambridge 1991).

[58] Having analysed the (in)applicability of the Darwinist paradigm in analysing the oldest Roman legal rules, the Roman and civil law expert from Göttingen, Okko Behrends, rightly emphasised that "the legal rules valid among people are something completely different from the stereotypes of animal behaviour acquired by natural selection"; O. Behrends, La mancipatio nelle XII Tavole, IURA, 33 *Riv. int. dir. rom. ant.* (1982) at p. 73, fn. 57.

[59] For example, even Eisenhart, in his work *Statum naturalem Hobbesii ex corpore iuris civilis profligatum et profligandum* from 1744 categorically stated in connection with Hobbes's idea of the natural conditions that "*statum illum generis humani quem Hobbesius fingit nunquam fuisse"* ("the state of the human race which Hobbes imagined never existed") and that *Hobbesi doctrina veterum iurisconsultorum philosophiae plane contraria ("*Hobbes' doctrine is completely contrary to the philosophy of the ancient lawyers"); cit. according to Staszków, op. cit. n. 54, at p. 87. The same statements are completely applicable to Jhering's theory of self-help. Thus, for example, Behrends, in his work of 1982, noted that the mentioned theory was *una construzione puramente astorica*; *see* O. Behrends, op. cit. n. 59, at p. 75; cf. also G. Broggini, *Vindex* und *Iudex,* 76 *ZSS /RA* (1959) at pp. 113 et seq.; M. Kaser – K. Hackl, op. cit. n. 17, at pp. 28 et seq.

[60] *See,* for example, Th. Mayer-Maly, *Gedanken über das Recht* (Vienna/Cologn/Salzbug 1985) at pp. 9 et seq.

[61] It may be correct to say, as has often been empasised, that Hobbes's construction of man's "natural state" (*status naturalis)* was only a speculative reflection of the England of his era, which was torn by the civil war (1642-49) and general anarchy and lawlessness; cf., for example, J. Hampton, *Hobbes and the Social Contract Tradition* (Cambridge 1986) at p. 5. If we accept this view, we might draw the conclusion that the *status naturalis* was by no means man's primary condition but rather the very opposite, i.e. "anti-evolutionist" view, according to which "there have been no barbaric conditions which did not result from some collapsed culture", was correct; cit. F.W.J. Schelling, *Philosophie und Religion*, *Sämtliche Werke*, I, 6, (Stuttgart/Augsburg 1860) at p. 12.

explain the genesis of law and legal proceedings just as, for example, was the Marxist utopian vision of an original genteel order, a classless society of free and equal individuals whose decay resulted in the creation of the state as an expression of the class society and an organ of class violence.[62]

As opposed to Jhering and Wlassak, and contrary to the *Selbsthilfetheorie* and *Schiedsgerichtstheorie*, which are based on assumptions regarding the ostensible "progressiveness" and "rationality" of the Romans who, it is claimed, were the only people capable of transcending self-help in such a way that the parties to a dispute freely contracted private arbitration, more recent romanistic studies have advocated the idea that the ancient Romans, like all other peoples, were wont to settle disputes in their community by turning to the supernatural powers of their deities, in the form of various types of trials by ordeal or prophecies.[63] However, as we have seen, the contemporary studies of civil procedural law have followed *Schiedsgerichtstheorie* as a paradigm of the origin and development of civil proceedings even in recent times.[64] Thus, in the opinion of this author, it is also necessary that contemporary civil procedure scholarship abandons this obsolete romanistic theory and takes into account the more recent romanistic reconstructions of the origin and development of Roman civil proceedings.

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62 Cf. M. Kaser – K. Hackl, op. cit. n. 17, at pp. 28 et seq.

63 *See,* for example, P. Noailles, op. cit. n. 39, at pp. 72 et seq.; G. Broggini, op. cit. n. 24, at pp. 29 et seq.; M. Kaser - K. Hackl, op. cit. n. 17, at pp. 29 et seq., with the reference to supplementary literature. It is interesting to note how the idea that the most ancient Roman civil proceedings originated from trial by ordeal (*Gottesurteil)* had also been briefly discussed by Rudolph von Jhering in his incomplete and posthumously published work entitled *Die Vorgeschichte der Indoeuropäer; see* R. von Jhering, *Die Vorgeschichte der Indoeuropäer* (Leipzig 1894), at p. 436. Unfortunately, Jhering did not have time to develop this idea in more detail or to incorporate it into his theory of the origin and development of Roman civil proceedings. For this idea might have encouraged him to revise some of the basic theses presented in his *Der Geist des römischen Rechts,* above all his view that the Romans, unlike some other peoples, had not transcended self-help by turning to the supernational powers of their deities in the form of various trials by ordeal, prophecies, casting lots, and so on. but rather by means of the contractual settlement of legal disputes (*vetragsmäßige Entscheidung der Rechtsstreitigkeiten).*

64 *See supra* under II *a)*.

Mr. Branko Hrvatin (President of The Supreme Court of Republic of Croatia)

REFORMS IN CROATIAN JUSTICE SYSTEM: PERSPECTIVE OF THE SUPREME COURT

Monday, May 22

Mrs. Satu Seppannen and Mrs. Nanny Granfelt (CEPEJ)

FINISH ADVICE

Monday, May 22

Mrs. Marie Helene Enderlin (European Commission)

ACCESSION PROCESS IN JHA SECTOR

Monday, May 22

Prof. dr. Vesna Rijavec (Maribor)

HOW TO ENSHURE AND EFFECTIVE SYSTEM OF ENFORCEMENT OF JUDICIAL DECISIONS?

Tuesday, May 23