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Justice, rights and democracy

Justice for All:
Practical approaches to solving cross-border civil and family disputes

Civil and family law conference
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UK PRESIDENCY OF THE EU 2005

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Foreword

In October 2005, Scotland took the centre stage of the UK Presidency of the European Union when the DCA and the Scottish Executive jointly hosted a major conference in Edinburgh under the heading *Justice for All: practical approaches to solving cross-border civil and family disputes*.

The conference attracted contributors and participants of the highest calibre from all parts of the EU. They came to Edinburgh to debate the future of Europe with regard to enabling citizens to live, work, study, buy and sell and do business across European borders with the same security and ease of access to justice as at home.

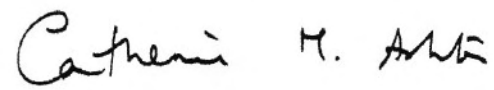
These rights are central to a modern, civilised society. That's why it's so important that we have the right civil laws, the right safeguards for the way we live today. Civil Justice touches all our lives, in one form or other, from cradle to grave. This conference focused in particular on family mediation and Alternative Dispute Resolution, e-justice, the work of the civil judicial network and streamlining court processes. These are vital issues in helping all of us in Europe to work together to find practical solutions to our daily problems. These are real issues that are important to people in every street, village, town and country in the EU.

Throughout the Conference, a recurring theme was improvement of best practice. It was thus not only a great honour for us but an essential part of the conference that we were able to host the presentation by the European Commission and the Council of Europe of the inaugural award of the *Crystal Scales of Justice*. The challenge now is to turn the very best from an aspiration into common practice.

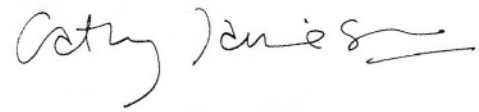
We are proud to have been part of this Conference and grateful to the expert contributors whose papers and presentations appear in the following pages, not least for the lively discussions they inspired, the thoughts they provoked, and the productive relationships they helped build.

The Conference of course was not the end point. We hope that the Conference and this publication can help take the development of civil judicial co-operation forward – looking towards the mid-term review of the Hague Programme and beyond.

Lord Falconer of Thoroton



Baroness Ashton of Upholland



Cathy Jamieson, Minister for Justice

Prof. Dr. Alan Uzelac
Faculty of Law, University of Zagreb
President, Task Force on Timeframes of Proceedings of the European Commission for the Efficiency of Justice (CEPEJ)

There is a certain contradiction between the topic of this panel – the streamlined court processes – and the customary understanding of law and legal processes. We are accustomed to the idea that the law must be something cumbersome and complicated – as it was most notoriously expressed by the famous waiting scene in the Kafka's novel "The Process (The Trial)" when Josef K. expected the unpredictable opening of the Gates of Law. Our history is teaching us that law that is simple and understandable may be regarded as archaic, and legal processes that are fast and affordable may be regarded as primitive.

Yet, although law schools today primarily prepare lawyers for their engagement in complex legal matters, the everyday practice of courts and judges is still predominantly occupied by cases that are by their nature simple and routine. Of course, one may attempt to find unique features even in cloned cases – and lawyers are well-known for their ability to complicate even the simplest things. But, when the delightful smell of good lawyering (fumus boni iuris) vanishes in the air, a basic and inevitable equation remains: the more a legal system is able to quickly and inexpensively deal with simple and repetitive tasks, the more time and money remains for other, "nobler" tasks. And, as simple and routine cases dominate the legal landscape, they may be at least as much important for citizens' access to justice as the "hard cases" that are important for legal policy and development of the law, but make only the tip of the iceberg in the sea of legal life.

In our contribution to the panel discussion, we will deal with the following three questions:

1. What are the impediments to a common European definition and understanding of streamlined proceedings?

2. What, if anything, connects the approach to divergent practices of "fast-track" proceedings in different European jurisdictions?

3. Which are the criteria under which the citizens participating in cross-border transactions may be taken to "realize the same ease of access to justice in a foreign jurisdiction as at home"?

1. Impediments to a common understanding of "streamlined court processes"

The definition of "streamlined processes" is mainly a negative one: these are all those processes that are intentionally made shorter and simpler in comparison with the usual, regular processes of civil law. As such, in a single national justice system, the term "streamlined processes" may cover rather diffuse field of rules, techniques and practices, from simplified procedures regarding issuance of titles in non-contested matters (e.g. payment orders, extracts from various court registers) to summary proceedings in civil disputes of a particular nature where interests for speed may play a bigger role than interests for elaborated legal proceedings (e.g. in small claims, commercial disputes etc.). The "streamlining" is regarded to operate on various level: on the level of procedural law; on the level of administrative practices; and, on the level of internal organization. It also uses various technical methods: on one hand, there is the use of forms and templates, but there are also other methods of automated proceedings. The most modern example of "streamlined" processes is the use of information technology (IT) in case management and court administration.

The situation gets even more complicated in respect to cross-border relations. The pool of divergent "streamlined" practices is by far bigger – but this is not all. As that what is perceived as "streamlined" is defined by that what is perceived as "regular", the same process may in one country be taken as "streamlined" and in the other as "regular". E.g. in those jurisdictions in which the index of complexity of legal processes is high, even a relatively complicated procedure may be taken as "streamlined" and vice versa.

Further difficulty occurs when perception of "streamlined" procedures is connected with the length of proceedings. "Streamlined" proceedings intend to be short – but what exactly is meant by "short"? The average length of civil proceedings in different European jurisdictions demonstrates considerable variations – from a couple of months to several years. In this context, what

is "short" in one jurisdiction may from the outset be viewed as overly lengthy in the other, even for regular cases.

Finally, there is also an economic and cultural impediment to full harmonization of the approach to "streamlined" processes. The border line between "streamlined" and "regular" is drawn according to the social understanding of the matters in which the fragile balance between full-fledged procedural guarantees of the fair trial and the matters in which the need for fast, efficient and affordable justice has precedence. Expressed in a simplified way, it depends on the perception of what is less important, or of low value – as opposed to "important" and "high value" cases. Obviously, as economic strength of different countries varies, so is the determination of "low" or "high" value cases also variable. The cultural element plays an additional role: depending on cultural and social elements, the same legal process (e.g. the divorce proceedings) may in one country be viewed as the process that is ripe for "streamlining", while in the other it will be left intentionally in the domain of "regular" cases, with possible additional complexity and length.

2. Connecting factors: common elements in the approach to divergent "fast-track" practices

In spite of all difficulties in determination of "streamlined processes", we may distinguish five elements that are common to all European discussions about streamlined (simplified, fast-track) proceedings.

The first element is the underlying reasoning. It may be obvious, but it is still important to note that common approach to streamlining of civil procedures presumes that everyone agrees that the need for procedural complexity and the need to shorten timeframes and reduce costs have to be balanced. The history of civil procedure may provide proof that this was not always the case: those who wanted to increase the efficiency and reduce delays were often outnumbered by those who adhered to the saying fiat iustitia, pereat mundus. Today, we see an emerging consensus about the need for a quick and affordable, but still well-functioning justice – and we hope that this consensus will last.

The second element is related to the focus on users. The main aim of streamlining is today viewed as the need to assist users in their access to justice, although other aims also play important role (e.g. reducing costs for the state, discharging the justice system of unnecessary burdens etc.).

The third element is related to the ideas of optimization and foreseeability. This element is best expressed in the Framework Programme of the European Commission for the Efficiency of Justice (CEPEJ) that is entitled "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe". As inefficiency and undue delays in legal proceedings is today taken to be "an endemic disease affecting European judicial systems", the objective for the future is to define and find the optimum timeframes for different types of proceedings, taking into account their relevant importance and the needs citizens. Such optimums should find appropriate balance between the extremes: processes should not be too long in order to guarantee legal certainty for citizens and the State; nor must proceedings be excessively shortened, since that could jeopardize guarantees of the fair trial. Especially in the domain of streamlined proceedings, the key word is the foreseeability. As we speak about the relatively simple and routine cases, the capacity to provide the users with more or less fixed schedule for their cases is great. This, in return, defines the expectation of the users and prevents impression of unreliability and hostility.

The fourth element is related to the minimum common standards. These standards are mainly defined by the case law of the European Court of Human Rights relating to the reasonable time of the legal proceedings. These standards are so far flexible and case-oriented, as the ECHR is assessing the length of the proceedings in the light of the circumstances of the particular case. They are also related to minimum, and not optimum cases, and do not prescribe any particular method of streamlining or accelerating the proceedings. In future, however, we should not exclude the possibility of further and more precise international standards – although this now looks like a rather utopian task.

The fifth element is focus on the use of appropriate technical tools and modern technology. This element – connected with the development and training of respective professionals in the area of court administration and case management – offers great chances

for analysis and planning in the justice sector. Yet, it is on the different level of development in different jurisdictions and is often not harmonized at the national level (and even less on the cross-border level). For streamlined processes the element of technology offers great advantages, because it also enables automation of routine tasks or event the whole processes (e.g. issuance of payment orders in non-contested matters etc.).

3. Criteria for equal access to justice for citizens in foreign jurisdictions

Taking into account all the differences, is it at all possible to provide through streamlined court processes equal access to justice for foreign citizens, i.e. to ensure that their position is at least roughly the same in their home jurisdictions?

The concrete forms of streamlined proceedings in different countries are now rather different, and it is extremely hard to imagine that this situation is going to change in the near future, if ever. Insofar, methods of access to justice in different jurisdictions (and sometimes even in the same jurisdiction) will always be different.

However, "equal access" for the citizens does not necessarily mean that they follow the same procedures in their own countries and abroad. In most countries, citizens are not familiar with procedural details of their own procedures, and in their pursuit for justice their interests are mainly elsewhere. What they need is the transparency of the proceedings, the appropriate and foreseeable length of the process, fairness in dealing with their case, affordable and cost-effective mechanisms of protection of their rights, just outcome and speedy and inexpensive enforcement of their justified claims. Accordingly, if we aim at evaluating the access to simplified proceedings in different jurisdictions, the factors that should be compared would primarily be related to these elements, and not to superficial similarity of forms and/or relevant legal provisions.

What is the current situation in this respect? The first round of evaluation of European justice systems undertaken by the CEPEJ on the basis of data from 40 European jurisdictions available for the year 2002 has indicated several facts that have to be taken into account. Although the questionnaire on which this pilot exercise was based did not comprise precise questions on summary and/or streamlined proceedings, the results of the research have demonstrated that very few European jurisdictions could provide full and reliable data about the average duration of typical proceedings. Moreover, the data collected was often reflecting only the institutional perspective, but was unable to reply basic questions that are important for the users of the justice system – e.g. the overall (integral) length of the whole process and its costs.

Based on these findings, in the years 2005-2006 the CEPEJ has designated one of its two working group to the further work on the procedural timeframes – the Task Force on Timeframes of Proceedings (TF-DEL). As particular steps in the implementation of the Framework Programme of the CEPEJ, the TF-DEL will engage in comprehensive study of the standards set by the jurisprudence of the European Court for Human Rights. One of its futher activities relevant for streamlining judicial processes is the study on waiting time in courts that will be undertaken based on the available experience and studies in Nordic countries. These and other information will help creation of the Compendium of best practices in delay-reduction that will be elaborated in close co-operation with the network of pilot courts established by the CEPEJ. At the same time, the TF-DEL will engage in a research of existent typology of cases in the Council of Europe jurisdictions

Finally, a checklist of indicators of the length of proceedings is going to be drafted related to the time management in the justice system. This checklist should help justice systems to collect appropriate information and analyze relevant aspects of the duration of judicial proceedings with a view to reduce undue delays, ensure effectiveness of the proceedings and provide necessary transparency and foreseeability to the users of the justice systems. This checklist that operates in several areas consists of a series of questions, directed mainly to policy-makers in national justice systems. The replies to the checklist should enable analysis of the proceedings on two levels: as total duration of the proceedings from the commencement to the final decision (and, if enforcement is required, until the enforcement of the decision); and as duration of individual stages of the proceedings (with particular attention devoted to the analysis of the periods of inactivity). Consequently, this checklist may facilitate time-management and delay-reduction policies in national justice systems, and contribute as such to streamlining of the existent proceedings.

Current results of the work of the CEPEJ have shown that in many aspects we still need to create preconditions for meaningful comparisons of the existent practices in streamlining and simplifying proceedings in Europe. This task is demanding, but in the course of the next few years it offers opportunity to start from the solid ground of hard facts. Only from such a basis we could make first steps towards common understanding of streamlined processes (and also of the "regular" ones).