

PART XI

SPECIAL FORMS OF PROCEDURE

PRIORITIZING EFFICIENCY IN THE JUDICIAL SYSTEM

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1 INTRODUCTION TO THE CHAPTER

1.1 Scope of the Study

- 1 The subject of this Part of the 'Comparative Procedural Law and Justice' (CPLJ) is 'special forms of procedure'. Before any consideration can be given to the subject, it is necessary to define its scope. It is not easy to determine what is covered by the wording 'special forms of procedure'.¹ In order to do so, it is possible to exclude the special forms of procedure that are the subject of other parts. This is the case of Part 12 on special subject matters in disputes (family, consumer, labour, environment, competition). These special procedures are easier to identify. They may be the subject of a dedicated section of the codes of civil procedure and/or a specific law.² The same applies to Part 10, which deals with collective actions. These special forms of procedure are adapted to the presence of a 'collective party', as Mauro Cappelletti described them. In addition, the enforcement procedures referred to in Part 14 are also excluded, even though certain special forms are specifically designed to recover debts. However, the aim is not to enforce an enforceable title but to enable the debt to be recovered by obtaining a title through an effective procedure. Finally, the arbitration procedure in Part 15 - which is highly contractualized - is also excluded and could also have been classified as a special form.
- 2 As a result, the special forms in question are not related to the subject matter of the dispute, or to the status of a party (collective party) or the judge (private judge), but to other considerations. This segment concerns only those special forms of procedure which aim to be effective and which allow for (reasonable?) accommodations with the guarantees of a fair trial: the concern for effectiveness or even efficiency shapes them because 'The need to have recourse to a trial in order to be vindicated must not be detrimental to the person who is vindicated'.³ What makes them special is that they bend the ordinary rules of procedure to ensure effective access to justice. This is why we have decided to add a subtitle to this segment: 'Prioritizing the efficiency of the judicial system'.
- 3 If there is an obvious link with other segments of this CPLJ, these will only be considered insofar as they serve the search for efficiency in special forms of procedure. This may involve the dematerialization of procedures that take special forms, without hearings or even without a judge! Dematerialization is a tool that is supposed to enhance the efficiency of special forms of procedure by simplifying and speeding up the process. Thanks to new technologies, the parties

¹ Unfortunately, it is not possible to rely on volume XVI of the International Encyclopedia of Comparative Law edited by Mauro Cappelletti. Indeed, although chapter XI entitled 'Special Proceedings and Provisional Remedies' was devoted to the subject, it has curiously disappeared from the book's table of contents... However, there is an indication that provisional remedies were included.

² For example, in France, Book III of the Code of Civil Procedure deals with 'provisions specific to certain matters' (persons, property, matrimonial property regimes, inheritance and gifts, obligations and contracts, social security and social assistance).

³ G Chiovenda, *Istituzioni di diritto procesuale civile* (Vol 1 No 34, Jovene 1933) 147.

can take their case to court at any time, by just using their smartphone.⁴ In the United Kingdom, Money Claim Online procedures (MCOLs)⁵ offer entirely dematerialized procedures without lawyers that help to recover debts and are similar to default procedures. Similarly, special forms of procedure, that are aimed at handling mass litigation, have special links with amicable dispute resolution methods used as a tool for managing flows.⁶ Finally, there are special forms of procedure dedicated to the search for evidence⁷ but the focus here will be on the procedure leading to it and not on the evidence itself. There are therefore necessary and inevitable links to be made with the other segments of CPLJ, to which reference is made for further details.

1.2 Definition of 'Special Forms of Procedure'

- 4 This part is devoted to special forms of procedure, which we must now attempt to categorize positively. In all legal systems, there are special forms of procedure, even if their definition, use, and sophistication take on singular appearances. They are not all identified in the texts or grouped together in a common dedicated section.⁸ The CPLJ project proposes to deal with three types of special procedures under this heading.
- 5 Firstly, provisional, conservatory, and evidentiary measures, which are the subject of rapid, sometimes non-adversarial procedures, serve the effectiveness of potential proceedings on the merits. They take a variety of forms, some of which are autonomous, and others integrated into ordinary proceedings.
- 6 Secondly, injunctions to pay and default proceedings, which ensure rapid recovery of debts.⁹ It should be noted from the outset that while the order for payment is a truly original procedure based on the inversion of the dispute, the default procedure is an ordinary procedure that relies on the absence of the defendant to speed up the procedure, lightened by a contradiction. However, in both cases, a creditor obtains an enforceable title quickly based on the appearance of a claim and minimal control by the judge.
- 7 Finally, there are summary procedures, which reduce the procedural constraints of the ordinary procedure. In order to manage the volume of litigation, the special procedure is streamlined, simplified, and speeded up to the point where it may even be possible to automate it completely. The special feature of these procedures is that they result in final judgments on the merits that have the force of *res judicata*. This is mainly the procedure applicable to small claims, known as

⁴ A J Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67 (1) Buffalo Law Review 89, 94, 156.

⁵ See Part 10 above.

⁶ See Part 16 below.

⁷ See Part 8 above.

⁸ In Italy, for example, Book IV contains special forms of procedure as well as rules on arbitration. V. Questionnaire. In the Netherlands, Book 3 of the Code is dedicated to special procedures but, as in France (Book 2 of the Code), this concerns procedures relating to the subject matter of the dispute.

⁹ See Ch 3 below, spec. para 101 ff.

the anticipated final judgment procedure¹⁰ but other special forms may have various sources (legal, case law, contractual).

- 8 A study of special forms of procedure reveals that they have been created either to manage large volumes of litigation - a sign of democratization of access to the courts - or to offer tools adapted to economic needs - a sign of economic development.¹¹ In this sense, the creation and development of special forms of procedure are a sign of the maturity of procedural systems, which are becoming more sophisticated. Because the same causes produce the same effects, this leads to the use of special forms of procedure as a tool for harmonizing, or rather globalizing, procedures. Everywhere, even if in different forms and to varying degrees, they are shaping a procedure that is supposed to serve both litigants and the justice system.

1.3 Category of 'Special Forms of Procedure'?

- 9 Although these special forms of procedure are all aimed at efficiency, it is difficult to recognize the existence of a genuine category of special forms of procedure. Indeed, they are not known or recognized as an autonomous category, either in legal regulations or in books on civil procedure. It is interesting to note, however, that a draft reform of the Argentine procedural code provides for the creation of a section dedicated to 'special procedures', which include emergency procedures, the amparo procedure, the payment order procedure, and immediate justice procedures.¹²
- 10 While the existence of special forms of procedure is sometimes acknowledged, their variety and lack of autonomy when used as tools of ordinary procedure cast doubt on the consistency of this category. Admittedly, an attempt could be made to sidestep the issue by considering that 'Like any other abstract distinction, it should be avoided because it is useless as an analytical tool and does not make it possible to understand the significant aspects of different systems'.¹³ Nevertheless, this category remains useful, even if it will be criticized in this Part.
- 11 The categories are of scientific interest because they make it possible to trace the evolution of legal systems. They make it possible to observe, for example, their growth and diversification, and to formulate the hypothesis of a link with the economic development of a State. In addition, they give coherence beyond the technical varieties that could give an image of chaos. 'The

¹⁰ Ch 4 para 82. Commentary P-9D of the Ali/Unidroit principles; commentary R-19C of the Transnational Rules of Civil Procedure (rapporteurs' study). It is then a question of ruling on the manifestly inadmissible or unfounded.

¹¹ In China, the summary procedure was created in 1982. With the rapid development of the commodity economy, the Civil Procedure Law (1991) added a procedure to speed up the recovery of debts and a procedure for the publication of a public notice for the exercise of rights, in order to promote the effective and practical realization of civil rights (see Questionnaire).

¹² Book Two. Special pt, Title IV, http://www.bibliotecadigital.gob.ar/files/original/20/2661/proyecto-ley_codigo-proc-civ-com.1.pdf

¹³ N Trocker and V Varano, 'Concluding Remarks', in Nicolò Trocker, Vincenzo Varano, Alessandra De Luca (ed), *The Reform of Civil procedure in comparative perspective* (Torino 2006, G Giappichelli Editors 2005) 243 ff spec. 245.

system of legal categories makes it possible to discipline the disorder and uncertainty of social facts by grasping them more easily under a clear qualification and determined rules'.¹⁴ In this sense, they make the law more intelligible, which is essential for justice. They also provide a degree of legal certainty. Any new law must be understood in the light of the system into which it is incorporated.

- 12 While it does not constitute an autonomous and clearly defined legal category, it remains what sociologists might describe as an analytical tool. Excluding any dogmatism, the instrument allows 'the incessant confrontation of ideal-types that intertwine and combine in sometimes unexpected ways'¹⁵, which is true of special forms of procedure, since they combine with other special forms linked, for example, to the subject matter, as well as with ordinary procedures. Thus, although the category of special forms of procedure has been criticized, it retains its scientific usefulness because it allows us to reveal an evolution in its forms and uses, which is why its study is so interesting.

1.4 Comparative and Practical Approach

- 13 On one hand, the aim of this part is to outline the main characteristics of special forms of procedure without going into unnecessarily technical details specific to each system. On the other hand, both the special forms provided for in the texts and those resulting from the practice of the courts (procedural protocols) or the parties (contractualization of the procedure) will be considered. The analysis is intended to be both theoretical and practical, although the fairly widespread lack of statistical data has to be noted.
- 14 To consider the special forms of procedure, it is necessary to identify what distinguishes them from ordinary procedures. Ordinary procedures are also not free from difficulties of approach because they can be plural. Specificity must therefore be measured against the supposed 'normality' of procedures. The study shows that special forms are not always autonomous but often interwoven with so-called ordinary procedures, which are difficult to define. The concept of a special form of procedure therefore requires some preliminary clarification (2).
- 15 In addition, the development of these special forms of procedure must be assessed because, in choosing favour of efficiency, it is necessary to ensure that the balance is preserved with the necessary fairness of the procedure. Effectiveness is a rather vague term, since 'what is effective is what produces the expected effect'.¹⁶ It is therefore necessary to find out beforehand what is expected of these procedural forms. Moreover, it is not always effectiveness but rather efficiency that is sought, and this is now enshrined in the principle of procedural proportionality: the aim must be achieved at minimum cost. We can see that certain special forms are sometimes dictated by economic and budgetary considerations. From the interest of the litigant, we move

¹⁴ J L Bergel, *Théorie générale du droit* (Paris Dalloz, 1999) 191, 204.

¹⁵ J Grosclaude, *Préface à la sociologie du droit de Max Weber* (Puf, coll. Quadrige, 2007) 16.

¹⁶ Larousse dictionary, V° Effectiveness.

to the public interest in a proper administration of justice. As P Raynaud put it, we are moving from 'justice that must not waste time' to 'justice that has no time to waste'.¹⁷ It is therefore necessary to analyze the functions of special forms (3).

- 16 Finally, common special forms of procedure lead to a form of harmonization under economic and/or budgetary constraints, with the argument of necessity and rationality. They inspire less developed procedural models that seek tools for managing mass litigation and ways of reassuring economic operators. Special forms of procedure are essential, but they must be assessed to ensure that they are not deployed to the detriment, in particular, of people in vulnerable situations (4).

2 THE CONCEPT OF A SPECIAL FORM OF PROCEDURE

2.1 Diversity of Special Forms of Procedure

- 17 Three sub-categories of special forms of procedure stand out for what they have in common: a need to adapt the rules in line with a concern for the efficiency of justice. These are, as announced, provisional and protective measures, orders for payment and default proceedings, and, finally, summary proceedings.
- 18 These three forms of procedure are judicial procedures that differ from ordinary civil procedures in that they have simplified, streamlined rules designed to meet the need for efficient procedures. However, they are very different from each other because they do not have exactly the same objectives. Efficiency may mean preserving the efficiency of current or future ordinary proceedings, enhancing the efficiency of debt recovery or the recognition of rights, or managing large volumes of litigation more efficiently.
- 19 The first sub-category is that of provisional or conservatory measures, which form part of the provisional jurisdictional protection¹⁸ offered in legal systems to varying degrees, even going so far as to institute a specialized judge with specific powers. The French *juge des référés* (interim relief judge) is the archetypal example. However, this protection sometimes operates concurrently or exclusively within the framework of ordinary proceedings.
- 20 In general, these measures are justified by the urgency of the situation, and the risk of imminent harm and are based on *prima facie* evidence. They may involve the seizure of the debtor's assets or sequestration to secure a judgment on a claim for money¹⁹, provisional measures, including the payment of an advance in the event of an obligation that cannot be seriously contested,

¹⁷ P Raynaud, lecture given on 1 March 1984 at the Palais de justice de Paris, Paris TGI printing works, May 1984.

¹⁸ C Chainais, *La protection juridictionnelle provisoire dans le procès civil en droit français et italien* (Dalloz, 2007).

¹⁹ These measures are known by a wide variety of names in the different legal systems: *Arrest* (Germany), *attachment/garnishment* (USA), *embargo preventivo* (Spain), *sequestro* (Italy, Brazil), *conservatoir beslag* (Netherlands), and so on.

protective measures, or evidentiary measures. There is therefore a wide variety of potential measures.

- 21 They are unusual in that they do not have the force of *res judicata*, since they can be challenged by a decision on the merits or cease as soon as the decision is handed down. However, they are so effective that they acquire de facto *res judicata* status when the parties do not initiate proceedings on the merits, which is permitted in some systems but is not the norm.²⁰ The forms they take vary considerably from one system to another, as not all measures are always available or always take a sufficiently autonomous form to remove them from the course of ordinary proceedings.²¹
- 22 The second sub-category concerns default procedures and payment order procedures, which make it possible to ensure rapid recovery of debts and thus contribute to effective enforcement.²² An order for payment is a truly original procedure based on the inversion of litigation: *imperium precedes jurisdictio*. The decision is enforceable unless the debtor appeals to re-establish the contradiction. The procedure by default is an ordinary procedure that relies on the absence of the defendant to speed up the procedure, alleviating the need for contradiction. Default by the defendant, which is sometimes anticipated, makes it possible to simplify procedural formalities. It is sometimes regarded as the equivalent of an admission. In both cases, a creditor obtains an enforceable title quickly based on the appearance of a claim and minimal control by the judge.
- 23 Finally, the third sub-category concerns summary procedures, which are used to relieve ordinary procedures of procedural 'constraints' or burdens to improve their efficiency, if not their 'yield'. To manage the volume of litigation, the special procedure is simplified, condensed, and accelerated, sometimes to the point of complete automation. The special feature of these procedures is that they result in final judgments on the merits that have the force of *res judicata*. They mainly concern what are known as 'small claims', but also proceedings where the outcome does not appear to merit ordinary proceedings on the basis of the evidence provided. In common law, this is referred to as an anticipated final judgment that does not merit the impanelling of a jury, and in civil law as the filtering of cases that are manifestly inadmissible or unfounded. The forms are so varied that it is impossible to mention them all.

2.2 What is an Ordinary Form of Procedure?

- 24 The category of special form of procedure presupposes the existence of a category of ordinary form of procedure. However, the latter is often difficult to define. For example, in France, the

²⁰ Ch 2, para 1.

²¹ Ch 2, para 2; For example, while in some countries, including the Netherlands, England and Wales (hereinafter: England), and France, interim payments may be granted by way of a provisional measure, in other countries such measures do not exist or hardly exist at all, for example in Spain, Italy, the United States and Argentina.

²² See Ch 3 below, para 103 ff.

model of ordinary procedure is difficult to identify insofar as written and oral procedures with distinct rules coexist and are considered to be two forms of ordinary procedure. However, oral proceedings could be regarded as a special form reserved for small claims where the amount is at stake (but not the nature of the rights in question).²³ The same is true in Spain, where the ordinary procedure for disputes involving sums above EUR 15,000 also exists alongside an oral procedure which is also considered to be ordinary for small claims.²⁴ It should therefore be noted that what is considered ordinary in some systems is perceived as special in others. What is more, these ordinary procedures for small claims are sometimes submitted to autonomous courts²⁵ and coexist with special forms which, depending on the amount at stake, can be further streamlined and accelerated.²⁶

- 25 In this chapter, oral procedures for small claims will be included in the special forms of procedure, even if they are perceived as 'ordinary' because the aim is to achieve rapid and simplified recovery. However, this raises questions about the concept of ordinary proceedings.
- 26 It is possible to think of the ordinary procedure as one that provides a standard model²⁷ which can be deviated from in certain cases (eg, for reasons of efficiency). In this case, the procedure would be contentious (and not non-contentious), adversarial, and giving rise to a final decision with the force of *res judicata*. In this respect, the special forms of procedure differ from the standard model in that they are not adversarial and do not have the force of *res judicata*. Thus, provisional or protective measures, payment orders, and default proceedings easily deviate from the standard model. However, as summary proceedings are also considered to be special forms, the standard model must be supplemented by an ordinary procedural sequence which takes different forms depending on the system (long circuit or pre-trial, impanelling of a jury). Short circuits should therefore be considered as falling into the category of special forms. This would make the standard or ordinary trial the most complex trial that merits the deployment of a procedural scheme that it is most often possible to dispense with.

²³ Because the oral procedure, only before the court, is reserved for disputes involving less than EUR 10,000, it will be treated as a summary procedure. See Ch 4, para 7.

²⁴ V. Questionnaire: One of these procedures (the so-called *juicio ordinario*, Book II, Title II, Art 339 to 436 SCCP) is appropriate for certain particular cases (Art 249.1 SCCP) and, in general, to bring suits of an amount at stake exceeding EUR 15,000 (Art 249.2 SCCP). The other ordinary procedure (called 'verbal procedure', *juicio verbal*, Book II, Title III, Art 437 to 447 SCCP) is the appropriate one to discuss amounts up to EUR 15,000 (Art 250.2 SCCP) and for certain cases specified by the SCCP (Art 250.1 SCCP).

²⁵ However, this is not always the case: Unlike Japan, Brazil, Netherlands, the *tribunal d'instance* in France dealt with small claims and was merged with the *tribunal de grande instance* by Law no. 2019-222 of 23 March 2019.

²⁶ Oral procedures, which are simplified procedures considered to be ordinary in France or Spain, may face competition from small claims recovery procedures, which are optional.

²⁷ In this regard, see C Chainais, F Ferrrand, L Mayer and S Guinchard, *Procédure civile* (36th edn, Précis Dalloz 2022) 681 ff, no 901 ff, La procédure type de l'instance : contentieuse, définitive et contradictoire.

2.3 What is the Relationship between Special Forms and Ordinary Procedures?

- 27 It should be noted that the relationship between special forms of proceedings and ordinary proceedings may vary from one sub-category to another. Some procedures are autonomous (eg, small claims procedures and order for payment procedures), while other procedures are closely linked to, form part of or run in parallel with ordinary procedures (provisional and protective measures), or constitute a procedural deviation in the course of procedures that have been initiated as ordinary/general procedures (default judgments and certain summary procedures).
- 28 Thus, in the category of special forms of procedure, there are some that can be used in the context of ordinary proceedings. This is the case with provisional and protective measures, which are not always the subject of a special, autonomous procedure. They are sometimes measures that an ordinary judge can apply in ordinary proceedings. To say that this constitutes a special form in this case would limit the ordinary procedure to a rather unrealistic and linear pedagogical scheme. What is special here is the autonomy of these measures, which can be ordered outside ordinary proceedings to prevent them and ensure their effectiveness. For all that, they are not always within the jurisdiction of a specialized judge, nor are they totally autonomous from ordinary procedure.
- 29 In addition, the special form of proceedings can be combined with ordinary proceedings. Thus, in the event of opposition to an order for payment, there is a return to an ordinary form of proceedings which may, moreover, be a national procedure if the European order for payment procedure has been used. Similarly, a provisional or protective measure, even if obtained independently, may be challenged in ordinary proceedings.
- 30 In addition, in the category of special forms designed to ensure the efficiency of debt recovery, an ordinary procedure by default is included alongside the injunction to pay, a reversed form of litigation.²⁸ The absence of the defendant, which may exist in an ordinary procedure, makes it special in that it allows for an accelerated procedure, sometimes based on the admission resulting from the defendant's absence. In this case, the special nature of the procedure may be disputed since it is the ordinary procedure that is followed, albeit a lighter one due to the defendant's absence. In most jurisdictions, default proceedings are not considered to be a special form of procedure.²⁹ In other systems, this default becomes a functional equivalent of the order for payment. It is noteworthy that the Netherlands decided to abandon the order for payment system in 1991 in favour of the default procedure, which was deemed to be sufficiently effective not to reintroduce the order for payment.³⁰ The special feature that unites the order for payment and default proceedings is that both mechanisms have their origins in the Roman law maxim 'confessus in jure pro judicato habetur, et quodammodo sua sententia damnatur',

²⁸ G De Leval, 'Les ressources de l'inversion du contentieux' in M T Caupain and G De Leval (ed), *L'efficacité de la justice civile et Europe* (Larcier 2000) 83.

²⁹ For example, in Brazil, France, Spain and Taiwan.

³⁰ V. Questionnaire.

which can be translated as ‘He who confesses before a court is considered to have been the subject of a judgment and is, in a certain way, condemned by his own sentence’.³¹

- 31 The relationship between special and ordinary forms of procedure is therefore complex, but it can already be argued that there is no opposition. The special character stems from a modification of the ordinary rules which may be temporary (order for payment in its pre-opposition phase), partial (phase of ordinary proceedings), or even purely practical because deduced from the absence of a party (default proceedings). There are extreme cases where the special form of procedure is completely autonomous, which does not prevent the result from being called into question by ordinary proceedings on the merits (summary proceedings judge) or, conversely, cases where no special form is claimed, which does not prevent concrete forms from being perceived (Argentina, Uruguay).

2.4 Diversification of Special Forms

- 32 The practical success of special forms of procedure has led to a diversification of their sources, methods, and applications. First of all, these special forms are sometimes created by codes of civil procedure or scattered laws, sometimes by contract, and sometimes by practice.³² They are therefore more difficult to identify, but this diversity of sources reveals that the procedure is adapted to the needs of litigants. For example, there are protocols of civil procedure specific to certain types of litigation, such as the guide issued by the International Chamber of Commerce in Paris³³, which is essentially designed to attract complex economic litigation. These specific protocols can be found in the Netherlands and Singapore and reveal competition between legal systems to attract highly technical litigation. The forms are special because they are contractualized, and it is notable that efficiency is not based on speed but, on the contrary, on the need for longer hearings. It may also be a matter of an agreement binding the parties since civil proceedings are not a matter of public policy and it is in principle possible to derogate from it by agreement. This is the case with contractual clauses that can create default procedures: *cognovit* clauses are a case in point.³⁴ In such cases, the parties agree in advance to waive the right to adversarial proceedings, which is considered to be in line with procedural guarantees in the United States³⁵ whereas it would be difficult to accept elsewhere.

³¹ R W Millar, *The Formative Principles of Civil Procedure* (18 Ill. Law. Rev. 1 1923).

³² Ch 4, para 113 ff.

³³ <https://www.cours-appel.justice.fr/paris/guide-pratique-de-procedure-devant-les-ccip-tc-et-ccip-ca-practical-guide-proceedings-iccp-cc>

³⁴ R J Effron, ‘The Invisible Circumstances of Notice’ (2021) 99 N.C.L. Rev. 1521, 1565.

³⁵ *D. H. Overmyer Co. Inc. v. Frick* (Supreme Court, US) [405 U.S. 174 (1972)]: the U.S. Supreme Court held: ‘Overmyer, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, and, on the facts of this case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional per se) did not violate Overmyer’s Fourteenth Amendment rights’.

- 33 These special forms may also have a judicial source if it is a judge's decision that leads to their use. The judge may thus decide to use a short or accelerated circuit depending on the matter in dispute (Delaware Court of Chancery, *rocket docket*). The use of procedural time is then measured and allocated according to the strict needs of the dispute. This may also take the form of procedural contracts involving the agreement - or simple advice - of the parties, as in France.
- 34 Secondly, special forms of procedure are sometimes mandatory, such as *small claims*, but they may also be optional.³⁶ The parties may decide contractually to submit to them. In China and Taiwan, for example, the parties may decide to submit their dispute to summary proceedings.³⁷ In France, to recover a debt, a party can choose between a procedure for small claims, a *référé provision*, or an *injonction de payer* (order for payment). There is a real strategic choice to be made here, provided that the litigant is aware of these possibilities.
- 35 In addition, these special forms of procedure tend to spread. This can be seen from the increase in financial thresholds. The same applies to *small claims*. In Europe, for example, the threshold for recovering small claims has risen from EUR 2,000 to EUR 5,000.³⁸ In the Netherlands, there are a significant number of proceedings before the district courts as a result of the increase in the threshold from EUR 5,000 to EUR 25,000 in 2011.³⁹ Sometimes the threshold is abolished or does not exist at all. In France for example, there is no upper limit for payment order procedures.
- 36 Finally, there is still a possible combination of special forms that can be adapted to the matter in dispute (family summary proceedings, environmental summary proceedings) or to the jurisdiction (articulation with arbitration proceedings). See CPLJ Parts 13 and 17 for further details.

2.5 What Remains of the Ordinary Procedure?

- 37 In systems where special forms of procedure exist and are effective⁴⁰, they could, in volume, supplant the ordinary forms deemed too cumbersome and complex. If they are not ordinary in the legal sense of the term, they are at least commonly used and may become the *de facto* procedure of principle. For example, more than half of all applications in Spain are for payment

³⁶ Ch 4 para 25 ff.

³⁷ Ch 4 para 122. In Germany, the parties can agree to simplify the evidence.

³⁸ Recitals 1 to 4 of the ESCP Regulation (2015).

³⁹ 823,450 civil sub-district procedures – 240,860 civil procedures (2020) <https://jaarverslagrechtspraak.nl/wp-content/uploads/sites/2/2021/04/Jaarverslag-Rechtspraak-2020.pdf#page=41>

⁴⁰ There are counter-examples where the special form is not a success. V. Belgium (In 2015, only 621 injunctions to pay were issued by Belgian courts. See <https://www.rechtbanken-tribunaux.be>), Brazil (2% of cases).

orders.⁴¹ The use of summary proceedings in commercial matters in France makes them the usual procedure before the commercial court.

- 38 It is the so-called ordinary procedure that in certain cases becomes exceptional as if it merely served as a model from which to mould the procedure to requirements. The ordinary form becomes the exception and must be 'earned'. Because they do not have the same names, and because the systems do not always have available statistics, quantification is difficult.
- 39 If we try to extend the special forms of procedure too far, we run the risk of reducing ordinary procedures to the bare minimum. For example, it is debatable whether we should talk about a special form of procedure when a short circuit is used as part of an ordinary procedure. Very often, what is described as a special procedure is in fact an adaptation of the ordinary procedure in order to comply with the principle of procedural proportionality.⁴²
- 40 However, the special forms are sometimes misused or unused. Special procedures are sometimes competing against each other, and some are unused because better alternatives exist. This is the case, for instance in Spain, where the European order for payment is preferred to the national model in order to circumvent their legal system. In other cases, the need for speciality is not felt because the procedure is deemed to be sufficiently rapid, as in China (20 days).

2.6 The Form of Special Forms of Procedure

- 41 Special forms of procedure are characterized by the fact that they are usually oral, do not require the presence of a lawyer, and benefit from a simplified procedure. However, they are only special if the ordinary model is written proceedings with compulsory representation. In most cases, however, the two types of procedure coexist and are subject to different jurisdictions, so that they both constitute ordinary procedures.
- 42 On the other hand, the need to adapt the procedure to the simplicity that would result from the small amount involved is increasingly leading to the creation of truly special forms, whether this involves submitting the dispute to an entity that is not a judge, imposing a fully dematerialized procedure or imposing an amicable attempt. The smaller the amount in dispute, the greater the

⁴¹ With a very significant use of the European order for payment, which has almost quadrupled. S Goris, 'Bondora: another brick in the proceduralization of the consumers' substantive rights' (2020) 12 (2) Cuadernos de Derecho Transnacional 1187V; also the success in France, Z Belmokhtar and C Kissoun-Faujas, 'Les injonctions de payer en 2019: de la demande à l'opposition' (2020) 178 Infostat Justice and in the United States, P Hannaford-Agor, Caseload Highlights: *The Landscape of Civil Litigation in State Court: Debt Collection, Landlord/Tenant and Small Claims Cases* (National Center for State Courts 2019). See figures below.

⁴² S Amrani Mekki, 'Le principe de proportionnalité procédurale' (2023) Gaz. Pal. 52; L Cadiet and S Amrani Mekki, 'General principles: Co-operation and proportionality' in Fernando Gascón Inchausti, Vincent Smith and Astrid Stadler (ed), *European Rules of Civil Procedure* (2023) 11 ff. R Stürner, 'Le modèle ELI-UNIDROIT de règles européennes de procédure civile' (2022) 86 *RabelsZ* 421 (453).

degree of hyper-specialization, with the question of thresholds being raised. These simplified procedures have existed since the days of the justice of the peace in France and Italy, with temporary honorary judges.

- 43 This variety of forms reflects the diverse functions attributed to these procedures.

3 THE FUNCTIONS OF SPECIAL FORMS OF PROCEDURE

3.1 Prioritize Efficiency for both Litigants and the Justice System

- 44 The function of special forms of procedure can be summed up as a concern for the efficiency of justice and hence of the law. The political rhetoric is the same, and the reasoning is similar. Whether it is a question of provisional or protective measures, an order for payment, or summary proceedings, the aim is to ensure that an effective solution is reached quickly, to the benefit of both the litigant and the justice system.⁴³
- 45 These special forms are designed firstly to ensure that the procedure is swift for the parties so that they have effective access to the courts and that the procedure allows rights to be exercised effectively. In Spain, for example, explicit reference is made to the constitutional right to an effective remedy.⁴⁴
- 46 For the judicial institution, they are also aimed at respecting the principle of procedural proportionality, since the aim is to commit only those judicial resources that are strictly necessary for resolving the dispute.

Cadiet and Mekki state the following:

Efficiency is an economic concept that has colonized law under the influence of neo-liberal ideology and the doctrine of new public management which led to a general revision of public policies. Justice did not escape the flow. Of course, it is true that the budget of justice is not indefinitely extendable, because citizens resources are not

⁴³ For example, the functions of provisional and protective measures are defined as follows in Art 184 of the European Rules of Civil Procedure: 'A provisional or protective measure is a temporary order which has one or more of the following functions: (a) to secure or promote the effective execution of final judgments concerning the substance of the proceedings, whether or not the underlying claim is pecuniary, including the pledging of assets and the obtaining or preservation of information concerning a debtor and his assets; or (b) to secure the effective execution of final judgments concerning the substance of the proceedings, whether or not the underlying claim is pecuniary'.

⁴⁴ Art 24(1) of the Spanish Constitution: Everyone has the right to obtain the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may such protection be refused.

indefinitely extendable either, and justice must not only be rendered in the particular case at hand but in the totality of cases which are submitted to the judge.⁴⁵

- 47 To this end, and in particular to speed up proceedings and reduce costs and complexity, certain stages of the procedure are reduced or eliminated. Some examples include reducing time limits, simplifying and/or digitising service, limiting the evidence that can be produced, allowing *ex parte* measures, reducing or extending the powers of the judge, giving precedence to oral pleadings, allowing a limited statement of reasons, the absence of *res judicata* and special appeal rules.
- 48 This alleviation of procedural forms may be based on the fact that the claim is not contested, that the value of the claim is low, or that other particularities of the case merit a less extensive and accelerated procedure. While the emphasis on procedural economy is generally legitimized by the nature of the claim or the procedural circumstances and is likely to improve access to justice, a key question is how fundamental procedural rights can be safeguarded.

3.2 Efficiency at the Service of Access to Justice?

- 49 The objective put forward by public policy regarding the creation and deployment of special forms of procedure is to improve access to justice by offering simpler and faster procedures.⁴⁶ This may result from the lower cost of the procedure, often linked to the absence of a mandatory lawyer, in order to give everyone access to a judge. It may also be due to the speed of the procedure, which is totally out of step with the normal length of proceedings, which often borders on a denial of justice, or to the fact that the procedure is more accessible. In Spain, the average length of proceedings is halved due to summary proceedings.⁴⁷ This access to the courts is sometimes facilitated materially. In the United States and Taiwan, for example, certain special forms of proceedings are accessible in the evening or at weekends. On other occasions, it is access to evidence that is facilitated by special forms of procedure in order to preserve access to the law.
- 50 In many countries, such as Brazil, these special forms are seen as a tremendous opportunity, given that the so-called ordinary procedures are inaccessible to the majority because of their cost, complexity, or duration. From the 1990s onwards, 'legal microsystems', with their own principles and rules, such as small claims procedures, were set up. In some African countries,

⁴⁵ L Cadiet and S Amrani Mekki (n 42) 2.039, 27; S Amrani Mekki (n 42) 52. V Woolf Report in England, Art 1: 'These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost'. See also A Proto Pisani, 'Per un nuovo codice di procedura civile' (2009) 132 (1) *Il Foro italiano* V, 1 'A proportionate use of judicial resources is ensured with respect to the purpose of the just settlement of the dispute within a reasonable time, taking into account the need to reserve court's resources for other cases'.

⁴⁶ V. not, Houmushouminjikyokusanjikanshitsu (法務省民事局参事官室) (ed), ichimonittou shinminjisoshouhou(一問一答 新民事訴訟法) (1996) 386-387.

⁴⁷ See however Ghana, for a counter-example, Ch 4 para 147.

such as Senegal, consideration is being given to drawing inspiration from the French *juge des référés*.

- 51 These undeniable advantages of special forms of procedure mean that criticism of them is sometimes non-existent or unwelcome in some countries. As always, it is all a question of balance, because nuances are needed. What is presented as an opportunity here is seen elsewhere as the risk of sub-standard or second-rate justice.⁴⁸ The criticisms are particularly clear-cut when it comes to summary proceedings or debt recovery. Retaining their optional nature is a way of responding to criticism.⁴⁹ However, the special form is sometimes mandatory, as in China, where the parties do not have the right to choose the procedure or the right to oppose it. In such cases, only the interests of the court are taken into account, without regard for the interests of the parties.
- 52 However, this efficiency is sought without always being accompanied by a reflection on fundamental rights. Special forms sometimes use new technologies without prior consideration of illiteracy, web accessibility, plain language in the design of electronic forms⁵⁰, and the barrier posed by the screen for vulnerable groups. In France, the criticisms levelled at the automated national jurisdiction for payment orders led to its abandonment.
- 53 It has been observed that the procedures are used primarily by economic operators to facilitate their debt collection, to the point that ‘debt collection companies are referred to as tools of oppression against the poor and uneducated’.⁵¹ This Part highlights that ‘a recent report indicates that 83% of all plaintiffs in Utah small claims court are businesses; nearly all defendants are individuals’.⁵² Moreover, a small number of businesses - just nine - file 50% of small claims.⁵³ This is precisely because special forms of procedure also serve the economic attractiveness of the States.

3.3 Efficiency at the Service of Economic Attractiveness.

- 54 We must not forget that efficiency is also an indicator of government performance. Economic development requires rapid procedures adapted to market needs. The order to pay, for example, appeared in Italy in the thirteenth century to facilitate trade, and it was merchants who spread it throughout Europe. Today, because the ‘enforcement’ category appears in the *Doing Business* report, special forms facilitating the recovery of debts make it possible to classify

⁴⁸ R Stürner (n 42) 421 (454).

⁴⁹ Ch 4, para 138.

⁵⁰ Ch 4 para 169. European form for the recovery of small claims, but also used in Taiwan, Canada and the United States. For a critique of the dematerialisation of public services, <https://www.defenseurdesdroits.fr/rapport-dematerialisation-des-services-publics-trois-ans-apres-ou-en-est-265>. See Segment 11.

⁵¹ Ch 4 para 151.

⁵² Utah Bar Foundation, Report on Debt Collection & Utah’s Courts, Apr 2022, 11. <https://www.utahbarfoundation.org/static/media/UBF2022.912d30c10e5681bf5f8c.pdf>.

⁵³ Utah Bar Foundation Report, 10.

the attractiveness of States.⁵⁴ This type of procedure appeared in China at the time of the rise of capitalism and in the OHADA system.⁵⁵ To reassure economic operators, who need to be able to recover their debts effectively, special forms are being developed.

In Europe, the grounds for the European order for payment are crystal clear:

The rapid and effective recovery of unpaid debts that are not the subject of any legal dispute is of vital importance to economic operators in the European Union, since late payment is a major cause of insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and leading to numerous job losses.

In France, the *formule exécutoire* (enforcement clause) is even affixed before the expiry of the opposition period to avoid having to return to court and thus save a step in the process.⁵⁶

3.4 Efficiency at the Service of Budgetary Policy

- 55 More prosaically, special forms are also encouraged by budgetary requirements. The limited resources of ministries of justice, exacerbated by successive crises, make it necessary to find appropriate ways of handling mass litigation. As a result, special procedures for small claims are proliferating throughout the world, in increasingly streamlined and even dematerialized forms, which are certainly a guarantee of access to the courts, but also a distortion of the procedure that may raise questions about respect for fundamental rights.⁵⁷ According to the *2016 Doing Business report of the World Bank*, 128 countries offer such a system.⁵⁸
- 56 Special procedures are generally designed to guarantee the economy of the procedure and may be inspired by the principle of procedural proportionality. They are therefore readily applied to so-called low-intensity disputes, which are assimilated to disputes where the financial stakes are modest and do not justify the costs and efforts of ordinary proceedings. In Brazil, for example, under Article 2 of federal law no 9.099/1995, small claims procedures are guided by the principles of 'orality, simplicity, informality, procedural economy and procedural agility, seeking conciliation or settlement whenever possible'. However, it is a mistake to identify low financial value with a limited interest in litigation. Firstly, because the case can have a major social impact.

⁵⁴ <https://archive.doingbusiness.org/en/doingbusiness>. This classification was widely criticized and is therefore no longer existent. In France, it led to the creation of another ranking system that places greater emphasis on the search for legal certainty, and not just on the interests of creditors' rights. The Index of Legal Certainty (ILC) or *Index de la sécurité juridique* (ISJ) is an indicator that empirically evaluates the legal certainty of a national economy in the context of international comparisons, see B Deffains and M Sejean, The index of legal certainty, (Dalloz 2018).

⁵⁵ OHADA Uniform Act on the Organisation of Simplified Debt Collection and Enforcement Procedures adopted on 10 April 1998 in Libreville, Gabon.

⁵⁶ Decree no. 2021-1322 of 11 October 2021

⁵⁷ L Cadiet, 'Case management judiciaire et déformalisation de la procédure' (2008) 1 (125) *Revue française d'administration publique* 133-150.

⁵⁸ World Bank, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* (2016) 92.

‘A dispute of little monetary value to the parties, such as whether a pupil can be suspended from school for a day, may have significant social ramifications and potentially far-reaching consequences’.⁵⁹ Secondly, because the technical nature of consumer law in Europe demonstrates the need for recourse to the courts. This is why low-value disputes can be submitted to ordinary procedures.⁶⁰

- 57 Particular features of special procedures may include special jurisdictional rules, reduced time limits, differentiated legal representation, simplification and/or digitization of service, limitation of issues that may be raised in defence, limitation of evidence that may be produced, limitation of the judge's power to evaluate evidence, absence of *res judicata*, possibility of granting *ex parte* measures, reduction or extension of the judge's powers, prevalence of oral pleadings, admissibility of limited reasoning, absence of *res judicata*, and special appeal rules.
- 58 Procedural streamlining is also achieved through by-passes, by encouraging out-of-court settlements, which are used more as a flow management tool⁶¹ than as a tool for pacifying industrial relations. Combined with the use of digital technology and predictive algorithms, the idea is to save the judge time by encouraging a settlement based on the predictable outcome of the case. The potentially delicate relationship between out-of-court settlements, digital technology, and low-intensity litigation may be detrimental to access to the courts, but it is widespread in both common law and civil law legal systems, such as the mixed Latin American systems. It should be noted that it is mainly low-intensity monetary disputes that must be the subject of an attempt at amicable resolution before being referred to the courts.⁶² However, the idea of plural justice⁶³, multi-door courthouse⁶⁴ (USA), or ‘Justiça Multiportas’⁶⁵ (Brazil) is in itself interesting. It all depends on how the amicable settlement policy is implemented because the idea of refocusing the role of the judge is an interesting one.⁶⁶
- 59 The main issue raised by these special forms of procedure is therefore the balance between the effectiveness and fairness of the procedures.⁶⁷ It is necessary to check that the restrictions on procedural guarantees are proportionate and reasonable to achieve the objectives of extending

⁵⁹ Ch 4, para 10.

⁶⁰ Ch 4 para 12: In addition to the low amount, simplicity in handling the dispute may be required (Art 3 of Federal Law No. 9.099/1995) and in China (Art 157, para 1, and Art 162 of the Chinese Criminal Procedure Act) (Art 436-8(2) of the CPC-Taiwan) or certain matters may be excluded (Spain, Art 249 CPC Protection of personality). Or limit the type of persons who may act (Brazil and Canada, which restrict access to legal persons).

⁶¹ X Kramer and S Kakiuchi, ‘Summary proceedings and ADR’ in General Report, 158.

⁶² See not. Art 750-1 CPC in France for claims for payment of less than EUR 5,000.

⁶³ L Cadiet, ‘Les modes alternatifs de règlement des conflits et le droit’ in P Chevalier, Y Desdevises and P Milburn (ed), *Les modes alternatifs de règlement des litiges: les voies nouvelles d'une autre justice* (La documentation française 2003) 262-263; L Cadiet, ‘La justice face aux défis du nombre et de la complexité’ (2010/1) *Les Cahiers de la Justice* 13-35.

⁶⁴ See, eg, F Sander, *Varieties of Dispute Processing* (West Publishing Company 1976) 70 F.R.D. 79, 111.

⁶⁵ Justiça Multiportas, <https://www.fecema.org.br/justica-multiportas> accessed 7 December 2022

⁶⁶ P Delmas Goyon Report, ‘Le juge du 21^{ème} siècle’ (2014) *La documentation française*, 34 ff.

⁶⁷ S Amrani Mekki, L Cadiet, See L Cadiet, ‘Efficience versus équité?’ in M Jacques van Compernelle (Bruylant 2004) 25-46; See also, G Canivet, ‘Economie de la justice et procès équitable’ (2001) *JCP I*, 361.

the right of access to justice and the proper administration of justice, as there is tension between the promotion and potential undervaluation of fundamental rights.

4 ASSESSMENT OF SPECIAL FORMS OF PROCEDURE

4.1 The Perverse Effects of Efficiency: ‘Government by Numbers’

- 60 The balance between the claimant's right to an efficient procedure and the defendant/respondent's right to a procedure conducted in such a way that his procedural rights are guaranteed is essential in these types of special procedures. For example, the seductive effect of the order for payment, particularly where it is fully automated in order to meet the concern for the efficiency of the right of claim, must be weighed against the summary nature of the judicial review. The low number of appeals against orders makes it effective in economic terms⁶⁸ but it is not immune from criticism.
- 61 Since what is effective is what produces the expected effect, everything depends on the objectives of public policies. However, when they are guided by economic concerns, there is a risk that procedures will be shaped by economic constraints, obscuring the values that procedural constraints of time and formalization carry. These new forms, which have common causes and common tools, now with digitalization, may well have the effect of harmonizing procedures. It is a procedure ‘without roots’, outside the territory, that is developing. Economic rationality and the objectivity of the means used would justify its generalization regardless of the diversity of legal systems. In this way, powerful economic factors have supplanted national standards of fair procedural law.

As the legal scholar Alain Supiot sums up:

The reason for power is no longer to be found in a sovereign body transcending society, but in the norms inherent in its proper functioning. On this basis, a new normative ideal is flourishing, which aims at the effective achievement of measurable objectives rather than obedience to equitable laws.⁶⁹

- 62 Overall, the reduction in guarantees will result from an analysis of probabilities. It is considered unlikely that there will be an appeal. Most often, the procedure is based on light control, making the court the theatre of appearances. If this appears to be true, then there is no point in carrying out a detailed review. If the rate of opposition to payment orders is very low, it is because the procedure is effective, confusing usefulness with use. Moreover, opposition is sometimes subject to financial constraints. In Colombia, for example, a defendant who lodges an unfounded

⁶⁸ In France, less than 10% of payment orders are contested. In the Netherlands, 70 to 80% of the monetary claims are uncontested.

⁶⁹ A Supiot, *La gouvernance par les nombres* (Fayard 2015). See also, L Cadet (n 67) 10. The economic analysis of law is here mobilised in the service of an undertaking to ‘des-étatisation’ justice, which is part of a commercial representation of democracy.

opposition to the claim is subject to a fine of 10% of the value of the debt in favour of the claimant.⁷⁰

63 Rationality takes control even though what is rational is not always reasonable.

4.2 Differentiate between the Principles of Proportionality and Cost-Effectiveness

64 These special forms of procedure often reflect the principle of procedural proportionality, which is spreading throughout the world and has recently been enshrined in the European rules of civil procedure. This principle justifies a form of sobriety in the use of judicial resources which in itself cannot be disputed. Rule ERCP 185 provides that 'A provisional and protective measure must impose the least possible burden on the defendant'. However, we must be wary of a practice that would obscure proportionality in favour of the sole profitability of the judicial system. The economic calculation must be global and not limited to the judicial institution. For example, it is possible to reject a judicial policy on violence against women because of its high cost, particularly when it comes to providing women with so-called 'high-risk' telephones. However, the judicial costs are largely offset by the savings made in the health budget (savings on healthcare expenditure) or the prison administration budget (savings on incarcerating the person who has actually committed the act).⁷¹

65 The use of evidence is revealing in this respect. Effectiveness tends to push the veracity of the facts into the background in favour of mere appearances. In this case, the evidence is superficial and sometimes even useless. Furthermore, when the judge has to decide whether to use an evidentiary measure, the principle of proportionality may lead him to rule out the search for evidence, as is the case in the Netherlands⁷² or Taiwan.⁷³ Some laws even restrict the use of certain types of evidence. For example, expert reports are generally inadmissible in proceedings relating to small claims.⁷⁴

66 While we can only be in favour of the principle of procedural proportionality, we must be vigilant to ensure that economic considerations alone do not guide the forms of procedure. As such, the principle of proportionality is not open to criticism but, when combined with an assessment of judges based on productivity criteria, it must not undermine the independence of the judge in his or her choice of appropriate procedure. We must therefore ensure that the fundamental guarantees are upheld.

⁷⁰ Art 421 of the Colombian Code of General Procedure. On the other hand, if the opposition is considered to be well-founded, the fine will be imposed on the creditor. Similar penalties exist in Brazil, in accordance with Art 701, paragraphs 10 and 11 of the Brazilian Code of Civil Procedure.

⁷¹ EU Daphne Programme 2006, Estimating the cost of domestic violence in Europe, June 2009, www.psytel.eu.

⁷² Netherlands questionnaire (Q1).

⁷³ See Chiou, 'Lain-Gong' (邱聯恭), in *Cheng xu li yi bao hu lun* (程序利益保護論) (2005) 43.

⁷⁴ Hibino, 'Yasuhisa' (日比野泰久), in *Chuushaku minjisoshouhou* (2015) 5, 668. See also Superior Court of Justice of Brazil, AgIntRMS 57.649/SP, 4th Chamber, Minister Raul Araújo, judged on 17.12.2019.

4.3 Preserving Fundamental Guarantees

- 67 As the following chapters will show in detail, special forms of procedure can undermine the guarantees of a fair trial that ordinary procedures normally respect. This is true of the adversarial principle since it is the first principle to be affected to ensure the effectiveness of proceedings. This is the case, for example, with measures without an adversarial hearing, default proceedings or payment orders. As a matter of principle, the defendant is not called in the first phase of the order for payment or does not appear in default proceedings, sometimes because he has waived this in a prior contract (*cognovit*). While these clauses are valid in the United States, their legality is more questionable elsewhere, precisely with regard to the right to a judge.⁷⁵
- 68 While this is obvious from the outset since it is the principle on which these procedures are based, contradiction is undermined less directly when the procedures for serving documents are simplified to such an extent that the effectiveness of contradiction is not guaranteed other than formally, or even artificially, whether the documents are served by posting or at the defendant's last known address, without any obligation to check the current address.⁷⁶ In China, it is even possible to serve documents by telephone or SMS. Some European laws do not even require the defendant to be informed of the consequences of failure to appear.⁷⁷
- 69 Finally, the effectiveness of the adversarial process is often linked to the possibility of being represented by a lawyer. However, special forms of procedure usually make representation by a lawyer optional because of the small amounts involved, discourage it because of the costs⁷⁸ and sometimes even prohibit it, as in Korea, New Zealand,⁷⁹ and Quebec.
- 70 This is also the case for the principle of oral proceedings, or even presence, which is sometimes called into question in fast-track proceedings that cannot afford the time required for a hearing.⁸⁰ The latter disappears because of the lack of necessary contradiction or is replaced by

⁷⁵ R J Effron, *The Invisible Circumstances of Notice* (2021) 99 N.C.L. Rev. 1521.

⁷⁶ Pew Charitable Trusts Report, *How Debt Collectors Are Transforming the Business of State Courts* (June 2020), 16; C L Peterson and D MacNeill, 'Unwarranted: Small Claims Court Arrest Warrants in Payday Loan Debt Collection' (February 2020) 12-13, 20-23, 27. The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Art. 7(1)(a)(ii)) also allows a State to refuse enforcement if the document which instituted the proceedings 'was served on the defendant in the State addressed in a manner incompatible with the fundamental principles of the State addressed regarding the service of documents'.

⁷⁷ See, IDJPEX study *L'introduction de l'instance: maillon faible de l'espace judiciaire européen*, UIHJ (2009), 42. See ECHR, 10 April 2003, *Nunes Dias v. Portugal*, no. 69829/01, indicating that notification by public notice should only be used as a last resort.

⁷⁸ *Silver & Farrow*, 2015, 240.

⁷⁹ Disputes Tribunal Act 1988; <https://www.legislation.govt.nz/act/public/1988/0110/latest/DLM133282.html> Disputes Tribunal Rules 1989; <https://www.legislation.govt.nz/regulation/public/1989/0034/latest/DLM128838.html>: see also Idaho Rule 8 for Small Claims Actions.

⁸⁰ Ch 4 para 45.

electronic exchanges in the context of dematerialized procedures.⁸¹ However, this is not the case everywhere, as some systems, such as those in Spain, Brazil, Australia, and Canada, retain oral hearings, sometimes via videoconferencing, as in Taiwan.

4.4 Examine the Concept of Justice

- 71 The special forms of procedure have in common that they reduce the role of the judge, or even dispense with it, whether by using dispute resolution platforms or by delegating the judge's control to a third party such as a court clerk or a judicial officer.⁸² When it is indeed the judge who intervenes in the procedure, his office is lightened since he becomes the judge of the obvious, of the simple appearance on which the economy of the special forms of procedure rests: the claim appears to be founded in principle, the obligation is not seriously contestable.
- 72 The debate on whether or not it is necessary to prove a claim for an order for payment is symptomatic in this respect. Some countries, such as Colombia, are content with a simple declaration.⁸³ The result is that there is virtually no statement of reasons, that the CJEU and the ECtHR accept as necessary for the proper administration of justice.⁸⁴ Unless we consider that the reasoning lies in the defendant's default.⁸⁵ Thus, when the judge requests additional documents in Brazil, there is a return to the ordinary procedure, as if a strengthened office were incompatible with the special forms. The risk is that 'approximate justice' will become the norm.⁸⁶
- 73 The judge's role has been lightened to such an extent that questions have been asked about the role of the law in the judge's intervention, and it has been recommended that in summary proceedings, the judge should rule on the basis of equity, as an amiable *compositeur*. In France, a senator put forward the idea that for disputes of less than EUR 1,500, it was sufficient to rule according to common sense. The idea has caught on in Japan⁸⁷ but not yet elsewhere.⁸⁸
- 74 We may well wonder what remains of the notion of justice if it is stripped of all its solemnity and symbolic force. Beyond that, there is a great risk of denying the rights of the parties under the weight of numbers. That's why there are a few safeguards. Thus, despite the summary nature of

⁸¹ There is a great temptation to dispense with a hearing. In France, proceedings without a hearing are constitutionally reserved for cases where the parties agree (Cons. const. decision no. 2019-778 of 21 March 2019). It is therefore necessary to make sure that the parties are not forced to agree.

⁸² The payment order is issued by a judicial officer in Germany or Taiwan.

⁸³ Colombia Art 420-6.

⁸⁴ CJEU, 6 September 2012, *Trade Agency Ltd v Seramico Investments Ltd*, C-619/10; ECHR, 9 December 1994, *Ruiz Torija v Spain*, App no 18390/91. V. Auss, -23A of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

⁸⁵ See Ch 2, para 141.

⁸⁶ https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_29/29-12-glenn.pdf

⁸⁷ *Koji, Shindo*(新堂幸司), *shin min ji so shou hou*(新民事訴訟法) (6th edn) 891.

⁸⁸ Notably in Germany, Stein, Jonas, Berger, *Kommentar zur ZPO* (23edn, Mohr Siebeck 2020) § 495a para 23, 40 f.

the procedures, the judge must, in accordance with European legislation, identify unfair terms *ex officio*. But when the case is handled by a clerk or conciliator, such an obligation cannot be imposed. On other occasions, it is the status of the party (eg, State, child) that imposes a greater role for the judge, as in England. The Belgian example reveals the hesitations between efficiency and fairness in the procedure.⁸⁹

4.5 Should Special Forms of Procedure be Limited/Controlled?

- 75 One might ask whether the use of special forms of procedure should not sometimes be limited or even prohibited. It is effectiveness that defines the contours of the procedure. Under the guise of promoting access to justice, it is sometimes a procedure in name only that is offered and proposed, which guarantees only a form reduced to its simplest expression. Particular attention should be paid to systems where, as in Portugal, only a notice is displayed for any form of notification, or where it is possible to waive the right to be heard in advance.
- 76 The specific nature of these forms of procedure calls for restraint. The risks associated with them led to the suspension of these special forms of procedure in Spain⁹⁰ and in the United States⁹¹ during the COVID-19 pandemic. On a more permanent basis, in Japan, a person may bring only ten small actions per year in the same court of first instance (Article 223 of the Rules of Civil Procedure).⁹² In Taiwan, care is taken to ensure that the claim is not divided so that summary proceedings can be used.⁹³ Sometimes proceedings are refused to professional creditors⁹⁴, other times they are limited in amount⁹⁵ or simply optional.
- 77 As Mauro Cappelletti writes:

It is theoretically possible to subsidise everyone to go to court, but it is practically too expensive to implement. Mass access is difficult to reconcile with ordinary courts and individual proceedings... But if we come to the radical conclusion that the panoply of

⁸⁹ Belgian Constitutional Court, 7 June 2018, B.7, B.8.1 and B.8.2.

⁹⁰ In response to the crisis triggered by COVID-19, Royal Decree-Law 11/2020 of 31 March introduced additional social and economic measures; Royal Decree-Law 16/2021 of 3 August introduced further changes, including an extraordinary suspension of eviction proceedings.

⁹¹ For example, Centers for Disease Control and Prevention (CDC), *Temporary Eviction Moratorium*, 85 Federal Register 55292, 09/04/2020; New York Tenant Safe Harbor Act, June 2020; New Jersey Executive Order 128, 24 Apr 2020.

⁹² Taiwan's law, which prevents creditors from multiplying small claims proceedings by dividing a large debt into several smaller debts (Sec 154), also protects judicial resources from overloading the courts of first instance.

⁹³ *Koji, Shindo* (n 87) 890.

⁹⁴ *Quebec and Nova Scotia. Silver & Farrow*, 239-240.

⁹⁵ There is sometimes discrimination according to the status of the claimant. In California, for example, businesses can only file small claims for less than USD 5,000, whereas individuals can file claims for up to USD 10,000. In addition, it is forbidden to bring more than two small claims actions for more than USD 2,500 in the same year, <https://www.courts.ca.gov/1062.htm?rdeLocaleAttr=en>.

judicial guarantees can be avoided, we have to recognise that there is no guarantee that the political outcome will ultimately be on the side of so-called social justice.⁹⁶

⁹⁶ M Cappelletti, *International Encyclopedia of Comparative Law* (vol XVI, Brill Nijhoff 2014).

ABBREVIATIONS AND ACRONYMS

| | |
|------------|--|
| ACCP | Code of Civil Procedure (Argentina) |
| ACHPR | African Court on Human and Peoples' Rights |
| ADR | Alternative Dispute Resolution |
| ALI | American Law Institute |
| ANCCPC | Argentine National Civil and Commercial Procedural Code (Argentina) |
| Art | Article/Articles |
| BGH | <i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany] |
| BID | <i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank) |
| CDC | Centers for Disease Control and Prevention |
| CEPEJ | <i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice) |
| cf | <i>confer</i> (compare) |
| ch | chapter |
| CIDH | <i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights) |
| CJEU | Court of Justice of the European Union |
| CPC-Taiwan | Code of Civil Procedure (Taiwan) |
| EBRD | European Bank for Reconstruction and Development |
| ECLI | European Case Law Identifier |
| ECtHR | European Court of Human Rights |
| ed | editor/editors |
| edn | edition/editions |
| eg | <i>exempli gratia</i> (for example) |
| ELI | European Law Institute |
| etc | et cetera |
| EU | European Union |
| EUR | Euro |
| ff | following |
| fn | footnote (external, ie, in other chapters or in citations) |
| GCCP | Code of Civil Procedure (Germany) |
| GDPR | General Data Protection Regulation (EU) |
| ibid | <i>ibidem</i> (in the same place) |
| ICPR | Civil Procedure Regulations (Israel) |
| ICT | Information and Communication Technologies |
| ie | <i>id est</i> (that is) |

| | |
|-----------|---|
| IIDP | <i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law) |
| ILC | Index of Legal Certainty |
| ISJ | <i>Index de la sécurité juridique</i> |
| JCCP | Code of Civil Procedure (Japan) |
| JPY | Japanese Yen |
| MCOLs | Money Claim Online procedures (UK) |
| n | footnote (internal, ie, within the same chapter) |
| no | number/numbers |
| OHADA | OHADA Uniform Act on the Organisation of Simplified Debt Collection and Enforcement Procedures (Gabon) |
| para | paragraph/paragraphs |
| PD | Practice Direction |
| PDPACP | Pre-Action Conduct and Protocols |
| pt | part |
| RSC Order | Rules of the Supreme Court (UK) |
| SCC | Supreme Court Canada |
| Sec | Section/Sections |
| supp | supplement/supplements |
| trans/tr | translated, translation/translator |
| UK | United Kingdom |
| UKCPR | Civil Procedure Rules (UK) |
| UNIDROIT | <i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law) |
| UP | University Press |
| US / USA | United States of America |
| USD | United States Dollar |
| USFRCP | Federal Rules of Civil Procedure (US) |
| v | versus |
| vol | volume/volumes |
| WB | World Bank |
| *** | *** |

LEGISLATION**International/Supranational**

Ali/Unidroit principles

<https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/>

European Rules of Civil Procedure

https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/200925-eli-unidroit-rules-e.pdf

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2019

OHADA Uniform Act on the Organisation of Simplified Debt Collection and Enforcement Procedures adopted on 10 April 1998 in Libreville, Gabon.

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